Indonesian Constitutional Politics
2003–2013

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In 2011, the Indonesian Parliament enacted Law 8 of 2011 amending Law 24 of 2003 on the Indonesian Constitutional Court. The amendment was intended to limit the Court's jurisdiction after a period of sustained activism. The Court responded by declaring substantial parts of the amending law constitutionally invalid.

This dissertation examines the timing and nature of this unsuccessful 'attack' on the Court's authority and the reasons behind the apparent ease with which the Court was able to thwart it. Two broad sets of theorisations of judicial power are tested: those that focus on external factors or background political conditions, and those that focus on internal factors or the issue of judicial agency. The dissertation's central finding is that no single theorization adequately accounts for the events of 2011. Rather, a combination of theoretical perspectives is required.

From 2003-2008, the Court's first Chief Justice, Jimly Asshiddiqie, exploited the window of opportunity provided by the groundswell of popular support for constitutionalism in Indonesia to build the Court's public reputation. His successor, Mahfud MD, was appointed to the Court on promises of returning it to its original jurisdiction. Instead, Mahfud MD pushed the Court in an even more activist direction, dispensing with Asshiddiqie's careful, scholarly style and introducing a 'substantive justice' approach that further exacerbated the Court's relationship with the political branches.

That change explains the timing of the 2011 attack. The Court's capacity to resist the attack, in turn, was a function of the fragmentation of Indonesian party politics. While it was one thing to construct the political coalition required to pass the 2011 reforms, it was another to amend the Constitution to counteract the Court's decisions.

While the Court emerges from this story as an apparently strong institution, its somewhat dogmatic stance on judicial independence leaves cause for concern. Paradoxically, the Court's very success in contributing to the strengthening of Indonesia's constitutional democracy means that it needs to develop a new understanding of judicial independence, one that is more sensitive to democratic preferences. The thesis concludes by explaining this idea and speculating about the future trajectory of Indonesian constitutional politics.

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ORIGINALITY STATEMENT

'I hereby declare that this submission is my own work and to the best of my knowledge it contains no materials previously published or written by another person, or substantial proportions of material which have been accepted for the award of any other degree or diploma at UNSW or any other educational institution, except where due acknowledgement is made in the thesis. Any contribution made to the research by others, with whom I have worked at UNSW or elsewhere, is explicitly acknowledged in the thesis. I also declare that the intellectual content of this thesis is the product of my own work, except to the extent that assistance from others in the project's design and conception or in style, presentation and linguistic expression is acknowledged.'

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Acknowledgements

It is true what people say: the doctoral process is not just about producing a thesis. In fact, a student who just goes through the process, and hands in his or her thesis, is not a true doctoral student. The doctoral process is a process of making. This is not only hard work, but also requires perseverance, and the ability to think strategically. It is not just a process of producing a finite number of words, but also a process of choice: which subject to choose among the many that could be discussed? In this process of choosing, one decides what needs to be included and what needs to be discarded.

This thesis aims to explain the story of the Indonesian Constitutional Court over its first decade. I had the luxury of being part of the Court's early generation: I witnessed the Court's rise. I find it difficult to know which part of the story I should tell and which I should not tell. The arrest of Chief Justice Akil Mochtar in October 2013 resulted in the Court reaching the lowest point of its institutional life. That is another story that needs telling and its effects on the Court observed.

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Constitutional Court more than he can. I could never have finished this journey without their supervision.

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This thesis process created a better version of me, and I am grateful that I have achieved Fritz 2.0.

Abstract

In 2011, the Indonesian Parliament enacted Law 8 of 2011 amending Law 24 of 2003 on the Indonesian Constitutional Court. The amendment was intended to limit the Court's jurisdiction after a period of sustained activism. The Court responded by declaring substantial parts of the amending law constitutionally invalid.

This dissertation examines the timing and nature of this unsuccessful 'attack' on the Court's authority and the reasons behind the apparent ease with which the Court was able to thwart it. Two broad sets of theorisations of judicial power are tested: those that focus on external factors or background political conditions, and those that focus on internal factors or the issue of judicial agency. The dissertation's central finding is that no single theorization adequately accounts for the events of 2011. Rather, a combination of theoretical perspectives is required.

From 2003-2008, the Court's first Chief Justice, Jimly Asshiddiqie, exploited the window of opportunity provided by the groundswell of popular support for constitutionalism in Indonesia to build the Court's public reputation. His successor, Mahfud MD, was appointed to the Court on promises of returning it to its original jurisdiction. Instead, Mahfud MD pushed the Court in an even more activist direction, dispensing with Asshiddiqie's careful, scholarly style and introducing a 'substantive justice' approach that further exacerbated the Court's relationship with the political branches.

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Relevant Publications and Presentations

Publications Arising from the Writing of this Dissertation

Journal Articles

Butt, Simon and Fritz Siregar, 'State Control over Natural Resources in Indonesia: Implications of the Oil and Natural Gas Law Case of 2012' (2013) 31(2) *Journal of Energy & Natural Resources of Law* 107

Roux, Theunis and Fritz Siregar, 'Trajectories of Curial Power: The Rise, Fall and Partial Rehabilitation of the Indonesian Constitutional Court' (2016) 16(2) *Australian Journal of Asian Law.*

Siregar, Fritz, 'Indonesia Constitutional Court Interpretation Methodology (2003-2008)' (2015) 1(1) (30 May 2015) *Constitutional Review.*

Siregar, Fritz, 'The Political Context of Judicial Review in Indonesia' (2015) 2 (31 August 2015) *Indonesia Law Review* 208.

Book Chapter

Siregar, Fritz, 'Application of Tolerance Interval Theory to the Indonesian Constitutional Court ' in Dri Utari R Christina and Ismail Hasani (eds), *Masa Depan Mahkamah Konstitusi Ri: Naskah Konperensi Mahkamah Konstitusi Dan Pemajuan Hak Konstitusional Warga* (Pustaka Masyarakat Setara, 2013).

Newspaper Articles and Online Opinion

Siregar, Fritz, 'Saving the Constitutional Court', *The Jakarta Post* (Jakarta), 19 October 2013 2013, <http://www.thejakartapost.com/news/2013/10/19/saving-constitutional-court.html%3E.

Siregar, Fritz, 'Indonesian Constitutional Politics' (2013) (20 October 2013). *International Journal of Constitutional Law Blog* *at*: http://www.iconnectblog.com/2013/10/indonesian-constitutional-politics

Presentations Arising From the Writing of this Dissertation

Siregar, Fritz, 'Analysis of the Extent to Which the Constitutional Court of Indonesia Has Held the Indonesia Government to Its Obligations to Respect, Protect and Fulfill Economic and Social Rights' (Paper presented at the The 4th Asian Constitutional Law Conference, The University of Hong Kong, 2011)

Siregar, Fritz, 'How the Indonesian Constitutional Court Has Changed Indonesia's Constitutional Balance ' (Paper presented at the American Society of Comparative Law, Young Comparativists Committee, Second Annual Conference: New Voices in Comparative Law, Indiana University Robert H. McKinney School of Law 2013).

Siregar, Fritz, 'The Rise of the Indonesian Constitutional Court: Political Fragmentation View' (Paper presented at the The 13th APRU Doctoral Students Conference 2014, University of Indonesia 2014).

Siregar, Fritz, 'Political Parties and the Institutional Legitimacy of the Indonesian Constitutional Court' (Paper presented at the conference on Cultures of Freedom and Contending Visions of Justice and Governance in the Muslim World: Voices from the Arab and Muslim Worlds, University of Sydney 2015).

Siregar, Fritz, 'The Indonesian Constitutional Court as Positive Legislator' (Paper presented at the The 6th Asian Constitutional Law Conference, National University of Singapore 2015).

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List of Abbreviations

ABNR	Ali Budiardjo and Nugroho Reksodiputro
ANC	African National Congress
BPUPKI	*Badan Penyelidik Usaha-Usaha Persiapan Kemerdekaan* – Investigating Committee for the Preparation of Independence
BPHN	*Badan Pembinaan Hukum Nasional* – National Law Development Agency
CSIS	Centre for Strategic and International Studies
DPR	*Dewan Perwakilan Rakyat* – People's Representative Assembly
HAM	*Hukum dan Hak Asasi Manusia* – Law and Human Rights
IMF	International Monetary Fund
KPK	*Komisi Pemberantasan Korupsi* – Corruption Eradication Commision
KPU	*Komisi Pemilihan Umum* - Election Commission
MKK	Mochtar, Karuwin and Komar
MPR	*Majelis Permusyawaratan Rakyat* – People's Consultative Assembly
PAN	*Partai Amanat Nasional* – National Mandate Party
PBB	*Partai Bulan Bintang* – Star Crescent Party
PBR	*Partai Bintang Reformasi* – Reform Star Party
PDI-P	*Partai Demokrasi Indonesia Perjuangan* – Indonesian Democratic Party of Struggle
PITA	*Partai Indonesia Tanah Air* – Indonesia Homeland Party
PKB	*Partai Kebangkitan Bangsa* - National Awakening Party
PKS	*Partai Keadilan Sejahtera* – Prosperous Justice Party
PMB	*Partai Matahari Bangsa* – Nation Daystar Party
PNBK	*Partai Nasional Benteng Kemerdekaan* – Indonesian Independent Nationalist Ox Party
PP	*Peraturan Pemerintah* – Government Regulation
PPP	*Partai Persatuan Pembangunan* – United Development Party
PSI	*Partai Sosialis Indonesia* - Indonesia Socialist Party
SBY	*Susilo Bambang Yudhoyono*
TSM	*Terstruktur, sistematis dan massive* – Structured, systematic and massive (test)
UNDP	United Nation Development Programme

Chapter 1: Introduction

1.1 The Indonesian Constitutional Court's forceful start

Upon the resignation of President Suharto in 1998, Indonesia conducted a series of democratisation reforms. One fundamental aspect of the reform agenda was amending the *1945 Constitution*. The amendment process was conducted gradually through a series of meetings of the *Majelis Permusyawaratan Rakyat* (MPR or 'People's Consultative Assembly') from 1999 until 2002.[1] The successive amendments incorporated an extensive bill of rights—based on the international bill of rights—into the Constitution. This meant that, effectively for the first time, citizens of the Indonesian Republic were able (in the juridical sense at least) to enjoy rights independently of the State. With the amendment of 2001, those rights were declared to be enforceable by a newly created Constitutional Court.[2]

The creation of Indonesia's Constitutional Court (hereafter 'the Court', unless a distinction needs to be made between this and other courts) was linked decisively to the need for an independent institution that would be able to drive the democratisation process forward. The 1999-2002 reforms introduced direct presidential elections, increased the power of the *Dewan Perwakilan Rakyat* (DPR or 'People's Representative Assembly') to legislate and call the government to account, ended the system of appointing members to the MPR, and removed the military's political role. The amendments also reformed the judiciary and established its independence from the executive, decentralised government, and introduced a new assembly of provincial representatives.[3]

After enactment of the provisions relating to the establishment of the Court on 9 November 2001, the amended *1945 Constitution* mandated the existing Indonesian

[1] 'The People's Consultative Assembly shall consist of the members of the House of Representatives and the members of the Regional Representative Council' (Article 2(1) of the *1945 Constitution*). 'The People's Consultative Assembly has the authority to amend and to enact the Constitution' (Article 3(1) of the *1945 Constitution*).

[2] Hendrianto, 'Institutional Choice and the New Indonesian Constitutional Court' in Andrew Harding and Penelope Nicholson, *New Courts in Asia* (Routledge, 2010) 158.

[3] Andrew Harding and Peter Leyland, 'The Constitutional Courts of Thailand and Indonesia: Two Case Studies From South East Asia' in Andrew Harding and Peter Leyland (eds), *Constitutional Courts: A Comparative Study* (Wildy, Simmonds & Hill, 2009) 118.

Supreme Court to undertake judicial review before the Constitutional Court officially opened.[4] The Supreme Court received 14 judicial review cases, but never began hearings to examine them. The *Constitutional Court Law* (24 of 2003) was finalised on 15 August 2003, and within three days of this, the Court's first bench was sworn in, with Jimly Asshiddiqie becoming the Court's first Chief Justice on 18 August 2003.

Since its creation, the Constitutional Court has positioned itself as 'the guardian of the Constitution and the protector of Indonesian human rights'.[5] In so doing, it has made a number of politically consequential and often quite controversial decisions. In one early case, the Court reversed years of anti-Communist repression on the part of the Suharto regime by reinstating the right of ex-Communist Party members to participate in elections and become candidates for parliament.[6] In another, the Court annulled the retroactive application of a counter-terrorism law that had been used to prosecute the 2002 Bali bombers.[7] A third example was the Court's confirmation that 'independent candidates' were entitled to stand for the position of head and vice head of regional governments around Indonesia.[8] The Court also struck down legislative provisions giving the President politically restrictive protection against defamatory statements.[9]

The Court's activism has extended not just to political rights, but also to economic rights. For example, in 2003, the Court declared the privatisation of the state electricity company to be in contravention of Article 33 of the *1945 Constitution*.[10] The Court also enforced Article 31(4), which requires the allocation of 20 per cent of the total State budget to education.[11] This decision was rendered on 13 August 2008, three days before the then President, Susilo Bambang Yudhoyono (SBY), was due to give his State of the Union speech.

It was this decision, more than any other, which drove the political executive's growing antipathy towards the Court and indirectly led to Jimly's ousting as Chief Justice in

[4] *Transitional Provision of the Fourth Amendment to the 1945 Constitution*.
[5] *Vision and Mission Statement of the Constitutional Court (2003–2008).*
[6] *Constitutional Court Decision 011-017/PUU-II/2004 on Communist Party Member* (2004).
[7] *Constitutional Court Decision 013/PUU-I/2003 on Retroactive Clause on Terrorism Law* (2003).
[8] *Constitutional Court Decision 005/PUU-V/2007 on Independent Candidate* (2007).
[9] *Constitutional Court Decision 013-022/PUU-IV/2006 on Defamation Towards President* (2006).
[10] *Constitutional Court Decision 001-021-022/PUU-IV/2003 on Electricity Law* (2003).
[11] *Constitutional Court Decision 013/PUU-VI/2008 on Education Budget* (2008).

2008.[12] From August 2008 to April 2013, the Court was led by Mohammad Mahfud (Mahfud MD). Mahfud MD was nominated to the Court by the DPR on the back of promises that he would rein in the Court's activism and return it to its original mandate. When Jimly's position as Chief Justice came up for renewal shortly after Mahfud MD's nomination to the Court, Mahfud MD was able to convince a majority of the justices to elect him instead. Jimly resigned from the Court on 1 November 2008,[13] after serving as Chief Justice for five years.[14]

Contrary to his stated vision at the time of his nomination, Mahfud MD took the Court's activism even further. In particular, he introduced a 'substantive justice' approach, in terms of which the Court sought to decide cases in a less formalistic, more outcomes-oriented manner. 'If any injustice occurs in consequence of a law's introduction,' Mahfud MD declared, 'the Court will step up to protect people's rights'.[15]

In responding to disputes about local election results, for example, the Mahfud Court ordered the Election Commission to undertake a recount of the vote or otherwise redo the voting process, even though by law, the Court had no authority to make such an order.[16] In judicial review cases, the Mahfud Court acted as positive legislator by handing down numerous 'conditionally unconstitutional' decisions, in which it conditioned the validity of challenged laws on its preferred rewording. In 2009, three days before the presidential election, the Court declared that a 'passport and identity card' was sufficient to vote, even though the persons concerned were not listed on the electoral roll.[17]

Over the course of these decisions, the Court became one of the most important and powerful State institutions in Indonesia.[18] The public came to expect that justice would prevail, and that their constitutional rights would be protected. Chief Justice Mahfud on

[12] A Mukthie Fadjar, *2307 Hari Mengawal Konstitusi: Tujuh Belas Sketsa Ringan, Analogi Puisi Dan PHPU* (In-TRANS Publishing, 2010) 19.
[13] Jimly never admitted that he resigned from the Court because he was no longer Chief Justice. In his resignation letter and various interviews, Jimly stated that his constitutional duties had come to an end.
[14] Mahfud always said 'no one will replace Jimly's position as Founding Father of Indonesia Constitutional Court'.
[15] Rita Triana Budiarti, *On the Record: Mahfud MD Di Balik Putusan Mahkamah Konstitusi/Rita Triana Budiarti* (Murai Kencana Konstitusi Press, 2010).
[16] *Constitutional Court Decision 041/PHPU.D-VI/2008 on East Java Head of Regency Election Result* (2008).
[17] *Constitutional Court Decision 102/PUU-VIII/2009 on Electoral Roll* (2009).
[18] Simon Butt, *The Constitutional Court and Democracy in Indonesia* (BRILL, 2015).

various occasions publicly announced that no law in the Republic of Indonesia would survive very long if it contradicted the *1945 Constitution*. Indeed, the Court did not hesitate to declare entire laws unconstitutional (for example, the 2002 *Electricity Law*[19] and the 2004 *Truth and Reconciliation Commission Law*).[20] The Court under Mahfud MD also became involved in intragovernmental disputes, such as that between the President of the Republic and the DPR in 2012.[21] This case related to a dispute about the repurchase of shares in State enterprises. The Court ruled in favour of the DPR and rejected the President's petition. Controversial as it was, this case at least showed that the President had sufficient faith in the Court to bring a dispute to it rather than trying to settle that dispute through political channels. Similarly, in its handling of disputes over the election of heads and vice heads of regional governments, the Court played a central role in resolving intragovernmental disputes.

1.2 The 2011 backlash

Almost inevitably, the Court's success in asserting its authority in this way bred opposition as the extent of its powers became apparent. In July 2011, the DPR and the President passed a series of amendments to the *2003 Constitutional Court Law* in the form of Law 8 of 2011 (the *2011 Constitutional Court Law*). While some were merely technical,[22] three of these amendments were clearly aimed at reining in the Court. Article 45A thus sought to prohibit the Court from issuing 'ultra petita' decisions (i.e. decisions in which the Court went further than requested by the constitutional claimant in invalidating a statutory provision). Article 50A provided that the Court, when reviewing a particular statute for constitutionality, should not use inconsistency with another statute as a basis for invalidation. A third provision, Article 57(2a), sought to prohibit the Court, when striking down legislation, from prescribing the form of words that would cure the constitutional defect identified.

Aside from these changes to the Court's jurisdiction and powers, the 2011 amendments also sought to regulate the composition, powers and procedures of the Constitutional Court Honour Council mentioned in Article 23 of the *2003 Constitutional Court Law*.

[19] *Constitutional Court Decision 001-021-022/PUU-IV/2003 on Electricity Law* (2003).
[20] *Constitutional Court Decision 006/PUU-IV/2006 on Truth and Reconciliation Commission* (2006).
[21] *Constitutional Court Decision 002/SKLN-X/2012 on Repurchase Newmont Shares* (2012).
[22] The amendments are discussed in full in Chapter 6.

As originally enacted, Article 23(3) simply referred in passing to the Council, leaving its 'formation, structure and work procedure' to be regulated by the Constitutional Court. An obvious weakness of this original formulation was that the dismissal of a Constitutional Court judge could only occur on the recommendation of the Chief Justice, with no provision made for the dismissal of the Chief Justice himself. In addition, although various grounds for dishonourable dismissal were set out in Article 23(2), no provision was made for the regulation of judicial misconduct falling short of a dismissible offence. This left the Court to fashion its own Code of Ethics and Behaviour Guidelines, which it did in 2003.

The 2011 amendments attempted to change this highly autonomous model. Article 27A formally required the Court to adopt a Code of Ethics and Guidelines and empowered the Honour Council to uphold it. At the same time, the amendments broadened the membership of the Honour Council to include, in addition to a Constitutional Court judge, a member of the Judicial Commission, a member of the DPR with responsibility over legislative affairs, a member of the executive responsible for legal affairs, and a Supreme Court judge. Read together, the amendments sought to wrest control of the disciplining of Constitutional Court judges from the Court and place it in the hands of a more broadly representative Council.

The *2011 Constitutional Court Law* was challenged in a series of cases that gave the Court the opportunity to consider the law's impact on its independence and protect its powers against legislative intrusion.[23] In the first case, the applicant requested the Court to invalidate Article 112 of the *2009 Narcotics Law* regarding punishment for drug users.[24] Since the remedy requested required the Court to issue a conditionally constitutional decision, it took the opportunity to invalidate Article 57(2A) (on the Court's power to make orders binding on lawmakers) and Article 45A (on *ultra petita* decisions)[25] of the *2011 Constitutional Court Law*. In a second case, decided immediately after the first, a group of constitutional law professors and activists filed

[23] *Constitutional Court Decision 48/PUU-IX/2011 on 2011 Constitutional Court Law* (2011); *Constitutional Court Decision 49/PUU-IX/2011 on 2011 Constitutional Court Law* (2011), rendered on 18 October 2011.
[24] The applicant was convicted of drug possession under Article 112 of the *2009 Narcotics Law*.
[25] Article 45A of *Law 8 of 2011* stated: 'If the Constitutional Court decision contains a finding that was not sought by applicants, or which exceeds what the application sought, except in respect of particular matters related to the basis of the application'.

for review of the entire *2011 Constitutional Court Law*. The Court responded by annulling sixteen of that statute's provisions.[26] The provisions declared unconstitutional included: (a) the mechanism and procedure for electing the Chief Justice;[27] (b) the requirement for working experience as a government official (*pejabat negara*);[28] (c) the stipulation that the tenure of new constitutional justices should be tied to the tenure of the justice they were replacing;[29] (d) the provisions relating to the Honour Council;[30] (e) a strict limitation that the Court should only use the *1945 Constitution* in determining cases;[31] (f) the requirement for the President to follow up on the Court's decisions;[32] (g) a transitional tenure period for existing justices,[33] and (h) the meaning of final and binding decisions.[34]

The legal reasoning and doctrinal issues arising from those two decisions have been analysed by Simon Butt and Tim Lindsey.[35] In their view, the Court's arguments were often unconvincing and even irrational. Nevertheless, Butt and Lindsey generally approve of the Court's attempt to defend its independence. Justice Harjono, the dissenting judge in the two decisions just discussed, was less forgiving, critiquing the majority of the Court for being 'too eager' to decide the cases,[36] and for failing to display the necessary self-restraint.[37]

Following the two decisions on the *2011 Constitutional Court Law*, the Court's budget was cut by IDR 22 billion (equivalent to USD$2 million). The cuts mostly related to public relation programs, including a civic education program that the Court had launched. The Court had predicted the possibility of this kind of counter-attack in issuing its decisions.[38] Whether or not it is correct to read the budget cuts in this way,

[26] *Constitutional Court Decision 49/PUU-IX/2011 on 2011 Constitutional Court Law* (2011).
[27] Article 4(4)(f)–(h).
[28] Article 15(2)(h) limited to phase 'and/or have been government high official (*pejabat negara*)'.
[29] Article 26(5).
[30] Article 27A(2)(c)–(e); Article 27A(3)–(6).
[31] Article 50A.
[32] Article 59(2).
[33] Article 87.
[34] Article 10.
[35] Simon Butt & Tim Lindsey, *The Constitution of Indonesia: A Contextual Analysis* (Hart Publishing, 2012) 149–157.
[36] *Constitutional Court Decision 49/PUU-IX/2011 on 2011 Constitutional Court Law* (2011) 87.
[37] Ibid 84.
[38] Interview with Hamdan Zoelva (Constitutional Court Building, 13 December 2013).

however, has been disputed. The Ministry of Planning Officer,[39] who is responsible for handling the Court's budget, denied that the cuts (ordered in 2011 and affecting 2012 spending) were in any way related to the 2011 decisions. It is also true that the economic situation in Indonesia at the time pushed the government to cut almost all state institutions' budgets, not just the Court's.[40] The cuts were in addition made only after the Court had failed to inform the Ministry of Planning how the affected funds should be spent.[41]

After the cuts, the Court went on to declare further provisions of the *2011 Constitutional Court Law* unconstitutional. It struck down, for example, the requirement that prospective constitutional justices be in possession of a Master's degree (Article 15(2)(b),[42] saying that this provision violated the rights of doctoral degree holders who did not have an intermediate degree.[43] The Court upheld Article 7(a)(1) regarding the role of the registrar, but only as long as it was interpreted to include the additional phrase 'with statutory retirement age of 62 years for the Registrar, Deputy Registrar and Substitute Registrar'.[44] The last Court decision striking out a provision of the *2011 Constitutional Court Law* related to the age requirement for a constitutional justice's second appointment.[45] The case arose when Justice Muhammad Alim, who had been younger than 65 when first appointed, reached the end of his first term at the age of 68. Article 15(2)(d) of the *2011 Constitutional Court Law* provided for a minimum age of 47 years and a maximum of 65 years on appointment. The Court decided that Article 15(2)(d) should be interpreted to mean a 'minimum of 47 years and a maximum of 65 years *at the time of first appointment*'.[46] This decision accordingly allowed Justice Alim to be reappointed for a second term.

Both the 2011 *Registrar* decision and the 2013 *Age Requirement for Second Appointment* decision have been extensively criticised by parliamentary members.[47] The applicant in both cases was Dr Andi Muhammad Asrun, a former clerk of the Court

[39] The Ministry of Planning will accumulate budgets from all ministries and other institutions.
[40] Interview with Prahesti Pandanwani (15 December 2013).
[41] Ibid.
[42] *Constitutional Court Decision 68/PUU-IX/2011 on Doctoral Requirement* (2011).
[43] Ibid [3.24].
[44] Ibid 44. This provides an extra seven years to the Civil Servant Law statutory requirement.
[45] *Constitutional Court Decision 007/PUU-XI/2013 on Age Requrement for Second Appointment* (2013).
[46] Ibid.
[47] Interview with Benny K Harman (DPR/Parliament Building, 18 June 2014).

who had gone on to become an advocate and had repeatedly filed cases at the Court. Asrun's legal standing to challenge the constitutionality of the *2011 Constitutional Court Law* was doubtful. Once again, Justice Harjono dissented, stating that:

> this was indeed a test of statesmanship for the constitutional court justices as determined by Article 24C paragraph (5) of the 1945 Constitution, because it involves the personal interests of judges and the court as an institution.[48]

Be that as it may, the Court, in these two decisions and those earlier discussed, almost entirely overturned the substance of the *2011 Constitutional Court Law*, and did so with apparent ease and few immediate institutional repercussions.

1.3 The global phenomenon of attacks on constitutional courts

Attempts to rein in or 'attack' activist constitutional courts are, of course, nothing new. The rise of a forceful court inevitably challenges the delicate balance of constitutional power between the judiciary and the political branches. In seeking to restore what they perceive to be the proper balance of power, the political branches may 'attack' courts in several different ways. Most obviously, they may seek to appoint constitutional justices more sympathetic to their concerns. The paradigmatic example of this was US President Franklin D Roosevelt's threatened court packing plan in the wake of the Supreme Court's resistance to the New Deal.

A slight variation on this form of attack is the non-reappointment of justices with reputations for independence. Here, the leading example is Hungary's Constitutional Court. Established on 1 January 1990, the Court, under Chief László Justice Sólyom's leadership, quickly built a reputation as the most powerful constitutional court in Eastern Europe, 'by design and performance'.[49] Despite, or perhaps, because of this, Chief Justice Sólyom was not reappointed for a second term in 1998 upon the expiration of his nine-year term.[50] (This was the first attack on the Hungarian Constitutional Court.

[48] Ibid 41.
[49] Herman Schwartz, *The Struggle for Constitutional Justice in Post-Communist Europe* (University of Chicago Press, 2000) 75; Spencer Zifcak, 'Hungary's Remarkable, Radical, Constitutional Court' (1996) 3 *Journal of Constitutional Law in Eastern and Central Europe* 1; Kim Lane Scheppele, 'The New Hungarian Constitutional Court' (1999) 8 *Eastern European Constitutional Review* 81.
[50] Ibid 78.

The second attack was the reduction of the Court's jurisdiction by a central-right political party—Fidesz—that took control of the government in 2010.[51])

Another form of political attack occurs when the parliament or the President changes the tenure of constitutional justices' appointments or reduces the Court's budget. A third concerns the reduction of the Court's authority through the contraction of its jurisdiction to decide certain cases.

In Russia, on 7 October 1993, then President Yeltsin signed a decree suspending the Constitutional Court until the adoption of a new constitution. Yeltsin was angry at the Court and expected it to be written out of the 1993 Constitution.[52] A study conducted by Epstein, Knight and Shvetsova argued that the first Russian Constitutional Court had made decisions about highly charged political disputes before building up the requisite goodwill with political actors and the public alike.[53] The Second Russian Constitutional Court (established from 1995 to 1996), they argue, was different in design from its predecessor and has engendered a higher level of respect. In contrast to the first Court, the second Court did not seriously challenge President Yeltsin's power, even though it had several opportunities to do so. Instead, it limited his authority only in cases in which the issues were less 'highly charged'.[54] As a result, the second Court has gradually built its institutional legitimacy in a way 'that could one day check potential abuses of [government] power'.[55]

The South African Constitutional Court, under its first Chief Justice Arthur Chaskalson, is another example of a court that made an initially forceful start, only to be somewhat reined in.[56] As Roux has argued, the South African Constitutional Court was able to use

[51] Miklos Bankuti, Gabor Halmai, and Kim Lane Scheppele, 'Hungary's Illiberal Turn: Disabling the Constitution' (2012) 23 *Journal of Democracy* 138; Kim Lane Scheppele, 'Not Your Father's Authoritarianism: The Creation of the "Frankenstate"' (2013) *American Political Science Association European Politics and Society Newsletter* 5.
[52] Lee Epstein, Jack Knight and Olga Shvetsova, 'The Role of Constitutional Courts in the Establishment and Maintenance of Democratic Systems of Government' (2001) 35 *Law & Society Review* 117, 137.
[53] Ibid 152.
[54] Thomas F Remington, Steven S Smith and Moshe Haspel, 'Decrees, Laws, and Inter-Branch Relations in the Russian Federation' (1998) 14 *Post-Soviet Affairs* 287, 219.
[55] Ibid 287.
[56] Heinz Klug, *Constituting Democracy: Law, Globalism and South Africa's Political Reconstruction* (Cambridge University Press, 2000); Theunis Roux, *The Politics of Principle: The First South African Constitutional Court, 1995–2005* (Cambridge University Press, 2013).

the transitional period from 1995 to 1996 to quickly establish its legitimacy.[57] Through decisions such as *Grootboom* (2000) and *Treatment Action Campaign* (2002), the Court became internationally famous for its decisions enforcing social and economic rights. The Court also abolished capital punishment laws in 1995. Unlike the Hungarian Constitutional Court, the South African Constitutional Court has not been formally attacked. Nevertheless, South Africa's dominant political party, the African National Congress (ANC), has challenged the Court's authority through issuing critical public statements and making what appear to be partisan political appointments. In 2011, President Zuma appointed Mogoeng Mogoeng, known as 'the most conservative justice on the court', as Chief Justice, against the desires of the legal community and ahead of several other seemingly better qualified candidates.[58] In 2012, President Zuma again challenged the authority of South Africa's Constitutional Court by announcing a controversial and vaguely formulated review of the social and economic impact of its decisions.[59]

Taiwan's Constitutional Court, the Judicial Yuan or the Council of Grand Justices, has the authority to supervise the lower courts, consisting of the Supreme Court, the Administrative Court and the Commission on the Disciplinary Sanction of Public Functionaries.[60] The Court also has the authority to 'interpret the Constitution and shall have the power to unify the interpretation of laws and orders'.[61] The first attack on this court occurred in 1958. In that year, the Legislative Yuan passed the Grand Justices Council Adjudication Act, which increased the voting threshold for issuing constitutional interpretation decisions and restricted interpretation of the constitutional text.[62] The second attack occurred in 2000. In Judicial Yuan Interpretation number 499, the Court decided that 'the term extension for delegates of the National Assembly and members of the Legislative Yuan is not justified under the Constitution', invalidating the fifth amendment of the Constitution. In response, the National Assembly passed an

[57] Roux, above n 56, 229.
[58] Pierre De Vos, *On the Appointment of a Chief Justice* (2011) *Constitutionality Speaking* <http://constitutionallyspeaking.co.za/on-the-appointment-of-a-chief-justice/>.
[59] Nickolaous Bauer, *ANC Sets Its Sight on the Judiciary* (17 March 2012) Mail & Guardian Africa's Best Read <http://mg.co.za/article/2012-02-17-anc-sets-its-sights-on-the-judiciary>.
[60] *Constitution of the Republic of China (Taiwan)*, art 77.
[61] *Constitution of the Republic of China (Taiwan)*, art 78.
[62] Tom Ginsburg, 'Constitutional Courts in East Asia: Understanding Variation' (2008) 3 *Journal of Comparative Law* 80, 83.

amendment providing that 'the lifetime holding of office and payment of salary do not apply to grand justices who did not transfer from the post of a judge'.

1.4 Research questions

Against this comparative background, this dissertation seeks to analyse the failed attempt in 2011 to amend the Indonesian Constitutional Court's jurisdiction and powers and to improve arrangements for judicial accountability. I am interested both in the circumstances leading up to the 2011 amendments (the explanatory dimension) and in assessing whether the Court was right to resist the amendments in the way that it did (the normative dimension). The explanatory dimension of this dissertation concerns such questions as the causes and timing of the 2011 amendments. Why did the DPR and President attack the Court by amending and trying to limit its authority, and why did this occur in 2011 and not in 2007, say, when the Court's activism was already apparent? I am also interested in how the Court was able to thwart this attack with such apparent ease. How was it that the Court was able simply to strike down the various amendments without major institutional repercussions, apart from the budgetary cuts mentioned?

Normatively, my interest lies in whether the Court was right to resist the attack in the way that it did. Here, my concern is less with the doctrinal aspects of the various 2011 decisions and more with the conception of judicial independence underlying the Court's decisions. Is it the case, as the Court appeared to assume, that any attempt to reduce the jurisdiction and powers of a constitutional court in a new democracy should be resisted at all costs, or are there circumstances where it is right and proper for the political branches to reduce the authority of a newly established constitutional court? If so, what are those circumstances, and how should a constitutional court respond in a way that respects democratic prerogatives while safeguarding its independence?

There appear to be three possible explanations worth exploring. According to the first, there was no real change in the way that the Jimly and Mahfud Courts approached the implementation of their mandate. The DPR and President simply took some time to appreciate the extent of the Court's powers and to develop a strategy to combat it. On this view, the Court enjoyed something like a 'honeymoon period' during which it was

insulated from political attacks by memories of Indonesia's authoritarian past. As soon as Indonesian politics normalised, however, and the democratic system began to function properly, the Court was seen as a counter-majoritarian institution that needed to be contained ('the political normalisation explanation').

An alternative explanation is that there was no significant change in the external political environment for judicial review. Rather, the explanation for the timing of the attack is that the Mahfud Court in some way departed from the approach that the Jimly Court had taken, either jurisprudentially (in the legal reasons it offered for its decisions) or strategically (in its capacity to anticipate and avert any adverse political consequences of its decisions). It was this altered approach to the implementation of the Court's mandate that precipitated the 2011 attack on its independence ('the strategic failure explanation').

A third and final explanation relies on a combination of the political normalisation and strategic failure explanations. On this view, both external and internal factors contributed to the timing and nature of the 2011 attack on the Court. On the one hand, the Court's very success in stabilising the democratic transition in Indonesia meant that the political branches acquired the legitimacy and moral authority to attack the Court. On the other, there was some change in decision-making approach and strategy between the Jimly and Mahfud Courts that drove the attack to a head.

In exploring which of these possible explanations is the strongest, I will deploy a range of legal-doctrinal and political science methods. First, I will use doctrinal legal analysis to identify whether there were any relevant differences between the way the Jimly and Mahfud Courts responded to their mandate. In addition to jurisprudential changes, I will identify changes in curial strategy by examining the micro-politics surrounding controversial cases. I will then examine how the Court adjusted its decisions to account for these factors. Second, I will use a combination of secondary literature analysis and a series of in-depth key informant interviews to understand the changing political environment for judicial review in Indonesia.

1.5 Thesis structure

This dissertation consists of six chapters in addition to this introductory chapter.

Chapter 2 conducts a literature review of the various theorisations of judicial empowerment in an effort to understand both how constitutional courts build their institutional legitimacy and how the political environment for judicial review might affect a court's capacity to resist political attack. The chapter divides the literature roughly into contributions that focus on external (background political) and internal (legal-institutional and strategic) factors.

Chapter 3 goes on to consider the political context in which the Jimly and Mahfud Courts operated. Indonesia's political history is full of corruption, mismanagement and authoritarianism. Despite Suharto's fall, public respect (or lack thereof) for politicians was affected by that legacy. In contrast, the Court was seen as a relatively legitimate or clean institution, and politicians were for a long time consequently unable to touch the Court. As Indonesia's democratic politics normalised, however, this dynamic changed. At the same time, the Court was rocked by several corruption scandals, rendering it more vulnerable to political attack.

Chapter 4 compares the composition, political backgrounds, and basic attitudes to decision-making of the Jimly and Mahfud Courts. It argues that in many ways the Jimly Court was more strategic than the Mahfud Court, although 'strategy' here should be understood not purely as a matter of rational self-interest, but also as an issue of wise judicial statesmanship. While laudable in the abstract, Mahfud MD's adoption of a 'substantive justice' approach politicised the Court in ways that Jimly had been able to avoid. There was also a noticeable increase in the number and proportion of conditionally unconstitutional decisions under Mahfud MD's leadership, which exposed the Court to charges of being a positive legislator. The precise timing of the 2011 attack, however, is attributable, not to the differences between the courts, but to the fact that Mahfud MD had promised to return the Court to its original mandate. It was only when that promise was shown to be empty that the political branches moved formally to amend its jurisdiction and powers.

Chapter 5 compares the doctrinal records of the Jimly and Mahfud Courts in an attempt to discover if there were any doctrinal changes between the two courts that might have upset the political branches. This chapter also examines decisions that were particularly politically controversial.

Chapter 6 returns to the 2011 legislative amendments to examine their motivations in more detail. What were the stated reasons for the amendments, and how does this information help to explain or mask what was really going on?

Chapter 7 summarizes the dissertation's main findings and gives a point-by-point answer to the research questions posed. It also sets out what the Indonesian case has to teach about the relative explanatory power of the various theorisations of judicial empowerment considered in Chapter 2.

Chapter 2: Literature Review and Methodology

2.1 Existing studies of the Indonesian Constitutional Court

This dissertation's objective is to examine constitutional politics in Indonesia, in particular to understand the role of Indonesia's Constitutional Court during a particular period (2003 to 2011). When an attempt to reduce the Court's authority was launched in 2011 by the parliament and President, the Court successfully resisted that attempt. This raises a series of questions that are interesting both for scholars of Indonesian constitutional politics and for comparativists. What prompted the attack? Why did it occur when it did and not before? How was it that the Court was so easily able to resist it? And was the Court right to resist it? In searching for answers to these questions, I will examine a range of literature, both on the Indonesian Constitutional Court in particular and other constitutional courts in which similar issues have arisen.

Several other scholars have already conducted specific studies of the role of Indonesia's Constitutional Court and have discussed how the Court's reputation has spread inside and outside Indonesia.[1]

Maruarar Siahaan wrote a thesis on the implementation and effect of the Court's decisions, including the factors that supported implementation of these decisions.[2] Siahaan claimed that legal norms, which had been declared constitutionally invalid and which took the form of a prohibition, permission or obligation, were ineffective from the time the decision was rendered. This was a self-implementing mechanism that did not require legislative support. However, where decisions were not self-implementing, a revision or amendment of law by legislation was required to ensure implementation. Decisions that fell into the latter category are those that created a new legal norm or public policy. For these decisions, new legislation needed to be enacted as the basis for the executive to implement the new policy. Any failure to enact those amendments was

[1] For example Diana Zhang, *The Use and Misuse of Foreign Materials by the Indonesian Constitutional Court: A Study of Constitutional Court Decisions 2003–2008* (University of Melbourne, 2010); Arjuna Dibley, *'Enabling' Constitutional Judicial Review in Indonesia: The Factors that Motivate Public Interest Litigants to Advance Freedom of Expression Cases* (Australian National University, 2011).
[2] Maruarar Siahaan, *The Implementation of Constitutional Court Decisions* (*Pelaksanaan Putusan Mahkamah Konstitusi*) (PhD thesis, University of Diponegoro, 2010).

a sign either of ignorance or of the executive's or legislature's intention not to implement the decision. To overcome this problem, Siahaan argued that the Indonesian people, and particularly the media, ought to pressure political lawmakers to fulfil their constitutional obligations.

Siahaan's thesis is invaluable as one of the earliest papers on the implementation of the Court's decisions. However, his research focuses on the social and economic aspects of implementing the Court's decisions, which is not the concern of my research project.

Human rights lawyer and parliamentarian, Benny K Harman's University of Indonesia thesis comprehensively explored the struggle to adopt judicial review in Indonesia from the early period of independence to the establishment of the Constitutional Court in the twenty-first century.[3] Harman conducted extensive research on the ideas and debates surrounding the Constitution's establishment. He analysed in detail the minutes of parliamentary hearings and discussions pertaining to the amendment of the *1945 Constitution* that led to the establishment of the Constitutional Court. Harman's study has made a valuable contribution to understanding the historical and political background to the Court's establishment. However, his study does not explain why the Court became so powerful and assertive.

Another significant doctoral dissertation that focuses on the Indonesian Constitutional Court is that by Simon Butt of the University of Melbourne.[4] Butt's focus is the decision-writing style of the Indonesian Constitutional Court; however, he also discusses historical aspects of the Court's establishment and provides a wide-ranging analysis of the institutional design of the Court, from its standing rules to the effects of its decisions. Several important findings from Butt's study include that the Court has entered the domain of public policy in ways that were not originally envisaged by the drafters.[5] Butt also observes that the Constitutional Court in many cases has failed to explain its decisions or the assumptions behind its decisions.[6] Butt believes that this failure arose from the fact that Constitutional Court justices lacked rigorous training in

[3] Benny K Harman, *Perkembangan Pemikiran Mengenai Perlunya Pengujian UU Terhadap UUD Dalam Sejarah Ketatanegaraan (1945–2004)* (unpublished thesis, University of Indonesia, 2006).
[4] Simon Butt, *Judicial Review in Indonesia: Between Civil and Accountability? A Study of Constitutional Court Decisions 2003-2005* (unpublished thesis, University of Melbourne, 2006).
[5] Ibid 234–235.
[6] Ibid 167.

constitutional law.[7] Butt argues that most of the judges who sit on the Constitutional Court only have civil law training. According to that tradition, the role of the Court is simply to apply the law as written. Butt expanded his thesis into a book in 2015.[8]

Hendrianto's examination of the emergence of Indonesia's Constitutional Court has become one of the most significant studies.[9] It describes how the justices—especially Chief Justice Jimly Asshiddiqie—asserted their authority and established the Court's legitimacy. Hendrianto also illustrates the role of the Chief Justice in orchestrating the actions of the first bench in the early years after the Court's establishment. In particular, he focuses on the role of judicial leadership in shaping the Court. His thesis explains how the Court started from nothing and became, not only operational, but also one of the most important institutions in Indonesia. His major contribution has been to show how Chief Justice Jimly played an important role in building the Court's institutional legitimacy by ensuring compliance with the Court's decisions. Jimly's assertiveness, which was not common in Indonesia at that time, increased the level of compliance by reminding other institutions of the Court's importance.

In their co-authored book, Butt and Lindsey have argued that Indonesia's Constitutional Court has been central to Indonesia's democratisation process.[10] After the constitutional amendment process from 1999 to 2002, the Court became a forum where people could seriously debate interpretations of the *1945 Constitution*. By examining the Court's jurisprudence, Butt and Lindsey show that the Court strengthened the meaning of the *1945 Constitution* and other State institutions in Indonesia. Through its decisions, the Court was able to clarify the role of State institutions in realising the rights vested in the *1945 Constitution*. This study is one of the most comprehensive on the *1945 Constitution* and on the Court's role in filling gaps in that constitution. However, it did not examine the relationship between the political environment in which the Court worked and the quality of the Court's decisions.

[7] Ibid 167.
[8] Simon Butt, *The Constitutional Court and Democracy in Indonesia* (BRILL, 2015).
[9] Hendrianto, *From Humble Beginnings to a Functioning Court: The Indonesian Constitutional Court, 2003–2008* (unpublished thesis, University of Washington, 2008).
[10] Simon Butt and Tim Lindsey, *The Constitution of Indonesia: A Contextual Analysis* (Hart Publishing, 2012).

A final study of Indonesia's Constitutional Court is Marcus Mietzner's analysis of the way in which the Court acted successfully as a referee in major political conflicts and contributed to democratic consolidation by expanding democratic rights.[11] Using Tom Ginsburg's political fragmentation theory, Mietzner argues that the Court's controversial judicial activism, though going beyond the terms of its original mandate, increased public support for the Court. In turn, the public support that the Court enjoyed protected it from outside intervention and enabled judges to declare unconstitutional any law that was an obstacle to democratisation in Indonesia.[12] In addition, the Court was able to present itself as an incorruptible institution, which further enhanced its public support after the collapse of Suharto's authoritarian regime.

Of all the various studies just discussed, Mietzner's is clearly the most relevant to my research project. His discussion of the way the Court built its institutional power provides one explanation for why the Court was able to survive the 2011 political attack. However, he has not addressed that question specifically. Nor does his research provide an explanation for the timing of the attack, or the particular resources on which the Court was able to draw. For answers to these questions, it is necessary to refer to the large body of comparative literature on the judicialisation of politics that has emerged over the last 20 years or so. This literature has its origins in studies of the US Supreme Court, but has been expanded to encompass constitutional courts in new or fragile democracies, including Brazil,[13] Argentina,[14] Chile,[15] Colombia[16] and Mexico.[17]

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[11] Marcus Mietzner, 'Political Conflict Resolution and Democratic Consolidation in Indonesia: The Role of the Constitutional Court' (2010) 10 *Journal of East Asian Studies* 397.
[12] Ibid.
[13] Diana Kapiszewski, *Challenging Decisions: High Courts and Economic Governance in Argentina and Brazil* (University of California Press, 2007); Daniel M Brinks, '"Faithful Servants of the Regime": The Brazilian Constitutional Court's Role under the 1988 Constitution' in Gretchen Helmke and Julio Rios-Figueroa (eds) *Courts in Latin America* (Cambridge UP, 2011) 128.
[14] Gretchen Helmke, *Courts Under Constraints: Judges, Generals, and Presidents in Argentina* (Cambridge University Press, 2005); Anthony W Pereira, *Political (In) justice: Authoritarianism and the Rule of Law in Brazil, Chile, and Argentina* (University of Pittsburgh, 2005).
[15] Javier Couso, 'The Politics of Judicial review in Chile in the Era of Democratic Transition, 1990–2002' (2003) 10 *Democratization* 70; Javier Couso and Lisa Hilbink, 'From Quietism to Incipient Activism: the Institutional and Ideological Roots of Rights Adjudication in Chile' in Gretchen Helmke and Julio Rios-Figueroa (eds) *Courts in Latin America* (Cambridge University Press, 2011) 99.
[16] Manuel J Cepeda Espinosa, 'The Judicialization of Politics in Colombia: The Old and the New' in Rachel Sieder et al (eds), *The Judicialization of Politics in Latin America* (Palgrave Macmillan, 2005) 67; Rodrigo Uprimny, 'The Constitutional Court and Control of Presidential Extraordinary Powers in Colombia' (2003) 10 *Democratization* 46.
[17] Jodi Finkel, *Judicial Reform as Political Insurance: Argentina, Peru, and Mexico in the 1990s* (Notre Dame Press, 2008).

This literature might be analysed in many ways. For my purposes, the most instructive is to divide the literature into studies that focus on the external political environment in which constitutional courts operate as the major determinant of the growth of their institutional power, and studies that focus on what the courts themselves have done to build their institutional power. By 'external political environment' I mean the background political conditions affecting a court's assertion of its institutional role, which are not necessarily within its power to control. Some studies stress that these conditions are the major determinants of a constitutional court's capacity to assert its institutional role. In contrast, others stress the importance of internal factors, such as the Court's doctrines and strategic choices about how best to understand its mandate and assert its role. The answer to my research question clearly lies in some combination of external and internal factors. However, for this literature review, the distinction between external and internal factors is a useful way of outlining the various theories and conjectures.

2.2 External factors: the political environment

It is incorrect to assume that a constitutional court operates in a vacuum. Studies about the development of a court's institutional legitimacy must take into account the external political environment in which it operates.

There is no simple answer, however, to the question why some constitutional courts take on politically 'consequential' roles and others do not.[18] According to one recent study, external political conditions, short-term political dynamics and the Court's own preferences interact in complex ways in determining both how courts decide cases and how they are received.[19] A court's decision is in this sense not merely 'a decision' alone of the court, but is the result of significant other factors and their consequences. No matter how careful the court is in drafting its decisions, and how carefully the court builds its institutional legitimacy, external factors always contribute to its institutional

[18] Diana Kapiszewski et al (eds), *Consequential Courts: Judicial Roles in Global Perspective* (Cambridge University Press, 2013) 18.
[19] Ibid.

trajectory. The court's function in guarding its 'consequential' role can never be immune from significant changes in external political conditions.[20]

As understood here, external factors are those outside the Court's immediate capacity to control. They are background conditions determining the extent to which the Court can assert its independence. While theorisations of judicial empowerment exist along a continuum, some tend to stress the determinative role of these background conditions more than others, and in turn downplay the influence of internal, or court-controlled factors. External theories in other words affirm that the Court's institutional power and its effectiveness in playing a checking role in democratic politics or enforcing the constitution, depends on factors external to the Court itself. There are five main such theories: (1) the insurance theory; (2) historical institutionalism; (3) the political fragmentation thesis; (4) the constitutional moment theory; and (5) the regime politics approach.

2.2.1 Insurance theory

Tom Ginsburg has argued that the establishment of judicial review is a solution to political uncertainty problems at the time of constitutional design. Political parties may believe they will lose power in a future election. To secure their political future, they participate in the establishment of judicial review by an independent court.[21] To support this argument, Ginsburg conducted a comparative analysis of the establishment of constitutional courts in the new democracies of Taiwan, Mongolia and South Korea. The external factor of political party interests, he finds, instigated and supported the creation of an independent judicial review authority.

As such, insurance theory is concerned more with questions of institutional design than curial performance or effectiveness. As soon as it comes to explaining the durability of constitutional courts, Ginsburg moves from external to internal factors, and discusses

[20] Kapiszewski et al use a metaphor of a 'boat in the sea' to explain how judicial review is affected both by external factors (the wind and waves) and internal factors (the skills of the ship's pilot).
[21] Tom Ginsburg, *Judicial Review in New Democracies: Constitutional Courts in Asian Cases* (Cambridge University Press, 2003).

the ways in which courts strategically move within their environment to build their institutional power.[22]

Ginsburg's study offers several insights into the functioning of judicial review in new democracies. His systematic, contextualised study of the strategic element of judicial behaviour and institutional responses to it is particularly valuable. While other scholars, such as Lee Epstein and Jack Knight,[23] have recognised this strategic element, Ginsburg serves constitutional theory by elaborating its relevance to the establishment and operation of new constitutional courts. Ginsburg's contribution renews appreciation of how constitutional judicial review promotes democracy: '[b]y transforming political conflicts into constitutional dialogues, courts can reduce the threat to democracy and allow it to grow ... courts must develop their own power over time'.[24] In the study of new democracies it is easy to see that constitutional judicial review is not necessarily anti-democratic. Properly constrained by the need to preserve their institutional power, courts may become democracy promoters.

However, insurance theory fails to explain several things. One of these relates to the Court's authority. Even though political actors may seek to insure their political interests through judicial review, the degree of power they are willing to hand over to the Court can vary. While the extent of political diffusion may explain differences in institutional design (e.g. the size of the bench or the length of the justices' terms),[25] it cannot explain what motivates political parties to put their trust in courts in the first place. What makes political parties confidently believe that when they adopt a new constitution their political rights will be enforced? It is not sufficient to say that the constitution itself provides insurance because there is no guarantee that this insurance will necessarily work in the absence of a long-term political tradition of respect for judicial independence and the rule of law.[26] But it is precisely such a tradition that new democracies are often seeking to build.

[22] Ibid 67, 72–73.
[23] Lee Epstein, Jack Knight and Olga Shvetsova, 'The Role of Constitutional Courts in the Establishment and Maintenance of Democratic Systems of Government' (2001) 35 *Law & Society Review* 117.
[24] Ginsburg, above n 21, 247.
[25] Mietzner, above n 11, 397.
[26] Ibid.

Political parties may have ongoing, self-interested reasons to subordinate themselves to the independent checking power of a constitutional court, but those interests will be affected by the extent to which disobedience to constitutional norms entails political costs, and that, in turn, is a function of long-run institutional factors. If those factors are absent—if there are no substantial political costs associated with reneging on a constitutional bargain—then political uncertainty on its own will not drive respect for judicial independence and the ongoing efficacy of judicial review.

2.2.2 Historical institutionalism

Historical institutionalism is not so much a theory as an approach to understanding the evolution of judicial power as a function of past contingent choices that set in motion institutional trajectories. These trajectories are 'path dependent' in the sense that, once launched on a particular path, the court will remain in that pattern until some significant force diverts it.[27] On this approach, contingent choices, such as the choice of a particular doctrinal understanding or reasoning style, determine the subsequent evolution of judicial review.[28] Historical institutionalists also emphasise the role of institutions in shaping the values, identities, preferences and behaviour of judges. Understanding how courts operate requires an understanding of the purposes and ideas that motivate judicial actors.[29]

The problem with historical institutionalism is that it tends to underplay the influence on judicial review of the micro-politics of individual cases and the strategic choices within cases. It is also somewhat self-fulfilling and untestable in the sense that it suggests that institutional trajectories are determinative until they are not, with the explanation for why a particular trajectory broke down always easily supplied after the event, but not foreseeable before it.[30] For purposes of this thesis, which seeks to explain the particular timing of the 2011 attack on the Indonesian Constitutional Court, a more detailed understanding of local political dynamics may be required.

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[27] Stephen D Krasner, 'Approaches to the State: Alternative Conceptions and Historical Dynamics' (1984) 16 *Comparative Politics* 223; Ira Katznelson and Helen V Milner (eds), *Political Science: State of the Discipline* (Norton, 2002).
[28] Peter B Guys, *Institutional Theory in Political Science* 2ed (Bloomsbury Academic, 2005) 20.
[29] M Rogers Smith, 'Historical Institutionalism and the Study of Law' in R Daniel Kelemen, Gregory A Caldeira, and Keith E Whittington (eds), *The Oxford Handbook of Law and Politics* (Oxford University Press, 2008) 46, 54.
[30] Guys, above n 28, 10.

2.2.3 The fragmentation thesis

The fragmentation thesis holds that political diffusion or competition between political parties provides opportunities for a court to build its institutional legitimacy.[31] During processes of democratisation, fragmented political parties create a space in which the court may be able to stand up and take the lead. Where there is no single actor or political majority with sufficient power to dominate the court, judicial review provides an opportunity for all parties to protect their basic interests. The more parties that compete with one another, the more likely it is that all political parties will accept and support an independent court.[32] Outside the formal party political process, political diffusion may also take the form of the existence of other significant social groups such as the military, ethnic groups, non-governmental organisations, social movements or reform coalitions.[33]

Chavez's study of Argentina showed that competitive politics promoted judicial autonomy and supported judicial independence, while 'monolithic party control' led to a weak and dependent judiciary.[34] Her main argument is that a balanced distribution is necessary for an independent judiciary, and that competition between political parties is the key mechanism to create such a power distribution.[35] She found that during periods of monolithic party control in Argentina, the executive branch generally dominated, controlling a weak and ineffective judiciary.[36] On the other hand, when a rotation of political parties occurred, this created incentives to strengthen the horizontal accountability of agencies, including the judiciary.[37]

The political fragmentation thesis has been challenged by Aylin Aydin, who concluded that political fragmentation is not in every situation positively correlated with judicial

[31] Rebecca Bill Chavez, 'The Rule of Law and Courts in Democratizing Regimes' in R Daniel Kelemen, Gregory A Caldeira and Keith E Whittington (eds), *The Oxford Handbook of Law and Politics* (Oxford University Press, 2008) 63, 68.
[32] Ibid 68.
[33] Ibid 75.
[34] Rebecca Bill Chavez, *The Rule of Law in Nascent Democracies: Judicial Politics in Argentina* (Stanford University Press, 2004).
[35] Ibid ch 1.
[36] Ibid 68.
[37] Ibid 120.

independence.[38] Statistically, according to Aydin's empirical research, fragmentation only drives judicial independence in mature democracies. In new democracies, fragmented political parties negatively impact judicial independence as competing groups try to capture the Court. Conversely, dominant political parties in new democracies may actually tolerate a high degree of judicial independence as they seek to legitimate their rule through law or simply because they feel less threatened.[39] Political fragmentation is in this sense neither a necessary nor a sufficient condition for judicial independence in new democracies.[40] While a fragmented external political environment may in certain circumstances provide support for a court in asserting its independence, it remains for the judges to exploit the political space open to them.

2.2.4 The transitional democracy rationale

In his paper on 'Democratic Hedging', Samuel Issacharoff argues that there is a link between the political rationale for the post-1989 turn to liberal constitutionalism and the relative success many post-1989 constitutional courts have enjoyed in enforcing democratic rights.[41] Issacharoff draws on the work of Ginsburg and others to show that it is precisely because judicially enforced constitutionalism sets limits on majoritarian power that countries transitioning to democracy have turned to this institutional device.[42] In turn, post-1989 constitutional courts have exploited this political rationale to establish their authority without triggering accusations of counter-majoritarianism. On this view, the reason why constitutional courts in countries as diverse as Ukraine, Mexico, Hungary, Mongolia, Bangladesh, Albania, the Czech Republic and Romania have moved so quickly to establish their institutional power is that this is precisely what they were designed and mandated to do.[43]

Issacharoff's research focuses on the role of constitutional courts in new or otherwise fragile democracies. His argument is not concerned with political fragmentation, but emphasises instead the rationale underlying the use of judicial review to protect

[38] Aylin Aydın, 'Judicial Independence across Democratic Regimes: Understanding the Varying Impact of Political Competition' (2013) 47 *Law & Society Review* 105.
[39] Ibid.
[40] Aydin above n 38; Chavez above 34.
[41] Samuel Issacharoff, 'Constitutional Courts and Democratic Hedging' (2010) 99 *Georgetown Law Journal* 961, 965.
[42] Ibid 986.
[43] Ibid 976.

democracy. The basic idea behind the 'Democratic Hedging' paper is that new democracies are by definition characterised by some measure of political-market dysfunctionality. Judicial intervention to enforce democratic rights is more easily justified in this context. Issacharoff's contribution is thus both explanatory and normative. The reason why post-1989 constitutional courts have been able to play such an effective role in enforcing democratic rights is that the moral objection to courts playing this kind of role reduces in cases where democracies are not yet properly functioning. In new democracies, constitutional courts have been established precisely to prevent a return to authoritarianism. Provided that they stay within this mandate, the moral justification underlying their institutional function translates into the sociological legitimacy of public support.[44]

Exploiting social fractures and fragmented political parties, the Court can facilitate a transition to democracy in two ways: through 'permitting the parties a quick transition to basic democratic governance' or by enforcing a 'constitutional compromise'.[45] In a society with fractured political parties, the Court acts as an umpire for the interests of those parties. Consequently, the Court does not just facilitate the transition to democracy, but becomes the centre of democratisation.

Express constitutional commitments to judicial review justify the Court in taking action to protect democracy. At the same time, the counter-majoritarian dilemma falls away because by definition in new democracies, the democratic system is dysfunctional to some extent, and thus incapable of producing uncontested democratic mandates. In this situation, courts are not just permitted but also obliged to act forcefully to protect the democratic system from attack. It is only when democracies mature and begin to function well that the counter-majoritarian dilemma once again raises its head.

In similar vein, Jeremy Waldron has argued that the moral legitimacy of judicial review is contingent on the performance of the democratic system.[46] In societies such as Australia, where a well-functioning democratic system is operating, the moral legitimacy of a court overturning a decision made by a parliament that represents the people is questionable. This hesitation or moral worry reduces, however, in newly

[44] Ibid 980–993.
[45] Ibid 985.
[46] Jeremy Waldron, 'The Core of the Case against Judicial Review' (2006) 115 *Yale Law Journal* 1346.

established or fragile democracies, where the Court is required to safeguard the functioning of democratic institutions so that political parties are able to take decisions that properly express the people's will.

2.2.5 Regime politics theory

In 1957, Robert Dahl wrote a paper claiming that the US Supreme Court acted as a national policy maker.[47] In that paper, Dahl challenged the notion that the Court was a truly independent institution given the political appointment process for Supreme Court justices. Since the US President essentially controls the appointment of new justices, he argued, every President would, after the requisite time in office, eventually be able to appoint a majority of justices sharing his party political preferences and ideology. A Court appointed in this way was unlikely to make policies truly independent of the dominant political regime, although it might be able to adjust them at the margins. The Court could exercise some discretion in the manner in which policies were understood and implemented, but could not fundamentally change a policy that the dominant political majority had decided upon. In this sense, the justices were agents of the dominant political regime.

Dahl's theory regards the political environment in which the Court operates as the dominant, though not completely controlling, influence on its decisions. This view has since become known as 'regime politics theory'.[48] Those who subscribe to it emphasise the significant role played by the political party environment in which the Court operates. Without completely denying the role of judicial agency, regime politics theorists maintain that judicial decisions are essentially a function of judicial ideology, which is in turn a function of the justices' loyalty to and espousal of the preferences of the dominant political regime that appointed them.

Dahl's regime politics theory has found some support in Keith Whittington's study of the way in which successive US Presidents and the political coalitions underlying them

[47] Robert A Dahl, 'Decision Making in a Democracy: The Supreme Court as A National Policy Maker' (1957) 6 *Journal of Public Law* 279, 285.
[48] Mark A Graber, 'Constitutional Politics in the Active Voice' in Diana Kapiszewski, Robert A Kagan and Gordon Silverstein (eds), *Consequential Courts: Judicial Roles in Global Perspective* (Cambridge University Press, 2013) 363, 368–371, 446.

have empowered the US Supreme Court to play an active role in democratic politics.[49] According to Whittington, the achievement of judicial supremacy in the US is a function not of the autonomy of law or strategic judicial decision-making, but of the fact that judicial supremacy has served the political interests of successive US presidents.[50] While 'constitutional authority ... is dynamic and politically contested',[51] over time the US system has developed in such a way as to support the role of the US Supreme Court as the final decision-making authority on important questions of public policy.

The political fragmentation thesis and regime politics view are somewhat in tension with each other in as much as the former argues that political competition drives judicial independence while the latter holds that a dominant political regime will be able to exert ideological control over a court. According to the political fragmentation thesis, a dominant political regime that knows that it will at some point in the future be out of power, as is the case in the US, should not attempt to turn the Court into an agent lest its political opponents reply in kind when they are in power. On the regime politics view, agency is an almost inevitable side effect of the polarisation of US politics and the statistical fact that dominant political coalitions are able to control the composition of the US Supreme Court given sufficient time in power.

The two theories are nevertheless agreed on the underlying point that it is the external political environment for judicial review, in the form of the party political structure of a society and the extent of political competition, that determines judicial choices and the degree of independence that a constitutional court enjoys. If a court is independent, this is because it serves the interests of political actors that it be so.

It follows from regime politics theory that a constitutional court should not be able to exert an independent effect on government and society.[52] Court decisions that have had broad social or political consequences have only occurred because the dominant

[49] Keith E Whittington, *Political Foundations of Judicial Supremacy: The Presidency, The Supreme Court, and Constitutional Leadership in U.S. History* (Princeton University Press, 2007).
[50] Ibid 27.
[51] Whittington above n 49, 27.
[52] Robert A Kagan, 'A Consequential Court: The U.S. Supreme Court in the Twentieth Century' in Diana Kapiszewski, Robert A Kagan and Gordon Silverstein (eds), *Consequential Courts: Judicial Roles in Global Perspective* (Cambridge University Press, 2013) 219.

political regime agreed to or approved those decisions. More importantly, they were willing to implement them. Kagan postulates that 'regime theorists see high courts not primarily as politically powerful "principals" but as "agents" whose decisions ... generally reflect the preferences of the political leaders who appointed them'.[53] Kagan uses the analogy of a train journey to explain regime theory: if a judge is driving the constitutional train, political leaders are the ones who build the track, select the engineers and decide in which direction the train will go.[54] This is in effect what Dahl had argued: that judicial independence exists at the margins—to adjust, but not fundamentally to alter policy.[55]

Proponents of regime politics theory self-consciously deny judicial agency, with the strongest version of this theory insisting that 'constitutional courts have little independent influence on constitutional politics'.[56] They hold 'that governing coalitions dictate the results of the Court's decisions'.[57] However, dominant national coalitions are seldom ideologically unified. Instead, power is frequently divided between different factions within a political party.[58] In a presidential system, control over the executive and legislative bodies may be held by different political coalitions. There is 'no monolithic' projection of political power from a dominant political regime to the judicial branch in this sense. Rather, the scholarly literature has shown that politics both structures and constrains opportunities for justices to exercise agency,[59] and that divided political parties provide opportunities for the Court to become an agent. Often, their judicial decisions will help political parties achieve their policy agenda.

Judicial decisions that assist political parties achieve their agenda have a consequential effect and promote 'the policy agendas and constitutional visions of governing elites at

[53] Ibid.
[54] Ibid.
[55] Dahl, above n 47, 279.
[56] Thomas Keck, 'Party Politics or Judicial Independence: The Regime Politics Literature Hits the Law Schools' (2007) 32 *Law & Social Inquiry* 511, 518.
[57] Ibid., 517.
[58] Mark A Graber, 'Constitutional Politics in the Active Voice' in Diana Kapiszewski, Robert A Kagan and Gordon Silverstein (eds), *Consequential Courts: Judicial Roles in Global Perspective* (Cambridge University Press, 2013) 446.
[59] Ran Hirschl, *Toward Juristocracy: The Origins and Consequences of the New Constitutionalism* (Harvard University Press, 2004); Keith E Whittington, *Political Foundations of Judicial Supremacy: the Presidency, the Supreme Court, and Constitutional Leadership in U.S. History* (Princeton University Press, 2007); Howard Gillman, 'How Political Parties Can Use the Courts to Advance their Agendas: Federal Courts in the United States, 1875–1891' (2002) 96 *American Political Science Review* 511; Mark A Graber, 'Constructing Judicial Review' (2005) 8 *Annual Review of Political Science* 425.

the expense of those championed by other governing elites'.[60] However, judicial decisions with a consequential effect occur only if those decisions are activist and depart from 'long-standing precedent' or current understandings of the Constitution. Implicitly, the Court amends the Constitution, and to ensure amendments to the Constitution through judicial revision succeed, sufficient support must exist from democratic political majorities, the legal profession and civil society.

To repeat: the distinction drawn here between external and internal factors is a classificatory one. As we have seen, actual theorisations tend to take account of both sets of factors. Nevertheless, the theorisations considered in this sub-section tend to emphasise the role of external factors, not as a determinative factor, but as the dominant influence on both the choices that constitutional judges make and the institutional trajectories that constitutional courts follow.

2.3 Internal factors: the workings of the Court

External theorisations stress that the growth of judicial power depends on the external political environment in which the court operates. Another set of approaches stresses the role of judicial agency. On this view, a court's legitimacy, independence and power may be significantly promoted, if not wholly determined, by the judges' doctrinal, prudential or strategic choices.

2.3.1 The Court as a forum of principle

At the extreme end of the internal factors spectrum is the 'forum of principle' idea. On this view, courts build their institutional power by making legally correct decisions according to accepted reasoning methods and principles. Only by developing a reputation as a forum for principled and politically impartial decision-making can constitutional courts remain immune from politics.[61] By the same token, as soon as constitutional courts begin factoring strategic considerations into their decisions, they reveal their hand as ordinary political actors and sacrifice any chance they might have had of building their independence and institutional power.

[60] Graber, above n 58, 446.
[61] Ronald Dworkin, *A Matter of Principle* (Oxford University Press, 1985) 33–72.

Ronald Dworkin, the main proponent of this view, denies that judges 'pick and choose amongst the principles and policies' that are presented to them for decision, or that a judge applies 'extra-legal' principles 'according to his own lights'.[62] This is because there is a distinction between rules and principles. In contrast to rules, principles have a weighted dimension that consists of their fit with existing doctrine and their moral attractiveness. If there is no clearly valid rule applicable, judges should decide a case according to principle. As a principle has a dimension of weight, that judge can set off one principle against another to determine a case's outcome. By upholding principles in each of its decisions, a court will maintain its reputation as an impartial decision-maker and grow its institutional power.

Maintaining a reputation as a 'forum of principle', on this view, is both morally required and strategically wise. 'Morally required' because the main justification for judicial review in a democracy is that judges are controlled not by their own political preferences, but by their duty to offer the 'best interpretation' of the Constitution according to their moral reading of the text, past decisions and their political community's values and practices.[63] The role of judges is to discover legally immanent constitutional principles[64] so that the Court 'can continue to act in the spirit of a community of principle'.[65] As soon as judges abandon that focus, and begin to consider the policy consequences or institutional repercussions of their decisions, judicial review loses its justification. Paradoxically, by ignoring consequential considerations in this way, judges end up acting strategically in the sense that they adopt the approach most likely to ensure their court's long-term independence and efficacy.

2.3.2 Passive virtues

If a court cannot provide adequate legal reasons for controversial decisions, the only option left is to avoid deciding the case until it is in a better position to do so. This is the essence of the 'passive virtues' approach advocated by Alexander Bickel.[66] According to Bickel, US Supreme Court justices need to display prudential wisdom in deciding

[62] Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press, 1978) 38–39.
[63] Ibid.
[64] Ibid 380–81.
[65] Ibid 380–81.
[66] Alexander M Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (Yale University Press, 1986).

cases to ensure that the Court will not overstep the accepted limits of its authority. The attitude of 'living to fight another day' serves as a metaphor to explain this situation. If the Court is prudent enough and careful with its decisions, it stands a chance of eventually becoming powerful.

The 'passive virtues' approach differs from regime politics theory and the political fragmentation thesis in stressing judges' capacity prudentially to navigate their external political environment. On this view, judges do have a measure of agency in deciding when to take on a particular issue and when to leave it for another day. The 'passive virtues' approach also differs from the forum of principle view in acknowledging that there will not always be a legally compelling answer to questions put to the Court. Faced by a hostile political environment and insufficient legal capital, judges must be prudent in respecting the 'pragmatic limits of their role'. Their duty is to find the optimal balance between enforcing constitutional rights and preserving the institutional power of the Court.

2.3.3 The strategic approach

The strategic approach concerns judges' and the Court's capacity to anticipate other institutions' policy preferences, and strategically adapt their decisions to maximise the chances that they will be enforced. Lee Epstein and Jack Knight are the main proponents of this idea. In their book, *The Choices Justices Make*,'[67] they model US Supreme Court justices as rational actors who make strategic choices about how to ensure that their political preferences are written into law. Because the justices operate under constraints, both of their immediate institutional environment and of the broader political environment, they trade off their first-choice policy preferences against the likelihood of their being enforced, deciding cases in line with the policy option closest to their policy preference most likely to be enforced.

According to the strategic approach, the key to institutional legitimacy lies in the Court's ability to make authoritative policy choices that other institutions regard as

[67] Michael J Gerhardt, 'Judicial Decision Making: Attitudes about Attitudes: The Supreme Court and the Attitudinal Model Revisited. By Jeffrey A Segal and Harold J Spaeth' (2003) 101 *Michigan Law Review* 1733, 1733–1763.

binding.[68] Strategic decision-making is about interdependent choice in this sense: an individual's action is, in part, a function of his or her expectations about the actions of others. To say that judges act strategically is thus to say that judges realise that their success or failure depends on the preference of other actors and the actions those actors expect them to take, not just on their own preferences and actions.[69]

The strategic approach is opposed to the attitudinalist perspective. On that view, US Supreme Court justices are indeed motivated by policy preferences but (1) the law does not constrain them from pursuing these policy preferences; and (2) the potential actions of other political actors also do not constrain them. On the attitudinalist view, US Supreme Court justices do not need to be strategic because security of tenure protects them against political backlash. They are thus free to be 'sincere' ideological decision-makers. In contrast, rational choice institutionalists assume that rules and regulations are significant.[70]

Although initially offered as a theorisation of the US Supreme Court's decision-making behaviour, the strategic approach has been extended to other courts, including courts in Argentina,[71] Germany,[72] Pakistan,[73] Russia,[74] South Korea[75] and South Africa.[76] While various adaptations have to be made when extending the strategic approach in this way,

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[68] Lee Epstein and Jack Knight, *The Choices Justices Make* (CQ Press, 1998) 12.
[69] Ibid.
[70] Keith E Whittington, 'Once More unto the Breach: Postbehavioralist Approaches to Judicial Politics' (2000) 25 *Law & Social Inquiry* 601, 626.
[71] Gretchen Helmke, *Courts under Constraints: Judges, Generals, and Presidents in Argentina* (Cambridge University Press, 2005).
[72] Georg Vanberg, *The Politics of Constitutional Review in Germany* (Cambridge University Press, 2005).
[73] Paula R Newberg, *Judging the State: Courts and Constitutional Politics in Pakistan* (Cambridge University Press, 2002) vol 59.
[74] Lee Epstein, Jack Knight and Olga Shvetsova, 'The Role of Constitutional Courts in the Establishment and Maintenance of Democratic Systems of Government' (2001) 35 *Law & Society Review* 117; Alexei Trochev, *Judging Russia: Constitutional Court in Russian Politics, 1990–2006* (Cambridge University Press, 2008).
[75] Dongwook Cha, *The Role of the Korean Constitutional Court in the Democratization of South Korea* (ProQuest, UMI Dissertations Publishing, 2005) <http://usyd.summon.serialssolutions.com/2.0.0/link/0/eLvHCXMwVZ0xCsMwDEVN6QkK7dwLGGzZUeS5NPQAuYDs6NOp9x-jQId206jp898XH4VwB8RNtLJMZB3IGwRjTs1nDDH-i7F_1Hy5hJN9rmFdnuvjFb_PAOK7TjmCzLmJkZBKQ81HFdqKbM52zZ0XOh1Hg6rIWmT2DcBDXZZ7p07KI9_C2Xnads9RJwM>.
[76] James L Gibson and Gregory A Caldeira, 'Defenders of Democracy? Legitimacy, Popular Acceptance, and the South African Constitutional Court' (2003) 65 *Journal of Politics* 1; James L Gibson, 'The Evolving Legitimacy of the South African Constitutional Court' in F Du Bois and A Du Bois-Pedain (eds) *Justice and Reconciliation in Post-Apartheid South Africa* (Cambridge University Press, 2008) 229.

it has proved useful in other contexts, and is now one of the main approaches recognised in comparative judicial politics.[77]

Judges on Argentina's Supreme Court, for example, have displayed a distinctive kind of strategic behaviour which has seen them 'defecting' from incumbent power holders when those power holders' political futures seem uncertain.[78] While Supreme Court judges in Argentina are appointed by the President, they transfer their ideological loyalty when his or her hold on power is threatened.[79] This is borne out statistically by an increase in the number of anti-government decisions during periods of transition.[80] The German Federal Constitutional Court also conforms in certain respects to the strategic conception. In a study by Georg Vanberg, the Court was found to have adjusted its decision-making behaviour according to the extent of public support for, and level of publication information about, the decision.[81]

2.3.4 Tolerance interval theory

Tolerance interval theory is a specification of the strategic approach to the question of how courts in new or fragile democracies build their institutional legitimacy. In a study of the Russian Constitutional Court, Epstein et al noted the strategic interactions between the Court and the two political branches of government, the President (executive) and parliament (legislature).[82] They posited that, for the Court to build its institutional legitimacy, it would need to ensure that each decision it took fell within the policy interval in two-dimensional policy space acceptable to both these actors. Provided this was the case, the decision would be enforced and the Court's reputation for effective decision-making, and thus its institutional legitimacy, would grow. They then deployed this model to explain why it was that the Russian Constitutional Court came to be suspended under Boris Yeltsin's presidency.

[77] C Neal Tate, 'The Literature of Comparative Judicial Politics: A 118 Year Survey' (2002) 12(2) *Law & Courts* 3 and (2002) 12(3) *Law & Courts* 3.
[78] Helmke, above n 71.
[79] Helmke, above n 71, 154.
[80] Matías Iaryczower, Pablo T Spiller and Mariano Tommasi, 'Judicial Independence in Unstable Environments, Argentina 1935–1998' (2002) 46 *American Journal of Political Science* 699.
[81] Vanberg, above n 72.
[82] Epstein, Knight and Shvetsova, above n 74, 117, 129.

According to Epstein et al's observations, in the Yeltsin era, before suspension, only 11 out of 29 decisions, or 37.9 per cent, were in the 'safe' area of preference distributions.[83] The Russian Constitutional Court's first bench (1993) decided highly charged political disputes before building up goodwill among political actors and the public alike; this led political actors to challenge the Court and its decisions.[84] Conversely, nearly 90 per cent of the re-established court's 34 decisions fell into the 'safe' zone. One explanation for this is that the Court sought to avoid 'severe political questions' both in and outside the Court.[85] In fact, the Court did not seriously challenge President's Yeltsin power, even though it had several opportunities to do so; instead, it limited his authority only in cases in which the issues were less 'highly charged'.[86]

Tolerance interval theory does not neglect the importance of legal reasoning. The tolerance interval for a case is thus partly a function of the ability of the Court to deliver a well-justified and clearly reasoned decision.[87] But the legal persuasiveness of the decision is just one factor among many that determines the tolerance interval for the case. In addition to this factor, public preferences and public confidence in the Court will also enlarge the tolerance interval.

If the Court is attentive to the preferences of relevant actors, the Court's institutional legitimacy should increase over time, assuming that it reaches decisions that other actors accept and with which they comply. This model requires the Court to reach decisions that are within the intersection of tolerance intervals, or to avoid disputes for which no intersection exists. What this suggests is that tolerance intervals can increase (or decrease) over time, quite apart from the particulars of a dispute.[88] Conversely, if the Court accepts and decides cases within the overlap of tolerance ranges, not only will the elected actors implement those decisions, but there will also be a cumulative effect on the Court's legitimacy and its ability to maximise its policy preferences. Consequently,

[83] Ibid 149.
[84] Ibid 152.
[85] Remington, Smith and Haspel, above n 56; Robert Sharlet, 'Transitional Constitutionalism: Politics and Law in the Second Russian Republic' (1995) 14 *Wisconsin International Law Journal* 9, 495.
[86] Remington, Smith and Haspel, above n 56, 219, 287.
[87] Ibid 130.
[88] Gregory A Caldeira, 'Public Opinion and the US Supreme Court: FDR's Court-packing Plan' (1987) 81 *American Political Science Review* 1139.

tolerance intervals will expand, thereby giving the constitutional court greater margins, both in terms of case selection and decision-making.[89]

Tolerance interval is classified here as an internal theorisation because it focuses on the Court's capacity to grow its legitimacy through respecting the policy preferences of other actors. By taking note of the political conditions in which it is operating, the Court has an opportunity to increase the tolerance interval for later cases and build its public support. While external factors are thus incorporated into the model, the focus falls on the Court's ability to negotiate its decision-making environment and ultimately to influence that environment in its favour.

2.3.5 Transformative constitutionalism

In 1998, Karl Klare wrote a paper on the South African Constitutional Court ('Legal Culture and Transformative Constitutionalism'[90]) in which he argued that the 1996 South African Constitution launched a political project of ongoing social and economic transformation from apartheid to a multi-party liberal democracy in which the Court had a central role to play. In particular, the Constitutional Court should, through its decision-making practices and reasoning style, attempt to effect a transformation in South African legal culture from a formal to substantive vision of law.[91] By taking the South African public into its confidence about the politics of adjudication, Klare argued, the Court could help to build a culture of justification that would assist in driving the 1996 Constitution's vision for trigger social and economic transformation.

Of all those considered in this chapter, Klare's theorisation is the most strongly normative. It ascribes to the Court a vanguard role in the South African democratisation process, and as such represents the high-water mark of theorisations that stress the role of judicial agency in the development of judicial power.

[89] Mary L Volcansek, 'Judicial Activism in Italy' (1991) *Judicial Activism in a Comparative Perspective*.
[90] Karl E Klare, 'Legal Culture and Transformative Constitutionalism' (1998) 14 *South African Journal on Human Rights* 146.
[91] Ibid 146.

2.4 Chosen approach

Which of the theories best accounts for the phenomenon that I am investigating in so far as they are testable in Indonesia's case? If no one theory provides this account, what combination of theories provides the best explanation for what has occurred? More specifically, I will test the extent to which the institutional of power of the Indonesian Constitutional Court can be accredited to external factors (where the stress falls on background political conditions) or internal factors (where the stress falls on judicial agency). My conjecture is that none of these theories on its own adequately explains why the Court was able to resist the 2011 attack and that some combination of theories is required to explain the phenomenon I am investigating.

2.4.1 Anticipated limits of theories that stress external factors

My particular conjecture in relation to the political fragmentation thesis is that it does not fully explain the growth of the Court, as the variations in political diffusion in Indonesia do not conform to the degree of independence the Court enjoyed. In particular, an examination of the degree of political diffusion in Indonesia shows that while the Court initially benefited from the failure of any political bloc to assert itself, this had changed by the time the Court was eventually attacked in 2011. Despite this, the Court successfully resisted the attack. While changes in the degree of political diffusion therefore help to explain the timing of the attack, they do not fully explain the Court's capacity to thwart it. To explain that aspect, we must look at the way the Court was able to exploit the initially fragmented space to assert and establish its independence. The factors relevant to that analysis are internal, such as the leadership of the Chief Justice and the strategic decisions that the Court took.

Historical institutionalism is not so much a theorisation, as a particular kind of methodological approach that stresses the role of long-term institutional factors, such as political culture and legal institutions. As such, historical institutionalism does not examine short-term political dynamics effectively. It can account for the trust that political actors place in courts, and for the resources on which courts are able to draw in resisting attacks, but not for the timing of particular attacks (as required by my research question).

Neither does regime politics theory provide a conclusive answer to my research question since the Indonesian Constitutional Court Justices were nominated and appointed through a three-tier system, consisting of the President, the National Representative Council and the Supreme Court. Each institution appointed three constitutional justices. Given that system, it is not possible in Indonesia to think of the Court acting as some kind of dominant political coalition agent. Either there was no such coalition, or the coalition's control over judicial appointments was too weak to fulfil the fundamental premise of this theory.

2.4.2 Anticipated limits of theories that stress internal factors

A second strand in the literature, as I have argued, stresses the role of judicial agency and focuses on what the Court does and the decisions that judges make. Although background political factors are not ignored, the emphasis falls on the choices that judges have, either strategic or doctrinal in nature. According to this view, judges have some capacity to act independently of their political environment.

Again, my conjecture is that no single one of these internal theories provides an adequate explanation for the Indonesian case I am observing.

The 'forum of principle' approach (or legalist model) has been suggested as 'the core of legal scholarship'.[92] Even though the application of the law may not be clear, this approach contends that judges are not free to act on their own preferences. Rather, judges are constantly constructing what the internal principles of the law require.[93] While this approach does not explicitly embrace a theory of the conditions that support the effective establishment of judicial review, it does imply one. This is that judges must endeavour to exclude all influences from their decisions, apart from fidelity to law. Only by doing that, the 'forum of principle' approach implies, can judges build support for judicial review as a form of legally restrained power that may legitimately thwart majoritarian decision-making.

From its establishment under Chief Justice Jimly, it was understood that the Indonesian Constitutional Court was required to provide principled legal reasons to justify its

[92] Richard A Posner, 'The Present Situation in Legal Scholarship' (1980) 90 *Yale Law Journal* 1113.
[93] Whittington, above n 70, 601, 627.

decisions. The judges believed that the authority of their decisions depended on their capacity to provide appropriate justification. However, the problem in Indonesia was that there was no developed tradition of legal reasoning to which the judges could appeal. Realising this, the judges often referred to foreign legal materials[94] and foreign scholars to justify their decisions.[95] These references did not adequately account for the Court's reconceptualisation of its role from negative to positive legislator. As a result, as Lindsey and Butt have shown, many of the Court's decisions are criticisable in purely doctrinal terms: the text and original intent underlying the Indonesian Constitution simply do not support the powers that the Court began exercising.[96] Despite this, when the Indonesian parliament attempted to amend the Court's jurisdiction, precisely to restrict it to its original mandate, the Court was able to strike down the amending legislation with no obvious immediate impact on its independence. The 'forum of principle' approach cannot adequately explain this. While it can possibly explain why the Court was attacked (as its decisions departed too far from its original constitutional mandate) it cannot explain why the Court was able to resist that attack.

As we have seen, tolerance interval theory crosses over the external and internal distinction posited here as it is concerned with the external political constraints affecting particular decisions and an internal analysis of the legal and policy content of decisions. The obvious problem with this theory in the Indonesian context is that the Indonesian Constitutional Court seemingly disregarded the tolerance interval for many of the cases it decided, acting forcefully from the very beginning before it had built its institutional legitimacy (in the manner explained by Knight, Epstein and Shvetsova).[97] Nevertheless, tolerance interval theory—in combination with the strategic conception of judicial review—is useful up to a point. It emphasises the space that the judges initially had, in the immediate aftermath of the transition to democracy, to define their Court's institutional role and in this way build up its prestige and public support. In the Indonesian case, this can be seen not so much in the Court's doctrinal record, but in the judges' engagement with the media and the general public, where much was done to popularise the Court as an institution. An important factor here is Chief Justice Jimly's

[94] Diana Zhang, *The Use and Misuse of Foreign Materials by the Indonesian Constitutional Court: A Study of Constitutional Court Decisions 2003–2008* (University of Melbourne, 2010).
[95] Butt, above n 8.
[96] Ibid.
[97] Epstein, Knight and Shvetsova, above n 74.

early decision to insist that the Constitutional Court should be given its own dedicated building in Jakarta. This helped cement the prestige of the Court from the very beginning.

A better way of explaining the Indonesian Constitutional Court's rapid institutional growth is to think of it as the product of the Indonesian reform era. The Court was expected to guard democracy and ensure that the *1945 Constitution* was implemented. As Issacharoff has argued, in this transitional moment, where the very purpose of setting up the Court was to enforce the rule of law and the orderly functioning of democratic politics, the argument that the Court was counter-majoritarian did not hold much water.[98] Both political parties and the Indonesian people themselves understood the rationale for the Court's creation and gave it the space to assert itself. However, when the euphoria of the transitional moment passed and politics began to normalise, the honeymoon period ended, and the Court became exposed to all the usual charges of anti-democratic functioning. Simultaneously, democratic politics in Indonesia became less fragmented as a certain political bloc (the coalition of political parties around President SBY) became more forceful than it had originally been. In that situation, the dominant political bloc attempted to restrict the Court, using both its newfound strength and the normalisation of Indonesian politics to neutralise the Court and return it to its original mandate. This attack failed, largely because the Court's on-going public support and prestige made it too politically costly for the political branches to further attack the Court after it had struck down the amending legislation. That is the conjecture or preliminary explanation I will be testing in this thesis.

2.5 Methodology

In exploring this conjecture, I will use a combination of 'thick description' and doctrinal analysis to describe the way the Court asserted its role in Indonesian politics. 'Thick description' is a term coined by Clifford Geertz.[99] In observing the development of culture, Geertz proposed a methodology to understand the meaning behind actions. This

[98] Issacharoff, above n 41.
[99] Clifford Geertz, *The Interpretation of Cultures: Selected Essays* (Basic Books, 1973).

is a descriptive-interpretive method where what happens in the political environment is observed and richly described on the assumption that small-scale differences matter.[100]

To understand the broader politics of judicial review in Indonesia, I will describe the development of Indonesian politics and the relationship of the parliament to the Court using this descriptive-interpretive methodology. This approach involves observing the development of political parties in Indonesia, the interests that political parties had and the coalitions that formed in parliament. It would be worth noting, for example, whether at the time a particular decision was taken there was a coalition in government and whether that coalition was working together in the parliament. To understand the Court's own institutional development, it will also be important to describe the quality of the judiciary and public perceptions of it, including corruption issues in the judicial sector. As a result of past experiences, a strong desire existed in Indonesia for a powerful judicial system that was modern and incorruptible. Part of the reason for the Constitutional Court's creation was that it was not thought possible to deliver such a system through the existing Supreme Court. After describing these factors, I will analyse their contribution not only to the initial growth of the Court, but also to the 2011 attack on the Court.

Doctrinal analysis will complement this approach. In particular, I will use doctrinal analysis to identify whether there were any relevant differences between the way the Jimly and Mahfud courts responded to their mandate. This will assist me to see whether the way the Court justified its decisions contributed to the attack on it. Was there any change, for example, between the way the Jimly Court and the Mahfud Court approached the negative/positive legislator issue? Did the latter Court stray further from the original meaning of the Constitution in this respect and fail to give adequate reasons for doing so? By looking closely at the decisions in this way, I will assess their legal plausibility and thus the contribution they might have made to the timing and nature of the attack on the Court.

I will also provide contextual background for each case, including the policy content of decisions, to determine whether the Court was inside or outside the tolerance interval or had acted strategically in any way. Measuring whether the Court was inside or outside

[100] Ibid.

the tolerance interval is obviously not an exact science. But I can provide a picture of what the interests of different political actors were and how the Court's decisions affected those interests.

In this way, I will track what Theunis Roux has called the 'micro-politics' surrounding controversial cases, and whether (and if so) how the Court adjusted its decisions to take account of these factors.[101] The micro-politics surrounding each case are distinct from the broader politics of judicial review in Indonesia. By explaining the political background to each decision, I will show the exact constraints impinging on the Court, and in this sense what room it had to manoeuvre.

By providing this kind of rich information on selected cases, I will explain what other political actors' perspectives of the cases were and their expectations of the Court. If the Court's decisions ran contrary to those interests, but were squarely within the Court's mandate, the tolerance interval for the decision should have been expanded. For example, if a decision was within the Court's original negative legislator mandate, as it was when the Court provided conditionally constitutional decisions, we should expect that the Court would have taken the decision without any regard for the interests of other political actors.

2.5.1 Selection of cases

To explore my working hypothesis or conjecture, I will review three sets of cases decided in the first ten years of the Court's operation: electoral decisions, so-called conditionally constitutional decisions, and decisions that upset the political branches.

The selected cases comprise three sets of politically sensitive Indonesian Constitutional Court cases. This study understands politically sensitive cases to be cases in which the Court had the opportunity to set boundaries between the Court and other institutions (for example, by reinforcing the separation of powers, expanding the effect of the Court's decision, and reviewing the constitutionality of policy positions adopted by the President or parliament), or more generally, to redefine the constitutional bargain or decide a case in a way that had not yet been part of judicial practice in Indonesia. The

[101] Theunis Roux, *The Politics of Principle: The First South African Constitutional Court, 1995–2005* (Cambridge University Press, 2013) 139.

risks these cases posed make them a strong test of judicial independence and determine the importance of understanding the political dynamics that led the Court to decide them as it did. The sample of cases will be used to reveal selected issues and conflicts into which the Court was drawn over the period of the study and to describe, in general terms, the Court's decision-making practices in politically important cases.

Examining only three sets of selected cases represents a careful approach. I elected to engage in an analysis of fewer cases for a number of reasons. It is worth investigating whether the Court ruled in systematically different ways on politically or legally crucial cases. Further, focusing on a small number of cases will provide me with the opportunity to explore compliance with the Court's decisions, and to understand their broader impact or significance. It will allow me to research these cases in greater depth, and list the important attributes of each case.

I used a systematic case selection method to choose the most important cases during the period of my study. This technique involves triangulating data about the importance of court cases from three sources: articles and books addressing the Court's rulings during the period of the study; articles on court cases that appeared in a major daily newspaper; and interviews with experts, parliamentary members, scholars and constitutional justices.

Examining these cases will allow me to investigate patterns of interaction between the Court and the elected branches, by closely examining the legal issues involved in the cases and the political stakes, and then tracing elected branch compliance with the Court's rulings. The challenge will be to select cases using a technique that is methodologically sound, substantively interesting and theoretically revealing. Departing from other studies about the Indonesian Constitutional Court, I will analyse cases that have affected the constitutional balance among various institutions, against the background of the powers granted by the Constitution. After the *1945 Constitution* was amended, throughout the early post-authoritarian regime, Indonesia's elected leaders repeatedly tried to maintain the status quo and limit the participation of new political parties. This generated a series of constitutional conflicts. Due to the legal transformation that was simultaneously underway, these conflicts often ended up before the Court, thus asking the Court to balance and strengthen the rule of law, and

constitutionalism in particular. Analysing Court decision-making specifically in those cases that affected the balance of constitutional powers will allow me to examine how the Court conducted this monumental task.

2.5.2 Data collection

The data on which this study is based were gathered during three months of fieldwork in Indonesia. I conducted 53 interviews during three field trips to Indonesia in 2013 and 2014, with current and former Constitutional Court justices, Constitutional Court clerks, Constitutional Court researchers, journalists, constitutional scholars, members of parliament, political activists and government personnel. As explained below, my interviews explored, and will continue to explore, the organisation of the Court, the issues that have come before it, the possible motivations for the Court's decisions, along with the level of government compliance with rulings that were not in the elected branches' interest. I have created a searchable electronic database containing articles regarding the Court and its most important decisions. Further, I have collected a broad range of secondary materials on the Court's jurisprudence (mainly books and journal articles). Finally, I have collected a large number of primary documents relating to the Court and the politically important cases it has decided.

2.5.3 Interviews

To understand the motivations of key actors in Indonesia, I have conducted three series of key informant interviews. This method has proved effective in analysing judicial decision-making in other jurisdictions.[102] Brenner and Brown[103] conclude that 90 per cent of all social sciences use various types of interview. In political science, Richard Fenno[104] has shown that personal interviews can produce insightful information that is otherwise unavailable. American public law scholars, such as Epstein, have employed interviews in their research to identify variables and formulate hypotheses.[105] Jason Pierce, an American political scientist, used extensive interviews with judges as the

[102] Alan Paterson, *The Law Lords* (1982); Simon Halliday and Patrick Schmidt, *Conducting Law and Society Research: Reflection on Methods and Practices* (Cambridge University Press, 2009).
[103] Michael Brenner, *The Research Interview, Uses and Approaches* (Academic Press, 1985).
[104] Richard F Fenno, *Home Style: House Members in their Districts* (Little Brown Boston, 1978).
[105] Jason Pierce, *Inside the Mason Court Revolution: The High Court of Australia Transformed* (Carolina Academic Press, 2006) 298.

main resource in his work on the political transformation of the High Court of Australia.[106]

The rationale for conducting interviews with judges is that individually, they hold strong views about the Court's future direction. Even though the justices never discuss this publicly, each justice has a very highly developed sense of the future 'position' of the Court in the realpolitik of Indonesia. Rational choice theory posits that judges have policy preferences that they attempt to maximise through their decisions.[107] In a new democracy like Indonesia however, policy preferences need to be understood broadly to include, not just the particular policy outcomes of decisions, but also the judges' preferences about the role the Constitutional Court should be playing in Indonesia's political system. Through the interview process, I attempted to determine the justices' policy motivations in this sense, and in particular how they tried to promote those preferences in the way they decided the cases that came before them.

A similar rationale also supported the need to conduct interviews with the members of parliament and government officials who were involved in launching the 2011 attack on the Court. While these interviews did not reveal their true intentions in trying to limit the Court's authority in 2011, they were prepared to speak freely about their views of the legal merits of the Court's decisions, and in particular about the need to restrict the Court to deciding cases within the terms of its original mandate.

[106] Ibid.
[107] Vanberg, above n 72, 116.

Chapter 3: The Political Context for Judicial Review in Indonesia

3.1 Introduction

Constitutional courts need not only determine how they should exercise their decision-making powers, but also how they should exercise these powers effectively within the political context in which they operate. Since its establishment, the Indonesian Constitutional Court ('the Court') has garnered public support and become institutionally powerful, earning respect from other constitutional institutions. To explain this phenomenon, it is necessary to examine the political context in which the Court has operated. In particular, this chapter will attempt to show that the functioning of the Indonesian Constitutional Court over the period of this study was accompanied by four factors generally regarded as essential conditions for constitutional courts to play an effective role in national politics.

First, as a product of the constitutional amendment process from 1999 to 2002, the Court enjoyed a 'honeymoon period' immediately after its establishment. The Court was able to use this window period to build its institutional legitimacy rapidly so that, by the time the DPR and other political actors became conscious of its power, it was too late to restrain it. This was not just a question of good fortune. The judges understood and exploited the reasons for the Court's creation – that it was to act as a counterweight to the power of parliament and the President. In exercising the Court's authority, the judges acted boldly to declare a law unconstitutional when necessary, thus establishing the Court's role as a significant veto player in national politics. The Court was thus able to deliver on the original aims of those who supported its establishment, further enhancing its power.

Second, the decision to establish a special court outside the existing Supreme Court, and the slow process of the Supreme Court's institutional reform, led to increased trust in the Constitutional Court. The decision not to give the primary power of enforcing the Constitution to the Supreme Court was influenced by past experience of the Supreme Court, and in particular by the extensive interference in the work of that Court by

Suharto's regime. The decision was also influenced by the fact that, at the time of the constitutional reform process, Supreme Court justices were appointed by the President alone, without input from parliament. The public expectation of a clean, fast and reliable judiciary was thus not fulfilled by the Supreme Court. The front line of the judiciary was managed by the district and appellate courts, which consisted of nine special courts. Even though it was not realistic to compare reform of the Supreme Court, which includes 5,000 judges and 13,000 court officers distributed around Indonesia, to one court comprised of nine justices and 250 employees, the Constitutional Court was still able to portray itself in a better light than 'the other' Court. The Indonesian people saw and compared the performance of the two courts, especially during budgetary discussions in parliament in which parliamentary members demanded that the head of the Supreme Court perform better and look to the example of his peers.

Third, the rapid process of democratisation in Indonesia has meant that numerous political parties have been created in a short period. In the absence of a permanent coalition or voting bloc in the DPR, each law that is discussed has its own constituency made up of the particular political parties that support it. The disappearance of strong and dominant political parties has created a lack of control and direction in parliament. Regarding political party obedience to the Court, even though each political party has its own objectives and views in relation to the Court's performance as an institution, each political party needs a strong Court to settle disputes between them. In the absence of other institutions, the Court acts: there is no other option for the DPR than to support the Court. In the most recent manifestation of this phenomenon, after the 2014 legislative elections, two dominant factions were deadlocked in the DPR, creating political space for the Court to assert its independence.

Fourth is the immaturity of political parties in Indonesia. This factor is related to the third factor, but is distinctive. Political maturity as discussed here concerns how the leaders of political parties manage the representation of values and operate as a channel for political participation by the people. The failure of political parties in Indonesia to mature in this sense has made them unpopular actors. As a result, the Court has again been able to portray itself in a comparatively better light. Another consequence of the failure on the part of political parties to mature is the corruption charges frequently

levelled against political parties and their activities. The unregulated financing of political parties has seen the creation of a political party chairman responsible for raising financial support. This in turn, has resulted in a number of political parties having to appear before the Corruption Eradication Commission. The DPR, as the institution in which these political parties operate, has inevitably been seen as a corrupt institution. In contrast, the Court has been able to portray itself as a clean and incorruptible institution. Unless this situation changes and parliament strengthens as political parties mature and gain public support, the Court's legitimacy as an institution will always be greater than parliament's.

3.2 Factor 1: The political rationale for the Court and its initial 'honeymoon period'

As noted in the Introduction, the creation of the Indonesian Constitutional Court (*Mahkamah Konstitusi*) was linked to the 1999-2001 amendments to the *1945 Constitution*. Those amendments, with accompanying statutory reforms, introduced direct presidential elections, increased the power of the DPR to enact legislation that would call the government to account, ended the system of appointing members to the Indonesian People's Consultative Assembly (MPR), removed the political role of the military, reformed the judiciary (thus establishing its independence from the executive), decentralised the government, and introduced a new assembly of provincial representatives.[1] However, the establishment of a Constitutional Court was not part of the original plan when the amendment process began in 1999.

The original version of the *1945 Constitution* was rapidly drafted in 1945 prior to Indonesia's independence. It resulted in the creation of a constitution that left executive power largely unchecked. The resulting political turbulence led to the *1949 Constitution* and the *1950 Provisional Constitution.* [2] Even though a special commission (*Konstituante*) was established to produce a new constitution, it was impossible to reach consensus. As a result, Indonesia reverted to the *1945 Constitution* in 1959 through a

[1] Andrew Harding and Peter Leyland, 'The Constitutional Courts of Thailand and Indonesia: Two Case Studies From South East Asia' in Andrew Harding and Peter Leyland (eds), *Constitutional Courts: A Comparative Study* (Wildy, Simmonds & Hill, 2009) 118.
[2] Simon Butt and Tim Lindsey, *The Constitution of Indonesia: A Contextual Analysis* (Hart Publishing, 2012) 14.

Presidential Decree (*Dekrit Presiden*) on 5 July 1959. The unclear and unchecked executive power in this Constitution enabled President Suharto to govern Indonesia for almost 30 years.

Upon Suharto's fall in 1999, a new constitutional amendment process began, with an initial aim of reducing the centralisation of power in the President. By dividing the powers between other institutions, the underlying idea was to prevent any institution from overpowering the others, with each institution being checked and balanced by the others. As a result, the constitutional drafters of the 1999 to 2002 amendments increased the authority of parliament, reduced the authority of the President, and shared the remaining authority by establishing other institutions such as the Constitutional Court and the Judicial Commission.[3]

3.2.1 Lessons learned from the amendment process

The process followed in the post-Suharto constitutional amendments was far from perfect. Indrayana's research suggests that it is not clear how the amendment process should be viewed and whether in particular it failed to gain the people's trust, given the limited amount of public participation.[4] The uneven, gradual and incomplete amendment process also partly served the interests of the military faction in Indonesia, as well as nationalists and supporters of the old regime. As Horowitz has argued, this feature of the amendment process was both its strength and weakness:[5] a strength because it ensured buy-in from all politically powerful actors in Indonesia, and a weakness as it ensured that these elements would remain influential even after the democratic transition.

Notwithstanding these shortcomings, the constitutional drafters, during the constitutional amendment process from 1999 to 2002, were willing to accommodate different ideas during their constitutional debates. The lack of a dominant party (after

[3] The Supreme Court was regulated by the original *1945 Constitution*. The constitutional amendment did not provide for the enlargement of the Supreme Court's authority. However, the amendment strengthened the independence of the Supreme Court and the Supreme Court Justices (Article 24A of the amended *1945 Constitution*).
[4] Denny Indrayana, *Indonesia Constitutional Reform 1999–2002: A Evaluation of Constitution Making in Transition* (Kompas Book Publishing, 2008).
[5] Donald L Horowitz, *Constitutional Change and Democracy in Indonesia* (Cambridge University Press, 2013).

Suharto) created a measure of mutual understanding and it was thus possible to discuss 'what is feasible to propose and what is not feasible' to reach consensus.[6] As far as the particular institutional choices were concerned, such as reducing the President's authority and increasing the authority of parliament and other institutions, including the Constitutional Court, these appear to have been strongly influenced by past experiences during the Soekarno and Suharto eras.[7]

As noted, the aim of reducing the President's authority was the Constitution makers' first priority when they started to amend the *1945 Constitution*. The *1945 Constitution*, before the amendment, was dominated by a concern for presidential authority. King has studied the relationship that existed between the presidential and legislative powers during the amendment process.[8] Ironically, King found that through direct election of the President and by narrowing the grounds for impeachment, the objective to reduce presidential power succeeded to a certain extent.[9] Using an 'electoral bargaining approach', King examined the competing political forces during the amendment process and the uncertainty over political outcomes, which led to the creation of the Constitutional Court as 'insurance' against future political uncertainty.[10]

Discussion about amending the *1945 Constitution* in the MPR was characterised by different views and attitudes, debates, bargaining and compromises.[11] During the discussion of each of the major amendments, it appears that the need to build checks and balances between State institutions in the system was the most prominent issue. Another prominent issue was the need for mutual control between State agencies to increase regional capabilities.[12] This was shown during the discussion regarding the role of the DPR, the MPR and the issue of direct presidential election.[13] This is in line with

[6] Ibid 264.
[7] Ibid 266.
[8] Blair Andrew King, *Empowering the Presidency: Interests and Perceptions in Indonesia's Constitutional Reforms, 1999–2002* (unpublished PhD thesis, Ohio State University, 2004).
[9] Ibid ii.
[10] Ibid iii.
[11] Valina Singka Subekti, *Menyusun Konstitusi Transisi: Pergulatan Kepentingan Dan Pemikiran Dalam Proses Perubahan UUD 1945 / Valina Singka Subekti* (RajaGrafindo Persada, 2008) 313.
[12] Ibid 314.
[13] According to Harjono, there was a meeting at Megawati's residence in Teuku Umar between Megawati's PDI-P conservative faction and a PDI-P member who was a member of PAH I/Panitia Ad Hoc I (the special commission that was assigned to amend the Constitution). The conservative faction proposed that Megawati should undo all the constitutional amendments that were made in the MPR and return to the original *1945 Constitution* by issuing a Presidential Decree. Megawati firmly rejected this

Ginsburg's insurance theory, in which political parties come together to provide for checks and balances so that no single political party can dominate the others.[14]

3.2.2 Past attempts to introduce judicial review

If we trace the history of the *1945 Constitution* back to the period between April and August 1945, it is possible to see that the debate about a need for judicial review was started by the founding fathers in sessions of the Investigation Agency in Preparation for Independence (BPUPKI). During that process, BPUPKI member Muhammad Yamin suggested:

> [t]he Supreme Court (Balai Agung) should not conduct the judiciary function alone, but should also act as an institution to compare whether Law created by the House of Representatives does not violate the Constitution of the Republic or contradict recognized customary law in, or not opposed to, the Islamic Sharia.[15]

However, this idea was rejected primarily by Soepomo, who argued that, as Indonesia had never had experience with judicial review, such an idea needed to be tested.[16] Soepomo also argued that the *1945 Constitution* already provided the fundamental elements that made it easy to interpret, while disagreement about whether a law was contrary to the Constitution was a political rather than a jurisdictional issue.[17] In addition, Soepomo noted, judicial review in many countries is conducted not by a Supreme Court but by a specialised constitutional court, or *constitutioneel-hof*.[18]

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proposal. She ordered the PDI-P faction in PAH-I to proceed with the process of amendment after she was briefed that in the Third Amendment of the *1945 Constitution*, the Constitutional Court had been put in charge of the process for impeachment of the President. See also the interview conducted by Valina Subekti in Jakarta, April 2006 (as quoted in Valina Singka Subekti, *Menyusun Konstitusi Transisi : Pergulatan Kepentingan Dan Pemikiran Dalam Proses Perubahan UUD 1945 / Valina Singka Subekti* (RajaGrafindo Persada, 2008) 321).

[14] Tom Ginsburg, *Judicial Review in New Democracies: Constitutional Courts in Asian Cases* (Cambridge University Press, 2003).

[15] Ananda B Kusuma, *Risalah Sidang Badan Penyelidik Usaha-Usaha Persiapan Kemerdekaan Indonesia (BPUPKI): Panitia Persiapan Kemerdekaan Indonesia (PPKI): 29 Mei 1945-19 Agustus 1945* (Sekretariat Negara, Republik Indonesia, 1992) 385 (unofficial translation).

[16] Ibid 390.

[17] Jimly Prof Dr Asshiddiqie, *The Constitutional Law of Indonesia: A Comprehensive Overview* (Sweet & Maxwell Asia, 2009).

[18] Jimly Asshiddiqie, *Menegakkan Tiang Konstitusi: Memor Lima Tahun Kepemimpinan Prof Dr Jimly Asshiddiqie S.H. di Mahkamah Konstitusi (2003–2008)* (*Uphold the Constitution: Leadership Memoir of Prof Jimly Asshiddiqie at Constitutional Court (2003–2008)* trans, Secretary General of Constitutional Court 2008) 4.

In the period of drafting the new Constitution by the *Konstituante*, during meetings of the *Konstituante* Assembly, it was agreed that judicial review authority, if established, should be vested in the Supreme Court (the *Konstituante* was an elected body formed to draft a new constitution to replace the temporary 1950 Constitution). At that time, the importance of judicial review was often voiced by members of the *Konstituante*.[19] Unfortunately, the *Konstituante* was unable to decide on the new constitution, due to the enactment of the Presidential Decree of 5 July 1959, which dissolved the *Konstituante* and reinstated the *1945 Constitution*.[20] From that time until 1970, discussion of creating a judicial review authority was restricted to legal scholars.[21] In 1970, the issue of judicial review emerged again with the introduction of *Law Number 14 of 1970 on Judicial Authority*, the purpose of which was to empower the Supreme Court to review subordinate regulations. This power was reconfirmed in *Law 14 of 1985 on the Supreme Court*. During the same period, the MPR also reconfirmed the Supreme Court's authority to review subordinate regulations by introducing *Decree Number VI/MPR/1973* and *III/MPR/1978*. The purpose of both of these MPR decrees was to strengthen the role of the Supreme Court in conducting judicial review of subordinate regulations. Even though the authority of the Supreme Court to review subordinate regulations was enacted in 1978, no reviews had been conducted until the introduction of *Supreme Court Regulation 1 of 1993 Regarding Material Review* (*Hak Uji Materiel*).[22]

After the reinstatement of the *1945 Constitution* in 1959, and the granting of additional authority to the Supreme Court to review subordinate regulations, the idea for judicial review of the constitutionality of statutes was discussed among non-governmental organisations, academics, legal scholars and groups concerned with the protection of

[19] Adnan Buyung Nasution and Sylvia Tiwon, *Aspirasi pemerintahan konstitusional di Indonesia: studi sosio-legal atas Konstituante, 1956–1959* (Grafiti, 1995) 237–238.
[20] The *Konstituante* had agreed on 90% of the Constitution and failed to reach agreement on only two important points: first, whether there would be a unicameral or bicameral legislature; and second, regarding the Jakarta Charter (*Piagam Jakarta*), particularly the addition of an obligation for Muslims to observe Islamic Law. See Adnan Buyung Nasution and Sylvia Tiwon, *Aspirasi pemerintahan konstitusional di Indonesia: studi sosio-legal atas Konstituante, 1956–1959* (Grafiti, 1995) 329–31.
[21] Daniel S Lev, 'Judicial Authority and the Struggle for an Indonesian Rechtsstaat' (1978) *Law and Society Review* 37.
[22] The performance of the Supreme Court in handling its limited judicial review authority has been subject to criticism from many parties. At the time, Supreme Court decisions were heavily influenced by government, its proceedings were closed (and paper-based only), and no proper procedures were in place for recording landmark decisions.

human rights.[23] However, the idea that the courts should be given the power of constitutional judicial review was opposed by the authoritarian government in power at that time.[24]

3.2.3 Establishing the Court

The Indonesian Constitutional Court was established in August 2003 following the third and fourth amendments to the 1945 Indonesian Constitution in 2001 and 2002. Its governing statute, *Law 24 of 2003*, was passed shortly before its establishment.

Before the Amendment of the *1945 Constitution*, the MPR was the highest constitutional institution in the land. The MPR consisted of members of parliament who were directly elected and representatives of functional groups, later called 'co-operatives, labour unions and other collective organisations'.[25] The MPR met once every five years 'to decide the policy of the State to be pursued in the future' and to elect the President and vice President of the Republic of Indonesia.[26] The atmosphere around a powerful President like Suharto haunted the MPR's membership, as did the problem of trying to establish a system of checks and balances. During the post-Suharto constitutional amendment process, one of the crucial decisions not taken was how to elect the President and Vice President. One faction demanded that the President should still be elected by the MPR. Another faction demanded direct elections or the possibility for the President and Vice President to be elected from different parties indirectly, through a multi-party cabinet and the creation of a two- or three-house legislature.[27]

In December 1999, the MPR's working body (*Badan Pekerja*), formed two *ad hoc* committees, one to work on an amendment to the Constitution (*Panitia Ad Hoc I* or PAH I[28]) and another to draft the MPR decrees, including a Standing Order for

[23] The introduction of a judicial review authority was already being discussed by political parties in the MPR (Interview with Jimly Asshiddiqie (Election Ethics Council Office, 9 December 2013)).
[24] Daniel S Lev, Nirwono and AE Priyono, *Hukum dan politik di Indonesia: kesinambungan dan perubahan* (*Lembaga Penelitian, Pendidikan dan Penerangan Ekonomi dan Sosial* (LP3ES), 1990) 391–411.
[25] *Elucidation of Article 2(1) of the 1945 Constitution before the Amendment.*
[26] Article 3 of *1945 Constitution* before the Amendment.
[27] Tim Penyusun Naskah Komprehensif perubahan UUD 1945, *Buku IV: Kekuasaan Pemerintahan Negara,* Naskah Komprehensif Perubahan Undang-Undang Dasar Negara Republik Indonesia Tahun 1945: Latar Belakang, Proses, Dan Hasil Pembahasan, 1999-2002 (Sekretariat Jenderal dan Kepaniteraan Mahkamah Konstitusi, 2010).
[28] PAH-I is the special commission that had been assigned to amend the Constitution.

legislative bodies (*Panitia Ad Hoc II*, or PAH II).[29] PAH I consisted of 47 members from all factions.[30] PAH I was chaired by Jacob Tobing, an ex-Golkar legislator, who had just become a PDI-P member one year earlier (1997). The PDI-P and Golkar had the largest delegations—12 members each on the committee—who began work on amending the Constitution in the last quarter of 1999.[31]

The creation of a separate Constitutional Court was not originally on the agenda when the Indonesian constitutional reform process began in 1999. According to Benny K Harman,[32] the idea of conferring judicial review power on the Indonesian judiciary was first raised by member of the Star and Crescent Party (*Partai Bulan Bintang)*, Hamdan Zoelva and another politician, Valina Singka Subekti.[33] Zoelva's original suggestion was that this power should be conferred on the Supreme Court.[34] Valina, too, urged the MPR to authorise the Supreme Court to conduct judicial review.[35] In the second meeting of the working committee (*Badan Pekerja*) of the MPR on 6 October 1999, both Hamdan and Valina argued that the conferral of a judicial review authority on the Supreme Court would enable it to act as a check on the legislature and executive.[36]

Hamdan and Valina's proposals on judicial review continued to be discussed by another constitutional drafting group—PAH I BP MPR. In their first meeting on 7 October 1999, PAH I's[37] discussion focused on empowering the Supreme Court, which included the authority to review subordinate regulations or limited judicial review.[38]

PAH I split into two groups. The first group sought to introduce limited judicial review of subordinate legislation, while the other sought a more comprehensive judicial review

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[29] *Naskah komprehensif perubahan Undang-Undang Dasar Negara Republik Indonesia tahun 1945: latar belakang, proses, dan hasil pembahasan, 1999–2002*, (*Sekretariat Jenderal dan Kepaniteraan, Mahkamah Konstitusi* 2010) 33.
[30] PAH-I was similar in this respect to the *Konstituante* (Preparatory Committee on the Constitution), which also consisted of members of all factions.
[31] Subekti, above n 11; the main action in amending *1945 Constitution in MPR 90–105*.
[32] As cited in Hendrianto 38–39.
[33] Benny K Harman, *Mempertimbangkan Mahkamah Konstitusi : sejarah pemikiran pengujian UU terhadap UUD*/Benny K Harman *Penyunting, Candra Gautama, Ining Isaiyas* (*Kepustakaan Populer Gramedia*, 2013) 284.
[34] Minutes of 2nd Meeting, Working Group MPR, 6 October 1999.
[35] Minutes of 2nd Meeting, Working Group MPR, 6 October 1999.
[36] Harman, above n 33.
[37] PAH-I is the special commission that was assigned to amend the Constitution.
[38] *Naskah Komprehensif Buku 6, Pembahasan UUD 1945, Sekretariat Jenderal Mahkamah Konstitusi*, 2012 39.

authority. The Golkar party faction and the Reformation and army/police factions rejected the idea of the Supreme Court performing the judicial review function. Patrialis Akbar from the Reformation faction, who later served as a constitutional justice, stated that:

> [r]egarding [the] law, the Supreme Court is not entitled to [conduct] a judicial review because it is a product of the people's representatives all together.[39]

The other factions who argued that the Supreme Court should be entitled to have full judicial review authority were the Star and Crescent Party *(Partai Bulan Bintang* - PBB*)*, Group Representative (*Utusan Golongan)*, and National Awakening Party (Partai Kebangkitan Bangsa –PKB) factions. These factions argued that judicial review was important in maintaining the rule of law, and was also necessary to counterbalance the power of other constitutional bodies.[40]

However, until the end of 1999, the constitutional amendment process focused its discussions on restricting the President's authority and increasing parliament's authority. The issue of judicial review was not placed on the agenda, due to time constraints. In the next year, the MPR issued decree Number III/MPR/2000, granting itself the power to review legislation for constitutionality, even though the MPR had possessed such authority but had never exercised it.[41] By August 2000, a PAH I leader reported that, of the eight factions that tentatively agreed on direct election, seven had defected.[42] If consensus regarding the election of the President and vice President was not achieved, it was likely that that a deadlock would occur and the1945 provision for presidential election by the MPR would remain.[43]

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[39] Rakyat Indonesia. *Majelis Permusyawaratan, Majelis Permusyawaratan Rakyat Republik Indonesia: [risalah Sidang Istimewa MPR]* (*Majelis Permusyawaratan Rakyat*, 1999). Book 2, JIlid 6, 50 as quoted in Benny K Harman, *Mempertimbangkan Mahkamah Konstitusi: sejarah pemikiran pengujian UU terhadap UUD/Benny K Harman; Penyunting, Candra Gautama, Ining Isaiyas* (*Kepustakaan Populer Gramedia*, 2013) 287.

[40] Benny K Harman, *Mempertimbangkan Mahkamah Konstitusi: sejarah pemikiran pengujian UU terhadap UUD*/Benny K Harman *Penyunting, Candra Gautama, Ining Isaiyas (Kepustakaan Populer Gramedia*, 2013) 288.

[41] MPR *Decree Number III/MPR/2000* was issued by the Leader of the MPR without consultation with PAH-I. It shows the lack of communication between the leadership of the MPR and the work processes of PAH-I. Interview with Jacob Tobing (Indonesia Church Association (PGI) Office, 18 August 2014).

The reasons behind the eventual decision to amend the Constitution to provide a separate Constitutional Court with broad powers of judicial review are still disputed. According to one view, the major reason for the creation of a separate Constitutional Court was to prevent a recurrence of the purely political impeachment of President Abdurrahman Wahid, who was dismissed from office by a vote of the MPR on 23 July 2001. Fearing a similar political impeachment process, the new President Megawati Soekarnoputri[44] and her Indonesian Democracy Party-Struggle (*Partai Demokrasi Indonesia-Perjuangan* [PDI-P]) decided to support the establishment of the Constitutional Court as an impartial forum for hearing presidential impeachment complaints.[45] This is today the general understanding of constitutional scholars on how Indonesia created its Constitutional Court.[46]

In the controversy surrounding the impeachment of President Abdurrahman Wahid, an idea was proposed to implement a constitutional arrangement on the mechanism of impeachment, so that a President accused of committing a crime would be brought before a court of law, rather than a political forum such as the MPR.[47] These circumstances can be explained by Ginsburg's 'insurance theory'[48] as an instrument for mitigating the risk of electoral defeat. However, while Ginsburg argues that the creation of a constitutional court is driven by the need to ensure that defeated political parties are able to *regain* power through an open and competitive process, in Indonesia, the Court

[44] The decision of the PDI-P party to have presidential direct elections in the Constitution was included in the package of amendments providing for the establishment of the Constitutional Court. Megawati had thought that the *1945 Constitution*, which had empowered her father, created a strong presidency. But the removal of Abdurahman Wahid made her rethink her position. The MPR's power to elect a president, and its highly discretionary power to remove an incumbent, created a presidency at the pleasure of the MPR, which was not in the interests of Megawati. See Blair Andrew King, *Empowering the Presidency: Interests and Perceptions in Indonesia's Constitutional Reforms, 1999–2002* (unpublished PhD thesis, Ohio State University, 2004); Donald L Horowitz, *Constitutional Change and Democracy in Indonesia* (Cambridge University Press, 2013) 112.

[45] Asshiddiqie, above n 17; Simon Butt, *Judicial Review in Indonesia: Between Civil Law and Accountability? A Study of Constitutional Court Decision* (unpublished PhD thesis, University of Melbourne, 2006); Maruarar Siahaan, *Pelaksanaan Putusan Mahkamah Konstitusi* (*The Implementation of Constitutional Court Decision*) (PhD thesis, University of Diponegoro, 2010); Indrayana, above n 2.

[46] Jimly Prof Dr Asshiddiqie, *The Constitutional Law of Indonesia: A Comprehensive Overview* (Sweet & Maxwell Asia, 2009); Simon Butt, *Judicial Review in Indonesia: Between Civil Law and Accountability? A Study of Constitutional Court Decision* (PhD thesis) (University of Melbourne, 2006); Maruarar Siahaan, Pelaksanaan Putusan *Mahkamah Konstitusi* (*The Implementation of Constitutional Court Decision*) (PhD thesis) (University of Diponegoro, 2010); Denny Indrayana, *Indonesian Constitutional Reform, 1999–2002: An Evaluation of Constitution-Making in Transition* (Kompas, 2008).

[47] Hendrianto, *From Humble Beginnings to a Functioning Court: The Indonesian Constitutional Court, 2003–2008* (unpublished thesis, University of Washington, 2008)16.

[48] Ginsburg, above n 14.

was created primarily to *safeguard* power, in the sense that the intention was to secure the President's position in the DPR by insisting that impeachment could occur only through the Court.[49]

Even this more nuanced account presents only half the picture. Arguments were also made that the Court was required for broader purposes, to ensure compliance with the amended Constitution. Jacob Tobing states that:

> [i]t is not true that we created the constitutional court because we were afraid of the impeachment of President Megawati. It might have been the final push, but we started to talk about the authority to 'review legislation' at the very beginning of the constitutional amendment process. We focused on whether we should have that authority first, not on where it should be located. As Chairman of the PAH I, I always communicated with President Megawati. She knew of the progress being made with this idea.[50]

According to this perspective, the Court was principally established to act as a counterweight to parliament and the President. Indonesia's history of presidential co-opting of parliament under Suharto's regime had shown that the concentration of power in the hands of those two institutions could lead to self-serving interpretations of the *1945 Constitution*. The role of judicial review against that background was to act as a deliberately 'counter-majoritarian'[51] check on the abuse of governmental power. As Harman notes:

> [p]ast history of the President and DPR relationship has shown that collaboration between those two institutions may lead to abusive interpretation of the constitution.[52]

A further reason for the creation of a separate Constitutional Court concerned the shift from a hybrid presidential/parliamentary system to a constitutional system. Article 1(2) of the *1945 Constitution* originally noted that 'sovereignty is in the hands of the people and is exercised in full by the People's Consultative Assembly'. This was amended during the 1999 to 2002 constitutional reform process to read: 'sovereignty is in the

[49] Hendrianto, above n 47, 57.
[50] Interview with Jacob Tobing (Indonesia Church Association (PGI) Office, 18 August 2014).
[51] Alexander M Bickel, 'Foreword: The Passive Virtues' (1961) 75 *Harvard Law Review* 40, 50.
[52] Interview with Benny K Harman (DPR/Parliament Building, 18 June 2014).

hands of the people and is implemented according to the Constitution'.[53] The shifting of sovereignty from the MPR to the Constitution required a completely different mind-set and enforcement mechanism.[54] According to Gunandjar '[t]he Court as a concept is a solution to protect the Constitution and democracy. That is why its decision is final and binding'.[55]

It was also logical that the creation of the Court should have been almost one of the last issues to be decided by the amendment process, since the powers and structure of the Court were contingent on the content of the rest of the Constitution. As Tobing argued:

> [i]f we need a constitutional court to protect the constitution, what kind of democracy would we like to have? If we need to have the rule of law, what is the requirement to have rule of law in the constitution? Once the rule of law has been developed, we can then discuss the establishment of the Court.[56]

3.2.4 The South Korean influence

A study tour of 21 countries by MPR legislators,[57] of which only 11 had a constitutional court, seems to have been influential in resolving a deadlocked debate regarding the type of institution (chamber, independent court or a constitutional chamber of the Supreme Court) that should be established.[58]

The final decision to adopt the South Korean judicial selection model, in which the parliament, the President and the Supreme Court each appoint three of nine constitutional justices, was taken by parliamentary members upon their return from a study tour of South Korea.[59] It could be, of course, that the MPR simply preferred this model, and would have adopted it anyway. However, the direct influence of the South

[53] Article 1(2).
[54] Article 1(2).
[55] Interview with Agun Gunandjar (DPR/Parliament Building, 3 December 2013).
[56] Interview with Jacob Tobing (Indonesia Church Association (PGI) Office, 18 August 2014).
[57] Hendrianto, above n 47, 41.
[58] Ibid.
[59] Interview with Agun Gunandjar (DPR/Parliament Building, 3 December 2013).

Korean study tour on the constitutional design choice in this respect appears to have been strong.[60]

Chief Justice Hamdan Zoelva has explained the reasons behind the choice of the South Korean model:

> Our main aim was to avoid political conflict over the selection process. We then looked at the selection process for the members of the Korean Constitutional Court, where each branch has the power to nominate three justices. We decided to follow this model as it promised to deliver on our main aim.[61]

The final appointments system agreed to for the Constitutional Court provided for the nomination of nine judges serving once-renewable, five-year terms.[62] Three of the nine members are nominated by the President, three by the National Representative Council (*Dewan Perwakilan Rakyat*—DPR) and three by the Supreme Court. Since nomination for renewal of a term may occur at the instance of an institution other than the original nominating institution, Constitutional Court judges do not owe any particular loyalty to the institution that originally nominated them. In 2008, for example, Judge Harjono, who had been nominated for appointment by President Megawati Soekarnoputri in 2003, was not re-nominated by President Yudhoyono (SBY), but by the DPR.[63]

3.2.5 The Court's initial mandate

On 9 November 2001, the MPR enacted the Third Amendment to the *1945 Constitution*. This amendment inserted a new Article 24C into the Constitution, providing for the jurisdiction and powers of the Constitutional Court.[64] In particular, subsection (1) of this article provides that the Indonesian Constitutional Court possesses the authority to:

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[60] The minutes of the plenary meeting also clearly recorded that the proposed selection method was modelled after the selection method in the Korean Constitutional Court. See Minutes of Plenary Meeting, PAH I BP MPR, 25 September 2001.
[61] Hamdan Zoelva, interview by Hendrianto, 26 July 2006 (Hendrianto above n 49).
[62] Article 24C(3). A mandatory retirement age of 67 is provided for in Article 23(3)c of the *Constitutional Court Law of 2003*.
[63] Björn Dressel and Marcus Mietzner, 'A Tale of Two Courts: The Judicialization of Electoral Politics in Asia' (2012) 25 (2012) *Governance* 391 405.
[64] See also Article 10 of the *Constitutional Court Law of 2003*.

> hear matters at the lowest and highest levels and to make final decisions on the review of legislation against the Constitution, the settlement of disputes regarding the authority of State bodies whose authority is given by the Constitution, the dissolution of political parties, and the settlement of disputes concerning the results of general elections.'

Article 24C(2) further confers on the Court the authority to 'adjudicate on the opinion of People Representative Council regarding allegations of misconduct by the President and/or the Vice President in accordance with the Constitution'.

These five areas of authority were carefully chosen. As noted, the basic judicial review authority was intended to guard against the potential abuse of power by the DPR and President acting together. This abuse of power had occurred for 30 years during the Suharto era and its possible recurrence haunted the constitutional reform process. To ensure respect for individual rights, it was of the utmost importance that the President and DPR should be policed by a separate institution. As we have seen, the discussions regarding the form of judicial review (whether limited or full) and which institution had the authority to conduct such a judicial review consumed a large part of the constitutional drafting process. Ultimately, it was decided that the Constitutional Court's decisions should be final and binding.[65] The question of which type of laws (i.e. statutes and government regulations) should be susceptible to judicial review by the Constitutional Court was settled during the drafting of the *Constitutional Court Law of 2003*. As enacted, Article 50 of this statute provides that '[t]he laws that may be appealed for review are those which have been enacted after the introduction of the amendments to the *1945 Constitution* of Indonesia'. This limitation on the Court's power was crucial to the political consensus around the establishment of the Court, but has since been overturned.[66]

[65] Article 47 *2003 Constitutional Court Law*. At the time of writing (16 March 2016), the Court had granted 187 judicial review cases out of a possible 807 cases put to it in relation to 406 laws. Twenty-four decisions related to the settlement of disputes between state institutions. Data obtained through the Court's website (accessed 16 March 2016).

[66] Jimly Asshiddiqie, *Menegakkan tiang konstitusi: memoar lima tahun kepemimpinan Prof. Dr. Jimly Asshiddiqie, S.H. di Mahkamah Konstitusi, 2003–2008* (*Sekretariat Jenderal dan Kepaniteraan, Mahkamah Konstitusi*, 2008) 91. Later, the Court declared this article invalid through *Constitutional Court Decision 66/PUU-II/2004 on Article 50*.

The second power given to the Court was the power to settle disputes regarding the authority of State institutions, established under the amended *1945 Constitution*. Prior to the amendment, the MPR was recognised as the 'highest' institution,[67] with the theoretical power to settle all disputes between institutions. In fact, the MPR had never exercised this power and Indonesian constitutional law scholars are agreed that Indonesia, under Presidents Soekarno and Suharto, did not recognise the full separation of powers.[68] The insertion of a judicial review power to settle disputes between constitutional institutions was intended to both recognise the separation of powers and to provide a dispute resolution mechanism between them.

The third power conferred on the Court was the power to dissolve political parties. Under previous regimes, the dissolution of political parties had been used as a tool to curtail political competition. This phenomenon started with President Soekarno, who dissolved the Masjumi Party (the largest Islamic party) and PSI (Indonesia Socialist Party) in 1960.[69] President Soekarno later issued a Presidential Decree (128/1961) that recognised only eight political parties.[70] A further decree (Decree 129/1961) dissolved the remaining political parties operating at this time.[71] President Suharto was reluctant to have many political parties and urged the integration of existing political parties to form larger groups.[72] Upon his election in 1971, President Suharto took over the idea of simplifying the political party structure into distinct factions: the national faction, the spiritual faction and the working faction (*Golongan Karya)*. Later, President Suharto, in *Law 3 of 1975 on Political Parties* and *Law 4 of 1975*, further reduced the number of political parties from ten to three. Learning from this past experience, the constitutional

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[67] Prior to the amendment of *1945 Constitution*, the MPR had the right to amend the Constitution, elections of the president and vice president, and determine the guideline of State policy.
[68] Lee Cameron McDonald, *Western Political Theory: From its Origins to the Present* (Harcourt, Brace & World, 1968) 377–379.
[69] *Presidential Decree Number 200/1960* and *201/1960*. Prior to this decree, the president had issued *Penetapan President Number 13/1960 regarding Acknowledgement, Supervision and Dissolution of Political Parties*; Muhammad Rusli Karim, *Perjalanan partai politik di Indonesia: sebuah potret pasang-surut / M. Rusli Karim ; Kata pengantar Ahmad Syafi'i Ma'arif* (CV Rajawali, 1983) 147.
[70] *PNI, NU, PKI, Partai Katolik, Partai Indonesia, Partai Murba, PSII dan IPKI; Jimly Asshiddiqie, Kemerdekaan berserikat, pembubaran partai politik dan Mahkamah Konstitusi*/[Jimly Asshiddiqie] (Konstitusi Press, 2005) 181. Later, the president also issued *Presidential Decree 440/1961* to acknowledge *Partai Kristen Indonesia* and *Persatuan Tarbiyah Islam (Perti*); Muhammad Rusli Karim, *Perjalanan partai politik di Indonesia : sebuah potret pasang-surut/M. Rusli Karim ; Kata pengantar Ahmad Syafi'i Ma'arif* (CV Rajawali, 1983) 149.
[71] *PSII Abukusno, Partai Rakyat Nasional Bebasa Daeng Lalo dan Partai Rakyat Nasional Djodi Gondokusumo*.
[72] Jimly Asshiddiqie, *Kemerdekaan berserikat, pembubaran partai politik dan Mahkamah Konstitusi* [Jimly Asshiddiqie] (Konstitusi Press, 2005) 194.

drafters believed that the dissolution of political parties should be decided by the Court, thus ensuring that political parties could not be dissolved without the intervention of a neutral umpire.

The Court's fourth power is to settle disputes concerning the results of general elections. Again, this power was included to support the development of political rights and democracy in Indonesia by ensuring that election result disputes would be settled by an independent institution. Before the enactment of this provision, Indonesia had no experience in resolving election disputes as there were, in effect, no competitive elections.[73] The new authority empowered the Court to decide on election result disputes, based on allegations of mistaken vote counts by the Electoral Commission. Such election result disputes cover all general elections, including the first and second rounds of legislative and presidential general elections.[74]

The fifth and final power conferred on the Court was the power to adjudicate accusations of wrongdoing made by the DPR against the President or Vice President, as part of the prescribed impeachment procedure. As mentioned earlier, this power was perceived to be one of the driving forces behind the creation of the Indonesian Constitutional Court. To that extent, it accords with Ginsburg's insurance theory of judicial empowerment.[75] However, as also noted earlier, empowering the Court to hear impeachment proceedings was not the sole reason for its establishment. While the impeachment of President Wahid (a.k.a. Gus Dur) in 2001 may have brought forward the decision to establish the Court, this was not the real reason for Indonesia adopting judicial review. This power has not been exercised as yet, suggesting that it now plays a relatively minor role in ongoing support for judicial review.

3.2.6 The Court's 'honeymoon period'

The creation of a constitutional court to exercise the power of judicial review has become a standard device in newly democratic countries to prevent a return to

[73] During the Suharto era, in which the winner of the election was known before the election had been conducted, Golkar won with massive support in all constituencies.
[74] Article 24C(1) *1945 Constitution*; Article 74(1) *Constitutional Court Law*.
[75] Ginsburg, above n 14.

authoritarianism.[76] In Indonesia, the decision to vest judicial review authority in a new institution rather than in the Supreme Court was an especially strategic one due to the Supreme Court's tarnished reputation. It also meant that the Court could be established from scratch, with an entirely new group of judges and mandate.[77] The objective was to separate politically significant cases (like impeachments) and determine the validity of elections by creating an independent court parallel to the Supreme Court. This supported the Supreme Court's independence by removing potentially controversial cases from it and gave the new Constitutional Court the opportunity to establish its authority.

The virtue of allowing a constituent assembly (or in this case, the MPR) to design the body that must eventually police the legislature's conduct is self-evident.[78] The process of constitution-making creates a common understanding among the legislature's members regarding the role of the constitutional court, thus reducing the possibility of subsequent conflict between the two institutions. In the case of the Indonesian constitutional amendment process, this was undoubtedly true: the MPR members who created the Court believed that they could live with it, even though there was a possibility that an activist court could work against their interests. More than this, participation in the design of the Court gave MPR members an active interest in sustaining it after its creation, and making a success of the constitutional reform process.[79]

In addition to this self-interested basis for support, the Court also benefited from the power vacuum that accompanied the constitutional reform process. Immediately after the end of that process, the DPR and President were uncertain of their responsibilities. The Court was able to exploit this situation by providing rapid answers to such questions as the nature of each institution's powers, the requirements of the rule of law,

[76] Donald L Horowitz, '*The Federalist* Abroad in the World' in Ian Shapiro (ed), *The Federalist Papers* (Yale University Press, 2009) 502.
[77] See Donald L Horowitz, 'Constitutional Courts: A Primer for Decision Makers' (2006) 17 *Journal of Democracy* 125.
[78] Jon Elster, 'The Optimal Design of a Constituent Assembly' in Hélène Landemore and Jon Elster (eds), *Collective Wisdom: Principles and Mechanisms* (Cambridge University Press, 2012) 148.
[79] Horowitz, above n 5, 293.

the protection of human rights and the role of public utilities. This gave the Court some initial momentum, on which it was able to capitalise.[80]

Added to this was the fact that the Court began fulfilling functions that suited all political parties. For many years under authoritarian rule, Indonesia had conducted carefully managed general elections in which losing parties did not have any opportunity to challenge the results. Every election result under the Soekarno and Suharto regimes was simply deemed legal and valid. After the constitutional reform process, all of this changed, and the Court's role in handling election result disputes, and the efficient and fair way in which it went about this task, encouraged political parties to put their trust in it.[81]

In exercising its authority 'to settle disputes between State institutions where their authority has been given by the constitution', the Court also acted as a guarantor of the amended *1945 Constitution*, helping to ensure that each institution functioned as it was intended to. This was also in marked contrast to the authoritarian era, where numerous loopholes and overlaps in the *1945 Constitution* had been exploited in a largely unchecked competition between institutions. By regulating the competition for power between institutions, the Court was able to achieve one of the most important objectives of those who had created it, and in this way institutionalise its own power as counterweight to, and regulator of, the power of other constitutional institutions.[82]

It is also worth noting that the judicial review process in Indonesia is somewhat different to many other civil law countries in that not just institutions but also individuals are able to file cases for judicial review. This turns every citizen into a potential constitutional complainant, contributing to popular support for the Court as a forum for reporting a variety of grievances.[83] Indeed, as we shall see in later chapters, the Court was able to decide numerous important cases early on in its existence, thus establishing its reputation as a powerful and significant institution in Indonesian politics.

[80] Interview with Harjono (Constitutional Court Building, 16 December 2013).
[81] Interview with Mohammad Mahfud (MMD Initiative Office, Jakarta, 3 December 2013).
[82] Interview with Benny K Harman (DPR/Parliament Building, 18 June 2014).
[83] Interview with HAS Natabaya (Constitutional Court Building, 10 December 2013).

The Court's rapid rise to prominence was fairly unexpected as few people, apart from academics,[84] really understood what a constitutional court was for and what it was capable of doing. This also benefited the Court, as it was able to fashion an institutional role for itself without initially having to consider traditional expectations about what its mandate was. It was only later, when the extent of the Court's powers became clear, that public debate shifted to discussing the extent to which the Court had overstepped its mandate.

There has been some criticism of academics' failure to explain the purpose of the Court properly, and in this way mitigate any possible backlash once the extent of its powers became known. Caught up in the euphoria of the Court's establishment, academics did not do enough to explain to the Indonesian public what the Court's legitimate role was, or criticise that role as it began to change. Saldi Isra, for example, has argued that:

> [a]cademics erred when letting the Court go on its way without giving any warning about the dangers of judicial activism. We always praised the Court, until Refly's case, when we realized that there was something wrong with it.[85]

This failure was initially outweighed by the general spirit of goodwill surrounding the Court. Most significantly, that spirit translated into a commitment on the part of the three appointing bodies (the DPR, the Supreme Court and the President) to select the very best and most talented people to serve on the Court. The backgrounds and biographies of the first bench will be discussed in Chapter 4. For now, the point is simply that, at its establishment, there was a tremendous groundswell of support for the Court and a widespread commitment to its success as an institution. This too, can be thought of as part of the 'honeymoon period' that the Court was able to exploit.[86]

In summary, the first important factor regarding the political context for judicial review in Indonesia was the continuity between the rationale for the Court's creation and the

[84] Interview with Achmad Roestandi (Residence, 19 December 2013).
[85] Interview with Saldi Isra (International Airport Soekarno Hatta Lounge, 16 June 2014).
[86] Interview with Dian Rosita (*Lembaga Kajian dan Advokasi untuk Indepedensi Peradilan* Office, 2 July 2014).

initial support it received as an institution. There was some resistance initially to the Court, but it was insignificant.[87]

3.3 Factor 2: The comparatively slow reform of the Supreme Court

3.3.1 The condition of the Supreme Court

As we have seen, the Court was established not only to provide an alternative forum (other than the MPR) for the presidential impeachment process, but also to realise the long-term ambition of creating a credible judicial review authority to enforce the Constitution.[88] At the time of the Court's creation, the existing national high court, the Supreme Court, was in a very poor State with its reputation badly damaged by political interference during both the Soekarno and the Suharto eras. The Supreme Court has still not recovered completely. In 2009, the Asian Human Rights Commission ranked Indonesia's courts generally as 'the worst in Asia'.[89] During President Soekarno's rule, the separation of powers was effectively abolished, with the executive regularly interfering in pending cases and directly intimidating judges.[90] In Suharto's era, independent judges were discredited and the courts were placed under the Department of Justice.[91] Incompetent judges were appointed to the Supreme Court, including the Chief Justiceship.[92] Cases in the Supreme Court were subject to illegal levies on litigants. This court and its large personnel became a front for the collection of bribes. Court personnel withheld the issuing of decisions until they were paid illegal fees and sometimes they orchestrated favourable judgements.[93] For 40 years, the Indonesian government did not lose a single case in the Supreme Court.[94]

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[87] Interview with Hamdan Zoelva (Constitutional Court Building, 13 December 2013).
[88] Sebastian Pompe, *The Indonesian Supreme Court: A Study of Institutional Collapse* (Cornell University Press, 2005) 172; Susi Dwi Harijanti and Tim Lindsey, 'Indonesia: General Elections Test the Amended Constitution and the New Constitutional Court' (2006) 4 *International Journal of Constitutional Law* 138, 146–47.
[89] Asian Human Rights Commission, *The State of Human Rights in Indonesia in 2009*, 20, quoted in *Country Research–Indonesia: A Sugarcoated Human Rights System*, unpublished paper (University of Hong Kong Department of Law, May 2010) 10, as quoted in Horowitz above n 5, 233.
[90] Pompe, above n 88, 52–64.
[91] *Law Number 14 Year 1970 on the Basic Principle of the Judiciary*.
[92] Pompe, above n 88, 111–56.
[93] Ibid 163.
[94] Ibid 157–72.

For decades, the Indonesian judiciary has accordingly been regarded by Indonesians as one of the most corrupt institutions. Surveys indicate that its reputation, ironically, relates to its propensity to act illegally, rather than its capacity to enforce the law, let alone deliver 'justice'.[95] Popular belief has it that most of Indonesia's judges and court officials are willing to accept bribes from litigants to secure victory in their cases, with the Supreme Court seen as one of the most corrupt courts in the country. Senior Indonesian judges, including retired Supreme Court Chief justices, have admitted there is validity in these popular perceptions. Former Chief Justice Soerjono has estimated that 50 per cent of Indonesia's judges are corrupt.[96]

Courts have never before been at the forefront in Indonesian history.[97] During the Soekarno and Suharto regimes, the judiciary lost respect, except to confirm and legitimate the political status quo. For years, the Supreme Court's administration (personnel, management, finance and structure) was under the control of the Department of justice, and the Court had limited power to review legislation.[98]

3.3.2 Reform of the Supreme Court

Reform of the judiciary was intensively discussed by constitutional drafters during the constitutional amendment process from 1999 to 2002, but the reforms subsequently introduced have been slow in contributing to the practical development of the Supreme Court. In March 1997, the National Planning Ministry, with support of the World Bank and assisted by two prominent law firms—ABNR (Ali Budiardjo Nugroho Reksodiputro) and MKK (Mochtar, Karuwin and Komar)—drafted a judicial reform initiative and produced a report entitled the 'Diagnostic Assessment of Legal Development in Indonesia'. The main topic of this report was increasing the capacity of judges and judicial institutions, rather than judicial integrity.[99] The fall of Suharto and the economic crisis in Indonesia led to the creation of the Commercial Court in Indonesia, as part of the International Monetary Fund (IMF) conditions to support

[95] AC Nielsen, *Survey Report on Citizens' Perceptions of the Indonesian Justice Sector: Preliminary Findings and Recommendations* (Asia Foundation, 2001).
[96] Pompe, above n 88, 414.
[97] Ibid.
[98] Transfer of judicial administration was effected on 31 March 2004 upon the enactment of *Law 4 of 2004 on the Judiciary* and *Law 5 of 2004 on the Supreme Court* through *President Decree 21 of 2004*.
[99] Interview with Dian Rosita (*Lembaga Kajian dan Advokasi untuk Indepedensi Peradilan* Office, 2 July 2014).

Indonesia. However, for a commercial court judge that had never handled bankruptcy cases, the development of a commercial court had its own flaws.

In 2001, Professor Bagir Manan was appointed by President Abdurahman Wahid as Chief Justice of the Supreme Court.[100] (At that time, the selection of the Chief Justice of the Supreme Court was conducted through the DPR and nominations were sent to the President for final selection. Professors Muladi and Bagir Manan were nominated by the DPR and then President Wahid chose Professor Bagir Manan as the Chief Justice.) Bagir Manan, in consultation with other justices, embarked on a mission to reform the Supreme Court and approached Justices Marianan Sutadi Nasution, Paulus Effendi Rotulung and Abdul Rahman Saleh to assist him.[101] This small group of Supreme Court justices commenced a reform process in the Supreme Court, which was traditionally a closed organisation. Given the Supreme Court's size and complexity, and the small number of people driving the reform, its chances of success were always quite low. Before his appointment as Chief Justice, Bagir Manan already had close ties with civil society and had started to communicate a reform agenda. In 2003, with the support of respected individuals[102] and the legal reform movement in civil society,[103] the Supreme Court successfully created a Reform Blue Print for the Supreme Court of Indonesia. The relationship of the Supreme Court with civil society provides further understanding as to why the Supreme Court could not continue its reform without external assistance. If the Blue Print was the first step for the Supreme Court, the second step was to create a Judicial Reform Team.[104] This team, chaired by the Chief Justice, included other internal members from the Supreme Court, the National Planning Ministry, the Minister of Justice, the Funding Agency, and also advocates, legal scholars and civil society members. This Judicial Reform Team was supported by the Judicial Reform Team Office that consisted of a Senior Civic Society Legal Reform Activist. However, soon

[100] The amendment of *Law Number 14 of 1985 on the Supreme Court* permitting non-career judges to become Supreme Court justices provided a way for Bagir Manan to enter the Supreme Court.
[101] Interview with Dian Rosita (*Lembaga Kajian dan Advokasi untuk Indepedensi Peradilan* Office, 2 July 2014).
[102] Mas Achmad Santosa, Rifqi S Assegaf, Zacky Hussein, Greg Churchil.
[103] *Lembaga Kajian dan Advokasi untuk Independensi Peradilan (LeIP), Pusat Studi Hukum dan Kebijakan Indonesia (PSHK) serta Masyarakat Pemantau Peradilan Indonesia (MaPPI*).
[104] *Supreme Court Chief Justice Letter Number: KMA/26/SK/IV/2004 regarding Formation of Judicial Reform Team*. This is the first legal basis for Judicial Reform Team formed by Supreme Court internally.

after its creation, the Judicial Reform Team Office realised that the Judicial Reform Team would not be able to concentrate on conducting the reform program.[105]

The lack of political support, both externally and internally, and massive judicial corruption has made reform of the Supreme Court a slow and arduous process with little impact to date. To combat a 'legal mafia', without providing a whole institutional reform agenda, President SBY established a Legal Mafia Eradication Taskforce (*Satgas Pemberantasan Mafia Hukum*) by Presidential Decree in 2009.[106] This taskforce operated for two years until 30 December 2011. The main function of the taskforce was the 'coordination, evaluation, correction, and monitoring so that the eradication of the judicial mafia, especially within the police force, the prosecutor's office, the courts, and correctional institutions ("law enforcement institutions"), could be achieved effectively'.[107] However, as the taskforce itself noted, this was no easy task:

> [t]he practices of the judicial mafia in Indonesia have been going on for a long time and are carried out using many methods of operation that are increasingly sophisticated.[108]

The constitutional drafters' decision in 1999 to 2002 to exclude the Supreme Court from conducting constitutional judicial review must be understood against this background. The drafters' reluctance to confer this authority on the Supreme Court is clear from reading the transcript of the constitutional amendment process.[109] An additional factor was the huge backlog of pending cases before the Supreme Court. To this day, the Supreme Court has been unable to develop a transparent court management system, although, with the assistance of foreign donors, the Supreme Court has been able to publish its decisions online.[110]

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[105] Interview with Dian Rosita (*Lembaga Kajian dan Advokasi untuk Indepedensi Peradilan* Office, 2 July 2014).
[106] *Presidential Decree No 37 of 2009*.
[107] Ibid.
[108] *Satgas Pemberantasan Mafia Hukum, Mafia Hukum* (UNDP, 2010).
[109] *Naskah Komprehensif, Pembahasan UUD 1945, Sekretariat Jenderal Mahkamah Konstitusi*, 2012.
[110] Upon strong support from reform team and civic society, the Supreme Court started to publish their decisions through *Chief Justice Decision Letter Number 11/KMA/SK/VIII/2007 on Free Information at the Court* (*Keterbukaan Informasi di Pengadilan*). Until the end of 2011, the Supreme Court was able to upload 144 438 decisions online. Up to 31 December 2014, the Supreme Court published 1 164 190 decisions.

It was also appreciated that the Supreme Court justices, as government employees selected and trained by the Ministry of Justice, would be reluctant to decide cases against the government by declaring laws unconstitutional. Indeed, the justices at that time thought of themselves as part of the government.[111]

Following the Constitutional Court's rise to prominence after 2003, the contrast between the Supreme Court and the Constitutional Court grew even sharper, particularly in relation to questions of judicial ethics. On 18 November 2005, Corruption Eradication Commission investigators searched Chief Justice Bagir Manan's office and questioned him regarding the Probosutedjo case.[112] For the Chief Justice to comply with questioning by the KPK, a summons had to be issued. This required the intervention of President SBY, who mediated the Chief Justice's initial refusal to be questioned by the KPK.[113] The search by the KPK's investigator of the Chief Justice's office was undoubtedly an affront to the Supreme Court, further undermining its reputation in comparison with the Constitutional Court.[114]

3.3.3 The Constitutional Court's comparatively better reputation

The desire for a clean, accessible judiciary has been a long-held aspiration of many in Indonesia.[115] In the short period since its establishment, the Court has largely been able to fulfil these expectations, providing a clean, modern justice system for the people. The Court has also been able to understand the gap between public expectations for a reformed judiciary and the reality on the ground,[116] which the Supreme Court has to date not been able to grasp.

As a result, public support for the Court has always been comparatively high. Parliamentary members, during budgetary meetings or meetings in which the Secretary of the Supreme Court and the Secretary General of the Constitutional Court appear

[111] Interview with Benny K Harman (DPR/Parliament Building, 18 June 2014).
[112] There were allegations that Probosutdjo had tried to bribe Supreme Court judges. Chief Justice Bagir Manan had been on the panel that heard his case. Even though the Corruption Eradication Commission did not find anything in their seizure of the Chief Justice's office, the effect of their actions was unbearable. See Indra Subagja, *Ketua MA Bagir Manan Diperiksa KPK di Kantornya* DetikNews <http://news.detik.com/read/2005/11/18/084611/480766/10/ketua-ma-bagir-manan-diperiksa-kpk-di-kantornya?nd771104bcj>.
[113] Nancy Irene, *'Presiden Bertemu Ketua MA dan Ketua KPK–Fokus'* (2014).
[114] Interview with Aria Suyudi (Indonesian Centre for Law & Policies Studies Office, 4 July 2014).
[115] Interview with HAS Natabaya (Constitutional Court Building, 10 December 2013).
[116] Ibid.

together, often compare the performance of the two courts and ask the Supreme Court to adopt reforms introduced by the Constitutional Court.[117]

The difference between the way the Constitutional Court and the Supreme Court manage their respective dockets and use public media to relate to ordinary Indonesians is also very marked. Under both Chief Justice Jimly and Mahfud, the Constitutional Court developed sophisticated media relations mechanisms that the Supreme Court has been unable to emulate. Although Supreme Court officials repeatedly argue that 'it is not fair to compare the Supreme Court and the Constitutional Court', this is nevertheless what the public does. The size of the Supreme Court, which is composed of the district courts, the appellate courts and special courts, including court personnel, is not comparable to the single Constitutional Court and its nine constitutional justices.

In summary, the Constitutional Court was created at a time when the Indonesian people had lost faith in the judicial system. The poor condition and status of the Supreme Court in particular was both the reason for the Constitutional Court's creation as a separate institution and also one of the reasons why it was able to distinguish itself rapidly in the public consciousness. In a sense, public expectations of what the judiciary could achieve were low, and the Court was able to exceed them easily.[118] The Court's authority was developed in contradistinction to that of the Supreme Court, which is to this day still preoccupied with its own internal problems and remains largely unreformed.[119] In contrast, the Constitutional Court did not need to be reformed as it started from scratch. This gave the justices, and Chief Justice Jimly in particular, great freedom to build the Court's systems from the ground up, appoint competent staff and generally create a modern institution that was distinguished in the public mind from the rest of the Indonesian judiciary.[120]

[117] Personal experience in attending hearings between judiciary institutions in the parliament.
[118] Interview with M Laica Marzuki (Residence, 19 December 2013); Interview with Dian Rosita (Lembaga Kajian dan Advokasi untuk Indepedensi Peradilan Office, 2 July 2014).
[119] Interview with Jacob Tobing (Indonesia Church Association (PGI) Office, 18 August 2014).
[120] Interview with Aria Suyudi (Indonesian Centre for Law & Policies Studies Office, 4 July 2014).

3.4 Factor 3: Political fragmentation

3.4.1 Introduction

In both new and established democracies, there is a need for parties to work effectively to make democracy work.[121] One important institutional condition for democracy is a well-functioning political party system.[122] The role of political parties is crucial as they are the 'principal mediators between the voters and their interests'.[123] Political parties are usually established to articulate coherent ideas, strengthening positions to achieve outcomes that meet with the people's aspirations.[124] In this section, the fragmentation of the Indonesian political party system will be documented by examining the results of the elections conducted from 1999 to 2014.

3.4.2 Elections before and immediately after the reform era

One of the agendas of the reform process, upon Suharto's fall, was to remove all restrictions on political parties. During the Suharto era (1966–1998), Indonesia had only three political parties, one of which was controlled by the President and had become a dominant political party.[125] After 1999, the newly unregulated political party system resulted in the establishment of party coalitions in most regions.[126] With a high number of political parties, it was thought that the DPR might well produce 'weak government with a high degree of internal conflict and immobilisation'.[127] Indeed, this has turned out to be the case. The configuration of political parties in Indonesia has been unstable from 1999 to date, with no party able to dominate the government.

The increase in the number of political parties participating in general elections from 1999 to 2014 can be explained in several ways. The 1999 general election was the first general election after the fall of Suharto in 1998, and the first ever free election after

[121] Ulla Fionna, *The Institutionalisation of Political Parties in Post-Authoritarian Indonesia* (Amsterdam University Press, 2014) 18.
[122] Robert A Dahl, *On Democracy* (Yale University Press, 1998) 37–38.
[123] Richard Gunther, José Ramón Montero and Juan Linz, *Political Parties: Old Concepts and New Challenges: Old Concepts and New Challenges* (Oxford University Press, 2002) 58.
[124] Fionna, above n 121, 16.
[125] David Reeve, 'The Corporatist State: The Case of Golkar' in Arief Budiman (ed), *State and Civil Society in Indonesia* (Centre for Southeast Asian Studies, Monash University, 1990) 151.
[126] Particularly for the Regional and Head of Regional Elections in which political parties often turned to coalition partners to nominate their candidate.
[127] Horowitz, above n 5, 56.

1950. The 1999 election was also an election in which the parliamentary members involved in redrafting the *1945 Constitution* participated. It is therefore not surprising that there was a huge proliferation of parties at this time. With the electorate's preferences essentially untested, numerous different parties that appealed to different interest groups were formed and contested the election.

The 2004 election was the first election in which parliament operated under the new constitutional arrangements, and in which the Court operated and was fully functional. Additionally, by 2004, the Court had already conducted its first attempt at resolving general election result disputes, settling 247 election result disputes, which resulted in 38 members of parliament being elected as a result of the Court's decisions. In 2009, 62 seats were exchanged as a result of the Court's decisions and in 2014, 11 seats.[128]

The only free national election in Indonesia before 1999 was held in 1955, during a period of parliamentary rule. The 1955 election resulted in a fragmented parliament, in which 28 parties won seats. However, four parties received about three-quarters of the total vote and secured 77 per cent of the seats, so party support was not impossibly fractured.[129] However, the 1955 parliament did not last long, and it seems that the parliamentary system did not then entirely suit the Indonesian public.[130]

With a new spirit post-Suharto, political parties sought to participate in constitutional change in Indonesia. Out of the 49 political parties registered in the general election, 21 won one or more seats in 1999, but the top six won 88.5 per cent of the vote.[131] The top four parties (PDI-P, Golkar, PKB and PPP) won 79 per cent of the votes, and the top two (PDI-P with 33.7 per cent and Golkar with 22.4 per cent) won more than half of the

[128] In 2009, during Mahfud's era, 11% of cases were granted and in 2014, during Hamdan Zoelva's leadership, the Court only decided 1.1% and no seats were exchanged in the DPR. In 2009, the Court retreated from the substantial justice approach introduced by Mahfud MD back to its original authority in deciding election result disputes. See Perludem, *Potret Pemilu Dalam Sudut Pandang Sengketa*, 2014.
[129] Herbert Feith, *The Indonesian Elections of 1955* (Modern Indonesia Project, Southeast Asia Program, Department of Far Eastern Studies, Cornell University, 1957) 58–59.
[130] Some scholars attribute the decline of Indonesian democracy in the 1950s to an undisciplined military, regional rejection against Java, differences of opinion concerning the role of Islam in the state, or the success of the Indonesian Communist Party. Herbert Feith, *The Decline of Constitutional Democracy in Indonesia* (Equinox Publishing, 2006); R William Liddle, 'Indonesia's Democratic Past and Future' (1992) *Comparative Politics* 443.
[131] 148 political parties were established close to the 1999 election, but only 49 political parties were eligible to participate in the general election.

votes.[132] The composition of the DPR was very different compared to previous elections during the Suharto era. Only 20 per cent of its members had served in the previous period, and only 10 per cent of the elected members were from the civil service or armed forces, compared to 37 per cent in the previous Suharto-Habibie era.[133] For the first time after four decades, Indonesia had freely elected its parliamentary members and those elected members played an important part in undertaking constitutional reform between1999 and 2002.

Before the national elections of 2004, new regulations governing political parties were established.[134] The 2004 election was also the first election to take place under the reformed *1945 Constitution*. By 2004, 261 political parties had been registered at the Ministry of Justice and Human Rights, even though only 24 political parties were actually eligible to participate in the election.[135] The five largest parties in 1999 remained strong in the parliament after the 2004 election, even though the composition of the seats changed and were distributed more equally between them. Nearly three-quarters of the DPR elected in 2004 were newcomers,[136] with pro-reform political leaders and different styles of doing political business.[137] Moreover, the top five parties in 1999 had gained 86.5 per cent of the vote and 90 per cent of elected seats; the same five in 2004 gained only two-thirds of the votes.

According to Horowitz, the seat distribution of the 2004 election result showed that the constitutional drafters (of 1999–2002) were not wrong when they worried about fragmentation, but the constitutional drafters may not have been aware of a potential threat as the result of presidential elections.[138] The MPR's decision regarding a separately elected President with a 50 per cent-plus-one threshold had fundamental

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[132] Donald E Weatherbee, 'Indonesia: Electoral Politics in a Newly Emerging Democracy' (2002) *How Asia Votes* 255, 255–81; Liddle, above n 130, 32–42.
[133] National Democratic Institute, 'The 1999 Presidential Election, MPR General Session and Post-Election Developments in Indonesia', *Kompas* (Jakarta), 1 October 1999 15.
[134] *Law Number 31 Year 2002 on Political Parties*.
[135] Tim Kompas, '*Partai-Partai Politik Indonesia: Ideologi dan Program* 2004–2009' (2004) *Jakarta: PT Kompas Media Nusantara*. Among those 261 political parties, 26 parties had not been verified by the Election Commission, 153 parties had been annulled by the Minister of Justice and Human Rights, and 58 parties did not satisfy the requirements of the *Political Parties Law 31 of 2002*.
[136] Horowitz, above n 5, 148.
[137] Edward Aspinall, 'Elections and the Normalization of Politics in Indonesia' (2005) 13 *South East Asia Research* 117, 136–38.
[138] Horowitz, above n 5, 280.

effects on dividing support, voter behaviour, external and internal party relations and presidential power.[139]

Megawati, as the incumbent President, ran against President SBY in the second round of presidential and vice-presidential elections in 2004. Initially, the political coalition that supported SBY won only one-fifth of all legislative seats and votes.[140] The SBY ticket even managed to secure a large fraction of votes from supporters of parties committed to other candidates in the first round.[141] Eighty-two per cent of Golkar supporters and 78 per cent of PP supporters voted for SBY in the second round, even though their party leaders urged them to vote for Megawati. Even one third of PDI-P supporters deserted Megawati for SBY in the second round.[142]

Even with a majority coalition, the DPR did not have a rubber stamp to support President SBY. The President prevailed on some issues, but not on all.[143] The initiating role of the President in the legislative process was not always well received, but it eventually began to take hold. It helped to have a majority in the DPR, even though the coalition was not uniformly sustained. Multipolar fluidity and cooperation across party lines occurred, but the government was also marked by cabinet instability, especially as the President was heavily dependent on parties other than his own.[144]

Prior to the 2009 national election, demand increased to reduce party fragmentation. The debate concerned three sets of requirements: registration of political parties, eligibility of parties to participate in DPR elections and to win seats, and eligibility to nominate presidential and vice-presidential candidates.[145] The *2008 Electoral Law* declared that any party that had qualified to contest the 2004 election was automatically eligible to contest the election in 2009, a provision later found to be unconstitutional by

[139] Ibid 154.
[140] This situation is almost similar to the 2014 presidential election in which Joko Widodo supported two political parties that had only 25% of the seats in the DPR.
[141] Aris Ananta, Evi Nurvidya Arifin and Leo Suryadinata, *Emerging Democracy in Indonesia* (Institute of Southeast Asian Studies, 2005) 21, 79–89.
[142] R William Liddle and Saiful Mujani, 'Leadership, Party and Religion: Explaining Voting Behavior in Indonesia' (2007) 40 *Comparative Political Studies* 832.
[143] For example, a proposed deregulation of some part of the labour market was held up, not by PDI-P alone, but by Golkar legislators as well. Damien Kingsbury, 'Indonesia in 2006: Cautious Reform' (2007) 47 *Asian Survey* 155, 156. This also happened when the president intended to take an unpopular decision to reduce fuel subsidies.
[144] Horowitz, above n 5, 153.
[145] *Law Number 2 Year 2008 on Political Parties, Law Number 10 Year 2008 on Elections of Representative to the DPR, DPD, and DPRD and Law Number 42 Year 2008 on Presidential Elections.*

the Court.[146] The law of political parties was designed to provide an advantage to large parties, making it difficult for smaller or newer political parties to participate in the 2009 national election.[147]

The most important reform for the 2009 elections concerned the establishment of a threshold for membership of the DPR, which had not been done in 1999 or 2004. Against the smaller parties' protests, the threshold was set at 2.5 per cent of the overall vote for 2009.[148] Another issue involved 'district magnitude', that is, the number of seats per constituency in a constituency-list system (such as Indonesia's). In general, the more seats that exist, the greater the proportionality and the more opportunities for smaller parties. The third question related to the rules for acquiring seats on remainders.[149]

In the 2009 national election, only nine parties won any seats at all, compared to 17 in the 2004 legislature. Twenty-nine parties qualified to participate in the 2009 election, receiving altogether more than 18 per cent of the vote, but elected no one to the DPR, due to the parliamentary threshold. In this election, 70 per cent of the DPR members elected in 2009 had not been in the 2004-2009 parliament.[150]

The result of the general election in 2014 changed the distribution of political power in the Indonesian parliament, with ten political parties in the DPR, as summarised in Table 3.1 below.

[146] Article 8(2) *Law No. 10 Year 2009 on Election of Representative to the DPR, DPD, and DPRD; Constitutional Court Decision Number 21/PUU-VI/2008.*
[147] Stephen Sherlock, 'Indonesia's 2009 Elections: The New Electoral System and the Competing Parties' (Centre for Democratic Institutions, 2009) 38.
[148] *Law Number 10 Year 2008,* Article 202(1).
[149] Horowitz, above n 5, 184.
[150] *Constitutional Court Decision Number 22-24/PUU-V/2008 Majority Vote and Female Candidate case*. This Court decision upheld 'simple majority' rule and declared as unconstitutional 'party nomination' for one electoral district. In consequence, candidates that had more votes secured the seat even though their name was at the bottom of the party's nomination list. This composition changed the structure and grass-roots politics of electing new parliamentary members at all levels.

Table 3.1: Seat Accumulation since the 1999–2014 Election[151]

Political Parties	1999 Election[152]	2004 Election	2009 Election	2014 Election
PDI-P	153	109	94	109
Golkar	120	128	106	91
PPP	58	58	38	39
PKB	51	52	28	47
PAN	34	52	46	48
PBB[153]	13	--	--	--
PK(S) [154]	7	45	57	40
PD [155]	--	57	148	61
Gerindra	--	--	26	73
Hanura	--	--	17	16
National Democrat	--	--	--	36

3.4.3 How did this political situation support the Constitutional Court?

Proportional representation, on the one hand, followed by a multi-party system on the other, did not just create political fragmentation within each parliament. It also prevented the consolidation of political party blocs in the DPR from one election to another. As described above, no political party dominated the DPR. The concentration of political parties did not change much, even though institutional reforms were introduced through provision for a new electoral threshold.

The main driver for political parties to support the independence of the Court was that they had an interest in the Court's role in maintaining a competitive electoral system.[156]

[151] Collected from Election Commission website and *Kompas* newspaper.
[152] Another 14 political parties gained seats in DPR (1, 2, 4 or 5 seats) but did not meet the election threshold for 2004 election.
[153] PBB accumulation votes did not meet the parliamentary threshold for the 2004, 2009 and 2014 elections.
[154] The PK was no longer eligible to participate in 2004, so it re-registered itself as the PKS for that election.
[155] The PD, Democrat Party (*Partai Demokrat*), the party of 2004 presidential candidate, Susilo Bambang Yudhoyono, was a new party organised before the election.
[156] M Stephenson, '"When the Devil Turns...": The Political Foundations of Independent Judicial Review' (2003) 32 *Journal of Legal Studies* 59.

Once political parties realised that the role of the Court was to protect democracy and provide adequate rule of law protections to maintain free and fair elections, they respected the Court's independence and focused instead on their main agenda: providing a menu of options appealing to a broad enough section of the electorate to secure a parliamentary majority.[157]

In Horowitz's view, Indonesian political parties have for the last 13 years consistently drafted new laws for each election.[158] This is far from standard practice in democracies around the world. It has not only created unstable laws from one election to another, but has also created battles between large and small political parties.[159] Those configurations created a factional equilibrium in which the Court had room to assert its independence and declare government policy unconstitutional.[160]

It is also noteworthy that, in its decision-making in election cases, the Court has acted as a policy maker—possibly more so than in other areas of law. For example, in its decision on the determination of seat allocations, the Court suggested the 'correct way' of determining seat allocation 'according to phase two and three' by providing an interpretation of the meaning of the 'open proportionality mechanism' as regulated by Article 5(1) of *Law 10 of 2008 on the General Election of National Representatives*.[161] The Court did not actually declare the relevant *Election Commission Regulation Number 15 (2009)* on the seat allocation mechanism invalid.[162] It was rather one of the Court's conditionally constitutional decisions and has been implemented through the specific mechanism the Court directed.[163] The Court has in this way built its institutional legitimacy by playing a key role in the management of the fairness of elections, while showing restraint where necessary.[164]

As noted, for almost 30 years during the Suharto era, Indonesia only had three political parties. After the fall of Suharto's regime in 1998, the 1999 elections were contested by

[157] Roux, above n 101, 121.
[158] Horowitz, above n 5.
[159] Ibid 206.
[160] Ibid 236.
[161] *Constitutional Court Decision 110-111-112-113/VII/2009.*
[162] *Constitutional Court Decision 110-111-112-113/VII/2009 par [3.37]*.
[163] *Constitutional Court Decision 110-111-112-113/VII/2009 par [3.37]*.
[164] On this route to legitimacy, see Martin Shapiro and Alec Stone Sweet, *On Law, Politics, and Judicialization* (Oxford University Press, 2002).

48 political parties. Currently, ten political parties have a seat in the DPR. The Indonesian Constitutional Court thus operates in an environment in which there is no dominant political party. Comparative studies from Asia, Eastern Europe, Latin America and the Middle East all support the claim that a political context of this sort is conducive to the emergence of judicial independence.[165] Fragmented political parties support constitutional courts by seeking out its independent view on disputed matters. Additionally, there is also often no unified bloc of parties capable of attacking these courts when their decisions prove inconvenient.[166]

Political fragmentation in parliament also often produces difficulties in drafting and adopting legislation. Even though the *1945 Constitution* provided that a law shall be discussed between parliament and the President/executive, in practice, the executive needs to negotiate each law with each faction in parliament. There is no single voice in parliament, and the executive thus needs to meet with each faction to accommodate its interests and pass legislation.[167] This situation tends to produce highly compromised and incoherent legislation that is susceptible to judicial review, thus further empowering and legitimising the Court.[168]

The Court has in this way acted as a neutral umpire, producing final and binding decisions for political parties and providing a mechanism for the settlement of their disputes.[169] As noted, this has been particularly apparent regarding disputes over election results, with the Court playing a central role in the relatively peaceful resolution of disputes arising from the 2004, 2009 and 2014 elections. In contrast, other institutions, such as the Supreme Court, the DPR and the President, have had their credibility questioned in relation to disputes arising from these elections.[170]

A strong and legitimate Constitutional Court has served the interests of major political actors in Indonesia, including political parties. Although political parties have had to

[165] Rebecca Bill Chavez, 'The Rule of Law and Courts in Democratizing Regimes' in R Daniel Kelemen, Gregory A Caldeira and Keith E Whittington (eds), *The Oxford Handbook of Law and Politics* (Oxford University Press, 2008) 63.
[166] Gretchen Helmke, 'The Logic of Strategic Defection: Judicial Decision Making in Argentina under Dictatorship and Democracy' (2002) 96*American Political Science Review* 291.
[167] Interview with Agus Hariadi (Ministry of Law and Human Rights Building, 4 July 2014).
[168] Ibid.
[169] Interview with Ramlan Surbakti (Kemitraan Office, 2 July 2014).
[170] Ibid.

give up some of their power to the Court, in return they have received the ability to operate in a relatively stable and predictable environment.[171]

3.5 Factor 4: Lack of political maturity

3.5.1 Introduction

This section argues that Indonesian political parties' failure to reform and modernise has contributed to the Constitutional Court's ability to assert its independence. This situation has allowed it to distinguish itself as a relatively modern and better functioning institution. In a sense, parliamentary members have been too busy establishing and regulating other institutions, such as the Constitutional Court itself, the Corruption Eradication Commission and the judicial commission, to attend to the problems in their own purview.

3.5.2 Failure to equip candidates

The first failing on the part of political parties has been their inability to develop and recruit qualified candidates they can then nominate to the position of legislator. Political parties are responsible for recruiting, grooming and maintaining qualified persons. What has happened in Indonesia is that political parties have allowed new candidates, with no political background or qualifications, to register and stand for election in an attempt to increase their popularity with the people and win their votes.

This failure of leadership can also be seen in the performance of political parties. There has been almost no attempt by political party leaders to enter into rational relationships with the electorate based on the principle of mutual exchange, that is, the people's votes in exchange for public services delivered. At the same time, party leaders seem to be trapped in an oligarchic system, so that commitment to the democratic process often stops at speeches that do not commit to concrete ideologies or political programs.[172] Ironically, the party leadership has remained institutionalised along oligarchic lines,

[171] Interview with Philips Vermonte (CSIS Office, 12 December 2013).
[172] Syamsudin Haris, Masalah-Masalah *Demokrasi dan Kebangsaan Era Reformasi (Yayayan Pustaka Obro Indonesia* 2014) 21. The PDI-P phenomenon under the leadership of Megawati Soekarnoputri and the National Awakening Party (PKB) led by Abdurrahman Wahid is a concrete example of the institutionalisation of the leadership of oligarchic parties. The Democrats were also stricken with an oligarchic leadership style at the same time under the leadership of President Yudhoyono.

even though, since the fall of Suharto, the formal political system has operated through direct elections.[173]

Frequent internal party conflicts that led to party divisions and factionalism confirm the general failure of party leaders to maintain party discipline and stability. A lack of leadership in managing these conflicts often leads to dissolution or disbandment of political parties.[174] During the Suharto era, political party conflict resulted from the State intervening in the election of party leaders. However, in the reform era, internal party conflicts still exist. For example, the PDI-P internal conflict resulted in the establishment of *Partai Nasional Benteng Kemerdekaan* (PNBK), *Partai Demokrasi Pembaruan* (PDP) and *Partai Indonesia Tanah Air Kita* (PITA). The PAN internal conflict created *Partai Matahari Bangsa* (PMB) and the PPP internal conflict created *Partai Bintang Reformasi* (PBR). Various losing candidates for the chairmanship of Golkar have left Golkar to create new political parties: *Partai Hanura* (created by Wiranto), *Partai Gerindra* (created by Prabowo Subianto), and *Naseem* (created by Surya Paloh). The less regulated political environment in the reform era allowed these three leaders to leave Golkar and create new political parties that gained seats in the national and regional parliaments, thus further contributing to political fragmentation.

Moreover, even though the Indonesian political system is a multi-party democracy, until recently there have been no significant ideological differences between parties in the DPR. Formally, parties claim that they have different ideologies. However, in reality, the differences are difficult to discern in debates over policy.[175] When required to further their interests, all political parties can cooperate with each other, irrespective of ideological differences. The consequence of this is that the Indonesian party political system is really a type of cartel system, in which parties offer their cooperation to other parties in return for rents, rather than competing with each other on the basis of particular ideologies or policy platforms.[176] All political parties are also prepared to

[173] Syamsuddin Haris, '2005 *Pemilu Langsung di Tengah Oligarki Partai: Proses Nominasi dan Seleksi Calon Legislatif Pemilu* 2004'; Tim Kompas, *'Partai-Partai Politik Indonesia: Ideologi dan Program 2004–2009'* (*PT Kompas Media Nusantara*, 2004).
[174] Such conflict recently led, for example, to the dissolution of Golkar and PPP.
[175] Syamsudin Haris, Masalah-Masalah *Demokrasi dan Kebangsaan Era Reformasi (Yayayan Pustaka Obro Indonesia* 2014) 22.
[176] Kuskridho Ambardi, *The Making Of The Indonesian Multiparty System: A Cartelized Party System And Its Origin* (Ohio State University, 2008).

sacrifice their principles in return for an opportunity to become part of the government.[177]

For all these reasons, political parties have failed to provide qualified legislators to the DPR and have also failed to recruit loyal supporters. Instead, political parties act as electoral machines for the aggregation of rent-seeking interests.[178] It is in this sense that political parties in Indonesia may be regarded as immature. Although the system serves the interests of the party leadership,[179] the shifting allegiances of parties and individuals within parties makes durable coalitions impossible. While adverse to Indonesia's interests, this situation has at least allowed the Court to resist attacks on its independence. As discussed in Chapters 1 and 6, although political parties managed to coordinate sufficiently to introduce legislative amendments to the Court's jurisdiction and powers in 2011, they were not able to persist in those amendments after the Court overturned them.

3.5.3 The failure to reform

The fundamental reason for the failure of political parties in Indonesia is that they lack clear and transparent funding sources.[180] This leads sitting members of parliament or ministers to use their offices illegally to take State funds. As a consequence, numerous political party members have been arrested on corruption charges. Alternatively, political parties rely on support from wealthy individuals, thus turning them into vehicles for these individuals' interests. This is a further reason for political parties not being well institutionalised in Indonesia. Instead of aggregating interests along ideological lines, parties are dominated by individuals who act as charismatic figures. Once again, this otherwise regrettable situation has proved to be beneficial to the Court. With the exception of the Akil Mochtar case,[181] the Court has been able to project itself

[177] Syamsudin Haris, Masalah-Masalah *Demokrasi dan Kebangsaan Era Reformasi (Yayayan Pustaka Obro Indonesia* 2014) 23.
[178] Harun Husein, *Pemilu Indonesia: Angka, Analisis dan Studi Banding (Analysis and Comparative Study Election in Indonesia: Numbers trans, Perludem (Perkumpulan untuk Pemilu dan Demokrasi*), 2014) 63.
[179] Interview with Djayadi Hanan (Syamsul Mujadi Consulting Office, 16 June 2014).
[180] Perkumpulan untuk Pemilu dan Demokrasi et al, *Keuangan Partai Politik: Pengaturan Dan Praktek* (Kemitraan bagi Pembaruan Tata Pemerintahan, 2011).
[181] Chief Justice Akil Mochtar, Mahfud MD's successor, was arrested on 3 October 2013 at his residence. The Corruption Eradication Commission caught Mochtar red-handed receiving bribes from parliamentary members in connection with the head of regency election result dispute of Gunung Mas, in Central

as a comparatively clean and reliable institution. The Court's institutional legitimacy is a relational phenomenon, with the Court distinguishing itself not just by its achievements but also by its achievements relative to other bodies.

This situation is quite ironic. During the constitutional amendment process, political parties successfully created a new Constitution for Indonesia. Political parties were also able to produce institutions that functioned well to support the process of democracy, such as the Corruption Eradication Commission (KPK), the Constitutional Court itself, and many other bold innovations. However, political parties have failed to reform themselves. Worse, political parties have arguably passed a critical phase, or 'punctuated equilibrium',[182] during which it was still possible to conduct meaningful reform. Now that this phase has passed, a new trajectory has become entrenched, meaning that it will be very difficult for political parties to reform themselves.

As a result, the party system is still feudal and closed, and political parties' strategic decisions often ignore the aspirations of the rank and file: '[t]he Party serves only as a means of channelling the political objectives of the party owner without trying to communicate with the cadres', said Yunarto.[183] Meanwhile, researchers Formappi and Lucius Karus have stated that current political parties take decisions more on the basis of the elites' interests, and these interests do not always align with the party's ideology.[184]

Some studies underline that the institutionalisation of democracy in Indonesia during the last decade is relatively more promising than, for example, in the Philippines and Thailand.[185] If the concept of institutionalising the party system is based on the level of 'stability of inter-party competition', as proposed by Mainwaring and Torcal,[186] most political parties in Indonesia are more institutionalised than the parties in these

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Kalimantan. The Corruption Court later found Akil guilty of receiving bribes and money laundering. The Court sentenced Akil to life imprisonment, a decision that was affirmed by the Supreme Court.

[182] Stephen D Krasner, 'Approaches to the State' (1984) 16 *Comparatives Politics* 223.

[183] FAJ, '*Pemecatan Wanda Bentuk Pemasungan'*, *Kompas* (Jakarta), 17 September 2014.

[184] Ibid.

[185] Krasner, above n 182, 28.

[186] Mariano Torcal and Scott Mainwaring, 'The Political Recrafting of Social Bases of Party Competition: Chile, 1973–95' (2003) 33 *British Journal of Political Science* 55.

countries.[187] Marcus Mietzner has offered a similar assessment, stating that the resilience of parties in Indonesia is relatively stable, not only compared to other political parties in the Philippines and Thailand, but also compared to political parties in South Korea.[188] Studies conducted by Aspinall and Mietzner highlight that if the performance of democratic institutions is able to increase qualitatively, Indonesia will have a promising future.[189] However, the problem is how to ensure that political parties work optimally in the public interest.

Unlike other institutions as products of reform, political parties cannot reform themselves.[190] Political parties manage quite well when their internal processes are undemocratic, oligarchic and driven by individuals. The problem is that the failure to institutionalise democratic procedures within parties affects the quality of democracy more generally.[191] Consequently, political parties are reluctant to submit themselves to democratic procedures, including the check and balances system installed by *1945 Constitution*.

As noted earlier, the failure to institutionalise political parties has created a situation of cartelisation. A 'cartel'[192] describes the situation in which each party disregards its ideological commitment and programs to maintain its existence as one group. The competition between political parties finishes once the election period has passed and each party has secured its parliamentary seats[193]

One of the most cited scholars on the political party system in Indonesia is Dan Slater, who identified the development of the political cartel in Indonesia.[194] Slater argues that

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[187] Andreas Ufen, 'Political Party and Party System Institutionalization in Southeast Asia: Lessons for Democratic Consolidation in Indonesia, the Philippines and Thailand' (2008) 21 *Pacific Review* 327.
[188] Marcus Mietzner, 'Stable but Unpopular' (2008) 92 *Inside Indonesia* (available at http://www.insideindonesia.org/stable-but-unpopular).
[189] Edward Aspinall and Marcus Mietzner, *Problems of Democratisation in Indonesia: Elections, Institutions and Society* (Institute of Southeast Asian Studies, 2010).
[190] Interview with Ramlan Surbakti (Kemitraan Office, 2 July 2014).
[191] Ibid.
[192] The political cartel thesis was introduced by Katz and Mair in 1995 and restated in 2009. See Richard S Katz and Peter Mair, 'Changing Models of Party Organization and Party Democracy: The Emergence of the Cartel Party' (1995) 1 *Party Politics* 5; Richard S Katz and Peter Mair, 'The Cartel Party Thesis: A Restatement' (2009) 7 *Perspectives on Politics* 753.
[193] Kuskridho Ambardi, *Mengungkap Politik Kartel : Studi Tentang Sistem Kepartaian Di Indonesia Era Reformasi / Kuskridho Ambardi* (Kepustakaan Populer Gramedia bekerjasama dengan Lembaga Survei Indonesia, 2009)
[194] Dan Slater, 'Indonesia's Accountability Trap: Party Cartels and Presidential Power after Democratic Transition' (2004) *Indonesia* 61.

political parties in Indonesia suffer from a condition he refers to as the 'accountability trap', which is associated with the failure of political parties to operate as a check and balance on government. As a result, the political system is perceived as one large arena for competition rather than as consisting of a governing party and opposition.[195] As a group, political parties disregard their public interest programs as promised in their campaigns, and collectively support the government's program.[196] Slater's argument may be correct in terms of President SBY (2004–2014). However, it needs readjustment to consider recent developments in Indonesia. Two 'almost' permanent coalitions in parliament will determine the future of President Joko Widodo, whose own supporting parties form a parliamentary minority.

3.5.4 Corruption

The democratisation process that Indonesia has been through clearly shows there is no guarantee that democracy will work against corruption.[197] Indeed, elections held to achieve democracy may promote corrupt practices as they lead to vote-buying and money politics, which in turn lead to a reduction in the quality of democracy. Nevertheless, this condition may not last forever and improvements may arise slowly. Research shows that political corruption usually increases in the early stages of democratisation, but declines later.[198] More than a decade after Indonesia's democratic transition, accomplishments include the constitutional amendment process and the new institutions it created. Even so, Indonesia is still considered a low-quality democratic country.[199] One factor supporting this categorisation is the corruption epidemic, which is closely related to how political parties govern and control their funding. Political parties with millions of members have the capacity to conduct significant programs, but

[195] Djayadi Hanan, *Making Presidentialism Work: Legislative and Executive Interaction in Indonesian Democracy* (Ohio State University, 2012).
[196] Ambardi, above n 193.
[197] Yan Sun and Michael Johnston, 'Does Democracy Check Corruption? Insights from China and India' (2009) 42 *Comparative Politics* 1.
[198] Samuel P Huntington, *Political Order in Changing Societies* (Yale University Press, 2006) 59; Larry Diamond, *Developing Democracy: Toward Consolidation* (JHU Press, 1999) 240; Etienne B Yehoue, *Ethnic Diversity, Democracy, and Corruption* (International Monetary Fund, 2007).
[199] Jamie Seth Davidson, *From Rebellion to Riots: Collective Violence on Indonesian Borneo* (NUS Press, 2009) 209; Larry Diamond, *The Spirit of Democracy: The Struggle to Build Free Societies throughout the World* (Macmillan, 2008) 220 (referring to Indonesia as 'a troubled democracy'). Horowitz above n 5 uses the term 'incremental'.

fail to conduct proper fund raising. Parties have also failed to report their funding sources, and prepare financial reports on the allocation of their funds.

The *Political Parties Law*[200] regulates political parties and stipulates that they may obtain funds from member fees, legitimate contributions and State support (national and regional funds).[201] Legitimate contributions, according to the *Political Parties Law*, consist of internal party (without limitation) and third party contributions. A third party contribution is limited to IDR 1 billion for personal contributions and IDR 7.5 billion for corporate contributions. State support (national and regional State budgets) consists of a funding contribution for each of the parties that secure a seat in national and regional parliaments, according to the number of votes they receive. According to the national budget, each vote received will be compensated by an amount of IDR 108.[202] Unfortunately, regional support differs according to each regional State budget. In the Sanggata regency, Kaltimpost reported that the regency compensated at IDR 5.500 per vote, or 51 times more than the national support for each vote.[203]

Membership fees as a source of party funding are listed first in the *Political Parties Law*, but have not always been used effectively. A study by the Elections and Democracy Association found that no parties used membership fees as their main funding source, at either the national or the regional level.[204] In the past, Justice Welfare Parties (*Partai Keadilan Sejahtera*) used this method fully, but this did not last long. This study further found that party officials viewed membership fees or member contributions as a cost for their members, which operated as a disincentive to the party's institutional strengthening efforts. Additionally, implementing this mechanism was difficult technically. Finally, the amount was not significant.

The abovementioned study conducted by the Elections and Democracy Association estimates that, for the day-to-day running of a political party's organisation—

[200] '*Undang-Undang Nomor 8 Tahun* 2011', (2011) *UU Partai Politik.*
[201] Ibid Articles 34A and 35.
[202] *Minister of Interior Decree 212 of 2010 regarding Financial Support towards Political Parties that secured seats at the DPR.*
[203] Harun Husein, *Pemilu Indonesia : Angka, Analisis dan Studi Banding* (*Analysis and Comparative Study of Election in Indonesia*: [Numbers trans] *Perludem (Perkumpulan untuk Pemilu dan Demokrasi*, 2014) 91.
[204] *Perkumpulan Untuk Pemilu dan Demokrasi (Perludem)* et al, *Keuangan Partai Politik : Pengaturan dan Praktek, Kemitraan bagi Pembaruan Tata Pemerintahan* No (2011).

secretariat, political education and regeneration, public campaign and travel—each party would require at least IDR 51.2 billion per year. The average reported party's income is IDR 1.2 billion per year. There has been no clear explanation by political parties on the mechanism used to close the resulting IDR 50 billion gap.[205] The assumption is that parties do use other mechanisms to support their finances, including elected members' contributions and unreported funding contributions. This is what has often led to corruption charges.

Blatant corruption scandals, such as those involving legislators who were willing to accept bribes in exchange for supporting specific legislation, have been acknowledged publicly.[206] Other examples include reports of parliamentary members who allegedly received payments to vote favourably on the confirmation of a senior central bank official,[207] and the KPK's allegation that 26 parliamentary members from Commission XI received traveller's cheques in return for deleting an entire section in the new health legislation dealing with tobacco as an addictive substance.[208] Even central government departments pay for favourable legislation, and regional governments pay for the release of central government funds.[209] The KPK also arrested parliamentary members from Commission IV, including the Provincial Secretary (*Sekretaris Daerah*) regarding the conservation of protected forests in Bintan, in the Province of Riau.[210]

Corruption also plagues the presidential election process, which is marked by the difficulty candidates experience in satisfying numerous parties and building the required

[205] Ibid.
[206] Greg Barton, 'Indonesia's Year of Living Normally' in Daljit Singh and Tin Maung Than (eds) *Southeast Asian Affairs 2008* (Singapore: Institute of Southeast Asian Studies, 2009)135-36; Angus McIntyre, *The Indonesian Presidency: The Shift from Personal Toward Constitutional Rule* (Rowman & Littlefield, 2005) 246; *Freedom House, Freedom in the World 2008* (Freedom House, 2009) 1, 326–25; Patrick Ziegenhain, *The Indonesian Parliament and Democratization* (Institute of Southeast Asian Studies, 2008) 166–67; Diamond above n 198, 22.
[207] Natasha Hamilton-Hart, 'Government and Private Business: Rents, Representation and Collective Action' (2007*) Indonesia: Democracy and the Promise of Good Governance* 93–114, 110–111.
[208] *Jakarta Globe*, 14 October 2009; Edward Aspinall, 'The Irony of Success' (2010) 21 *Journal of Democracy* 20, 27.
[209] Harold A Crouch, *Political Reform in Indonesia after Soeharto* (Institute of Southeast Asian Studies, 2010) 70–73. Government bodies, business firms, and societies have been known to pay DPR commission chairs for the approval of proposed legislation; William Case, *Executive Accountability in Southeast Asia: The Role of Legislatures in New Democracies and under Electoral Authoritarianism* (East-West Center, 2011) 27.
[210] *Kompas*, 7 July 2008.

coalition to be elected.[211] Political parties that joined the winning presidential coalition in 2004 and 2009 rushed for ministerial positions, using these as sources of party revenue and administration.[212] The important and increasing role of money in presidential campaigns, which began in 2009, will make anti-corruption efforts more difficult. This is especially so as much of the corruption in Indonesia is undertaken not to enhance private welfare but to meet the needs of political parties and candidates.[213] All parties require payments to survive.[214] Research shows that 22 of the 70 ministries and government agencies of the Indonesian central government have foundations (*Yayasan*) or are affiliated with them, and at least 46 of them use State assets. These are often not audited by the Government Audit Board (*Badan Pemeriksa Keuangan*).

Even though Indonesia has tried to work on this issue, the Transparency International Corruption Perception Index 2004 to 2013, indicates that Indonesia moved from a score of 2.0 to 3.2 (a slight improvement) but was still ranked below India, Thailand and China.[215] In a 2010 survey, 69.1 per cent of responses declared that the level of corruption in Indonesia was high or very high,[216] and a few respondents believed that the struggle against corruption was going well or better than it had done previously. As a result, even though most supporters of political parties did not believe their parties put the public interest first, frustration towards political parties was very high.[217] This certainly led to a decline in public support for political parties, with knock-on effects for the DPR.

Transparency International also found that political parties and parliament were the most corrupt institutions in Indonesia and politicians were the most corrupt actors,[218] followed by the judiciary and police in 2013. Public trust in political parties is also at its lowest point, compared to public trust in the military, government (central and

[211] Nadirsyah Hosen, *Reform of Indonesian Law in the Post-Soeharto Era (1998-1999)* (PhD Thesis, Faculty of Law, 2004).
[212] Horowitz, above n 5, 153.
[213] Legislative candidates and Regional Heads or Vice Heads.
[214] Horowitz, above n 5, 223.
[215] Deborah Hardoon and Finn Heinrich, *Global Corruption Barometer 2013* (Transparency International 2013). The scale ranges from 0 to 10, from high to low corruption.
[216] *Lembaga Survei Indonesia, Ketidakpercayaan Publik Pada Lembaga Pemberantasan Korupsi* (Public Distrust of Bodies Fighting Corruption), LS, Jakarta, 10–22 October 2010, 14.
[217] Paige Johnson Tan, 'Anti-Party Reaction in Indonesia: Causes and Implications' (2002) 24 *Contemporary Southeast Asia* 484.
[218] Hardoon and Heinrich, above n 215, 36.

regional), police and parliament.[219] A similar situation is evident in the unfolding of various cases of budget funds abuse by party politicians in parliament or in the general public's perception of parties' performances.[220]

People question the quality of parliamentary members because of money's influence in elections. Massive 'money politics' during general elections is something that cannot be denied. As a consequence, the public finds it difficult to appreciate the actions that parliament takes.[221]

The failure to groom candidates and reform themselves has also affected political parties' selection of candidates to become parliamentary members. Center for Strategic and International Studies (CSIS) research showed that 82 per cent of people had no knowledge about their representatives.[222] The election system that has been created does not support the district mechanism that leads to less accountability from elected members of parliament to their constituents. This also results in there being only a weak relationship between constituents and their parliamentary member. In the 2014 election, people were more likely to vote for a political party than the person standing for parliament. In the 2009 elections, people were allowed to vote either for their representative or a political party, and the repeated pattern of voting for political parties in the 2014 elections proved the existence of a disconnect between candidates and constituents.

Nevertheless, the quality of parliamentary members from 2009 to 2014 was better than in previous generations. Members had better educational backgrounds than the previous generation of politicians. Seventy per cent of members after the 2009 elections were new to parliament, compared to 2004 to 2009, and most were entrepreneurs or former government officials.[223] The 2009 members of parliament were younger and better

[219] Syamsuddin Haris, *Praktik parlementer demokrasi presidensial Indonesia/Syamsuddin Haris*; editor, Putri Christian (CV Andi Offset, 2014) 174.
[220] *Pramono Anung Wibowo, Mahalnya demokrasi, memudarnya ideologi: potret komunikasi politik legislator-konstituen/Pramono Anung Wibowo; pengantar Megawati Soekarnoputri (Penerbit Buku Kompas*, 2013).
[221] Interview with Benny K Harman (DPR/Parliament Building, 18 June 2014).
[222] Interview with Philips Vermonte (CSIS Office, 12 December 2013).
[223] Interview with Ronald Rofliandi (Indonesian Centre for Law & Policies Studies Office, 11 December 2013).

educated, but most lacked adequate political experience; statistically, they had no experience in politics.[224]

The majority vote system that used to apply in DPR elections has created opportunities for candidates with private wealth or access to private wealth to become elected. In comparison with proportional representation systems, political parties in majority vote systems have little control over their candidates. This means that candidates are not required to involve the political party machine to win an election, but can instead use their own resources.[225]

The method of proportional representation, combined with majority vote rule that has been applied in Indonesia since the 2009 legislative elections, has created a new type of parliamentary member. As explained by the leader of the PDI-P faction:

> [i]n order to become a parliamentary member, we have to fight internally with other fellows from the same political parties. Political recruitment that we intended, it is not happening. If we close the recruitment system, the political party can punish the members that are doing wrong or not performing. It [majority vote rule] is changing the political structure. No wonder we have Parliamentary Members of such low quality, making democratisation a slow process. We cannot choose the smartest people. They lose to the people who have money and the ability to increase the vote.[226]

Larry Diamond writes that even though political rights and civil liberties in Indonesia have improved rapidly in comparison to Thailand and the Philippines, good governance, policy and the rule of law have decreased compared to India and those two countries.[227] Bappenas and UNDP report in relation to the *Index Democracy in Indonesia* reports that

[224] Interview with Eryanto Nugroho (Indonesian Centre for Law & Policies Studies Office, 11 December 2013).
[225] Interview with Ronald Rofliandi (Indonesian Centre for Law & Policies Studies Office, 11 December 2013).
[226] Interview with Yasonna Laoly (Kuala Namu International Airport Lounge, 8 December 2013). Currently, Mr Yasonna serves as Minister of Law and Human Rights under Jokowi's Administration.
[227] Larry Diamond, 'Indonesia's Place in Global Democracy' in *Problems of Democratisation in Indonesia: Elections, Institutions and Society* (Singapore: ISEAS, 2010) 51.

even though the index of political rights is relatively high, the index of the institution of democracy (election, parliament, political parties and bureaucracy) is low.[228]

It is difficult to deny that democratisation after the fall of Suharto's regime has increased rapidly. The amendment of the Constitution, democratic elections and direct elections for the President, vice President and head of regional government, have contributed to this. However, at the same time, popular understandings of politics, political parties, elections, democracy and the essence of good governance have significantly decreased. As a result, political parties that should be considered as a channel and forum to serve, train and increase political awareness in the public have lately become a vehicle to obtain employment.[229] Elections in Indonesia tend to produce members of parliament who are ready to 'take', rather than leaders who are responsible and ready to serve the people.

As argued by Haris, respect for the right to freedom of association, which has encouraged the formation of dozens of political parties after Suharto, has seemingly not changed the character of political parties.[230] Instead, political parties have inherited the structural failures that existed before Suharto.[231] Consequently, there is almost no tradition of rationally organised, democratic and responsible political parties in Indonesia. It is common for decisions and political choices to be determined by a handful of political party leaders, or even a party leader.[232] Ironically, there is no dedicated or serious attempt by political parties to change or reform this situation. Political leaders exploit this situation to maintain their power.[233]

There is demand for political parties to conduct internal reform themselves.[234] On the other hand, the current electoral system has led to a situation where there is no need for

[228] Maswadi Rauf, *Laporan Akhir Indeks Demokrasi Indonesia, Bappenas-UNDP* No (2008) (quoted in Syamsudin Haris, *Masalah-Masalah Demokrasi dan Kebangsaan Era Reformasi (Yayayan Pustaka Obro Indonesia* 2014)).
[229] Haris, above n 219, 18.
[230] Ibid.
[231] Ibid 178.
[232] Ibid 178.
[233] Ibid 179.
[234] Syamsuddin Haris, *Partai, Pemilu, Dan Parlemen : Era Reformasi / Syamsuddin Haris* (Yayasan Pustaka Obor Indonesia, 2014); Interview with Philips Vermonte (CSIS Office, 12 December 2013); Interview with Saldi Isra (International Airport Soekarno Hatta Lounge, 16 June 2014).

political parties to be accountable to the public.[235] The election system that created parliament has produced a situation in which a political party only needs the public vote for a five-year term. There is no need for a parliamentary member or political parties to take care of their constituents or to be accountable to those constituents.[236]

3.5.5 The mentioned factors' effects on the Constitutional Court

In this context of broken political parties and imperfect democratisation, the role of the Constitutional Court has become critical. As Mietzner has argued, the failure of political parties to settle their issues requires the Court to become involved in settling political party disputes.[237] Individually, political party members may not approve of the Court playing this role, but institutionally, political parties need to respect the Court's independence; it acts as an umpire for political parties.[238]

As we have seen, the Court has also been able to present itself as a clean and effective institution compared to political parties and the DPR. The Secretary General of the Court has received a clean audit report from the Ministry of Finance each year from 2004 up to 2014. The 2004 report marked the first time the judiciary had received this award.

A further effect of the poor state of political parties in Indonesia is that it is very difficult to build a coalition permanently to alter the Court's jurisdiction. The Court was created through constitutional amendment, and its constitutional basis has protected it against political disaffection arising from its activist role. In effect, parliament has little capacity to revise the Court's jurisdiction through constitutional amendment. The Court's popularity, and the disinclination of all political actors to re-open the delicate constitutional reform process, has effectively insulated the Court from this form of attack.[239]

Ironically, the Court is partly to blame for the poor health of political parties in Indonesia. Its decision to enforce the majority vote system has contributed to the

[235] Interview with Ramlan Surbakti (Kemitraan Office, 2 July 2014).
[236] Ibid.
[237] Edward Aspinall and Marcus Mietzner, *Problems of Democratisation in Indonesia: Elections, Institutions and Society* (Institute of Southeast Asian Studies, 2010).
[238] Interview with Philips Vermonte (CSIS Office, 12 December 2013).
[239] Interview with Djayadi Hanan (Syamsul Mujadi Consulting Office, 16 June 2014).

situation where candidates with money and influence tend to be elected.[240] In this contradictory sense, the Court has reinforced the political conditions for its own independence. However, political parties are also themselves to blame. As a result of their failure to reform, the public's perception is that political parties have not changed much from the way they functioned under the Suharto regime. In essence, the public perception is that political parties consist of people who seek power at all costs, even to the extent of being prepared to change their political affiliation as easily as people change their clothes.[241] Political parties in turn are seen as vehicles to achieve power, rather than institutions to be developed and to fulfil public expectations.

3.6 Conclusion

This chapter has argued that four main political conditions have supported the Indonesian Constitutional Court's legitimacy and the space it has enjoyed to assert its role in national politics. The political momentum behind the creation of the Court carried over into an initial 'honeymoon period', in which the Court had considerable freedom to act. Thereafter, the slow progress made regarding the reform of the Supreme Court, the fragmentation of the Indonesian political party system and the general immaturity of that system have all contributed to the Court's capacity to distinguish itself in the public mind as a relatively clean and credible actor.

While the extent of the Court's activism eventually became apparent, the difficulty of introducing further amendments to the *1945 Constitution* meant that the Court could resist the two legislative attacks of 2011 and 2013 (Government in Lieu Number 1 Year 2013 on Second Amendment of *2003 Constitutional Court Law*). As the Indonesian case shows, in countries where constitutional amendment is fraught with difficulty, it is one thing to form a political coalition to attack a constitutional court through ordinary legislation, and another to form the more durable coalition required to mount an effective constitutional attack.

The arguments in this chapter regarding the extent of corruption in Indonesia and the way this has degraded the legitimacy of political parties are not new. However, this chapter has sought to establish the impact of these factors on the Court's institutional

[240] *Constitutional Court Decision Number 22-24/PUU-V/2008 Majority Vote and Female Candidate case*.
[241] Interview with Djayadi Hanan (Syamsul Mujadi Consulting Office, 16 June 2014).

legitimacy in particular. Here too, there appears to be little reason for the political conditions supporting the Court's independence to change any time soon. For as long as corruption remains a problem in Indonesia and the Court can avoid another Akil Mochtar scandal, the Court will have a comparatively better public reputation than the DPR and presidency, and will be able to rely on this factor to see it through periods of legislative attack. Whether this is a positive condition for democratisation in Indonesia in the long run is another question. The Court's capacity to resist attacks on its independence does not necessarily translate into a capacity to promote democratisation, beyond the steps it has already taken.

This chapter has explained how various external political conditions might have contributed to the Indonesian Constitutional Court's institutional legitimacy and its ability to resist the 2011 attack on its independence. The political context for judicial review in Indonesia, however, does not explain the precise timing of the attack. Why was it attacked in 2011 and not before? To answer this question, the following two chapters consider various internal factors, including doctrinal developments and differences of adjudicative style between the Jimly and Mahfud Courts.

Chapter 4: Two Courts and Two Personalities: Comparing the Jimly and Mahfud Courts

4.1 Introduction

The previous chapter explained the external political conditions impacting on the Indonesian Constitutional Court's institutional strength and independence, while the following chapters (4 and 5) will focus on explaining the internal differences between the Jimly and Mahfud courts. The issues considered are the contrasting leadership and reasoning styles of the two chief justices and the decision-making processes they encouraged. The latter topic is left for Chapter 5. That chapter will also explore the internal factors that directly led to the 2011 backlash. Chapter 5 has more of a doctrinal focus, whereas this one concentrates on matters of style.

The Indonesian Constitution provides that the Constitutional Court is made up of nine justices, of which three are nominated by the President, three by the DPR and three by the Supreme Court.[1] Since its establishment in 2003 up until 2013 (the end point for this thesis), the Court was led by two Chief Justices: Jimly and Mahfud. Their tenures were associated with two almost completely different benches, both in terms of composition and character.[2] Chief Justices Jimly and Mahfud played an important part in this contrast: how they dealt with their bench determined both the outcomes of decisions and public perceptions of the Court. Each bench struggled in its own way to establish the Court's institutional legitimacy.

The first bench led by Chief Justice Jimly had virtually no institutional support when sworn in on 16 August 2003. Jimly often said that when a person became a constitutional justice, they would have only 'three documents' to support their job: the *1945 Constitution*, the 2003 Constitutional Court Law and the Presidential Decree appointing them as constitutional justice.[3] In the case of the first bench, the recruitment process took three days, and only the nominations from parliament used a fit and proper

[1] Article 24C(3) of the *1945 Constitution*.
[2] Chief Justice Jimly Asshidiqqie led the Court from 16 August 2003 up to 17 August 2008. Chief Justice Mahfud MD led the Court from 18 August 2008 to 31 March 2013.
[3] Jimly Asshiddiqie, 'Constitutional Change' paper presented at the *The Constitutional Court & Democracy in Indonesia: Judging the First Decade Workshop*, Sydney 11 December 2014.

test. The first constitutional justices were accordingly criticized as being 'second-class',[4] and there was a general air of pessimism regarding the Court's institutional prospects.[5]

This chapter will argue that, by the time the second bench was sworn in on 16 August 2008, the Court had already demonstrated its institutional strength through its decisions. Physically, the Court was housed in a relatively grand government building compared to other government institutions. The insistence of the first bench of constitutional justices on a Roman Gothic style building in the central government district was criticized and opposed by the province's governmental building committee, but proved to be vital in establishing the Court's institutional legitimacy.

As a constitutional law professor at the University of Indonesia, Jimly was on the editorial board of, and produced, various academic journals and books.[6] Prior to his time at the Court, Jimly was also assigned as a member of the Expert Team on the Ad Hoc Committee (*Panitia Ad Hoc - PAH 1*) MPR Working Body.[7] Jimly had a profound understanding of a constitutional court's functions. He had participated in study tours to several countries with their own constitutional courts. As a full-time academic, he brought an 'academic environment' from the campus to the bench. He insisted that each justice provide a legal opinion on every case, creating discussion around the judges' differing views. These meetings were entertaining and enjoyed by the constitutional justices. However, as mentioned in Chapter 1, Jimly's judicial activism and rising profile in Indonesian politics was seen as dangerous by President Susilo Bambang Yudhoyono and Vice President Jusuf Kalla, and Jimly lost his role as Chief Justice of the Court to Mahfud in August 2008.

If Jimly successfully built the Court's institutional legitimacy, Mahfud brought a more strategic sense to the Court. As a constitutional law professor who wrote his doctoral

[4] Refly Harun, 'Hakim Konstitusi "Kelas Dua"', *Koran Tempot* (Jakarta), 22 August 2003.
[5] Hendrianto, *From Humble Beginnings to a Functioning Court: The Indonesian Constitutional Court, 2003–2008* (unpublished thesis, University of Washington, 2008) 81.
[6] Among others Prof Dr Jimly Asshidiqqie, *The Constitutional Law of Indonesia: A Comprehensive Overview* (Sweet & Maxwell Asia, 2009); Jimly Asshiddiqie, *Konstitusi Ekonomi /Jimly Asshiddiqie* (Penerbit Buku Kompas, 2010); Jimly Asshiddiqie, *Green Constitution : Nuansa Hijau Undang-Undang Dasar Negara Republik Indonesia Tahun 1945 /Jimly Asshiddiqie* (Rajawali Pers, 2009). As of 16 March 2016, Jimly had written 54 books.
[7] Ad Hoc Committee (*Panitia Ad Hoc – PAH 1)* MPR Working Body *(Badan Pekerja)* responsible for preparing the amendment draft of the Indonesian Constitution.

thesis on law and politics, Mahfud was already active in political activities and later was a parliamentary member for the PKB political party in the DPR, before joining the Court in 2008. Mahfud retired from the Court in April 2013 and refused a nomination for a second term, even though he was eligible. He intended instead to stand for nomination as a candidate for Vice President or President in the 2014 elections. This nomination was not supported by other political parties, and Mahfud ended up as head of Prabowo Subianto's campaign team.

If the different backgrounds of these two Chief Justices were not enough, the different qualities of each bench can be seen in their varying styles and the quality of the decisions they made. The first and second benches of constitutional justices were also selected in two different contexts, with the two benches producing different types of decisions.

Hendrianto has already written an extensively researched thesis on how the Court tried to build its legitimacy.[8] Through the charismatic leadership role played by Chief Justice Jimly, he argues, the Court was able to secure its position in national politics and develop the doctrines that later formed the foundation for its work. This chapter will not repeat what Hendrianto has presented, but rather seek to supplement it. His argument regarding the role of Jimly is that, in his leadership of the bench and with his past connections to relevant ministries that could support the Court, the Court's legitimacy was established and increased. However, Hendrianto's study did not explore the role of other justices in supporting the Court's legitimacy. The composition of the bench and the backgrounds of the other justices also need to be explored in order to determine whether they supported Jimly's approach to developing the Constitutional Court.

4.2 The Jimly Court

4.2.1 Recruitment process

The recruitment process for the first Constitutional Court bench was far from perfect. The relevant amendment to the *1945 Constitution* stipulated that the Indonesian Constitutional Court should be established by 17 August 2003.[9] Upon the enactment of

[8] Hendrinato, above n 5.
[9] *Clause III, Transitional Provision 1945 Constitution Amendment*.

the *2003 Constitutional Court Law* on 13 August 2003, this left each nominating institution only two days to submit their candidates to the President. President Megawati Soekarnoputri nominated Prof HS Natabaya, Prof Mukthie Fadjar and Dr Harjono. The Supreme Court nominated Prof Laica Marzuki, Maruarar Siahaan and Soedarsono. Finally, the DPR nominated Prof Jimly Asshiddiqie, Lieutenant General (Retired) Roestandi and I Dewa Gede Palguna. President Megawati Soekarnoputri swore in the newly appointed first batch of justices on 16 August 2003 in the State Palace. This ceremony was the only one in which all nine constitutional justices took their oaths simultaneously. This has not happened since.

Due to the short nomination period, not all those nominated were adequately prepared. It is a well-known joke among the constitutional justices of the first bench that they would not have become constitutional justices if the recruitment process had taken longer than two days. Justice Palguna received a phone call in the middle of the night when he returned to his room at the Hilton Hotel, in which he was asked to submit a resume the next morning. Justice Mukthie Fadjar was driving in his car from Pasuruan to Surabaya when he received a phone call from a Minister of Justice staff member, who asked him to submit his resume at the end of the day. Justice Maruarar was in the middle of packing his belongings when he received a phone call from Supreme Court Chief Justice Bagir Manan. He had just been promoted as Chairman of the Appeal Court in North Sumatra (from the Appeal Court in Bengkulu). He was not sure whether he was suitable for nomination, as constitutional law was not his area of expertise. However, Chief Justice Bagir Manan persuaded him to accept the position.

The Supreme Court nominations were accepted by President Megawati on 13 August 2003 at 2:30pm, immediately after the signing of the *2003 Constitutional Court Law*. In response to criticisms regarding the lack of prior publicity about the candidates, Chief Justice Bagir Manan stated that the Supreme Court had no obligation to announce its candidates to the public, only the President did.[10] As Chief of the Army Faction at the MPR during the constitutional amendment process (1999–2002), Roestandi had repeatedly rejected the idea that there should be a judicial review authority.[11] However,

[10] Osd, 'Presiden Tanda Tangani UU MK—MA Tunjuk Langsung Tiga Hakim', *Kompas* (Jakarta), 14 August 2003.
[11] The idea to establish a constitutional court emerged in 2001, after Roestandi left the DPR.

the PPP Faction approached him to become a constitutional justice and he agreed to stand.[12]

Only three constitutional justices were prepared for the role. Jimly, Natabaya and Laica Marzuki had all been involved in the drafting of the *2003 Constitutional Court Law*. As Special Staff for the Minister of Justice and a former Chairman of the National Law Reform Agency (*Badan Pembinaan Hukum Nasional* [BPHN] [1996–2002]), Natabaya was deeply involved in drafting the *2003 Constitutional Court Law*. In fact, Laica Marzuki had approached Chief Justice Bagir Manan and asked to be nominated. Along with Bagir Manan, his colleague in the doctoral degree program at the University of Padjajdran Bandung, Laica became part of the first generation of Supreme Court justices (in 2000) who had not been career judges. Bagir was reluctant to appoint Laica as a constitutional justice. However, Laica insisted on being appointed as he had long believed that a constitutional court was required to settle high-level political disputes.

As a constitutional law scholar deeply involved in constitutional amendments, Jimly anticipated becoming a constitutional justice. In various consultation meetings during the constitutional amendment process, parliamentary members would joke that they were preparing an institution that would be led by Jimly: this became true.

4.2.2 Jimly Asshiddiqie

Jimly Asshiddiqie brought vision and an academic approach to the Court. He established the foundations for how the Court should work. Jimly was the third of three constitutional justices put forward by the DPR.[13]

Even though Jimly spent his entire education at the University of Indonesia (which houses the most prominent law school in Indonesia), he had been trained in the international academic manner. He had undertaken short courses at Harvard and

[12] H Zain Badjeber and Chozin Chumaidy were the leaders of Fraction PPP in DPR. They approached Roestandi to become a constitutional justice just two days before the deadline. Zain Badjeber admitted that they had no intention to submit a nomination from his party's colleagues. Understanding Roestandi's expertise and their experience in the DPR, PPP was confident to support his nomination.

[13] Jimly obtained 37 votes, Roestandi 26 votes and Palguna 22 votes. '*Dipastikan, Enam Dari Sembilan Hakim Konstitusi*', *Kompas* (Jakarta), 15 August 2003. Jimly also later had an opportunity to become a constitutional justice through presidential nomination, but had by that time already submitted his application to become a constitutional justice through the parliamentary selection process. Therefore, when President Megawati asked for his permission to nominate him he refused, saying that 'if I am passed [over by] Parliament, that will be God's will'.

Stanford universities in the US and at Leiden Law School. He was also responsible for establishing and editing the first constitutional law journal in Indonesia. He was fluent in English, teaching English part-time at a junior school to earn money while studying.

The first 'civilised' job that he had after coming to Jakarta from South Sumatra, Palembang, was as a translator at the Pakistan Embassy in Jakarta.[14] His extensive understanding of English was rare among academics at that time. This ability increased his confidence and gave him the advantage of learning from English-language law literature, more so than other Indonesian legal academics.[15]

Jimly's international perspective was reflected in early decisions in which he referred to international jurists, international conventions or other constitutional court practices, something that was unusual for Indonesia's jurists at the time. His use of foreign materials often offended other justices during deliberation meetings, but he stood firm, arguing that:

> Each country learn[s] from other countr[ies] regard[ing] how to interpret their constitution. In fact, there is [a] red line connecti[ng] one constitution to other constitutions. That is why, it is necessary to learn from other countries' experience and try to put it into Indonesia's context.[16]

Jimly had the advantage of being involved in the process of amending the *1945 Constitution*. He assisted in representing members on an *ad hoc* committee to draft the amendments, and became a consulting expert for legislative members. Jimly understood that, as a newly established institution, the Constitutional Court needed to win public support and gain respect from other 'political institutions' that were already established in Indonesia. In making constitutional decisions, the Court needed to make decisions that would address public needs, while also 'saving face' for the government and parliament. In his view, there was no point in handing down decisions that were unenforceable by government. Even though the Court realised that executing decisions

[14] Purwadi, *Pendekar Konstitusi Jimly Asshiddiqie : Satria Bijak Bestari Dari Bumi Sriwijaya / Purwadi* (Hanan Pustaka, 2006).
[15] E. P. Zainal Abidin, *Setengah Abad Jimly Asshiddiqie : Konstitusi Dan Semangat Kebangsaan / [Naskah & Penyelaras, Zainal Abidin E.P. & Lisa Suroso]* (2006).
[16] Interview with Jimly Asshiddiqie (Crown Plaza Hotel, Coogee, 13 December 2014).

was not the Court's role, it could align with and support the government and parliament.[17]

The *2003 Constitutional Court Law* stated that the Chief Justice and his deputy were to be elected by the constitutional court justices.[18] The constitutional justices attended to this matter at their first meeting on 19 August 2003. The briefcase belonging to Justice Achmad Roestandi was used as the ballot box in the election. Jimly Asshiddiqie was elected as the Chief Justice after he garnered five out of eight votes. Laica Marzuki received three votes, which allowed him to assume the position of deputy Chief Justice from 2003 to 2008.

When the Constitutional Court opened on 19 August 2003, it had no funding, no office and no support staff. With no office or infrastructure, the Court had to use the Chief Justice's mobile phone number as its first contact number.[19]

As someone who closely followed the constitutional reform process, Chief Justice Jimly was aware that the government had tried in several ways to limit the authority of the newly established Constitutional Court. Moreover, as a constitutional scholar, Chief Justice Jimly also understood that the purpose of a constitutional court was to evaluate legislation. If the Court remained compliant in relation to the government, its whole existence would be meaningless.[20]

However, Jimly also understood how to play strategically against other powers that did not welcome a new institution like the Court:

> The Court is a new institution. If you are new, and you acted like Pangkomkaptib (military police in Soeharto's era) that hits everybody, other institutions will reject and hate you. You need to choose carefully what law you need to annul. If you annulled all laws at once, other institutions would not support the Court. In the end, it is not good for the Court.[21]

[17] Interview with Jimly Asshiddiqie (Crown Plaza Hotel, Coogee, 13 December 2014).
[18] Article 4(3) *2003 Constitutional Court Law*.
[19] The mobile phone was kept in the Constitutional Court Museum, even though it was not the original version.
[20] Hendrianto, above n 5, 106.
[21] Private conversation 30 October 2007.

Jimly set out his vision to establish a strong Constitutional Court, understanding how to do this systematically. In particular, he began to establish the Court's institutional legitimacy in three ways: 1) through securing the Court's building and other infrastructure; 2) by obtaining the respect of other institutions and moving away from presidential or parliamentary influence; and 3) by transforming the Court's environment into an academic one.

The Court had to move several times before its eventual and current building was built and ready to use.[22] Jimly wanted to establish not just 'a court building'. The Court was to inhabit a building that people would respect, one with authority and a strong character; whoever passed the building would understand that it was the Constitutional Court building. The Court later approved and adopted a classical style based on that of Ancient Greece and Rome, one that reflected authority. To the judges, it was evident that buildings in other parts of the world had adopted this style to show that authority.[23]

However, the construction faced several obstacles. First, the Court rejected the initial design, insisting instead on nine pillars to represent each of the nine justices (the original architectural design did not incorporate an odd number of pillars). For that reason, when the design was discussed with the DKI Jakarta Urban Architectural Counsel Team to obtain a licence (IMB), the design was rejected. However, Chief Justice Jimly insisted on constructing the nine pillars, as there was no legal provision interdicting it.[24] The Court did not want to delay the licence to build because of this matter.[25] Another obstacle related to the design of the stairway located in the front part of the podium, connecting the yard and the building's lobby. At first, the stairway was built from the left to the right end of the lobby. However, the architectural team objected to this; it was concerned that the stairway was higher than the presidential State Palace stairways, which implied arrogance. Regarding this matter, the Court

[22] Upon the inauguration, the Court hired a space in the Santika Hotel West Jakarta as a temporary office. Not long afterwards, the Court leased space in the Plaza Centris building in South Jakarta. Due to limited space, the Court's first hearing was conducted at Gedung Nusantara IV (Pustaka Loka) in the DPR/MPR complex. Lastly, the Court occupied a building at Jln Medan Merdeka Barat Number 7, Central Jakarta, owned by the State Ministry of Communications and Information Technology in 2004. For the first time, the Court was able to have its office and court hearings in the same place.
[23] Rafiuddin Munis Tamar, *The History of the Construction of the Constitutional Court Building* (Secretariat General and Registry's Office of the Constitutional Court, 2007) 48.
[24] Ibid 46.
[25] The Russian Constitutional Court and the US Supreme Court building have eight pillars.

accepted the team's suggestion and changed the stairway design. Therefore, the final design was a stairway supported with two complementary staircases in the form of a balcony.[26] In the end, two buildings were constructed totalling 4,220 square metres over an area of 22,323 square metres.[27] The inauguration of the Court on 13 August 2007 became another landmark in Indonesia's history as President Susilo Bambang Yudhoyono and former President Megawati came together in one official reception that reconciled the two presidents.[28]

As a constitutional law scholar and academic, Jimly had a highly developed political sense.[29] He understood that fighting politicians required a politician's mind-set. He understood the necessity of gaining respect from other institutions. He thus refused to attend the independence celebrations at the State Palace unless the Office of the State Palace provided him with a seat allocation equivalent to that of the President and Vice President. Chief Justice Jimly also demanded '9 (RI-9)' as the number plate for his official car. Jimly refused to be underestimated by other institutions with poor records of respect for the judiciary (as discussed in Chapter 3, section 3.3). He understood how to use his power as Chief Justice in a way that his counterpart at the Supreme Court did not.[30] The Chief Justice of that Court, Prof Bagir Manan, was also an academic like Jimly. However, Bagir Manan had less success in building the Supreme Court's institutional legitimacy. In Bagir Manan's period, the Corruption Eradication Commission (KPK) seized the Chief Justice's office amidst corruption allegations against him.[31] Jimly made no such mistake. To clarify the distinction between the Court and foreign aid agencies, Jimly refused any assistance from donors, which was unusual at the time. Jimly opined that the State budget was enough to support the Court's programs. These firm decisions distinguished the Court from other courts (including the Supreme Court), which did receive assistance from numerous foreign organisations.[32]

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[26] Tamar, above n 23, 42.
[27] Ibid 30.
[28] Upon Megawati's defeat by SBY in the 2004 election, it was publicly known that Megawati held bitter feelings towards SBY. She never came to any official State activity such as the Independence Day Celebrations at the Presidential Palace (it has become customary for former presidents to be invited).
[29] Interview with Aria Suyudi (Indonesian Centre for Law & Policies Studies Office, 4 July 2014).
[30] Ibid.
[31] '*KPK Geledah Ruangan Ketua Ma Bagir Manan: Pendapat Hukum Hakim Agung Terkait Difotokopi*', *Kompas* (Jakarta), 28 October 2005.
[32] Interview with Dian Rosita (*Lembaga Kajian dan Advokasi untuk Indepedensi Peradilan* Office, 2 July 2014).

Chief Justice Jimly's academic background influenced how he treated his fellow judges. In particular, his idea of transforming the Court into a place of scholarly debate clearly distinguished his Court from the Mahfud Court. Constitutional justices were encouraged to take an academic perspective on their decisions. This meant in effect careful attention to the analytic legal reasoning process.[33] Jimly reinforced this approach by insisting that all justices attend judicial conferences held to discuss decisions.[34] As constitutional law professor, Justice Laica Marzuki later testified:

> Jimly is a teacher and, like all teachers, he would supervise what his students did. That is what Jimly was like. He thought of us as his students, and always supervised what we did.[35]

The intellectual environment that Jimly created affected not only the Court's legitimacy, but also the individual constitutional justices upon their retirement. Jimly's judicial leadership pushed other justices into providing more sharply reasoned opinions. According to Aria Suyudi, a member of the Reform Team at the Supreme Court:

> During my time... in [the] Supreme Court's Reform team engaging with many judges, I seldom came across someone of the quality of [Constitutional Court justice] Maruarar Siahaan. It is almost impossible for the Supreme Court to produce a person like him.[36]

Jimly wrote numerous books during his time at the Court. He also pushed other constitutional justices to write books. Upon the first generation's retirement, each justice had published at least two books. Under Jimly, there was proper intellectual rigour. The intellectual approach that Jimly took towards his bench was something that other benches did not have.[37] Most associate justices on Jimly's bench either had spent some time in academia or were still active academics. Justice Natabaya, for example, was a Professor of International Law and Dean of the Faculty of Law at the University of Sriwijaya. Justices Mukthie Fadjar and Laica Marzuki were professors of

[33] Interview with Aria Suyudi (Indonesian Centre for Law & Policies Studies Office, 4 July 2014).
[34] Interview with M Laica Marzuki (Residence, 19 December 2013).
[35] Interview with Maruarar Siahaan (Indonesia Christian University, 10 December 2013).
[36] Interview with Aria Suyudi (Indonesian Centre for Law & Policies Studies Office, 4 July 2014).
[37] Interview with Anonymous Participant B (University of New South Wales Law School, 27 October 2014).

constitutional law. Jimly encouraged other constitutional justices to work in academic environments. He noted:

> A statesman must have political experience, but his work is an intellectual job. The job of the justice is an intellectual job. I [am] inspired by Germany[’s] Constitutional Court that is removed from ... the political and business centres [of Germany] (based as it is in *Karlsruhe*).[38]

The academic environment imposed by Jimly and the consistent practice among constitutional justices resulted in each judge being obliged (1) to submit his or her own legal opinions and (2) to support those opinions with rigorous legal reasons. (This aspect of the Jimly Court’s work is elaborated upon later in this chapter.)

Despite all of these innovations, Jimly’s legacy ended sooner than expected. Article 22 of the *2003 Constitutional Court Law* provided that the Chief Justice could be re-elected for a second term, subject to the individual judicial term limit of two five-year terms and the mandatory retirement age. Jimly fully expected to be re-elected after he had secured his second five-year appointment in 2008. However, he miscalculated the preferences of the newer constitutional justices and the interests of the executive and parliament. Looking back on his experience just before he came up for re-election as Chief Justice, Jimly said:

> On Independence Reflection Day (*Renungan Suci*) on 16 August 2008, the Coordinating Minister for Politics, Law and Security, Jend (Ret) Joko Santos approached me. He stated that all Ministers hate the Court because of [the] *Education Budget* decision. They had to work hard over two days to revise their budget. Some of them also asked to take a picture with me. It seems they already knew that I would not continue as Chief Justice.[39]

The *Education Budget* case to which Jimly was here referring was a case in which the Court adopted a strict textual interpretation of the Constitution. The applicants were teachers and members of the Indonesian Teachers Association. They argued that Article 31(4) of the Constitution, which required the State to prioritise education by allocating at least 20 per cent of the State and regional revenue and expenditures budget to

[38] Interview with Jimly Asshiddiqie (Election Ethic Council Office, 9 December 2013).
[39] Interview with Jimly Asshiddiqie (Crown Plaza Hotel, Coggee, 13 December 2014).

education spending, imposed mandatory obligations. The precise text of Article 31(4) is that:

> The State shall prioritize the budget for education to a minimum of 20% of the State Budget and of the Regional Budgets to fulfil the implementation needs of national education.

Every year since 2005, the applicants had filed a judicial review case against the *State Revenues and Expenditure Budget Law*. In 2005, in its *First Education Budget Case* decision,[40] the Court had dismissed the applicant's petition. In 2006 and 2007, in its *Second and Third Education Budget Case* decisions,[41] the Court granted the petition, but decided, having regard to the consequences of the *State Revenue and Expenditure Budget Law* being declared constitutionally invalid, to declare only the existing percentage of the education budget to be in violation of the Constitution. Finally, in 2008, in its *Fourth Education Budget Case* decision,[42] the Court was confronted with an education budget in the revised *2008 State Revenues and Expenditures Budget Law* of only 15.6 per cent of the overall budget. Considering its three previous decisions, the Court held that:

> There are sufficient reasons for the Court to assess that there is a deliberate intention on the part of the regulator to violate the *1945 Constitution*. As a consequence, the Court declares the entire revised *2008 State Revenues and Expenditures Budget Law* constitutional[ly] invalid.[43]

In the course of its decision, the Court rejected the government's argument that it had to allocate funds for energy subsidies and the payment of foreign debt. If the budget for energy subsidies and foreign debt were set aside from the State budget, the government had argued, the educational budget would have constituted 20 per cent of the overall budget, as required by the Constitution.[44] Despite the rise in oil prices, and Indonesia's obligation to pay its foreign debt and in this way manage the economic turbulence resulting from the 2008 Global Financial Crisis, the Court stood firm.

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[40] *Case Number 012/PUU-III/2005, Judicial Review of Law Number 36 Year 2004 Regarding the 2005 State Revenue and Expenditure Budget.*
[41] *Case Number 0026/PUU-IV/2006, Judicial Review of Law Number 18 Year 2006 Regarding the 2007 State Revenues and Expenditures Budget.*
[42] *Case Number 013/PUU-VI/2008.*
[43] *Case Number 013/PUU-VI/2008*, 100.
[44] *Case Number 013/PUU-VI/2008*, 101.

The Court's decision on 13 August 2008, which the Court intentionally read out on that day, shocked the government. In accordance with constitutional precedent, the President of Indonesia was due to deliver the State of the Union speech on 16 August at the MPR's Plenary Meeting. In that speech, it is customary for the President to report on progress and present the budget projection for the next year. It would have been a huge slap in the face for the President if the Court had annulled the Law of the State budget after the delivery of this speech. Even so, the consequence of the Court's decision was to require all ministers to revise the national budget in only two days. Immediately after the decision, Jimly sensed that he was not going to be re-elected as Chief Justice for a second term. And, indeed, on 16 August 2008, during the morning tea at the swearing in of the new constitutional justices, the Minister of Justice of Human Rights, Andi Mattalata, approached one of the justices, Mukthie Fadjar, and said that the government needed a new Chief Justice for the Court.[45] At the same time, the Minister tried to persuade Mukthie to vote for Mahfud MD as the next Chief Justice.[46]

Jimly was also disliked by the Chief Justice of the Supreme Court for comments that had jeopardised his Court's position. In 2007, the Constitutional Court intended to establish Video Conferencing facilities around Indonesia and wanted to use the Appellate Courts as the host. Given the 2004 General Election, in which the Court had to settle election result disputes around Indonesia, there was a need to have such a facility.[47] The Court was willing to provide the necessary equipment and expenses. When the Court was not using the facility, the Supreme Court could use it for its purposes (training, meetings or video conference discussions). Chief Justice Jimly visited the Supreme Court and explained this idea. However, it was rejected by Chief Justice Bagir Manan. Jimly was often critical of this decision. There is no evidence, however, that the Chief Justice of the Supreme Court pressurised its three nominees as constitutional justices to vote against him.

[45] *Konstitusionalisme Demokrasi: Sebuah Diskursus Tentang Pemilu, Otonomi Daerah Dan Mahkamah Konstitusi Sebagai Kado Untuk 'Sang Penggembala', Prof. A. Mukhtie Fadjar, S.H., M.S. / [Penulis, A. Mukhtie Fadjar ... Et Al.]* (In-TRANS Pub, 2010).
[46] Ibid 18.
[47] At that time, only the Police Department had video conference facilities in all 33 provinces of Indonesia. The Court used these facilities for the 2004 General Elections to hear testimony and check evidence. It was criticised because the witnesses has to testify at the regional Police Office.

Before the election process began, Justice Akil Mochtar approached Jimly to inform him that the Court was split four-four between Jimly and Mahfud MD; however, Jimly refused to respond to Akil's statement. Later, justices Alim and Laica visited Jimly to inform him that Alim had been pressurised to vote for Mahfud MD, but that he (Alim) had nevertheless still voted for Jimly.[48]

On the night before the Chief Justice's election, the Indonesian Ambassador to Russia, Dr Hamid Awaludin, called Mukthie to remind him that the Palace did not like Jimly and wanted Prof Mahfud MD to become Chief Justice.[49] It emerged later that Hamid had received a request from Vice President Jusuf Kalla to make this call. On the morning of the election day (18 August 2008) retired constitutional justices, Prof Natabaya and Prof Laica, in turn called Mukthie and requested that Jimly remain as Chief Justice.

In the event, Mahfud MD defeated Jimly by five votes to four. The four justices who cast their votes for Mahfud MD, apart from Mahfud MD himself, were justices Akil, Arsyad, Maria and Sodiki. Jimly's three supporters, in addition to his own vote, were justices Mukthie, Maruarar and Alim. Jimly was particularly disappointed by Justice Maria's failure to support him:

> Maria was not brave enough to stand against the request from the President. I briefed her during her confirmation with the President, but she refused to support me.[50]

Although Jimly's non-election as Chief Justice did not affect his status as an ordinary judge (having been elected for a second five-year term) it quickly became clear that he would not be able to continue. The absence of any protocol for dealing with a former Chief Justice and Mahfud MD's new leadership style (as explained below) made things awkward, not only for the other constitutional justices but also for the Court's employees. Jimly was aware of this. The pain was too difficult to bear and, on 6 October 2008, he submitted his resignation letter to each justice and to the Chief Justice.

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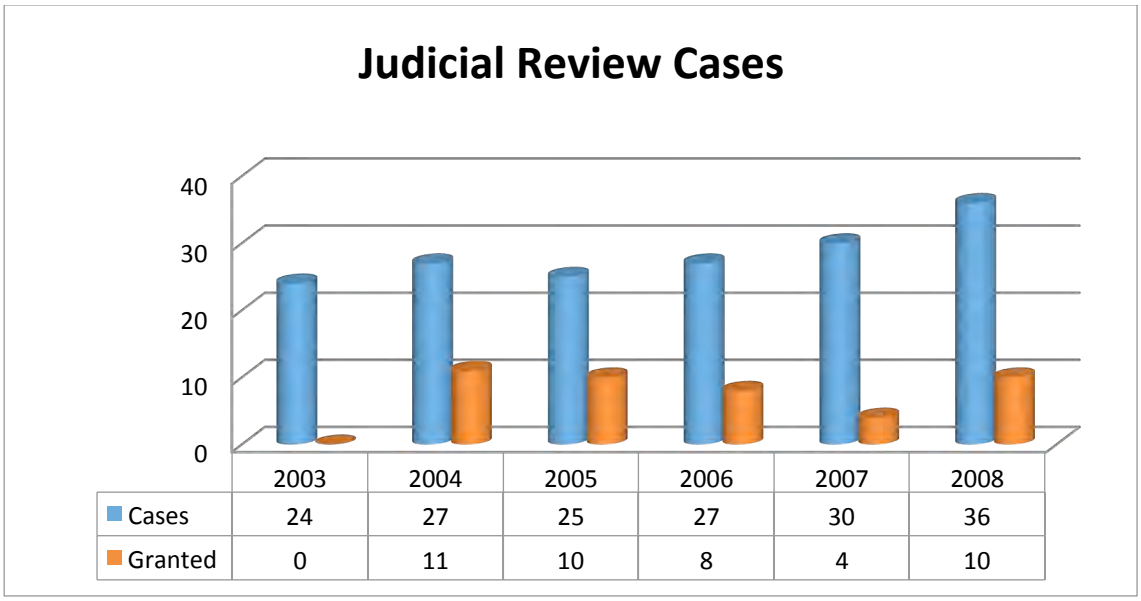
[48] Interview with Jimly Asshiddiqie (Crown Plaza Hotel, Coogee, 13 December 2014).
[49] *Konstitusionalisme Demokrasi: Sebuah Diskursus Tentang Pemilu, Otonomi Daerah Dan Mahkamah Konstitusi Sebagai Kado Untuk 'Sang Penggembala', Prof. A. Mukhtie Fadjar, S.H., M.S./[Penulis, A. Mukhtie Fadjar ... Et Al.]* (In-TRANS Pub, 2010) 19.
[50] Interview with Jimly Asshiddiqie (Crown Plaza Hotel, Coogee, 13 December 2014).

In a public statement, he said that he done his best for the Court but that his time at the Court was over.

Under Jimly's leadership, Indonesia's Constitutional Court had established itself as one of the most important constitutional-reform era institutions. The Court was only five years old but had rapidly become an active institution with a steadily growing number of cases, as reflected in the following table.



	2003	2004	2005	2006	2007	2008
Cases	24	27	25	27	30	36
Granted	0	11	10	8	4	10

Figure 4.1: Judicial Review Cases[51]

Just how the Jimly Court achieved this result is further discussed in section 4.4 below and Chapter 5. For the moment, attention turns to the Mahfud Court, and in particular Mahfud MD's very different leadership style.

4.3 The Mahfud Court

4.3.1 Recruitment process

In 2003, when the Constitutional Court was created, no one foresaw that it would become such a powerful player in national politics. Nevertheless, it was seen as the embodiment of the new constitutional order and everyone wanted it to succeed in that sense. In consequence, the three nominating institutions (President, DPR and the

[51] These figures were compiled by the author.

Supreme Court) sent their best candidates to become constitutional justices.[52] By the time of the second selection process in 2008, by contrast, the three nominating institutions saw the Court as a common enemy and they accordingly nominated justices who could conduct political missions on their behalf.[53]

For the second generation of judges, President SBY appointed a selection team led by a member of the Presidential Advisory Council, Adnan Buyung Nasution. Later, Denny Indrayana, as special staffer for the President, joined this selection team. Mukthie Fadjar filed an application indicating that he was willing to be re-selected. The government still maintained its tradition of selecting academics to become constitutional justices by selecting Prof Mukthie Fadjar, Prof Maria Farida Indrati and Prof Achmad Sodiki as constitutional justices in 2008. Upon the retirement of Mukthie Fadjar in 2010, the President appointed Hamdan Zoelva from the Star and Crescent Party (*Partai Bulan Bintang*). The appointment of Hamdan was controversial. In comparison to 2008, when the President convened a special team to conduct reviews and nominations, Hamdan's appointment was less considered. His name was simply put forward by the Minister of Justice and Human Rights, Patrialis Akbar (who later also became a constitutional justice). Hamdan himself claimed that three coordinating ministers had interviewed him prior to his interview with President SBY. But the general feeling among Court watchers was that the President had lost sight of the need to promote the best people to the Court. As a politician, with no academic background, Hamdan's appointment departed from previous practice.[54]

Chief Justice Bagir Manan of the Supreme Court appointed Maruarar Siahaan, Muhammad Alim and Arsyad Sanusi in 2008. When Maruarar was sworn in a second time on 16 August 2008, he was 65 years old. Chief Justice Bagir Manan reappointed him to become a constitutional justice until his mandatory retirement age of 67, on 16 December 2009. He served on the second bench for less than one-and-a-half years. But his reappointment had several benefits. Maruarar did not only have the experience required to settle legislative and presidential election result disputes in 2009, he was also expected to induct the new constitutional justices from the Supreme Court.

[52] Interview with Saldi Isra (International Airport Soekarno Hatta Lounge, 16 June 2014).
[53] Ibid.
[54] Interview with Taufik Basari (National Democrat Party Office, 17 December 2013).

Maruarar's institutional memory was regarded as an important asset. Mahfud CJ duly appointed him to become one of three panel chiefs overseeing the 2009 legislative election result proceedings (the two other panels were led by Mahfud MD himself and Mukthie Fadjar). Maruarar was replaced by Fadlil Sumadi in December 2010. Arsyad Sanusi was replaced by Anwar Usman in April 2011.

The increase in the Constitutional Court's popular legitimacy under Jimly's chief justiceship had not been welcomed by other judicial institutions. This was perhaps understandable in the case of the Supreme Court. Many institutions and NGOs over the years had stated that the Supreme Court should follow the way the Constitutional Court handled its cases, and that it should adopt its case and employment management practices. This irked the Chief Justice of the Supreme Court, Prof Bagir Manan, who stated on several occasions that the Supreme and Constitutional courts were different and should not be compared.

During Jimly's chief justiceship, Chief Justice Bagir Manan had been invited to a Constitutional Court event, but due to a lack of communication, there was no seat allocated for him. In another incident, as noted already, Chief Justice Jimly offered to build video conferencing facilities at the Appeal Court in each province. Chief Justice Bagir Manan rejected this idea, considering it interference in his running of the court system.

The appointment of Arsyad Sanusi and Muhammad Alim to the Court was criticised by legal reformers.[55] Arsyad and Muhammad Alim had both graduated from the University of Hasanudin, South Sulawesi. Both had also originally come from South Sulawesi, like Vice President Jusuf Kalla. Upon his resignation from the Court, Arsyad published a book in which he especially thanked Dr (HC) Jusuf Kalla.[56] There was a rumour that the South Sulawesi group was very prominent in the Supreme Court. Chief Justice Bagir Manan was replaced by Chief Justice Harifin A Tumpa in 2009. In 2012, Chief Justice Harifin A Tumpa was replaced by Chief Justice Hatta Ali. Harifin and Hatta had graduated from the University of Hasanuddin and were also from South Sulawesi. Rumour had it that Vice President Jusuf Kalla's South Sulawesi connection was very

[55] Ibid.
[56] ANA, '*Langkah Arsyad Sanusi Patut Diapresiasi*', *Kompas* (Jakarta), 12 February 2011 ix.

significant in determining the selection of Muhammad Alim and Arsyad Sanusi, as part of Jusuf Kalla's grand design to secure his second term in 2009.

In 2011, Arsyad requested early retirement, due to bribery allegations against his daughter and son-in-law.[57] Arysad was replaced by Anwar Usman, former head of the Supreme Court's training centre. Anwar Usman had spent 15 years as a staff member, head of the human resources bureau and later head of the Court's legal training centre. Due to his previous long service in managerial and administrative matters, Anwar's credibility in handling cases at the Supreme Court was in doubt. Indeed, he had little understanding of judicial techniques.[58] Before his appointment as a judge of the Constitutional Court, he had spent only a short time as a judge in Bima before returning to the Court as a substitute registrar. After that, he had held purely administrative positions.[59]

In 2008, the Supreme Court had nominated a different quality of judge to the Constitutional Court when compared to those of 2003. A significant difference in the commitment of justices is evident between the first and second generations.[60] For the first generation, the Supreme Court was able to send its best candidates to become constitutional justices. However, this was not the case for the second generation.[61] This fitted a general pattern in terms of which the Supreme Court would send less qualified people to other organisations. One example was the appointment of Supreme Court justice Sahid Abas as a judicial commissioner. At the time of his appointment, Sahid Abas had high-profile cases pending in his Supreme Court logbook, and his integrity was in doubt. During his nomination as a judicial commissioner, however, he suddenly had no pending cases in his logbook.[62] It was clear that the Supreme Court had cleared the way to get rid of an inefficient judge. Despite these criticisms, the Supreme Court insisted on placing Abas in the Judicial Commission.[63]

[57] Ibid.
[58] Interview with Soedarsono (Residence, 4 December 2013).
[59] Interview with Aria Suyudi (Indonesian Centre for Law & Policies Studies Office, 4 July 2014).
[60] Interview with Dian Rosita (Lembaga Kajian dan Advokasi untuk Indepedensi Peradilan Office, 2 July 2014).
[61] Interview with Saldi Isra (International Airport Soekarno Hatta Lounge, 16 June 2014).
[62] Interview with Dian Rosita (*Lembaga Kajian dan Advokasi untuk Indepedensi Peradilan* Office, 2 July 2014).
[63] Interview with Aria Suyudi (Indonesian Centre for Law & Policies Studies Office, 4 July 2014).

There was no direct proof of the potentially more serious allegation that the Supreme Court sent people to work at other organisations who would effectively work to support its interests.[64] The Supreme Court did, however, withdraw candidates who did not support its policies, as occurred during the second-term nomination of constitutional justice Fadlil Sumadi.[65] Generally speaking, the Supreme Court nominated people to the Constitutional Court who were already at the peak of their careers so that they would not feel as though they were being rejected.[66]

Like the first generation of constitutional justices nominated by parliament, the second generation was selected through a formal process. Jimly, on being nominated for a second term, was reluctant to resubmit himself to the required fit and proper test (which included questions from parliamentary members). In his view, his credibility as Chief Justice should not be assessed by parliamentary members.[67] Jimly had been nominated by four factions in the parliament: PPP, PAN, PBR and PKS.[68] A selection committee led by the third commission (the legal commission) extended the registration date to accommodate Jimly's reluctance to participate in the selection process. The parliament also needed to re-arrange the date for his examination, due to Court hearings. After negotiations between the political parties that supported Jimly becoming a constitutional justice, a middle way was found: Jimly was interviewed, but was asked only one question and excused from complying with the usual administrative requirements.[69]

Along with Jimly and Harjono, Mahfud MD and Akil Mochtar were nominated by the chair of the legal commission, Trimedja Panjaitan, as prospective candidates for constitutional justice positions.[70] Mahfud MD and Akil Mochtar were parliamentary members from the National Awakening and Golkar parties respectively. On 18 March

[64] Ibid.
[65] The Supreme Court refused to re-nominate Fadlil for a second term. He supported the Court's decision to grant a repeating judicial review (PK) of the Supreme Court (*Court Decision 34/PUU-XI/2013*). Fadlil also aligned with the majority that declared that *Supreme Court Law 3 of 2009* was unconstitutional (*Court Decision 27/PUU-VII-2009*).
[66] Interview with Dian Rosita (*Lembaga Kajian dan Advokasi untuk Indepedensi Peradilan* Office, 2 July 2014).
[67] Private conversation.
[68] MI, '*Seleksi Pejabat: Harjono Ikuti Uji Kelayakan 5 Menit* ', *Media Indonesia* (Jakartat), 12 March 2008.
[69] Jimly agreed to attend a question and answer session. The Chairman of the Legal Commission asked one question only: 'are you willing to be nominated as constitutional justice?'
[70] Dian Widiyanarko, '*Seleksi Hakim Mk Mengerucut Empat Nama*', *Seputar Indonesia* (Jakarta), 10 March 2008.

2008, the parliament selected Jimly Asshiddiqie, Mahfud MD and Akil Mochtar as constitutional justices for 2008 to 2013. Despite Jimly receiving tremendous support from certain parliamentary members (as mentioned in the media),[71] his achievement in building the Court's institutional legitimacy from scratch was not well recognised by parliamentary members and he did not get the most votes. The final count was Jimly 32, Akil 37 and Mahfud MD 38.[72] With the fourth largest amount of votes, Harjono was not initially selected. However, upon Jimly's resignation in November 2008, Parliament decided to nominate him as a constitutional justice.

During the 2008 selection process, parliament made its intention to nominate people with political experience very clear:

> We need constitutional justices that not only understand the law, have integrity and are free from corruption, but who are also people who understand politics. An understanding of the law is not enough.[73]

4.3.2 Mahfud MD

Mahfud MD grew up in Madura and then lived in Yogyakarta. Mahfud erupted into the political arena in Indonesia upon being sworn in as the Minister of Defence by President Abdurahman Wahid in 1999. He was the first civilian to hold that position. Upon Gus Dur's resignation in 2001, he returned to Yogyakarta as Professor of Constitutional Law at the Islamic University of Indonesia. In 2004, he re-entered national politics as a parliamentary member, becoming head of the National Awakening Party (PKB) Faction in the DPR. Mahfud's *curriculum vitae* is significantly different from the constitutional justices who served under his chief justiceship, none of whom had the same degree of academic and political experience. He brought considerable charisma to the position, and was the acknowledged official and *de facto* leader.

Mahfud, however, had not written many books when he came to the Court, unlike Jimly. At his 50th birthday in 2007, Mahfud launched his first three books. The first,

[71] JP, 'House Session Names Court Judges', *Jakarta Post* (Jakarta), 19 March 2008.
[72] '*Hakim Konstitusi Pilihan DPR*', *Majalah Tempo* (Jakarta), 23 March 2008.
[73] Interview with Ferdiansyah (DPR/Parliament Building, 20 December 2013).

Law Never Stands Still (‘*Hukum tak Kunjung Tegak*’), was a collection of his newspaper articles from 2003 to 2007. The second, *Constitutional Law Debates Prior to Constitutional Amendment* (‘*Perdebatan Hukum Tata Negara Pasca Amandemen Konstitusi’*), was also a compilation of articles. The third book, *Contribution of Thoughts for the 50th Anniversary of Prof Dr Moh Mahfud MD* (‘*Kontribusi Pemikiran untuk 50 tahun Prof Dr. Moh Mahfud MD: Restropeksi terhadap Masalah Hukum dan Kenegaraan*’), was a compilation of articles written by his colleagues at the Islamic University of Indonesia (*Universitas Islam Indonesia).*[74]

Before his nomination as constitutional justice, Mahfud MD confessed that becoming a member of parliament was not his true calling. He was frustrated upon realising that a minor political party’s power was insignificant during the law-making process. As a result, Mahfud MD spent more time in teaching.[75]

Mahfud MD objected to how the Court worked under Jimly, as revealed in a newspaper article on the Court’s 2005 *ultra petita* decisions. He wrote:[76]

> The Court only has the authority to declare that a law is unconstitutional. The Court cannot make a decision that has a spirit to regulate or grant decisions beyond [what the] parties asked for (*ultra petita*).

His frustration as parliamentary member drove Mahfud MD’s interest in becoming a constitutional justice. He communicated this intention to other parliamentary members and political party leaders. Realising that his party had little influence, Mahfud MD sought support from other political parties. He met Taufik Kemas, leader of the Indonesia Democracy Party-Struggle (*PDI-Perjuangan* [PDI-P]) and Vice President Jusuf Kalla, as chair of the Golkar Party. PDI-P and Golkar had a majority in the DPR’s legal commission. Taufik Kemas and the Vice President’s approval of Mahfud MD’s intention to become a constitutional justice was communicated to PDI-P and Golkar’s factional chief in parliament.[77]

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[74] *RWN, ‘Mahfud MD: Luncurkan Buku Tentang Hukum*’, *Kompas* (Jakarta), 24 May 2007.
[75] Rita Triana Budiarti, *Kontroversi Mahfud M.D./Rita Triana Budiarti* (*Konstitusi* Press, 2012) 52.
[76] Mahfud MD, Mendudukan Soal ‘Ultra Petita’, *Kompas* (Jakarta), 5 February 2007.
[77] Budiarti, above n 75, 54–57.

In the DPR's fit and proper test, on 12 March 2008, Mahfud MD provided a list of ten things that a constitutional justice should not do.[78] The first restriction was that a constitutional justice should not issue regulatory decisions. Second, the Court should not issue *ultra petita* decisions. Third, the Court should not use narrow legalist grounds as a basis for their decisions. Fourth, the Court should not contradict policy choices that have been delegated to the legislature to make. Fifth, the Court should not base decisions on a theory that was not clearly grounded in the constitutional text. Sixth, the Court should not decide a case that would directly affect the Court's own interests (*nemo judex in causa sua*). Seventh, constitutional justices should not provide comments on cases currently under consideration by the Court. Eighth, the Court should not prompt parties to file a case in the Court. Ninth, constitutional justices should not volunteer to become political mediators. Finally, the Court should not provide opinions regarding the quality of the *1945 Constitution*. As we shall see, Mahfud MD broke almost all of these self-imposed rules.

Once Mahfud MD took over the chief justiceship, the Court moved even further from its founding rationale than the Jimly Court had done. Mahfud MD's judicial philosophy was highly instrumentalist and oriented towards substantive justice rather than legal formalism. No law in Indonesia, he often said, should survive if it contradicted the spirit of the Constitution. This philosophy was consistent with the doctoral thesis that Mahfud MD wrote before his appointment. In that thesis, Mahfud MD argued that law was the product of politics. Therefore, to understand law, one had to understand the politics behind its creation. Unfortunately, in practice this meant that the Mahfud Court's decisions were often poorly reasoned, depending more on judicial assertion than careful deduction of the law's meaning. Former Minister of Law and Human Rights, and later constitutional justice, Patrialis Akbar, expressed his disappointment towards Mahfud MD: 'Mahfud has changed. I helped him to be elected, but he changed.'[79]

The poor technical quality of the Mahfud Court's decisions became a problem for the Court. For example, in the *2012 Arrest Order Decision*,[80] the Court needed to conduct a

[78] Rita Triana Budiarti, *Biografi Mahfud M.D:Terus Mengalir/Rita Triana Budiarti; Koreksi Naskah, Miftakhul Huda, Shohibul Umam, Achmad Dodi Haryadi* (Konstitusi Press, 2013) 420–424.
[79] Interview with Patrialis Akbar (Constitutional Court Building, 17 December 2013).
[80] Ilham/MH, *MK Tegaskan Soal Eksekusi Putusan Pidana Tanpa Perintahan Penahanan* (5 March 2013) Constitutional Court of Indonesia.

special press conference to explain its reasons and the implications of its decision.[81] The petitioner challenged the constitutionality of Article 197(1)(k) and (2) of *Law Number 8 of 1981 on Criminal Court Procedure*. Rejecting the petition, the Court gave a 'new meaning' to Article 197(2).[82] In the view of the petitioner, by providing this 'new meaning', the Court contradicted the concept of arrest as regulated by Article 197(1)(k). This lack of carefully crafted decisions created uncertainty and controversy.[83]

In a public forum in 2008, Mahfud MD (as Chief Justice of the Constitutional Court) defended a broad conception of judicial review that allowed courts to invent law. 'Now, at the moment', he said, 'the Court is trying to see the function of a court from a more progressive point of view. So I think we need to do a breakthrough in the legal field to develop the law in Indonesia'.[84] At another forum, Mahfud MD defended what he characterised as flexible constitutional interpretation, and suggested that the role of the Court was to keep legislation within the Pancasila ideology.[85] Legislation, he added, must not threaten national integrity and must be based on (among other things) tolerance. 'If a law in substance is against one of the values mentioned, it must be against the constitution', he declared. 'We (the Court) will strike it down'. Agun Gunanjar, leader of the Golkar party in the DPR that had supported Mahfud MD's bid to become constitutional justice in 2008, also showed his disappointment:

> Before his appointment, Mahfud criticized Jimly for being activist and issuing ultra petita decisions. However, when he joined the Court, he became even more activist.[86]

During his time on the Court and upon his retirement, Mahfud MD did not write any books on the development of the Constitutional Court or on constitutional law. The books that he did write focused on the untold story behind a case or a discussion between justices regarding certain decisions.[87] The books discussed his role in

[81] *Constitutional Court Decision 69/PUU-X/2012 on Arrest Order in Supreme Court Decision* (2012).
[82] Ibid 144.
[83] Interview with Taufik Basari (National Democrat Party Office, 17 December 2013).
[84] Public Figure Discussion II in Constitution Week: Court's Authority Not Only Counting Votes, Jakarta, Constitutional Court, 22 December 2008.
[85] Pancasila Five Principles, the official ideological foundation of the Indonesian state, found in the preamble to the constitution. The principles consist of belief in one God, a just and civilized humanity, the unity of Indonesia, democracy guided by wisdom and deliberation, and social justice.
[86] Interview with Agun Gunandjar (DPR/ Parliament Building, 3 December 2013).
[87] Rita Triana Budiarti, *On the Record:Mahfud MD Di Balik Putusan Mahkamah Konstitusi/Rita Triana Budiarti* (*Murai Kencana: Konstitusi* Press, 2010); Rita Triana Budiarti, *Kontroversi Mahfud MD/Rita Triana Budiarti* (*Konstitusi* Press, 2012); Rita Triana Budiarti, *Biografi Mahfud MD:Terus Mengalir/Rita*

managing conflict, including negotiation among the parties to settle political deadlocks. The Court also published a book of his previously published media statements and comments.[88] Later, from 2013 to 2014, when Mahfud MD was gathering support for a run for the Presidency or Vice Presidency, his friends wrote books about his judicial activism,[89] and new biographies of his life were published.[90] Two books written by Mahfud MD himself were published in 2011. However, they were a reprint of his thesis published in 2009[91] and his collection of articles published[92] before his time on the Court. Even though Mahfud MD was also a professor of constitutional law, he did not bring an intellectual approach to the Court and the scholarly atmosphere that had prevailed under Jimly generally declined during his chief justiceship.[93]

From the establishment of the Court in 2003, the first generation of constitutional justices had realised that they needed to win public support. Various activities to inform the public of the existence of the Court were conducted, including (but not limited to) town hall meetings, study visits, the establishment of a media centre and publications. The idea behind the town hall meetings was to promote civic education and inform the public about the Court's decisions. Jimly also used the media to conduct the Court's public relations. He established a media centre in 2004 that has become a permanent institution. Through the media centre, the Court services journalists and newsmakers by providing a space for them to work (including computer and printer facilities), media releases and food. It was Jimly's idea to ensure that all journalists were well treated and informed about the Court.[94] Later, Jimly also established Constitutional Court

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Triana Budiarti; Koreksi Naskah, Miftakhul Huda, Shohibul Umam, Achmad Dodi Haryadi (*Konstitusi* Press, 2013).

[88] *Mahfud MD Di Mahkamah Konstitusi Dalam Liputan Pers* (*Sekretariat Jenderal dan Kepaniteraan, Mahkamah Konstitusi*, 2010).

[89] *Mahkamah Agung Akan Kembali Menangani Sengketa Pilkada* (9 September 2012); *Kompasiana* <http://hukum.kompasiana.com/2012/09/07/mahkamah-agung-akan-kembali-menangani-sengketa-pilkada-491620.html>; *Sahabat Bicara Mahfud M.D./Tim Penyusun, Masduki Baidlowoi [and Seven Others]; Penyunting, Saldi Isra, Edy Suandi Hamid* (Murai Kencana, 2013); Ariyanto, *Mahfud MD, Hakim Mbeling/Penulis, Ariyanto; Editor, Miftakhul Huda* (Konstitusi Press, 2013).

[90] MN Aguk Irawan, *Cahayamu Tak Bisa Kutawar: Novel Biografi Mahfud M.D./Aguk Irawan MN; Pengantar, D. Zawawi Imron* (Ar-Ruzz Media, 2014).

[91] MD Moh. Mahfud, *Politik Hukum Di Indonesia/Moh. Mahfud M.D* (Rajawali Pers, 2009).

[92] MD Moh. Mahfud, *Konstitusi Dan Hukum Dalam Kontroversi Isu/Moh. Mahfud M.D* (Rajawali Pers, 2009).

[93] Interview with Abdul Multhie Fadjar (Residence, 4 December 2013).

[94] This idea was rejected early by the court employees; mostly public servants are not familiar with working with journalists.

Television (MK-TV) and Constitutional Court Radio (MK-Radio). At the beginning of his leadership, Jimly attended newspaper or media offices to discuss the Court's rules.

Mahfud MD continued and expanded these activities, using the facilities that Jimly had created. Mahfud MD was also active in various external activities. For example, he provided speeches for Friday prayers as an Imam and presented 'constitutional prayers' (*pengajian konstitusi*) at various Islamic boarding houses. Mahfud MD was also involved in many discussions about law enforcement. He even joined in the TV soap opera (*Sinetron Mbak Ijah*), using his real name as the solution to a problem posed in the scene.[95]

Mahfud MD's media engagement attracted criticism. For example, his judicial colleague, Justice Patrialis Akbar, concerned about Mahfud MD's various media activities, said:

> Chief Justice Mahfud talked too much in in the media. It is unpleasant for the public. It is obvious to the parliamentary members that the Chief Justice is using his public appearances as a stepping-stone for another position.[96]

Parliamentary members were also concerned that the Court's budget was being spent for public service announcements on TV:

> They are spending too much money and using it to provoke people to submit an application to Court. Once people come to Court, they complain about the bad laws Parliament has made.[97]

The parliament and government cut the Court's budget by IDR 22 billion in 2011.[98] These cuts were taken from constitutional awareness programs. The numerous appearances of Chief Justice Mahfud in public service announcements on TV created the impression among parliamentary members that he was using this money for his own purposes.[99] Chief Justice Mahfud's media appearances also triggered similar feelings.[100]

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[95] Interview with Achmad Roestandi (Residence, 19 December 2013).
[96] Interview with Patrialis Akbar (Constitutional Court Building, 17 December 2013).
[97] Interview with Achmad Rubaire (DPR/Parliament Building, 28 November 2013).
[98] Interview with Prahesti Pandanwani (15 December 2013).
[99] Interview with Anonymous Participant E (Constitutional Court Building, 26 November 2013); The Court paid fee for Public Service Announcement at repsective television company by using State Budget.
[100] Interview with Muhammad Reza (Ministry of Law and Human Rights Building, 21 July 2014).

This issue later influenced the drafting of the 2011 amendments to the *Constitutional Court Law*.[101]

Jimly and Mahfud MD in fact had similar approaches to media engagement. Both liked to make a 'show'. Both liked to be interviewed by the media and newspapers, and gave comments on their decisions, which was something they should not have done as constitutional justices.[102] The main difference was that Jimly generally restrained himself in public. In contrast, Mahfud MD liked to be in the public eye. Instead of cutting down on the Court's media presentations as it became better known, he took them to a new level.[103] Often, upon finalisation of a court hearing, he would appear on television for an interview later the same evening.[104] Mahfud MD's media involvement produced many awards, particularly for himself. Harian Indonesia acknowledged Mahfud MD as Person of the Year in 2009. In the same year, Mahfud MD was also named the most influential head of a State institution, based on a survey conducted by Charta Politika Indonesia.[105] Globe Asia named Mahfud MD as a Person Making a Critical Difference in 2010. This was the second award from Globe Asia. In 2009, Globe Asia granted Mahfud MD a Change Agents award (12 December 2009), while Harian Republika awarded him a Man of Change award in 2010. In 2011, Seputar Indonesia named Mahfud MD Newsmaker of the Year, beating Barack Obama. To acknowledge his achievements, the Islamic University of Indonesia (UII), from which Mahfud had graduated and in which he had served as a lecturer, granted him 'a trophy'. Unfortunately, the trophy contained 66 grams of gold plate. Afraid of the graft problem, Mahfud MD gave the trophy to the Corruption Eradication Commission.[106]

Legal reform activists viewed Mahfud MD from a different perspective. He was not seen as a judge, but as someone who could be appealed to politically, to make interventions in public debate.[107] Mahfud MD, for example, often provided statements

[101] Ibid.
[102] A Mukthie Fadjar, *2307 Hari Mengawal Konstitusi: Tujuh Belas Sketsa Ringan, Analogi Puisi Dan PHPU* (In-TRANS Publishing, 2010) 28.
[103] Interview with Denny Indrayana (Minister of Law and Human Rights, 23 December 2013).
[104] Interview with Anonymous Participant C (Law Firm Office, 12 December 2013).
[105] EDN, '*Charta Politika: Tahun* 2009, Mahfud MD *Paling Berpengaruh*', *Kompas* (Jakarta), 5 January 2010.
[106] JPNN, '*Takut Kena Pasal Gratifikasi: Mahfud Md Serahkan Emas 66 Gram Ke KPK*', *Rakyat Merdeka* (Jakarta), 10 Maret 2010.
[107] Interview with Dian Rosita (*Lembaga Kajian dan Advokasi untuk Indepedensi Peradilan* Office, 2 July 2014).

regarding cases or potential cases that were not before him. This should have been seen as an ethics violation, but the public liked these kinds of statements.[108] Activists, for their part, recognised that Mahfud MD used his position as Chief Justice to gain popularity.[109]

Jimly was known for his various books on constitutional law, although there was some criticism that he had just borrowed other people's ideas, including those of his fellow constitutional justices.[110] In contrast, Mahfud MD was known for his sharp comments on, or controversial approach to, cases or existing political controversies that came to the Court. If Jimly collected his ideas in books, Mahfud MD collected his ideas in controversial comments or opinions, writing in various newspapers and magazines. Some of the opinions he expressed in newspapers or comments that were quoted include: 'Judges messing with election',[111] 'Only ten minutes',[112] 'Democracy is not always right',[113] 'If we are stuck, we will make new law',[114] 'Even evil can become a witness at the Court',[115] 'Guarding the Constitution to protect democracy',[116] and '[President] SBY's English Speech Illegal'.[117]

Chief Justice Mahfud also liked to cast aspersions on parliament's performance. Once, he raised the issue of 'buying and selling' provisions in the drafting process, saying that provisions drafted in this way contradicted the Constitution and the public interest. In consequence of this statement, several applications were filed to review the provisions concerned.[118] This produced an outcry from parliamentary members, and the deputy chair of parliament requested that the Chief Justice indicate which provisions were affected by this practice.[119]

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[108] Ibid.
[109] Interview with Abdul Multhie Fadjar (Residence, 4 December 2013).
[110] Hendrianto, above n 5.
[111] Moh Mahfud MD, '*Mengadili Pemilu Amburadul'*, *Indo Pos* 13 April 2009.
[112] Vid/Mok, *Mahfud Setuju Perpu Pengawasan Permanen Untuk Mk* (17 October 2013 PT Detik.com <http://news.detik.com/berita/2388828/mahfud-setuju-perpu-pengawasan-permanen-untuk-mk>.
[113] Moh Mahfud MD, '*Demokratis Belum Tentu Benar*', *Majalah Tempo* (Jakarta), 28 September 2008.
[114] MD Moh. Mahfud, *Politik Hukum Di Indonesia/Moh. Mahfud M.D* (Rajawali Pers, 2009).
[115] MD Moh. Mahfud, '*Setan Pun Boleh Jadi Saksi Di Mk*', *Seputar Indonesia* (Jakarta), 28 April 2010.
[116] Moh Mahfud MD, '*Mengadili Pemilu Amburadul*', *Indo Pos* 13 April 2009.
[117] K Highlander, 'SBY's English Speech Illegal: Mahfud', *Jakarta Post* (Jakarta), 3 June 2011.
[118] Rahmad Budi Harto, '*MK: Pasal Uu Diperjualbelikan*', *Republika* (Jakarta), 16 November 2011.
[119] Her/Irn, *DPRMinta Mahfud MD Tunjukkan Pasal Uu Yang Diperjualbelikan* (16 November 2011) PT Detik.com <http://news.detik.com/berita/1768491/dpr-minta-mahfud-md-tunjukkan-pasal-uu-yang-diperjualbelikan>.

Mahfud MD's critical comments were not only addressed to parliament but also to the Supreme Court. Supreme Court Chief Justice Harifin Tumpa became angry at Chief Justice Mahfud's comments and refused to attend a ceremonial occasion involving Mahfud MD. In response to the arrest of a judge by the KPK (Corruption Eradication Commission) in 2011, Chief Justice Mahfud stated:

> The Supreme Court has absolutely failed to reform itself into a fair and clean court. The public has no respect any more for the judges [of the Supreme Court].[120]

Mahfud MD was not only active in the media providing comments. He was also willing to participate in other courts. On 26 May 2011, Mahfud was a defence witness (*saksi meringankan*) in the Corruption Court for Agus Condro, a former parliamentary member. Mahfud MD informed the panel of judges at the Corruption Court how Agus Condro revealed corruption that occurred in parliament. He came with his official car RI-9, with security guards and protocols. Before appearing before the judge, Mahfud MD left his pin as the symbol of a 'constitutional justice' and bowed to the Court.[121] Mahfud MD submitted a list of names of people alleged to have conducted cases as brokers (*makelar kasus*) before the Corruption Eradication Commission special task force on the legal mafia.[122]

Doctrinally, as explained in more detail in the next chapter, Mahfud MD built on the foundation laid by Jimly's bench. However, the Court's decisions were generally seen as being more political. In handling disputes surrounding the election of regency heads and vice heads, for example, the Court ordered a re-vote and a recount, which was not authorised by the *2003 Constitutional Court Law*.[123] The Court also annulled the results of head of regency elections.[124] This decision, too, did not fall under the Court's authority. The Court also increased the Regional Representative Council (DPD)'s participation in the drafting of laws, together with the House of Representatives

[120] Nurhadi, *Harifin A Tumpa: Pemukul Palu Dari Delta Sungai Walanae/Nurhadi; Editor, Sukma N. Loppies* (Pustaka Dunia, 2012) 296.
[121] Ariyatno, *Mahfud MD, Hakim Mbeling* (*Konstitusi* Press, 2013) 9.
[122] Irawaty Wardany, 'Judicial Corruption Task Force Taking Notes', *Jakarta Post* (Jakarta), 14 January 2010.
[123] This began with the East Java Governor election result dispute, 'Constitutional Court Decision 041/PHPU.D-VI/2008 on East Java Head of Regency Election Result' (2008).
[124] *Constitutional Court Decision 059/PHPU.D-VI/2008 on South Bengkulu Head of Regency Election Result* (2008).

Council.[125] In the general election, the Court decided to choose a majoritarian system over the party candidate list to determine a representative member's election.[126] Through these decisions, Mahfud MD was perceived as bringing political practices to the Court.[127]

Mahfud MD's activism on the Court, highlighted by its decisions, along with his media image, made him one of the strongest candidates for the 2014 presidential elections. On 28 November 2012, the Indonesia Survey Agency (*Lembaga Survei Indonesia*) named Mahfud MD as the most eligible and best candidate for President in 2014. His chances were considered to be brighter than those of Jusuf Kalla (Vice President of Indonesia 2004–2009) and even Megawati Soekarnoputri (President of Indonesia 2001–2004).[128] Jimly had also wanted to become Vice President or President as a continuation of his role as Chief Justice. However, his ambitions were not as evident to the media or ordinary people. Rather, Jimly kept them to his inner circle. One plausible reason for this was that Jimly realised that SBY's bid for the presidency would be stronger. And, indeed, in the 2009 presidential election, SBY won an outright victory in the first round with 60.8 per cent of the vote. The context was different when Mahfud MD made his more public bid for the presidency, as by then President SBY had ended his second term, and there was a strong desire among Indonesians to have other alternatives. Despite this, Mahfud MD's bid for the presidency was, as mentioned, ultimately unsuccessful.

4.4 Comparison between the two Courts

This section compares the different styles of judicial decision-making and strategies on the Jimly and Mahfud Courts. It also considers the two Courts' different approaches to legal reasoning and the obligation to give legal opinions. Both Jimly and Mahfud played an important role in influencing the Court in these respects.

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[125] *Constitutional Court Decision 092/PUU-VII/2009 on Regional Representative Council* (2009).
[126] *Constitutional Court Decision 022-24/PUU-V/2008 on Majority Vote and Female Candidate* (2008).
[127] Interview with Benny K Harman (DPR/Parliament Building, 18 June 2014).
[128] Arfi Bambani Amri, Syafrul Ansyrai 'LSI: Mahfud MD *Dominasi Survei Capres Pilihan* Opinon Leaders', *Viva News*, 28 November 2012, accessed 26 February 2013 <http://us.politik.news.viva.co.id/news/read/370839-lsi--mahfud-md-dominasi-survei-capres-pilihan-opinion-leader>.

4.4.1 The obligation to give legal opinions

The different styles of the two Chief Justices affected how other constitutional justices delivered their opinions and transformed those opinions into court decisions that were supported with rigorous legal reasons. The main difference related to the obligation to write a legal opinion. Chief Justice Jimly expected each constitutional justice to provide a legal opinion before the judges' deliberation meetings. Jimly wanted the work of the justices to be intellectually rigorous: 'I declared [the] environment in court [was an] academic environment, a scholarly environment'.[129]

The obligation to write a legal opinion was imposed by the *2003 Constitutional Court Law*. In particular, article 45(5) stated that:

> In the session, all constitutional court justices are obliged to present a written consideration or opinion against an application.

Under Jimly, each justice would submit a draft legal opinion for discussion at a deliberation meeting. Jimly would send them a memo two weeks in advance to remind them of this obligation.[130] Once the draft legal opinions had been distributed, all the justices would attend the deliberation meeting.

This practice was sometimes controversial. In one deliberation meeting, a constitutional justice presented his legal opinion in front of the other justices. Suddenly, Chief Justice Jimly arose and said 'as a Constitutional Law Professor, I am ashamed to hear that kind of legal opinion'. In another incident, Justice Palguna threw his papers at Justice Maruarar because of a disagreement. The elder of the two,[131] Maruarar left the room, with Justice Laica Marzuki chasing after him.[132] On the whole, however, the exchange of draft legal opinions and the opportunity to debate them with the other justices improved the technical quality of the opinions over time.

The tradition of providing draft legal opinions and debating these at deliberation meetings decreased significantly in Mahfud MD's era. The second generation of judges

[129] Jimly Asshiddiqie, *Menegakkan Etika Penyelenggara Pemilu/Prof. Dr. Jimly Asshiddiqie, S.H* (Rajawali Press, 2013).
[130] Interview with Anonymous Participant H (Constitutional Court Building, 3 December 2013).
[131] It is customary in Indonesia that the younger should respect to the elder.
[132] Interview with M Laica Marzuki (Residence, 19 December 2013).

was reluctant to engage in this practice and the Chief Justice did not do anything to enforce the tradition Jimly had started.[133] Instead, it was left to the Court Registrar to try to maintain the tradition. This worked at the beginning of the second generation's term, but it was difficult to maintain the tradition without high-level support.[134] As Mahfud did not push the other constitutional justices to submit legal opinions, there was a low level of compliance.[135] When constitutional justices did submit their drafts, the quality of the opinion was generally quite low.[136] Alternatively, draft legal opinions would be written by the judge's associate, sometimes with no judicial input:

> I feel ashamed to tell you that my Justice never wrote any legal opinion. Even though he had to provide something in the form of a legal opinion, I was the one that had to write it for him.[137]

The second generation of judges considered that their spoken words at the judicial deliberation meeting constituted their legal opinion.[138] They also considered that their ideas, questions and spoken words during examination hearings were legal opinions.[139] This habit of viewing non-written interventions as legal opinions was confirmed by Justice Sumadi:[140]

> I wrote my legal opinions, but I do not know about the other Justices. Writing a legal opinion was not considered mandatory and was seldom done. We would still defend our legal opinions, but not in the form of a written legal opinion, rather through our oral interventions at the judges' deliberation meeting.[141]

One plausible argument for why the first generation had to write their legal opinions has to do with a lack of support. In the early period, the Court was not properly established and had only minimal staff to support the justices. Consequently, constitutional justices had to do everything themselves. The second generation of constitutional justices had more support, with the Court employing a court researcher and numerous substitute

[133] Interview with Anonymous Participant H (Constitutional Court Building, 3 December 2013).
[134] Interview with Anonymous Participant C (Law Firm Office, 12 December 2013).
[135] Interview with Anonymous Participant I (Constitutional Court Building, 3 December 2013).
[136] Interview with Anonymous Participant H (Constitutional Court Building, 3 December 2013).
[137] Interview with Anonymous Participant D (Constitutional Court Building, 28 November 2013).
[138] Interview with Anonymous Participant G (Constitutional Court Building, 3 December 2013).
[139] Interview with Ali Safaat (Faculty of Law University Brawijaya, 5 December 2013).
[140] Justice Ahmad Sumadi spent five years as registrar during Jimly's era.
[141] Interview with Fadlil Sumadi (Constitutional Court Building, 13 December 2013).

registrars. On this view, the presence of supporting staff 'spoilt' the second generation.[142]

With the decline of written draft legal opinions, justices who disagreed with the majority became reluctant to issue formal written dissents. In 2003, Article 45(10) of the *Constitutional Court Law* provided that dissenting justices had to be named:

> In a case where consensus is not reached as stated in sub-articles (7) and (8), dissenting views of member justices must be mentioned in the decision.

Under Mahfud MD, writing a dissenting opinion was considered difficult as the dissenter needed to elaborate on why their understanding of the law was better than the majority's. Writing a dissenting opinion also obviously imposed an additional burden of work. Overall, the dissent rate on the Mahfud Court was 13.7 per cent (47 of 343 cases). Under Jimly, the rate had been 37.75 per cent (57 of 151 cases). Mahfud MD's explanation for this discrepancy was that the justices on his Court shared similar views of substantive justice and sought to keep their technical-legal differences to a minimum. Therefore, not many dissented.[143]

4.4.2 Legal reasons for decisions

Under Jimly, the primary battle that the justices had to wage was to convince their colleagues of the persuasiveness of their opinions before putting them to the public. The deliberation meetings became the main forum for these battles, and Jimly took them very seriously as a determinant of the Court's decisions:

> You must see all the differences before you write a decision because all opinions matter. You must consider not only other opinions, but the cause and effect of a decision. Justices have a duty to redress injustice, not least because their decisions are final and binding.[144]

[142] Interview with Anonymous Participant E (Constitutional Court Building, 26 November 2013).
[143] Vid/Mok, *Mahfud Setuju Perpu Pengawasan Permanen Untuk Mk* (17 October 2013), PT Detik.com <http://news.detik.com/berita/2388828/mahfud-setuju-perpu-pengawasan-permanen-untuk-mk>.
[144] Interview with Jimly Asshiddiqie (Election Ethic Council Office, 9 December 2013).

During these deliberation sessions, justices would present their legal opinions, and eventually cast a vote on the case.[145] Justice Laica would often hide the ashtray under the table when discussions became intense, as he was afraid someone would take it and throw it at the other justices.[146] The atmosphere was one in which each justice fought passionately (but peacefully) for the values in which they believed.[147] This changed under Mahfud MD.[148] While the deliberation meetings continued, the cases were not discussed as deeply. The lack of draft written opinions ensured that debates during Mahfud MD's era were shallow and very pragmatic. Only the three justices from Jimly's era, who were still active, provided written opinions in those meetings.[149] This change may partly have been a function of the increasing number of cases, flowing especially from the Court's new authority to handle the head of regency election results disputes,[150] but it was also partly a function of the general reluctance on the part of the judges to engage each other in debate.[151]

Attendance at the deliberation meetings also differed between the two Courts. The first generation of constitutional justices was allowed to leave the court precinct during the weekend (Friday and Saturday). If they intended to be away during the week, however, they needed Chief Justice Jimly's permission. Under Mahfud MD, everybody could come and go as they wished.[152] The second generation, including Mahfud MD himself, focused on participating in outside activities.[153]

The final opinion drafting process also changed between the Jimly and Mahfud eras. Under Jimly, a panel of three justices who were responsible for the preliminary hearing of a case would provide their opinion on whether it should proceed or not. One of the justices would then be nominated to write the opinion on behalf of the Court. The final wording would be agreed by all the justices at a deliberation meeting. In Mahfud's era, this system changed. The panel of justices with knowledge of the proceedings would report to the other justices in the deliberation meeting. Mostly, by then, the panel had

[145] Interview with Anonymous Participant I (Constitutional Court Building, 3 December 2013).
[146] Interview with M Laica Marzuki (Residence, 19 December 2013).
[147] Interview with Anonymous Participant A (Constitutional Court Building, 3 December 2013).
[148] Interview with Abdul Multhie Fadjar (Residence, 4 December 2013).
[149] Interview with Anonymous Participant C (Law Firm Office, 12 December 2013).
[150] Interview with Anonymous Participant H (Constitutional Court Building, 3 December 2013).
[151] Interview with Mustafa Fahri (Faculty of Law University of Indonesia, 3 July 2014).
[152] Interview with Anonymous Participant H (Constitutional Court Building, 3 December 2013).
[153] Ibid.

already determined the outcome and went on to draft the opinion.[154] Although there were occasionally some questions from the other justices, this was very rare.[155] In consequence, not all justices understood what cases were before the Court and what it had decided.[156]

Another problem under Mahfud MD was reliance on the opinions of expert witnesses that appeared at court hearings.[157] Justice Harjono, who was a constitutional justice under both Jimly and Mahfud MD, shared:

> Honestly, the second generation of justices is very different from the first. When they decide a case, they just choose the outcome and make up an argument to suit it. Many of their decisions lack a ratio decidendi.[158]

To convince other justices, a justice needs to write a legal opinion. However, the lack of written legal opinions under Mahfud MD made it difficult for justices to do this.[159] Consequently, constitutional justices in the second generation used to ask a substitute registrar to write a decision. Towards the end, this became quite a common request.[160] In the end, the constitutional justices became wholly reliant on substitute registrars to write their judgements. The justices would simply declare their decisions, and then the registrar would write reasons to support it. After that, the justices would revise the judgement. This differs from the first generation in which the constitutional justices wrote their own decisions.[161] The second generation of justices were reluctant to make this effort.[162] Statistically, the Jimly Court wrote 151 judicial review opinions totalling 304 597 words, or an average of 2 017 words per decision. In comparison, the Mahfud Court averaged 1 450 words per decision with a total of 497 191 words from 343 cases.

In the end, the second generation of constitutional justices led by Mahfud MD was not able to provide decisions of the same level of quality as the first generation. This not only applies to the written words, but also to the quality of their legal reasoning. Legal

[154] Interview with Maruarar Siahaan (Indonesia Christian University, 10 December 2013).
[155] Interview with Anonymous Participant I (Constitutional Court Building, 3 December 2013).
[156] Interview with Anonymous Participant A (Constitutional Court Building, 3 December 2013).
[157] Interview with Anonymous Participant C (Law Firm Office, 12 December 2013).
[158] Interview with Harjono (Constitutional Court Building, 16 December 2013).
[159] Interview with Ali Safaat (Faculty of Law University Brawijaya, 5 December 2013).
[160] Interview with Anonymous Participant G (Constitutional Court Building, 3 December 2013).
[161] Interview with Anonymous Participant H (Constitutional Court Building, 3 December 2013); Interview with Ali Safaat (Faculty of Law University Brawijaya, 5 December 2013).
[162] Interview with Ali Safaat (Faculty of Law University Brawijaya, 5 December 2013).

scholars could see the difference in quality.[163] As constitutional law scholar Prof Saldi Isra from the University of Andalas, West Sumatra and a close observer of the Court, said: 'Honestly, the first generation was able to provide richer legal reasoning than the second generation'.[164] Taufik Basari, a public advocate who often presented at the Court, testified:

> We could understand the first generation's legal reasoning, even though sometimes we did not agree with it. But I could not understand the second generation.[165]

The public enjoyed reading the decisions of the first generation of constitutional justices, due to the richness of their ideas. This is something that the second generation failed to deliver.[166] The first generation provided competing arguments in their decisions as a way to make the public understand their reasoning process. However, this practice was not always welcome in Mahfud MD's era. In one deliberation meeting, Justice Harjono shared his ideas about a case. Chief Justice Mahfud intervened and said: 'Save that for an academic paper. It is not for decision.'[167] This aversion to stating competing arguments reduced the quality of the Mahfud Court's decisions.[168] It was as though only one answer was ever possible.[169] Reading the Court's decisions was consequently 'like reading a paper from a bachelor degree's dissertation. Only one side's perspective was given.'[170]

Competing ideas regarding a judicial decision often stem from the judges' different backgrounds. The first generation of justices included five academics, each of whom had a fairly developed legal philosophy. In comparison, upon the retirement of Mukthie Fadjar, only three academics were left on Mahfud MD's bench. Under Jimly, the judges' differing legal philosophies led to disagreement but also enriched the Court's decisions and enhanced their logic.[171] There was no dominant ideological voice on the Jimly Court. Rather, there was a balance between progressive justices (Maruarar) and conservative justices (Natabaya). This equilibrium was not sustained in Mahfud MD's

[163] Interview with Mustafa Fahri (Faculty of Law University of Indonesia, 3 July 2014).
[164] Interview with Saldi Isra (International Airport Soekarno Hatta Lounge, 16 June 2014).
[165] Interview with Taufik Basari (National Democrat Party Office, 17 December 2013).
[166] Interview with Anonymous Participant F (Constitutional Court Building, 13 December 2013).
[167] Interview with Anonymous Participant G (Constitutional Court Building, 3 December 2013).
[168] Interview with Anonymous Participant H (Constitutional Court Building, 3 December 2013).
[169] Interview with Taufik Basari (National Democrat Party Office, 17 December 2013).
[170] Interview with Ramlan Surbakti (Kemitraan Office, 2 July 2014).
[171] Interview with Saldi Isra (International Airport Soekarno Hatta Lounge, 16 June 2014).

era. Sodiki and Mahfud MD himself were confident and dominated the others. Their influence stemmed not just from their reputations but also from their relationships. Alim and Arsyad had studied at the Islamic University of Indonesia Yogyakarta under Mahfud MD's supervision. Mahfud MD had also been Fadlil Sumadi's supervisor.[172] As a progressive justice who supported substantive justice, Mahfud MD had few opponents during the deliberation meetings. Maruarar Siahaan, who was in the minority in pursuing progressive justice, was a great supporter of Mahfud MD's substantive justice approach (to be explained below).[173] Upon Mukthie and Maruarar's retirement in December 2009, Mahfud MD promoted this idea among the other justices. In contrast, the first generation had no dominant figure. Even Jimly could not impose an idea on his own, but was kept in check by other justices like Laica, Natabaya and Mukthie. This equilibrium did not exist in the second generation.[174]

The decline in the quality of the Court's legal reasoning processes did not lead to a reduction in the number of cases that came to it nor in the number of NGOs or public advocates willing to bring cases to the Court. Rather, Parliament's poor performance contributed to ongoing faith in the Court. In a sense, public advocates still believed in the Court because they had to believe in it:

> After we lose a battle in the Parliament, we go to the Court. Some of our cases are successful, even though with less compelling reasoning compared to the previous generation. But we still get some sort of legal reasoning.[175]

Even the questions that the justices asked experts, or counter-arguments from expert witnesses during examination hearings, were not as difficult as those posed by the first generation.[176] Frustrations regarding how the second generation handled its cases led public advocates to avoid difficult legal jargon and complicated legal-philosophical arguments. In their view, there was 'no need to make a complicated petition – the

[172] Interview with Ali Safaat (Faculty of Law University Brawijaya, 5 December 2013).
[173] Interview with Anonymous Participant C (Law Firm Office, 12 December 2013).
[174] Interview with Saldi Isra (International Airport Soekarno Hatta Lounge, 16 June 2014).
[175] Interview with Gita Putri Damayanti (Indonesian Centre for Law & Policies Studies Office, 11 December 2013).
[176] Interview with Eryanto Nugroho (Indonesian Centre for Law & Policies Studies Office, 11 December 2013).

justices would not understand it.[177] This does not mean that the Jimly Court was never criticised for its handling of cases. But mistakes or errors made during Jimly's chief justiceship were seen as weaknesses that the Court needed to fix. The thinking was that public advocates and civil society needed to work together to make the Court a better institution. Under Mahfud MD, by contrast, the Court was seen to deviate from this model.[178] Public advocates viewed the second generation of justices as more political than academic. Nevertheless, the foundation of trust that had been built up under Jimly provided sufficient capital for the second generation to undertake significant reforms.[179]

One plausible explanation for the reduced quality of the Mahfud Court's opinions was the reduced legal-professional skills of the individual justices themselves. This argument was made in all the interviews I conducted. However, this thesis has not been able to find an objective basis on which to say that the first generation of justices was of a better quality than the second generation. Certainly, there were more legal academics on the Jimly Court.[180] Whether that means that the members of the Mahfud Court were overall of a lower quality than the Jimly Court is, however, questionable. Academics, while adopting a more scholarly style, are not necessarily technically better than other judges. It seems rather to have been the case that less was expected of the Mahfud Court judges, and therefore that they delivered less.[181]

The turning point in the performance of the Mahfud Court was the conferral on it of jurisdiction to decide local election result disputes, a jurisdiction that had not been conferred on the Jimly Court.[182] This change, as noted earlier, contributed to the reduced quality of the Court's decisions. By requiring the Court to settle local election result disputes, the justices became in effect ordinary, first-instance justices.[183] Ironically, it was Chief Justice Jimly who had lobbied Parliament to transfer the head of regency election results disputes from the Supreme Court to the Constitutional Court.[184]

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[177] Interview with Eryanto Nugroho (Indonesian Centre for Law & Policies Studies Office, 11 December 2013).
[178] Interview with Benny K Harman (DPR/Parliament Building, 18 June 2014).
[179] Interview with Saldi Isra (International Airport Soekarno Hatta Lounge, 16 June 2014).
[180] Interview with Ramlan Surbakti (Kemitraan Office, 2 July 2014).
[181] Interview with Benny K Harman (DPR/Parliament Building, 18 June 2014).
[182] Interview with Taufik Basari (National Democrat Party Office, 17 December 2013); Interview with Dian Rosita (*Lembaga Kajian dan Advokasi untuk Indepedensi Peradilan* Office, 2 July 2014).
[183] Saldi Isra, '*Memudarnya Mahkota MK*', *Kompas* (Jakarta), 14 August 2013.
[184] Hendrianto, above n 5.

As stated by constitutional drafters, Jacob Tobing and Zen Badjeber above, a constitutional court should not review election results disputes. The main business of a constitutional court is judicial review.[185] (Further discussion about how the Court settled the head of regency election results disputes is presented in Chapter 5.)

As discussed in the Chapter 3, the Jimly Court paradoxically benefitted from the underdevelopment of Indonesian constitutional law. For many years, the New Order military regime, under President Suharto, relied on political repression to maintain its authoritarian control. The use of intimidation also applied to academic institutions. The regime would thus automatically suppress any oppositional scholarly voice.[186] In such circumstances, scholars who studied constitutional law seriously would be subjected to political pressure whenever they produced criticism of government structures or practices. Consequently, the study of constitutional law was not well developed.[187] This created quite a 'free environment' in which the Jimly Court had wide discretion to adopt any number of practices, judicial philosophies or constitutional principles, and in which it might have used after-the-fact rationalisations to justify its decisions.[188] The first generation of justices understood this, however, and worked hard to develop a tradition of legal reasoning that future Courts would be bound to respect.[189]

The Mahfud Court did not enjoy this luxury. As a logical consequence of increased media relations and civic education and court awareness-building programs, the legal community and law students became aware of the Court's decisions and role. There was also an increase in the sheer number of people interested in the work of the Court. As noted earlier, the Court under Jimly had established a centre for constitutional law in almost every Indonesian public law school. The mere existence of the Court encouraged more students to enrol in constitutional law subjects.[190] The number of courses relating

[185] Simon Butt, *Indonesian Constitutional Court Decisions in Regional Head Electoral Disputes* (Centre for Democratic Institutions, Australian National University, 2013).
[186] Jimly Asshiddiqie, *Pokok-Pokok Hukum Tata Negara Indonesia Pasca Reformasi/Jimly Asshiddiqie* (Bhuana Ilmu Populer, 2007); Ariel Heryanto, *State Terrorism and Political Identity in Indonesia: Fatally Belonging* (Routledge, 2005).
[187] Ibid 38.
[188] The Court quoted decisions from various constitutional courts such as the South African, South Korean and German constitutional courts.
[189] Interview with Abdul Multhie Fadjar (Residence, 4 December 2013).
[190] The University of Indonesia's Faculty of Law doubled its student numbers in constitutional law every semester.

to the Constitutional Court increased and became mandatory at various universities.[191] At the same time, the Court's caseload increased year by year. With all this added attention and scrutiny, the Mahfud Court's public legitimacy depended on its capacity to build on and enhance the legal reasoning tradition that the Jimly Court had begun. Unfortunately, as argued in the next section, the Mahfud Court did exactly the opposite: instead of improving the legal rigour of its decisions, it switched to a more informal, substantive justice style that exposed it to criticism as a political institution.

4.4.3 From formal to substantive justice

The transition from the Jimly to the Mahfud Court also saw a radical shift in judicial philosophy. While the first generation of justices had wanted to become the 'sole interpreter of the constitution', the second introduced what Chief Justice Mahfud called a 'substantive justice' (*keadilan substantif*) approach. (Chapter 5 discusses the compatibility of this approach with Indonesian constitutional law.) Substantive justice became the tag line for all Court decisions and the theme of any public speech given by the Chief Justice or one of the other constitutional justices. Mahfud MD's own conception of substantive justice held that the Court could issue any decision as long as it aligned with the Constitution:

> The law is the product of politics, and if the law fails to deliver justice to the people, the Court will step up to protect people's rights.[192]

Justice Maruarar—the most progressive justice in Jimly's era—found much truth in this statement and became one of the great supporters of the substantive justice approach, together with Justice Sodiki.[193] In Sodiki's view, formal regulations did not always fit a society. The Court needed to step in to protect the public interest. In a multicultural country like Indonesia, one formal legal system would not fit the entire nation.[194] To bridge the protection of the public interest and a more formal approach, the Court needed to apply a substantive justice approach in its decisions. This meant the rejection of legalism, a project that Sodiki alleged all the justices supported:

[191] The University of Indonesia has imposed this.
[192] Ibid.
[193] Interview with Anonymous Participant C (Law Firm Office, 12 December 2013).
[194] For example, community agreements for the head of regency election in Papua.

> All justices in our generation agree with the substantive justice approach. Luckily, all the justices have the same idea.[195]

During his interview with the 2008 selection team, Prof Sarjito Rahardjo, a respected legal scholar, asked Sodiki whether he was satisfied with the current law. Sodiki replied by saying that he was not 'because the current law does not serve to settle problems, and there is a need for a breakthrough'. Sodiki maintained this point of view even when Prof Sarjito later said: 'When you become a constitutional justice, you need to remember that.'[196]

Sodiki continued to argue that his generation should adopt a realistic approach that would fit public expectations.[197] The law itself was not perfect:

> Laws [were] drafted by humans to serve human interests. Our approach to decision-making was similar to that. We preferred to make laws for humans as they are. That is part of the philosophy that [was] developed in the Court. Without that idea, law could become inhumane.[198]

However, Justice Sumadi did not agree that the Mahfud Court was solely focused on substantive justice. He argued that substantive law focused on justice, and in contrast, procedural law focused on certainty. Between substantive law and procedural law, there was a reality called 'utility' (as argued by Bentham).[199] If procedural law did not recognise substantive justice, an injustice would have occurred. At that stage, the Court would do whatever it could to provide justice for the people. That was the condition if procedural law was not able to perform and the intention to find justice had been exhausted: in this situation, the Court would step in.[200]

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[195] Interview with Ahmad Sodiki (Residence, 4 December 2013).
[196] Interview with Ahmad Sodiki (Residence, 4 December 2013)
[197] This realism approach also influenced the High Court of Australia during Chief Justice Anthony Mason's period. See Jason Louis Pierce, *Inside the Mason Court Revolution: The High Court of Australia Transformed* (Carolina Academic Press, 2006) 147.
[198] Interview with Ahmad Sodiki (Residence, 4 December 2013).
[199] Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* (Clarendon Press, 1879).
[200] Interview with Fadlil Sumadi (Constitutional Court Building, 13 December 2013).

Justice Sumadi's opinion was supported by Justice Mukthie Fadjar, who also rejected the claim that the Mahfud Court always used a substantive justice approach.[201] In Justice Mukthie's view, procedural and substantive justice had to be properly harmonised. It was the role of judicial statesmanship to find the correct balance between those two things. Substantive justice is not absolute:

> We cannot always rely on a moral reading of the Constitution as stated by Dworkin. We must give proper justifications with adequate legal reasons.[202]

As the primary supporter of the substantive justice approach, Mahfud MD opined that the law was a product of politics and consequently some part of the law would invariably be unjust.[203]

The battle between formal and substantive justice has a long history in Indonesia's legal community. The substantive justice approach, which is seen as progressive, was proposed by Prof Satjipto from the University of Diponegoro, Semarang, Central Java:

> A progressive approach is an approach that is brave enough to get out from under regulatory tyranny to produce substantive justice. All justice is progressive justice.[204]

This understanding of substantive justice would not have enjoyed much support on the Jimly Court. Justice Natabaya, who was known as a proponent of formalism, rejected the concept of substantive justice. He noted:

> It amounts to saying that, if we don't like something, we will fix it, even though doing so might be against the law. We just declare the law unconstitutional.

In support of this vision, Mahfud MD drafted the introductory part of the Court's decision in the 2008 East Java head of regency election results dispute.[205] He detailed what his vision of a progressive and a substantive justice approach included. This personal statement of his approach was read out in public in front of the other

[201] Mukthie Fadjar served one-and-a-half years under Mahfud MD's leadership before he retired in December 2009.
[202] Interview with Abdul Multhie Fadjar (Residence, 4 Deceber 2013).
[203] Interview with Mohammad Mahfud (MMD Initiative Office, Jakarta, 3 December 2013).
[204] Ibid.
[205] *Constitutional Court Decision 041/PHPU.D-VI/2008 on East Java Head of Regency Election Result* (2008).

constitutional justices.[206] (Mahfud MD later claimed that, as all the justices had a similar approach, there would be less dissent on his Court.[207]) The Court then issued its *ultra petita* decision.[208]

In his second term with the Court, Justice Harjono appeared to miss his first generation colleagues. If Maruarar Siahaan was considered the great dissenter of the first generation from 2003 to 2008, Harjono was the great dissenter from 2008 to 2013. His strong constitutional law background made him seem like an outsider to the 'substantive approach' that had become the tag line since Mahfud MD became Chief Justice. Harjono often expressed his disapproval of the majority in 'strong words'. In the *BP Migas Case*, for example, he questioned the majority opinion in determining the legal grounds for the unconstitutionality of BP Migas. He continued by stating, 'it is very wrong for the Court to deliver a judgment on constitutionality that itself potentially violates the constitution (*yang berpotensi melanggar konstitusi pun bisa diputus oleh Mahkamah sebagai perkara konstitusionalitas*)'. In the 2013 *Constitutional Justices' Age Requirement Case*,[209] Harjono wrote that 'the constitutional harm suffered by the petitioner is imaginary', and (by increasing constitutional justices' mandatory requirement age) 'it is very close to the constitutional justices' personal interest and a test for the spirit of constitutional justice'.[210]

4.4.4 The Court's handling of *Pilkada* decisions

Even though the DPR was not able to remove the hearing of local election results disputes from the Court's jurisdiction in 2011 (as discussed in Chapter 1), it is worth discussing this issue. The question of where this authority should reside consumed most of the drafting committee's allocated time for the 2011 amendment to the Constitutional Court Law (apart from the issue of supervision). The Court under Jimly took the view that local election results disputes should be 'centralised' in one court (i.e. the Constitutional Court). However, the Court failed to predict that local election results disputes would have a direct impact on national parliamentary members and thus failed to recognise the backlash that might result from its involvement in these matters.

[206] Interview with Mohammad Mahfud (MMD Initiative Office, Jakarta, 3 December 2013).
[207] Ibid.
[208] Interview with Anonymous Participant C (Law Firm Office, 12 December 2013).
[209] *Constitutional Court Decision 007/PUU-XI/2013 on Age Requierment for Second Appointment* (2013).
[210] Ibid 42.

Parliamentary members and political parties had an interest in the regency heads. In particular, political parties' role in maintaining their constituents' support in their district was easier if the head of regency came from the same political party as the relevant parliamentary member. Parliamentary members needed to consolidate their constituents in their areas and having a head of regency from the same party 'line' was necessary to secure a seat for upcoming elections.[211] Parliamentary members' interest in the Court's decisions regarding local elections for the head of regency stemmed from the fact that it affected their electability in incoming elections. They realised that their constituents had been 'taken care of'. Complaints regarding the Court's handling of local election results had already been made before the arrest of Chief Justice Akil Mochtar in October 2013. However, because of the high volume of local election results disputes, no one could track the cases in which corruption had occurred.[212] When the Court handed down judicial review decisions, the complaint would come from the DPR as the institution that had produced the law. However, when the Court issued a *pilkada* election results dispute decisions, the interest in the decision was divided among many parliamentary members. The more the Court settled local election results disputes, the more it affected many parliamentary members' interests.[213] In addition, the Mahfud Court handled the *pilkada* cases differently from the Jimly Court. Whereas the latter Court focused on the tabulation of the votes, the Mahfud Court reviewed the entire process and quality of the elections.[214] Through deciding the *pilkada* cases, the Mahfud Court thus came into conflict with parliamentary members.[215] A detailed explanation of the differences in approach between the two benches in handling the *pilkada* cases is given in Chapter 5.

[211] Interview with Gita Putri Damayanti (Indonesian Centre for Law & Policies Studies Office, 11 December 2013).
[212] Interview with Dian Rosita (Lembaga Kajian dan Advokasi untuk Indepedensi Peradilan Office, 2 July 2014).
[213] Interview with Maruarar Siahaan (Indonesia Christian University, 10 December 2013).
[214] Interview with Achmad Rubaire (DPR/Parliametn Building, 28 November 2013).
[215] Interview with HAS Natabaya (Constitutional Court Building, 10 December 2013).

4.5 Conclusion

The process for selecting the judges was one of the major factors influencing the legitimacy of the Court.[216] The nomination of constitutional justices took place in a different context and had a different rationale in 2003 as opposed to 2008. The 2003 nomination process, even with the short timeframe for the selection of candidates, produced more appropriately qualified justices compared to the 2008 nominations. Still highly influenced by the constitutional reform spirit in 2003, each nominating institution (the President, the DPR, and the Supreme Court) attempted to send their best candidates to the Court. There was a joint effort to make the new institution work well. The 2003 nominations were also less politically motivated.

The spirit of the 2008 nominations was different. After five years of judicial review, the Court had demonstrated its power and begun to challenge other constitutional agencies. A strong political will to reduce the role of the Court led to the nomination of justices of a lower, more malleable quality compared to the first bench. The quality of the judges, however, should not be assessed at an individual level but collectively, by reference to the performance of the Court.

The judges nominated in 2003 collectively had more significant career achievements and stronger personalities. For this reason, the judges' deliberation meetings were rich, and it was common for the justices to discuss legal principles and other matters deeply. Even though Chief Justice Jimly had more advanced constitutional law knowledge than the other justices, they were of a similar intellectual quality to him and their discussions were conducted as equals. For example, Natabaya, Mukthie and Laica were widely known scholars [217] preparing to became constitutional justices when appointed. This environment was not sustained after the 2008 nominations.

Criticisms abound of the reduced performance of the Court after the first generation led by Chief Justice Jimly.[218] A straight comparison between the two Courts, however, is complicated by the fact that the first generation did not deal with the head of regency

[216] Sultani, *'Jajak Pendapat "Kompas": Hancurnya Citra Penegak Konstitusi'*, *Kompas* (Jakarta), 14 October 2013.
[217] Interview with Saldi Isra (International Airport Soekarno Hatta Lounge, 16 June 2014).
[218] Saldi Isra, 'Memudarnya Mahkota MK', *Kompas* (Jakarta), 14 August 2013.

and city election results disputes. Even so, the quality of legal reasoning displayed in the judicial review decisions of the second generation was far from ideal. The Court became quite one-sided and the number of dissenting opinions and the degree to which the Court entertained counter-arguments declined.

The Mahfud Court was also weakened by the selection of judges who were expected to be less activist. Indeed, the Minister of Law and Human Rights (Patrialis Akbar) who led the attack on the Court in 2011 was eventually himself appointed to the Court. This also happened to the Director of Regulation of Ministry of Law and Human Rights, who prepared the government's position and acted on behalf of the government at the DPR (Wahiduddin Adam); he also became a constitutional justice. This is evidence of an ongoing attempt to weaken the Court from the inside.[219]

As a parliamentary member, Mahfud MD had criticised the Court, but once he became the Chief Justice, he was more aggressive in his approach to decision-making than Jimly had been. People had not expected that Chief Justice Mahfud would be like that. Indeed, he was appointed precisely to rein the Court in. The Mahfud Court's increased assertiveness eventually passed a political tipping point and triggered the *2011 Constitutional Court Law* that attempted to reduce the Court's authority.

The question remaining is: would the Court still have been attacked in 2011 if Jimly had been reappointed as Chief Justice? Arguably not. Jimly's capacity to read the political winds and restrain himself from an overactive role in media activities would have reduced negative sentiments regarding his role as Chief Justice. Jimly was also reluctant to provide 'negative comments' regarding how other institutions should conduct their duties.

As Chief Justice, Jimly would have maintained the academic environment at the Court. His strict rule that justices should not leave the bench during the working week would have reduced their extra-curricular activities. He would also have been able to build on the reasoning tradition he had started to ensure that the Court's decisions were perceived as legally motivated, even when they proved inconvenient. The combination of Jimly's media savvy and his control of the Court's decision-making processes would

[219] Interview with Saldi Isra (International Airport Soekarno Hatta Lounge, 16 June 2014).

have minimised the grounds on which Parliament and the executive could have launched the attack. Perhaps the attack would have come eventually, but not in 2011.

Chapter 5: Comparing the Two Courts' Decisions: 'Conditionally Constitutional' and Other Controversial Cases

5.1 Introduction

In Chapter 4, I discussed the different leadership styles of the first two Chief Justices of the Indonesian Constitutional Court and the decision-making processes of their respective courts. The Mahfud Court's failure to maintain the high-level intellectual environment that had developed on the Jimly Court, it was argued, led to a decline in the legal-technical rigour of its decisions. In this chapter, I will discuss the Jimly and Mahfud Courts' different approaches to doctrinal questions. This chapter in this sense continues the study of the internal factors that might have led to the 2011 attack.

The difference between the two benches will be illustrated in two parts. The first part will examine the increase in so-called 'conditionally constitutional' decisions. Through this type of decision, the Court showed how a statute should be implemented by providing an interpretation or inserting a new norm. The habit of issuing these decisions began in Jimly's era and was criticised by Mahfud MD when he was a parliamentary member. However, upon the inauguration of Mahfud MD as Chief Justice, the issuing of conditionally constitutional decisions intensified rapidly and came to dominate the cases that the Court decided.

The second part examines selected cases that upset the political branches and/or political parties. These were either conditionally constitutional cases or normal judicial review cases. These selected cases not only challenged the equilibrium between the parliament and the President, but also resulted in extreme discomfort for political parties. The first case discussed concerns the 2008 East Java Governor head of regency election results dispute. This was the point at which the Court began to decide head of regency election results disputes by imposing the TSM test (structural, systematic and massive) for gross violations of the electoral process. The second case discussed is the *Simple Majority Rule Case* of 2008, in which the Court declared a proportional system with an open candidate list unconstitutional and imposed a simple majority system to determine the elected candidate who could secure a seat in parliament in the respective

region. The third case discussed is the *Corruption Eradication Commission Case* of 2009, in which the Court controversially played a tape recording that tried to frame a corruption eradication commissioner.

5.2 Conditionally constitutional decisions

The Court gradually built its capacity to decide judicial review cases. It started by rejecting judicial review cases filed by former President Abdurahman Wahid (Gus Dur), by confirming that the health requirement to become a presidential candidate was constitutional.[1] On 24 February 2004, for the first time, the Court declared that Article 60(g) of *Law Number 12 of 2003 on Legislative Elections* was constitutionally invalid (*the Communist Party Case*).[2] The Court perceived that restrictions imposed on nomination to the legislature due to past Communist Party membership were unconstitutional. This decision lifted the generational stigma imposed by the New Order upon Communist Party family members up to that date.

Through these and other decisions, the Court started to expand its role from negative to positive legislator. The particular way it did this was by issuing conditionally constitutional decisions.

Since its establishment, the Court had the capacity to issue two forms of conditionally constitutional decision. One form occurred when the Court stated that 'the law was constitutional but only if it [was] interpreted the way the Court interpreted it' ('reading down' as it is conventionally known). This is a way of deciding that the law in question is constitutional to the extent that it is interpreted in the fashion laid down by the Court. The Court used the terms 'conditionally constitutional' or 'conditionally unconstitutional' to explain this form. Conditionally constitutional meant that the law was constitutional as long as it was interpreted in the way the Court interpreted it. Conditionally unconstitutional meant that the law was unconstitutional if it was not interpreted as the Court had decided.[3]

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[1] *Constitutional Court Decision 008/PUU-II/2004 on Health Requierment for Presidential Candidate* (2004).
[2] *Constitutional Court Decision 011-017/PUU-II/2004 on Communist Party Member* (2004).
[3] The Court uses phrases such as 'meaning as', 'as long as it is interpreted as', 'as long as not interpreted', 'must be read', 'as long as not included', 'constitutional as long as [included phase]'.

The second form of conditional decision occurred when the Court issued a conditionally constitutional or conditionally unconstitutional decision by inserting a new word into the law. Here, the law under review was unconstitutional unless the new words were included. The Court in this way acted 'as a sort of second parliament' that rewrote laws.[4]

The third form of conditional decision declared that the law was unconstitutional and provided a period during which the decision should be enforced, giving the President and the DPR time to amend the existing law according to the Court's interpretation. Another name for this form of decision is 'suspension of invalidity'. This third form of conditionally constitutional decision was issued twice in Jimly's era. The first occasion concerned a challenge to the constitutionality of the Corruption Court.[5] The Court reviewed the constitutionality of Article 53 of the *Anti-Corruption Commission Law* regarding the establishment of the Corruption Court. The Court determined that the establishment of the Corruption Court under the anti-corruption commission law was unconstitutional as it provided an opportunity for a general court to handle corruption cases. Two forums providing sentences for similar criminal charges might result in different outcomes. The operation of the two courts (the Corruption Court and a general court) in handling similar criminal charges breached the constitutional protection of equality before the law.[6] However, fearing that invalidating the article would weaken the fight against corruption in Indonesia, the Court provided three years for the legislature to revise the law and establish a proper legal basis for the anti-corruption court.[7] The second case is the 2008 *Education Budget Case*.[8] The Court found that the Education section of the 2008 State Budget did not comply with Article 31(4) of the *1945 Constitution* and declared the 2008 State Budget unconstitutional.[9] Fearing this decision would lead to confusion in state administration, the Court suspended the validity of the Court's decision until the Government introduced a new State Budget.[10]

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[4] Simon Butt, 'Asia-Pacific "Illegitimate" Children and Inheritance in Indonesia' (2012) 37 *Alternative Law Journal* 196.
[5] *Constitutional Court Decision 012-016-019/PUU-IV/2006 on Corruption Court* (2006).
[6] Ibid 281-83.
[7] Less than three years later, parliament enacted *Law 46 of 2009 on the Anti-Corruption Court*.
[8] *Constitutional Court Decision 013/PUU-VI/2008 on Education Budget* (2008).
[9] *2008 State Budget Regulation in Law 16 of 2008 on the Amendment of Law 45 of 2007 on the 2008 State Budget*.
[10] *Constitutional Court Decision 013/PUU-VI/2008 on Education Budget* (2008) par [4.3].

The Mahfud Court only issued a suspended order of invalidity on one occasion. It did this when it decided, several months before the 2014 elections, that general elections (legislative elections) and presidential elections should be conducted simultaneously,[11] but that its decision should apply only from the 2019 general and presidential election.[12] These three suspension of invalidity cases were the only cases of that type that the Court decided.

The discussion now turns to the first and second type of conditionally unconstitutional decision and the Jimly and Mahfud Courts' different approaches to them. This area of law was controversial because it contradicted the common understanding of the Court as a negative legislator in the Kelsenian sense.[13]

5.3 The Jimly Court's approach

5.3.1 The *Water Resources Case*

The Jimly Court first introduced a type of conditionally constitutional decision in deciding the constitutionality of *Law Number 7 of 2004 on Water Resources* (the 2004 Water Resource case).[14] In that decision, rendered on 19 July 2005, the Court rejected the application and declared the legislation conditionally constitutional. Even though the Court rejected the case, it provided some principles that the government must comply with when implementing the *2004 Water Resource Law*. Those principles, among others, were that the State must be actively involved,[15] the State must ensure that people's access to water is reflected in the implementing regulations,[16] and water companies may only charge for actual production costs.[17] The Court also provided a guideline that the State's control over water through water rights was classified as the right to use water (*hak guna pakai air*) and the right to manage water (*hak guna usaha air*), as provided in the *2004 Water Law*. The Court acknowledged that the right to use water was a right derived from basic human rights and should be interpreted as part of

[11] *Constitutional Court Decision 14/PUU-XI/2013 on Stimultaneous Elections Case* (2013).
[12] Ibid 88. The Court was criticised significantly for this decision. This case was decided on 26 March 2013. However, the Court read out the decision on 23 January 2014.
[13] Hans Kelsen, *General Theory of Law and State* (The Lawbook Exchange, Ltd, 1945).
[14] *Constitutional Court Decision 058-059-060-063/PUU-II/2004 on Water Resource Law* (2004); *Constitutional Court Decision 008/PUU-III/2005 on Water Resource Law* (2005).
[15] *Constitutional Court Decision 008/PUU-III/2005 on Water Resource Law* (2005) 487, 488.
[16] Ibid 495.
[17] Ibid 500.

the right to live (*hak untuk hidup*), which is protected by the *1945 Constitution*. Therefore, the right to use water was to be enjoyed by every individual and could not be eliminated.[18] In contrast, the right to manage water was merely a right that existed in so far as the State allowed or permitted it to be granted. Consequently, a right to manage water could only be exercised on a permit from the government.[19] Even though the Court rejected the petition, it left open the opportunity for the application to be relodged as a judicial review application if the government failed to comply with the principles the Court had provided. In doing this, the Court waived restrictions on filing an application for judicial review of a statute against a specific constitutional provision more than once, as ordinarily prohibited by Article 60 of the *2003 Constitutional Court Law*.[20]

Using this waiver, the leader of *Muhammadiyah* (the second largest Muslim community in Indonesia) and other Islamic organisations applied for further judicial review of the *2004 Water Resource Law* (the 2013 *Water Resource Case*).[21] In the 2013 application, the applicants challenged six implementing regulations of the *2004 Water Resources Law* that they alleged contradicted a set of principles that had been decided by the Court in the 2004 *Water Resource Case*.[22] On 18 February 2015, the Court (under the leadership of Chief Justice Arief Hidayat) rendered its decision and determined that the President had not complied with the Court's interpretation of the law in the 2004 *Water Resource Case* and declared the entire *Law 7 of 2004 on Water Resources* unconstitutional.[23]

That decision was the first occasion on which the Court laid down principles that the government should follow in implementing laws under review in order to sustain the constitutionality of the law being reviewed. The failure to implement principles that the Court had laid down resulted in the Court striking down the law. In this case, the Court

[18] Ibid 495.
[19] Ibid 496.
[20] Article 60 of *2003 Constitutional Court Law*. Applications for repeated review against the material content of sub-articles, articles and parts of laws that have been reviewed cannot be re-filed.
[21] *Constitutional Court Decision 085/PUU-XI/2013 on Water Resource Law* (2013).
[22] *Government Regulation No. 16 of 2005 on Development of Drinking Water Supply System; Government Regulation No. 20 of 2006 on Irrigation; Government Regulation No. 42 of 2008 on Management of Water Resources; Government Regulation No. 43 of 2008 on Ground Water; Government Regulation No. 38 of 2011 on River; Government Regulation No. 73 of 2013 on Swamp Area*.
[23] This decision was reached on 17 September 2014 under the leadership of Hamdan Zoelva, but it took some time for the decision to be announced.

did not further review the law itself, but reviewed the compatibility of government regulations with the principles earlier provided by the Court. That mechanism was a logical step that the Court under Jimly intended to implement by issuing the original conditionally constitutional decision.

The Jimly Court also issued other conditionally constitutional decisions, but remained consistent in rejecting the applicant's case and providing guidelines on how the law in question should be implemented. For example, the Court examined the constitutionality of the requirement regarding the impact of a past criminal history on a legislative candidate's ability to hold public office (the 2007 *Criminal History Case*[24] and the 2008 *Criminal History Case*).[25] The Court stated that the relevant requirement (that the candidate should not have been sentenced to imprisonment by a legally binding court order for committing a criminal act punishable by imprisonment of five years or more) was constitutional, as long as the provisions were not interpreted as including minor or political crimes.[26] The Court suggested that the petitioner's request should be resolved through a legislative review by the legislature,[27] and should not be decided by the Court.

5.3.2 The *Censorship Board Case*

In deciding the constitutionality of the Board of Film Censorship (the 2007 *Censorship Board Case*),[28] the Court decided that the existence of an institution composed of the State and the film industry for supervising film development was required.[29] The petitioners (consisting of among others, actors, actresses, film producers and film directors), argued that the existence of the censorship board restricted the freedom of expression guaranteed by the *1945 Constitution.*[30] The Court stated that the current laws about films, including the censorship board, did not align with the current values that supported democracy and human rights protection.[31] However, if the Court declared that *Law 8 of 1992 on Film* was unconstitutional, there would be a legal vacuum that would create uncertainty. This would be because new laws about film with new norms had not

[24] *Constitutional Court Decision 014-17/PUU-V/2007 on Past Criminal History* (2007).
[25] *Constitutional Court Decision 015/PUU-V/2008 on Past Criminal History* (2008).
[26] *Constitutional Court Decision 014-17/PUU-V/2007 on Past Criminal History* (2007).
[27] Ibid 133.
[28] *Constitutional Court Decision 029/PUU-V/2007 on Board Film Censorship* (2007).
[29] Ibid par [3.23.3] 229.
[30] Ibid par [3.22.1] 220.
[31] Ibid par [4.1.1].

yet been created. Therefore, the Court declared that laws about film, including the censorship board, were conditionally constitutional as long as they were implemented in accordance with the commitment to democracy and human rights. The Court rejected the application and provided a conditionally constitutional decision. Through this conditionally constitutional decision, the Court gave directions on how the law on film should be implemented, including the values within which the censorship board should work. In this approach, the Court did not replace the legislative authority by providing a new meaning to the law. Rather the Court under Jimly's leadership appreciated its limits and returned the film law to the legislature to update it in line with contemporary values of democracy and human rights.

5.3.3 The Jimly Court's persistence

In its conditionally constitutional decisions from August 2003 to June 2008, the Court had rejected applications even as it provided guidance on how the law should be implemented. In the initial view of the Jimly Court, a conditionally constitutional decision was one in which the Court provided an interpretation regarding the implementation of a law, or how a law should be interpreted, without interfering in the legislature's authority to regulate. Its decisions amounted to non-binding instructions to other government institutions on how a law should be implemented. In this way, the Court demonstrated its caution and prudence.[32] The idea was that, if the Court later discovered that the government or related parties had not implemented the law in accordance with the Court's interpretation, it would be able to review those cases again. This approach enabled the Court to operate effectively within its limited authority as a negative legislator. It had the authority to declare that a provision in a law was unconstitutional without inserting a new provision into the law.[33] This position saved both the Court's and the DPR's 'face': 'the DPR was not pushed to amend unconstitutional statutes, and the Court did not face the prospect of having its decisions formally overridden'.[34]

[32] Interview with Abdul Multhie Fadjar (Residence, 4 December 2013).
[33] Jimly Asshiddiqie, *Pokok-Pokok Hukum Tata Negara Indonesia Pasca Reformasi/Jimly Asshiddiqie* (Bhuana Ilmu Populer, 2007) 609.
[34] Nadirsyah Hosen et al, 'Debate' (2014) 170 *Bijdragen tot de taal-, land-en volkenkunde/Journal of the Humanities and Social Sciences of Southeast Asia* 557, 560.

The Court's power to re-review cases derived from a qualification in the regulation on judicial review matters. This regulation was an implementing regulation of the *2003 Constitutional Court Law* to regulate in detail matters that had not been regulated properly in that law. *Court Regulation Number 06/PMK/2005 on Court Procedures in Judicial Review*, Article 42(1) prohibited the filing of re-reviews (in line with Article 60 of the *2003 Constitutional Court Law*). However, the next provision said that a re-review would be allowed if the parties used a different constitutional basis:

> (2) Without prejudice to the provision of section (1) above, the petition regarding the judicial review of the Law in terms of the material content of the sections, articles, and/or the same parts as the case having once been decided by the Court can be proposed to be judicially reviewed in so far as the constitutional basis on which the said petition is founded is different.[35]

5.3.4 The Jimly Court starts to legislate

Even for the Jimly Court, however, the temptation to legislate was difficult to resist. On 1 July 2008, half a month before the end of its term on 16 August 2008, the Jimly Court (for the first time) issued a conditionally constitutional decision in a matter in which the application was granted. The case concerned the constitutionality of the absence of a domicile requirement for Regional Representative Council (DPD) candidates[36] (the 2008 *Domicile Requirement Case*). *Law Number 10 of 2008 on General Elections*, Article 12, did not require candidates to be domiciled in the region in which they stood for election as a regional representative candidate. The law also did not require that each candidate should submit a copy of their identification document as part of the administrative requirements. The applicants consisted of the Regional Representative Council (as an institution) and 33 members of that council and various NGOs that focused on the election system. The applicants argued that the *1945 Constitution* already prescribed a two-tier system of representation, which included the DPR and the DPD. The DPR represented political parties and the DPD the regions. Therefore, the domicile requirement was a must.

[35] *Constitutional Court Regulation 6/PMK/2005 on Procedural Guidelines in Judical Review Cases* (2005) Article 42(2).
[36] *Constitutional Court Decision 010/PUU-VI/2008 on Domicile Requirement* (2008).

The Court opined that having a domicile requirement for candidates of the DPD was a norm attached implicitly to the provision of Article 22C(1). This reads 'Members of the Regional Representative Council shall be elected from each province through a general election'. Article 22C(2) reads, 'Members of the Regional Representative Council of each province shall have the same number and the total number of members of the particular Regional Representative Council shall not exceed one-third of the total number of members of the People's Legislative Assembly'. Therefore, the implicit constitutional norm should have been provided as an explicitly formulated norm in Article 12 and Article 67 of *Law Number 10 of 2008*, as a requirement for candidate members of the DPD. Consequently, Article 12 and Article 67 of *Law Number 10 Year 2008*, which failed to establish such a provision explicitly, should be considered unconstitutional.[37] The Court granted the applicants' petitions and declared that Article 12 and Article 67 remained constitutional (conditionally constitutional), as long as they were interpreted as including the requirement for a candidate to have a domicile in the province being represented.[38]

This case is a rare example in which a decision was taken by a narrow majority of the judges. Four constitutional justices in all dissented (Natabaya, Palguna, Mahfud and Harjono). Harjono did not dissent because of the conditionally constitutional decision. He dissented because the domicile requirement was not restricted as a requirement imposed by the *1945 Constitution*. It was likely, he held, that people who lived outside a province they represented would have more empathy and concerns for their representing province, even though they were domiciled in the capital city.[39]

Natabaya, Palguna and Mahfud dissented for two reasons. First, there was no constitutional damage incurred by the petitioners. Second, because the Court issued a conditionally constitutional decision that inserted a new norm into the law (*Law 10 Year 2008 on General Elections*). It was predictable that Natabaya would dissent over this issue. He was known as 'formalist and too positivist' by his colleagues. In the Jimly Court, Natabaya was the only real bureaucrat who had held several offices before being

[37] The Court recognised the difficulty of reviewing a norm that had not been included in a law; the review may be subject to petitioning for a judicial review based on its constitutionality. It is impossible to file for a judicial review, as it would be considered obscure. According to Article 56(1) of the *2003 Constitutional Court Law*, such a petition could not be accepted.
[38] *Constitutional Court Decision 010/PUU-VI/2008 on Domicile Requierment* (2008) par [4.4].
[39] Ibid 230.

appointed to the bench. As a former chair of national legal development (BPHN) and special advisor to the Minister of Justice and Human Rights, he understood and participated in the drafting of the *2003 Constitutional Court Law*. Natabaya liked to argue and was known as 'Mr No' because he always rejected other people's ideas and provided his own understanding. Most of his judicial associates during his time in the Court refused or hesitated to have discussions with him due to his vast and deep understanding of legal theory. He took a very strict approach in particular to the issue of legal standing. As his colleague Justice Maruarar Siahaan said, 'if we use Natabaya's strict understanding regarding legal standing, no one would be able to appear before the Court'.[40]

In the *Domicile Requirement Case*, Natabaya refused to support a conditionally constitutional decision. He considered that it was never intended that the Court should become a positive legislator:

> The Parliament makes the law, and we negate it. If we try to regulate everything, it will create conflict with other institutions.[41]

The three dissenting constitutional justices (Natabaya, Palguna and Mahfud) wrote a joint dissenting opinion. In their view:

> [What the petitioner seeks] is something that cannot be done by the Court because the authority to insert a new norm falls within the province of the legislature. Consequently, the issues that the applicant asks us to consider are legislative review issues, and not judicial review matters. By accepting the applicants' petition, the Court not only acts in an act ultra vires way. It also sets a bad constitutional precedent for the future. The Court's decision is final and binding. Thus, once the Court has justified inserting a new norm into a law, the Court in the future will have no reason to reject a similar request. In this way, the Court will metamorphose into a positive legislator. That would destroy the true nature of the Court as a court and turn it into a political institution.[42]

When Mahfud MD became Chief Justice on 18 August 2008, he kept to this dissenting opinion in deciding conditionally constitutional decisions.

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[40] Interview with Maruarar Siahaan (Indonesia Christian University, 10 December 2013).
[41] Interview with HAS Natabaya (Constitutional Court Building, 10 December 2013).
[42] *Constitutional Court Decision 010/PUU-VI/2008 on Domicile Requirement* (2008) 222.

5.4 The Mahfud Court's approach

Based on the foundation laid by the Jimly Court, the Mahfud Court confidently started issuing conditionally constitutional decisions.[43] Indeed, the conditionally constitutional decision became one of the Mahfud Court's central practices.

5.4.1 Past criminal history

The Mahfud Court had no problem reviewing and overturning cases previously decided under Chief Justice Jimly, but often failed to provide a justification for why the Court had changed its mind. My interviews with members of the Mahfud Court showed that the Court did not always stand by previous decisions. Justices in the Mahfud Court believed that the context had changed, and that petitioners could come with a different constitutional ground to challenge a law's constitutionality.[44] For example, on 24 March 2009, the Mahfud Court decided its first conditionally unconstitutional case, the 2009 *Criminal History Case*.[45] Article 12(g) of *Law 10 of 2008 on General Elections* stated that a candidate should not ever have been convicted of criminal charges for wrongdoing or have had a criminal sentence for five or more years. The petitioner claimed that Article 12(g) breached human rights protections against double jeopardy. If someone had served time in prison, he or she had already paid for his or her past wrongdoings. As mentioned, the Jimly Court had decided the constitutionality of this claim on two previous occasions.[46] In 2008, it held that the requirement that candidates should not have a criminal conviction was constitutionally valid as long as it was interpreted as excluding political crimes or minor charges (*culpa levis*).[47] The Jimly Court viewed this requirement as necessary to ensure that candidates were fit to hold public office and held that it was based on objective criteria.

The Mahfud Court's view was that norms had to be morally justified. Quoting Lon Fuller, the Court held:

[43] Interview with M Laica Marzuki (Residence, 19 December 2013).
[44] Almost all justices in the Mahfud Court had similar opinions on this concept.
[45] *Constitutional Court Decision 004/PUU-VII/2009 on Past Criminal History* (2009).
[46] *Constitutional Court Decision 014-17/PUU-V/2007 on Past Criminal History* (2007); *Constitutional Court Decision 015/PUU-V/2008 on Past Criminal History* (2008).
[47] *Constitutional Court Decision 015/PUU-V/2008 on Past Criminal History* (2008) par [3.14].

> A rule is a law only if it has fulfilled some moral criterion, and not merely because it complies with formal requirements. For instance, unjust laws are not laws, though they fulfil the formal requirements. Morality consists of features without which a system cannot be properly called a legal system (vide Zafer, M.R., Jurisprudence, An Outline, 1994; 44–45).[48]

Even though the Mahfud Court mentioned the Court's 2007 and 2008 decisions in the *Past Criminal History Case*, it did not explain how its decision differed from those two decisions. Nor did it reject the legal considerations that had been applied in the 2007 and 2008 decisions.[49] The Court simply declared that Article 12(g) was conditionally *unconstitutional* unless the following conditions were met:

> 1) It was not to be applied to elected public offices (elected officials) unless the candidate had been subject to an additional criminal sanction in the form of revocation of the right to vote by a court decision having permanent legal force; (2) it was applicable for a limited period of time only, namely 5 (five) years after the ex-convict had undergone the criminal sanction of imprisonment based on the Court decision having permanent legal force; (3) honesty or transparency as to the background of his/her identity as an ex-convict; (4) he/she is not perpetrator of repetitive criminal act.[50]

The Mahfud Court in this way changed the Jimly Court's conditionally constitutional decision on Article 12G of the *2008 General Election Law* into a conditionally *unconstitutional* decision. This shift was significant. It meant, in effect, that the Court's four conditions needed to be read as part of the text of the law, rather than as an interpretation conditioning its constitutionality.

5.4.2 The *Electoral Roll Case*

The *Electoral Roll Case* is the most cited example of a conditionally constitutional decision being used to solve urgent matters.[51] The petitioners challenged the constitutionality of Articles 28 and 111(1) of the 2008 *Presidential Election Law*, which

[48] *Constitutional Court Decision 004/PUU-VII/2009 on Past Criminal History* (2009) par [3.17.2].
[49] Ibid par [4.4].
[50] Ibid par [4.4].
[51] *Constitutional Court Decision 102/PUU-VII/2009 on Electoral Roll* (2009). The *Electoral Roll Case* was cited by almost all interviewees, even though it is just one of many cases in which the Court provided or issued a conditionally constitutional decision.

required that voters' names should be listed in the electoral roll issued by the Election Commission. The petitioners' names were not so listed and they thus faced exclusion from voting. The requirement to be listed in the electoral roll, the petitioners' argued, restricted a citizen's right to vote and contradicted Articles 27(1) and 28D(1) and (3) of the Constitution. The Court upheld that argument and held that Articles 28 and 111(1) of the 2008 *Presidential Election Law* were conditionally constitutional, as long as they did not prevent a person who had not registered from voting. In its order, the Court listed a series of conditions and mechanisms to accommodate unregistered voters.[52]

The controversy surrounding the *Electoral Roll Case* stems from the rushed way in which it was decided and the practical consequences of the Court's decision given the time constraints. There was thus only one examination hearing in the *Electoral Roll Case* followed by a decision hearing later that afternoon. The case was decided on 6 July 2009, just two days before voting for the presidential elections began. Amidst increasing public concern over the large number of unregistered voters, two of the presidential candidates, Megawati and Prabowo, had announced that they were considering withdrawing from the election if the Election Commission failed to deal with the problem. The Commission's hands were tied, however, by the governing legislation, which President SBY refused to amend as he might have done by issuing an Emergency Law/Government in Lieu to accommodate the unregistered voters. The Court's decision effectively overrode that refusal. Even though it was styled as a conditionally constitutional rather than unconstitutional decision, the short-time frame meant that it was 'self-executing'. The Election Commission and its employees had no choice but to follow the Court's guidelines in implementing the decision.

5.4.3 Seat allocation mechanism

After the Mahfud Court had settled the disputes arising from the 2009 general elections, granting 11 per cent of the total applications, the Court needed to resolve the confusion over how to determine seat allocations. Its decision in the 2009 *Seat Allocation Mechanism Case* covered three important issues:[53] first, that its decision would be

[52] The use of a national identity card, passport and registering one hour before the closing of a voting station.
[53] *Constitutional Court Decision 110-111-112-113/PUU-VII/2009 on Seat Allocation for Second and Third Round* (2009).

conditionally constitutional; second, that a new norm should be inserted providing a mechanism for how the calculation of the remaining votes for the second and third round elections would determine the seat; and third, that its decision would have retroactive effect. The last aspect of the decision contradicted the Court's earlier decision on retroactivity in the *Terrorism Act Case*[54] and the *2003 Constitutional Court Law* itself.[55] In the Court's view, 'a decision that does not apply retrospectively can, in some circumstances, lead to the non-fulfilment of a protective legal mechanism'.[56] The Court continued:

> For decisions that provide an interpretation of the constitutionality of a norm (interpretative decision), it would be natural for them to be retrospective from the time the law under interpretation was enacted… Therefore, even though the Constitutional Court law stipulates that the Constitutional Court's decision operates prospectively, for this case, because of its special characteristics, it must be given retrospective operation for the allocation of DPR, Provincial DPRD and city DPRD seats from the 2009 elections, without compensation for the consequences of previous laws.[57]

Through this conditionally constitutional decision concerning Articles 204(4), 211(3) and 212(3) of the *2008 Legislative Election Law*, the Court established principles and mechanisms on how to determine the seat allocation for the second and third rounds of the DPR and DPD elections. This decision strengthened the Election Commission's interpretation of the proportionality mechanism established by the above articles in determining seat allocations, as reflected in *Election Commission Regulation Number 15 Year 2009* ('*Election Commission Regulation*'). The *Election Commission Regulation* had earlier been challenged in the Supreme Court. *Supreme Court Decision Number 015/P/HUM/2009* annulled Article 25 of the *Election Commission Regulation*.

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[54] *Constitutional Court Decision 013/PUU-I/2003 on Rectroactive Clause on Terrorism Law* (2003). To respond to the Bali Bombing and charge the suspect, the government introduced *Government in Lieu 1 of 2002 on Terrorism*. The government also enacted *Government in Lieu 2 of 2002*, which gave retroactive effect to *Government in Lieu 1 of 2002*. The Court annulled *Law 16 of 2003 on Government in Lieu 2 of 2002* giving retroactive effect to *Government in Lieu 1 of 2002* as being unconstitutional.

[55] Article 58 of the *2003 Constitutional Court Law* restricts the Court's decisions from being applied retroactively: 'Law being reviewed by the Constitutional Court still applies before a decision stating that the respective law is contradictory to the 1945 Constitution of the Republic Indonesia has been made'.

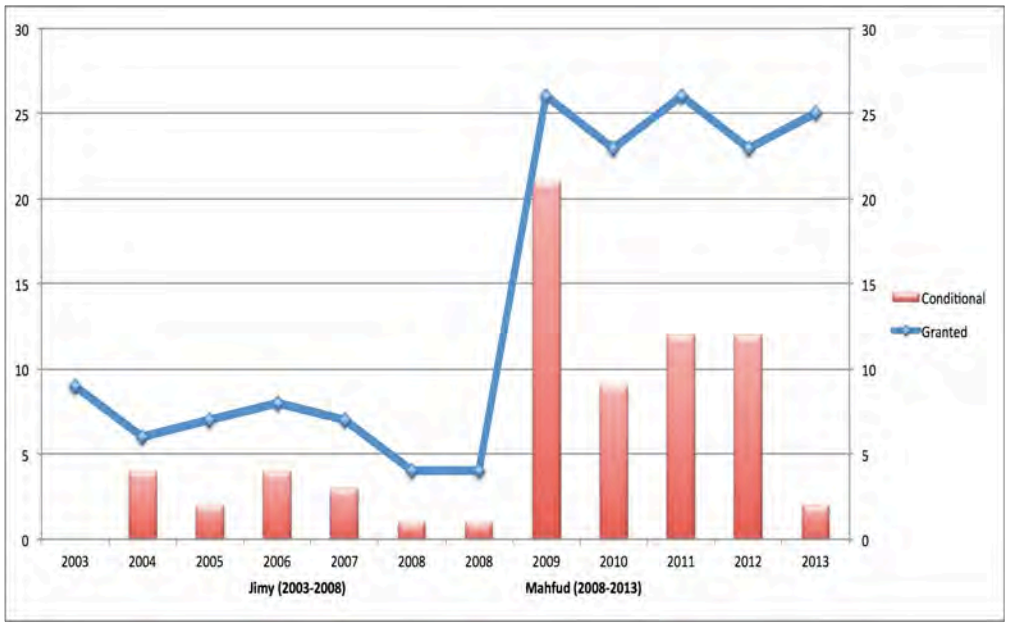
[56] *Constitutional Court Decision 110-111-112-113/PUU-VII/2009 on Seat Allocation for Second and Third Round* (2009) 106–107.

[57] Ibid 108 (translation taken from Simon Butt and Tim Lindsey, *The Constitution of Indonesia: A Contextual Analysis* (Hart Publishing, 2012) 125).

As a result, the allocation of seats to the DPR changed, providing a greater number of seats for large political parties and fewer for small political parties.[58] *Supreme Court Decision Number 015/P/HUM/2009* led to uncertainty regarding the seat allocation mechanism that in turn led to conflict between the political parties. Small political parties that lost their seats due to the Supreme Court's decision filed a judicial review case. In deciding the challenge, the Constitutional Court did not challenge the legality of the *Election Commission Regulation*, nor *Supreme Court Decision Number 015/P/HUM/2009*.[59] However, the Court on its own account determined the mechanism for how votes should be calculated. The 2009 *Seat Allocation Mechanism* case ended the political conflict in determining seat allocations that had resulted from the Supreme Court's decision.

5.4.4 Graph showing rise in conditionally constitutional decisions

The Mahfud Court took the Jimly Court's conditionally constitutional jurisprudence to a new level. As reflected in the graph below, this type of decision quickly became the most common form of decision in cases in which the application for review was granted.



[58] Helmi Firdaus and Kholil, '*Putusan MK Perkuat Peraturan KPU*', *Seputar Indonesia* (Jakarta), 8 August 2009 1.
[59] In an interview with Newspaper Merdeka, 8 August 2009, Chief Justice Mahfud stated that the Supreme Court decisions were all void as the legal basis to determine those case was changed by the Court.

Figure 5.1: Conditionally Constitutional Decisions of Jimly and Mahfud Courts

5.4.5 The Mahfud Court's opinions

Mahfud MD was not alone in driving this increase in the proportion of conditionally constitutional decisions. The current Chief Justice, Arief Hidayat, supports the Court's position:

> Conditionally constitutional decisions [were] used as a tool to fill loopholes in laws that had been declared unconstitutional by the Court. As the guardian of the constitution and protector of democracy, the Court was able to break through. Importantly, the Court promoted the values of substantive justice in deciding constitutional cases.[60]

To ensure that their decisions delivered substantive justice and practical benefits, the Mahfud Court often de-prioritised procedural requirements. Reflecting on this, former Chief Justice Hamdan Zoelva said that, in the search for justice, legal certainty should take a back seat.[61] He noted:

> Conditional constitutionality is unavoidable. If we declared a law unconstitutional, it would create uncertainty in implementation. We always think whether we should reject the petition or declare that the law is conditionally unconstitutional. The key to determining this question is which option will provide the greater public benefit.[62] The idea of the Court as a purely negative legislator has not worked.

Despite his objections to the practice before his appointment, Mahfud MD had no qualms about using the conditionally constitutional approach:[63]

> We usually used that type of decision as a way of partially granting the application. If the Court declared the law unconstitutional, the objective was not achieved and there was no possibility of a solution.[64]

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[60] Interview with Arief Hidayat (Constitutional Court Building, 8 August 2014). In 2015, 9 out of 12 granted decisions were condtionally constitutional decisions.
[61] Interview with Hamdan Zoelva (Constitutional Court Building, 13 December 2013).
[62] Ibid.
[63] HER, *Sepuluh Rambu Hakim Konstitusi Ala Profesor Mahfud* (13 March 2008). Hukumonline.com <http://www.hukumonline.com/berita/baca/hol18749/sepuluh-rambu-hakim-konstitusi-ala-profesor-mahfud>.
[64] Interview with Mohammad Mahfud (MMD Initiative Office, Jakarta, 3 December 2013).

The Mahfud Court saw conditionally constitutional decisions as part of its progressive approach, allowing it to side with justice and legal pragmatism rather than focusing on procedural law.[65]

Harjono, who served on both the Jimly and Mahfud Courts for full terms, also thought that the Court had the authority to issue conditionally constitutional decisions. He argued:

> The Court understands there [are] several alternatives, and the Court needs to propose one. The Court does not take authority away from Parliament. We also look at how Parliament makes the law. We saw that the Parliament still uses Dutch culture (not providing detail and leaving it to judges to interpret). The law, currently, is mostly just a guideline. Consequently, the Court has to supply the detail. In so doing, we do not deprive Parliament (the DPR) of its authority. Once the Parliament has made the law, its function is over. Implementation of a law depends on Government Regulations. Parliament's work is complete. That is the misunderstanding in current thinking. Application of the law relies on (1) Government regulation and (2) Court decisions.[66]

Most of the justices on the Mahfud Court interviewed for this thesis did not hesitate to issue conditionally conditional cases, except for Patrialis Akbar. In Patrialis's view, in doing this the Court did assume the authority of parliament.[67] However, Patrialis hardly dissented on any conditionally constitutional cases:

> We focus on how to settle the problem in society. If we just declare a law null and void, there is a long vacuum. How can we let people live in injustice for an indefinite period. The Court needs to step up.[68]

5.4.6 Spread of conditionally constitutional decisions to other courts

The Court's practice of issuing conditionally constitutional cases spread to other judicial institutions. In conducting a judicial review of *Government Regulation Number 36 of 2011 on the Restriction on Concurrent Positions for the Supreme Court and the*

[65] Martitah, *Mahkamah Konstitusi: Dari Negative Legislature Ke Positive Legislature?/Dr. Martitah; Editor, Fajar Laksono Soeroso* (Konstitusi Press, 2013) 15.
[66] Interview with Harjono (Constitutional Court Building, 16 December 2013).
[67] Interview with Patrialis Akbar (Constitutional Court Building, 17 December 2013).
[68] Interview with Fadlil Sumadi (Constitutional Court Building, 13 December 2013).

District Court, the Supreme Court issued a conditionally unconstitutional decision.[69] Its decision focused on the phrase 'Central and Regional government' in Article 2(h) of *Government Regulation Number 36 Year 2011*. It declared this phrase unconstitutional having regard to Articles 18, 19 and 31(1) of *Law 48 Year 2009 on Judicial Authority*. Those articles would be considered unconstitutional, the Court held, unless the phrase 'Central and Regional government' was interpreted as being 'only applicable in the territory of the Executive at Central and Regional level'.[70]

Conditionally constitutional decisions are a double-edged sword as illustrated by the Court's decision on criminal court procedures in handling pre-trial hearing decisions dated 28 April 2015.[71] In this decision, the Court declared that the act of investigators, including naming a person as a suspect, and searching and seizing evidence in criminal cases, could be challenged at a pre-trial hearing. Prior to this decision, the Criminal Procedure Code (KUHAP) did not allow these actions to be challenged. Additionally, the Court also redefined the standard of evidence to name a person as a suspect. The petition was submitted by Bachtiar Abdul Fatah, former director of Chevron, who was sentenced to four years imprisonment and given a fine of IDR 200 million in the *Chevron Bioremediation Case*.

The discussion on the ambit of pre-trial hearings had been triggered in an unrelated case. In it, District Judge Sarpin Rizaldi decided to allow police commissioner General Budi Gunawan to challenge his status as a suspect by the Corruption Eradication Commission at a pre-trial hearing in the South Jakarta District Court on 16 February 2015. The controversy arose due to Article 77 of *KUHAP* not allowing the defendant to challenge being formally named a suspect at a pre-trial. Two months later, on 28 April 2015, the Constitutional Court issued a conditionally constitutional decision regarding pre-trial hearing procedures.

[69] *Supreme Court Decision No. 11 P/Hum/2014 on Restriction on Concurrent Position for Supreme Court and District Court Judge* (2014).
[70] Ibid ('applies only within the Executive Branch of the State power which is in the Central and authority of Executive Branch located at the Regional level' (*hanya berlaku di dalam lingkungan kekuasaan Negara Cabang Executive yang berada di tingkat Pusat dan lingkungan kekuasaan Negara Cabang Executive yang berada di tingkat Daerah*).
[71] 'Constitutional Court Decision 021/*PUU*-XII/2014 on Pretrial Procedures' (2014).

By referring to the Court's decision on pre-trial hearings, the South Jakarta District Court (Judge Yuningtyas Upiek), in deciding the pre-trial procedures of a corruption suspect, Ilham Arief Sirajuddin (former Mayor of City Makassar) stated that the corruption charges by the Corruption Eradication Commission were invalid.[72] Judge Yuningtyas did not only refer to the Court's decision that naming a suspect was an object of pre-trial procedures, but also quoted the requirement for two pieces of preliminary evidence that the Court laid out in their decision. As the Corruption Eradication Commission failed to provide two initial pieces of evidence, Judge Yuningtyas declared that the arrest of Ilham Arief was invalid.

5.5 Responses to conditionally constitutional decisions

5.5.1 Executive obedience

The increase in conditionally constitutional decisions issued by the Mahfud Court was influenced by the President's acceptance of the Court's decisions. This occurred despite the fact that the Mahfud Court became less concerned about whether the President or parliament would implement its decisions, compared with the Jimly Court.[73] The Court also paid less attention to the potential difficulties faced by bureaucrats in enforcing its decisions. The hesitation or confusion regarding how to enforce conditionally constitutional decisions is revealed through letters sent to the Court Registrar requiring explanations of how to execute the Court's decision.[74]

The President's personal commitment to implementing the Court's decisions was barely recognised as a critical point in supporting the Court as an institution. Regardless of the debate on how to implement conditionally conditional decisions, the government decided to follow the Court's decisions, and no academic perspective from other scholars could challenge those decisions.[75] On many occasions, President SBY urged his closest advisers and ministries to respect the Court's decisions.[76] As a former military general, the President understood the notion of a command, and as the highest

[72] IAN/BIL, '*Putusan MK Jadi Pertimbangan : Permohonan Praperadilan Dikabulkan*', *Kompas* (Jakarta), 13 May 2015.
[73] Interview with Anonymous Participant C (Law Firm Office, 12 December 2013).
[74] Ibid.
[75] Interview with Agus Hariadi (Ministry of Law and Human Rights Building, 4 July 2014).
[76] Interview with Wahiuddin Adam (Constitutional Court Building, 4 July 2014).

link in the chain of command, he had to set an example.[77] This was confirmed by Minister of Justice and Human Rights, Patrialis Akbar, who later joined the Court as a constitutional justice. As he stated:

> The President wants to set an example to the public that even the President follows the law and is bound by judicial authority. The President did not want to make any evaluation of the Court's decisions. Rather he said: 'We have to follow the Court's decisions, even though some of them are hard to follow.'[78]

As also stated by the special legal adviser to the President and the Deputy Minister of Justice and Human Rights, Prof Denny Indrayana:

> Before the decision has been rendered, we deliver all arguments that we can provide to the Court. However, once the Court has decided, the discussion is finished. While we may have different ideas and arguments during the examination hearing, once the decision has been made, that is it: the argument ends. There is no discussion whether we agree or don't agree. We have to follow what the Court has said. This doesn't mean that the President agrees with all decisions. But the main principle is, the President should obey the decision.[79]

However, there is an argument that official statements ordering ministries to obey the Court's decisions constitute just one side of the story. The absence of a clear agenda regarding legislation from the President left the laws reviewed by the Court in the department specifically affected by the Court's decisions. There was no clear guideline from the President on how to respond to the Court's decisions. Ministers, during their meetings with parliament, retained the status quo by confirming the Court's decisions, 'because the Court said so'.[80] As Ronald Rofliandi, a member of a non-governmental organization that focuses on public policy issues, stated:

> The Minister of Justice and Human Rights did not successfully manage political legislation. There is no one institution that is responsible for all laws. Sometimes, the government sub-contracts academic papers to Professors. The decision to follow the

[77] Interview with Achmad Roestandi (Residence, 19 December 2013).
[78] Interview with Patrialis Akbar (Constitutional Court Building, 17 December 2013).
[79] Interview with Denny Indrayana (Minister of Law and Human Rights, 23 December 2013).
[80] Interview with Eryanto Nugroho (Indonesian Centre for Law & Policies Studies Office, 11 December 2013).

> Court's decision depends on which political party that Minister comes from and whether his political party agrees with the Court's decision.[81]

The President's support for the Court's decisions gave no clear direction on how to respond to those decisions. The official statement that the presidency would follow the Court's decisions was repeated at every inauguration or oath-taking ceremony for new constitutional justices at the State Palace.[82] Support from the President through these official statements and personal knowledge that the President had ordered the ministries to follow the Court's decisions increased the justices' confidence in deciding cases independently[83] This was one of the reasons for the increase in conditionally constitutional decisions during Mahfud MD's tenure as Chief Justice.

5.5.2 Lack of support for constitutional law

The stagnant development of Indonesian constitutional law under Suharto's authoritarian regime provided significant space for the Court. The Court's public engagement exercises educated the public regarding its existence. It also encouraged legal scholars to create a journal on the Constitutional Court and the Court's decisions. The Court understood this situation and promoted an increase in the study of constitutional law. By establishing a judicial centre of constitutional law, including developing video conference facilities, the Court educated legal scholars in different schools on how to understand and support the Court's decisions.[84] As a result, the development or implementation of Court decisions was Court driven. The process of accepting the Court's decision to annul a law (an article, word or entire law) has been a learning process not only for the legal community but also for parliament and the President. Before the establishment of the Court, a judicial review authority did not exist and the Court had to fight not only to establish its identity but also to provide justification for its decisions. As discussed previously, the Jimly Court built this foundation successfully.

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[81] Interview with Ronald Rofliandi (Indonesian Centre for Law & Policies Studies Office, 11 December 2013).
[82] Interview with Ahmad Sodiki (Residence, 4 December 2013).
[83] Interview with Hamdan Zoelva (Constitutional Court Building, 13 December 2013).
[84] The Court pays for equipment, installation, and yearly services including support of a monthly organisation for constitutional law studies in various universities.

However, the conditionally constitutional and conditionally unconstitutional decisions handed down by the Mahfud Court took its decisions to a new level. Regarding the underdevelopment of constitutional decisions, the Court emphasised how to respond to its conditionally constitutional decisions in the name of substantive justice with less adequate legal reasoning.

5.6 The Mahfud Court's reasons for choosing this approach

5.6.1 The *East Java Case*

The Mahfud Court's adoption of a substantive justice approach occurred soon after Mahfud MD became Chief Justice with the Court's decision in the East Java election results dispute.[85] On 11 November 2008, the East Java Electoral Commission declared that Sukarwo and Saifullah Yusuf had been duly elected governor and deputy governor of East Java province. The other candidates, Khofifah Parawansa and Mujiono, filed head of regency election results disputes with the Court, claiming numerous mistakes or improprieties had occurred in 26 counties in that province. Khofifah Parawansa and Mujiono requested that the Court invalidate the results and declare them the winners. Unexpectedly, the Court ordered a re-vote at two regencies (Bangkalan and Sampang) and a recount at one regency (Pamekasan). The Court had no authority to order a recount under constitutional and regional autonomy laws. The judgment, which was crafted by Chief Justice Mahfud himself, was intentionally written to signal the Court's new direction. The decision in the *East Java Case*, which was handed down on 2 December 2008, was thus the beginning of the substantive justice era at the Indonesian Constitutional Court.

The Court started its judgment by quoting Gustav Radbruch:

> As it has been written, preference should be given to the rule of positive law, supported as it is by due enactment and State power, even when the rule is unjust and contrary to the general welfare, unless, the violation of justice reaches so intolerable a degree that the rule becomes in effect 'lawless law' and must therefore yield to

[85] *Constitutional Court Decision 041/ PHPU.D-VI/2008 on East Java Head of Regency Election Result* (2008).

> justice." [G. Radbruch, *Rechtsphilosophie* (4th ed. page 353. Fuller's translation of a formula in *The Journal of Legal Education* (p. 181)].[86]

Evidence submitted to the Court supported a finding that the *Regional Head Election Law*, which required that elections should be held in a democratic manner, had been violated.[87] The Court continued:

> A law and justice principle universally adhered to states that 'No one can obtain an advantage by his own deviation and violation and no one shall be harmed by other people's deviation and violation' (*nullus/nemo commodum capere potest de injuria sua propria*). Therefore, there is no pair of candidates that may be benefited in the vote acquisition as a result of violations of the constitution and justice principle in the general election implementation.[88]

Regarding the claim that criminal elections may be prosecuted by other means, the Court refused to let the pair of candidates get away with this:

> Apart from the actions of law enforcement officials, who will process all criminal acts in the general election of Regional Head in a quick and fair manner to become evidence in disputes regarding regional head elections before the Court, in its experience general elections of Regional Head are insufficiently effective, and accordingly the Court deems it necessary to make a breakthrough in order to advance democracy and escape from the standard practices of systematic, structured, and massive violations as reflected in the a quo case.[89]

It was the first time that the Court under Mahfud MD's leadership had stepped in and written the concept of 'substantive justice' into a judgment.

5.6.2 Responsive law and substantive justice

Mahfud MD adopted the idea of responsive law and substantive justice from Phillipe Nonet and Philip Selznick.[90] Even though Mahfud MD never referred to these two

[86] *Constitutional Court Decision 041/PHPU.D-VI/2008 on East Java Head of Regency Election Result* (2008) par [3.25].
[87] Ibid par [3.25].
[88] Ibid par [3.25].
[89] Ibid par [3.25].
[90] Philippe Nonet and Philip Selznick, *Law & Society in Transition: Toward Responsive Law* (Transaction Publishers, 2001 [1978]).

scholars when writing his judgements, he had included them in his doctoral thesis at the University of Gadjah Mada, Yogyakarta. In particular, Mahfud MD used Nonet and Selznick's framework, and that of John Henry Merriman,[91] to explain the role of the political context in the creation of law regarding elections, regional government, and land reform.[92] The stage of responsive law, according to Nonet and Selznick, was one in which 'law [is] a facilitator of response to social needs and aspirations'.[93] In Nonet and Selznick's schema, 'autonomous law' was about legal regularity whereas responsive law was about substantive justice.[94] The autonomous law judge was expected to apply rules, which contrasts with the responsive law judge who was expected to 'interpret and reformulate rules in light of their actual consequences; their guides in that regard are broader principles of law, justice, and public policy... [as such, responsive law] seeks to level the legal playing field, either by providing help or by adjusting the rules'.[95] Responsive law is a stage in the development of law, following repressive law and autonomous law.[96] Those three stages of law, Nonet and Selznick argued, were not necessarily linear, but could coexist in the same society. An autonomous legal regime was committed to protecting law's separateness from politics and its inherent rationality, whereas responsive law sought to close the gap between 'justice as legal rule application and justice as substantive fairness'.[97] Responsive law was in this sense a more flexible form of law, in which the politics of law was acknowledged, but in which judges were seen to have a role in overseeing the development of law in line with social needs.

The idea of responsive law ultimately derived from American legal realist notions of law's malleability and irreducible politicality.[98] Referring to the legal realist notion that the 'rules did not and could not decide cases, but men did', Nonet and Selznick argued:

> Law was not a realm of authoritative, outcome-determining principles and rules, but a field of action in which social forces and political attitudes shaped legal decision-

[91] John Henry Merriman, *The Civil Law Tradition: An Introduction to the Legal System in Western Europe and Latin America* (1969).
[92] MD Moh Mahfud, *Politik Hukum Di Indonesia/Moh. Mahfud MD* (Rajawali Pers, 2009) 7.
[93] Nonet and Selznick, above n 90, 14-15.
[94] Ibid 16.
[95] Robert A Kagan, 'Introduction to the Transaction Edition' in Philippe Nonet and Philip Selznick, *Law & Society in Transition: Toward Responsive Law* (Transaction Publishers, 2001) xi.
[96] Nonet and Selznick, above n 90, xii.
[97] Kagan, above n 95, xvii.
[98] Ibid xx.

> making, often in socially unequal ways. Law, then, could justifiably be *reshaped* to meet social needs, aspirations, and visions of a just society.[99]

The responsive law regime concept was triggered by American legal reformers and their advances in fighting for justice. In the US in the late 1960s and early 1970s, the government introduced new policies, such as liberalised divorce laws and rights to abortion, or laws that mandated equal treatment for women or expanded legal services for the poor.[100] The introduction of these policies was followed by an explosion of public interest lawsuits and judicial policymaking.[101] Objections towards policies introduced by central and State governments encouraged law reform activists to use the courts as an alternative to judicial review procedures and judicial decision-making processes.[102]

In applying the idea of responsive law in Indonesia, Mahfud MD ignored the fact that this idea had developed in the context of a US society that had already achieved a measure of autonomous law. Mahfud MD also tended to ignore Nonet and Selznick's warnings that too precipitous a move to responsive law might trigger a reversion, not to autonomous law, but to repressive law – a form of law with which Indonesia was all too familiar.

5.6.3 Progressive law

The Mahfud Court was also influenced by the progressive law approach (*hukum progressif*) introduced by Sajipto Raharjo, a respected scholar from the University of Diponegoro, Central Java. In essence, progressive law places justice over the law: laws are for humans, not humans for law.[103] According to this teaching, the law is an institution whose objective is to serve justice and ultimately to provide prosperity for humanity. This requires the development of a progressive conception of law that incorporates the functions and legal objectives that need to be realised. Progressive law

[99] Ibid.
[100] Mary Ann Glendon, *Abortion and Divorce in Western Law* (Harvard University Press, 1987).
[101] Kagan, above n 95, xxii.
[102] Robert A Kagan, 'The Political Construction of American Adversarial Legalism' in Austin Ranney (ed) *Courts and the Political Process* (Berkeley, CA Institute of Governmental Studies, 1996) 19.
[103] Satjipto Rahardjo, *Membedah Hukum Progresif/Satjipto Rahardjo* (*Kompas*, 2006) 56.

is part of a process, 'searching for the truth', that never ends.[104] Progressive law departed from the law in practice and from dissatisfaction with the law.[105] Therefore, according to this teaching, law is developed not for its own sake but in aid of something greater. Consequently, 'when problems arise in law, the thing that needs to be reviewed is the law and not the human needs to which law is responding'.[106] Second, 'the law itself is not an absolute and final institution but a process in the making' to achieve perfection that is welfare, justice, and social awareness.[107]

To illustrate that law is always a process, Satjipto Rahardjo stated:

> Law is an institution that continuously develops and changes itself towards a better level of completeness. The quality of accomplishment can be classified into factors of justice, welfare, concern for the people, etcetera. That is the substance of law as a process, law in the making. The law does not exist for itself, but for humans.[108]

Sarjito developed his concept of progressive law out of dissatisfaction with the implementation of law and regulations in Indonesia. He noted that humanity influenced the implementation of laws. The law could not separate itself from its normative characteristic as rules, but the law was also behaviour. Rules would be developed in an existing legal system, while human behaviour would drive the rules and systems. A law can only be a reality; promises in the law can only be actualised with human intervention.[109]

A progressive law based on rules and behaviour frees humans from the reign of absolute rules. Therefore, if changes occur in the community and legal texts are unable to cope with the values being developed, judges must not let themselves be enchained by rules that are no longer relevant. Judges are expected to see outwards, looking at the changing social context when making legal decisions. Adherents of this teaching are asked to think outside the box and act beyond legal boundaries ('rule breaking') to search for and provide justice. These legal breakthroughs are expected to actualise the purpose of the

[104] Martitah, *Mahkamah Konstitusi: Dari Negative Legislature Ke Positive Legislature?/DR. Martitah; Editor, Fajar Laksono Soeroso* (*Konstitusi* Press, 2013) 26.
[105] Ibid 37.
[106] Satjipto Rahardjo, '*Hukum Progresif, Hukum Yang Membebaskan*' (2005) 1(1) *Jurnal Hukum Progresif* 5.
[107] Ibid 6.
[108] Ibid.
[109] Ibid.

law, which, according Satjipto Rahardjo, is that the law should bring happiness (*hukum yang membuat bahagia*).[110] On many occasions, Satjipto publicly praised how the Mahfud Court settled the 2009 *Electoral Roll* case as an example of how the progressive approach had been implemented.[111] Satjipto wrote in *Kompas:*

> The Court has given a valuable lesson to the nation about the intricacies of law enforcement, or more specifically about the decision making by the court. The judges of the Constitutional Court did not follow the formal legal procedures or business as usual. They aroused nationalism and practice progressive approach.[112]

5.6.4 The Mahfud Court's failure to heed Nonet and Selznick's warning

Nonet and Selznick had warned that responsive law was a high-risk strategy as 'the legal order loses the protection of firm institutional boundaries and becomes an integral part of government and politics', and 'legal institutions become at once more accessible and more vulnerable'.[113] Responsive law is a dangerous form of law to promote because it can quickly reduce to the interests and policies of the person applying or interpreting the law. Another risk associated with responsive law flows from the fact that it blurs the line between law and politics and thus threatens to undermine the legitimacy of legal institutions, including courts.

As noted, the Mahfud Court generally ignored these warnings. It also ignored the fact that a transition to responsive law requires a highly sophisticated form of legal reasoning that takes account not just of a norm's formal pedigree but also of the individual and social consequences of a norm's application.[114] Judicial institutions adopting a responsive law approach need to craft careful legal opinions that promote

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[110] This approach also has been discussed by other scholars: Fritjof Capra, *The Turning Point: Science, Society, and the Rising Culture* (Bantam, 1983). Progressive law has a similar meaning to sociological jurisprudence from Roscoe Pound, who observed the effect of the law and how it works. See Shidarta, '*Posisi Pemikiran Hukum Progresif Dalam Konfigurasi Aliran-Aliran Filsafat Hukum: Sebuah Diagnosis Awal* ' in MD Moh & Mahfud et al (eds), *Satjipto Rahardjo Dan Hukum Progresif : Urgensi Dan Kritik* (Epistema Institute: HuMA, 2011) 65.
[111] Rita Triana Budiarti, *Kontroversi Mahfud Md Jilid 2: Di Balik Putusan Mahkamah Konstitusi* (Konstitusi Press, 2010) 5.
[112] Satjipto Rahardjo, 'Tribut Untuk Mahkamah Konstitusi ', *Kompas* (Jakarta), 14 July 2009.
[113] Nonet and Selznick, above n 90, 117.
[114] Kagan, above n 95, xxiv.

understanding of the issues at stake. Instead, as we have seen, the Mahfud Court combined its adoption of this approach with a reduction in the length and sophistication of its opinions, with the overall word length declining from 2,017 to 1,450 words as between the Jimly and Mahfud Courts. At the same time, the dissent rate declined – exactly the opposite of what one would expect in a system that acknowledged the political, purposive element in law.

As confirmed by the interviews in this study, the Mahfud Court did not hesitate to strike down any law that contradicted the *1945 Constitution*. By promoting substantive justice, the Court started to consider the matters in review substantively, according to the Court's interpretation that aligned with Indonesia's democracy. However, Mahfud's Court failed to provide adequate legal reasons.

In the Indonesian context, the substantive justice concept looked fantastic to the public.[115] Despite this, it was politically very risky. It was politically risky because the border between the Court's objective interpretation of the Constitution regarding the constitutionality of a law and what the Court considered substantive justice regarding the measure became very thin.

The Court has an obligation to convince the public and politicians (i.e. anyone subject to the Constitution) of the correctness and legal justifiability of its decisions through the quality of its legal reasons. It is very difficult to convince political leaders that judges can decide issues of substantive justice without promoting their personal ideology or agenda. The substantive justice approach in this sense is not an excuse for failing to provide detailed and careful reasons or for dispensing with scholarship. Quite the opposite.

[115] *Satjipto Rahardjo Dan Hukum Progresif : Urgensi Dan Kritik,* Seri Tokoh Hukum Indonesia (Epistema Institute - HuMA, 2011).; Shidarta, 'Posisi Pemikiran Hukum Progresif Dalam Konfigurasi Aliran-Aliran Filsafat Hukum: Sebuah Diagnosis Awal ' in M. D. Moh. Mahfud et al (eds), *Satjipto Rahardjo Dan Hukum Progresif : Urgensi Dan Kritik* (Epistema Institute : HuMA, 2011) ; Abu Rokhmad, *Hukum Progresif : Pemikiran Satjipto Rahardjo Dalam Perspektif Teori Maslahah / Abu Rokhmad ; Editor, Ahmad Hakim* (Pascasarjana IAIN Wali Songo : Pustaka Rizki Putra, 2012).

5.7 Cases that upset the political branches

5.7.1 Introduction

Chief Justice Jimly's success in developing the Court into a powerful political institution prompted the parliament and President to choose another Chief Justice. This was discussed in Chapter 4, section 4.2. However, changing the Court's leadership from Jimly to Mahfud MD did not reduce the judicial activism that had begun in Jimly's era. In fact, Mahfud MD furthered the Court's judicial activism. Mahfud MD did not act to rein the Court in, as the President and parliament had expected. Instead, the substantive justice approach became the Mahfud Court's central theme. Under Mahfud MD, the Court not only transformed itself into a positive legislature but also decided upon matters that brought discomfort to the parliament and President. This section discusses some of the more prominent cases decided from 2009 that prompted parliament to initiate the 2011 amendment to the *2003 Constitutional Court Law*.

5.7.2 The *Majority Vote Case*

The *2003 General Election Law* had introduced a 'party candidate list' to determine whether a candidate was able to secure a seat. To secure a seat, a candidate had to be able to achieve a 'seat quota'. If a candidate was not able to obtain a seat quota, the chances of that candidate's receiving a seat depended on their position in a party candidate list.[116] The higher the candidate's rank in the party list, the more likely it was that the candidate would be allocated a seat, even though another candidate with a lower rank might have more votes (but did not meet the quota). This 'party candidate list' was challenged in 2004. The applicant argued that this list provided special treatment to another candidate who had been moved into a higher rank and elected to parliament without having more votes. This contradicted Article 1(2) of the *1945 Constitution*.[117] In 2004, the Court rejected this challenge in so far as it concerned Article 107 of the *2003 General Election Law*. The Court held that Article 22E(6) of the Constitution ('General Elections') gave the DPR the right to regulate the general elections mechanism, subject to the Constitution. The Court continued by arguing that there was no particular type of electoral system imposed by the Constitution. It was left to

[116] Article 107(2)(b) of the *2003 General Election*.
[117] *Constitutional Court Decision 002/PUU-II/2004 on Open List* (2004) 24.

parliament to determine the particular electoral system, whether constituency-based, semi-proportional or proportional or any variation in which the DPR had adopted a proportional system with an open list. Each system had advantages and disadvantages, and the DPR had already considered the positive and negative aspects by examining the role of political parties and candidates' rights.[118]

In 2008, however, the issue was re-opened in the form of a challenge to the open list system (the 2008 *Open List Case*).[119] On 23 December 2008, the Court declared that a proportional system with an open list was constitutionally invalid. The Court annulled Articles 214 (a), (b), (c), (d) and (e) of *Law 10 of 2008 on General Election Law* (*2008 General Election Law*). The Court thereby invalidated the open list system that had been upheld by the 2004 *Open List Case*. The 2008 *Open List Case* was the most far-reaching and controversial decision on Indonesia's legislative election system. It changed the open list system to a simple majority system to determine a candidate's seat.

Article 107(2)(b) of the *2003 General Election Law* stated that for a candidate who did not fulfil a seat quota, the determination of the seat allocation depended on the candidate's position in the party candidate list. In the *2008 General Election Law*, the requirement for determining seat allocations was stricter. The candidate would get a seat if the candidate was able to secure 30 per cent or more of the votes required to meet the seat quota.[120] If more candidates were able to achieve the 30 per cent requirement than the number of seats won by their party, the candidates with the highest ranking in the party's candidate list would get seats.[121] If fewer candidates were able to meet the 30 per cent requirement than the number of seats won by their party, the seats would be distributed to candidates according to their relative position on the party's list.[122] However, the Court declared that Articles 214(a), (b), (c), (d) and (e) of the *2008 General Election Law* were constitutionally invalid. Sutjipto (an activist in the Democrat Party who later became a parliamentary member in the national parliament in 2009) was the petitioner. He argued that even though the 'party candidate list' was the

[118] Ibid 26.
[119] *Constitutional Court Decision 022-24/PUU-Vi/2008 on Open List* (2008). The petitioner not only challenged the open list system but also the 30% quota for women candidates (affirmative action).
[120] Article 214(a).
[121] Article 214(b).
[122] Article 214(d), (e).

party's right, giving the seat to another candidate with a higher rank due to party preferences was unjust and breached Articles 22E (free and fair as fundamental of elections) and 28D(1) (prohibitions discrimination and injustice).

The Court concluded that the majority vote system was a simpler and easier way to determine elected candidates. By providing rights to the people to elect their chosen candidate directly through the majoritarian mechanism, a candidate's electability was not determined according to political parties' preferences. Consequently, internal party conflicts that could affect the public would be reduced.[123] The Court also declared that Articles 214(a), (b), (c), (d) and (e) were unconstitutional as they contradicted the substantive meaning of the people's sovereignty. It would contradict the people's sovereignty if a candidate with more votes could be eliminated by a candidate with fewer votes just because he or she was more highly ranked in the party's candidate list.[124] The Court noted that Indonesia already had direct elections to elect the President, vice President, and the head of regency. Therefore, this upheld the fair principle that general election candidates could become parliamentary members according to the number of votes they obtained. In the Court's summary:[125]

> The election of a candidate through a party candidate list impedes justice and breaches the people's sovereignty substantively. Both justice and the wishes of the people as the holder of popular sovereignty are breached by this method (the party candidate list).[126]

The list mechanism restricted the people's choice and jeopardised the legitimacy of the candidate with the majority of votes.[127] By respecting equality and opportunity before the law, as embodied in Articles 27(1) and 28D(3) of the *1945 Constitution*, the Court noted that Article 214 of the *2008 General Election Law* contained a double standard as it treated candidates differently, promoting injustice and unfairness.[128]

By declaring that Article 214 was constitutionally invalid, a 'hole' appeared in the *2008 General Election Law* regarding how to allocate a seat to a candidate if the majority

[123] *Constitutional Court Decision 022-24/PUU-Vi/2008 on Open List* (2008) 105.
[124] Ibid 105.
[125] Ibid 105.
[126] Ibid 105.
[127] Ibid 105.
[128] Ibid 106.

mechanism was not regulated in the *2008 General Election Law*. Addressing this hole, the Court explained:

> The annulment of [Article 214] does not create a legal vacuum, because the Court's decision is self-executing. The Election Commission, exercising its authority as regulated in Article 213[129] of the 2008 General Election Law, will be able to determine elected candidates based on this decision.[130]

The Court continued in its conclusion that implementing this decision would not create any administrative obstacles, as the Election Commission was ready to apply this decision if the Court determined that the election of candidates was conducted through the majority system.[131] If the decision to determine elected candidates remained with the Election Commission, the commission would carry out the Court's order when applying the simple majority mechanism to determine seat allocation. In the event, the Election Commission chose to apply two systems to identify elected candidates, with the elected candidate being determined by a simple majority mechanism and the vote that went to the political party being allocated to the candidate with the higher rank in the party candidate list. This method was probably the best interpretation of the Court's decision to determine seat allocation.

If the 2009 *Electoral Roll Case* was the most cited case regarding the Court's use of conditionally constitutional decisions, the 2008 *Majority Vote Case* was the most controversial case from the point of view of elections and the changes required to political parties. In this respect, the Court's decision was both legally and politically problematic. In the five pages of legal argument that determined that a proportional system with an open list (party candidate list) was invalid, the Court did not elaborate upon other arguments that rejected this interpretation. The Court did not provide any explanation (or reject or provide an argument) regarding why this system had been installed in the first place. The Court also refused to elaborate on or explain previous

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[129] Article 213 *(Determination of Elected Candidate).* (1) Elected candidate for DPR and DPD determined by National Election Commission; (2) Elected candidate for DPRD determined by Province Election Commission; (3) Elected Candidate for Regency/City DPRD determined by Regency / City Election Commission.
[130] *Constitutional Court Decision 022-24/PUU-VI/2008 on Open List* (2008) 107.
[131] Ibid par [4.4].

decisions upholding this system. Nor did it review parliament's reasons for adopting the system in the first place.

The potential consequences of the Court's decision were not just that political parties would lose interest in promoting each candidate, but that each candidate would have to work to obtain more votes themselves. Consequently, their relations to their constituents would be closer than with the political parties. The Court's decision could be expected in this way to increase 'money politics' among the candidates, and each candidate would fight with others from the same political party to get elected. [132]

5.7.3 Election results disputes

The reason that the head of regency election results disputes were transferred to the Court was not just because of the Court's interpretation of the law. It was also due to the increase of political party trust in the Court in handling this sort of dispute with a mathematical system or a strict interpretation of the legislative and presidential election results disputes in 2004. The Jimly Court had reviewed the constitutionality of Article 236C of *Law 32 of 2004 on Regional Government* regarding the Supreme Court as the forum to settle the election results dispute. It decided that that the choice of forum was constitutionally valid.[133] Three constitutional justices (Laica Marzuki, Mukthie Fadjar and Maruarar Siahaan) dissented from the majority and opined that regional election results disputes (*pilkada* election results disputes) should be conducted in the same forum as the general and presidential election results disputes: the Constitutional Court.[134] The DPR accommodated the minority dissenting opinion by amending *Law 32 of 2004 on Regional Government* by passing *Law 12 of 2008* on *First Amendment of Regional Government Law*. *Article 236C* of the new law stated that *pilkada* election result disputes should fall under the Constitutional Court's authority. The transfer of regional election results disputes from the Supreme Court to the Constitutional Court took place upon the signing of an agreement by the Chief Justices of these two courts on 29 October 2008.

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[132] Stephen Sherlock, *Indonesia's 2009 Elections: The New Electoral System and the Competing Parties* (Centre for Democratic Institutions, 2009) 39.
[133] *Constitutional Court Decision 072-73/PUU-II/2004 on Regional Election* (2004).
[134] Ibid 117–132.

The strict interpretation of the law that the Jimly Court had adopted was not, however, followed by the Mahfud Court. Instead, the Mahfud Court changed the direction established by the Jimly Court. This began, as discussed previously, with the *East Java* head of regency election results dispute case. In that case, the Mahfud Court introduced the idea of TSM (a test for 'systematic, structured and massive' breaches of the electoral law) – a term that the Court used in that case to describe a gross violation that had been committed by one of a pair of candidates.

This new understanding changed the Court's approach to election results disputes. The problem however, was that TSM was applied in an inconsistent way.[135] The Court thus applied TSM not just to the commission of massive and systematic abuses of the electoral law, but also to Election Commission misconduct, and to mathematical errors in tallying or recounting of votes. Through a close reading of the Court's decisions, parliamentary members found inconsistencies regarding how the Court applied the TSM test and this became an issue during the drafting process of the 2011 Amendment to the *2003 Constitutional Court Law*.

Through the TSM test, the Court ordered a recount or re-vote, dismissed the elected candidates, disqualified candidates, annulled election results or ordered re-nominations of the candidates. None of those decisions fell within the Court's jurisdiction according to the *2003 Constitutional Court Law* or the *2008 Regional Government Law*. Nevertheless, the Election Commission, with the support of the President, complied with the Court's decisions and ensured that they were implemented.

The Mahfud Court's decisions regarding the head of regency election disputes had an indirect effect on parliamentary members. The Court had imposed a majority vote requirement to elect parliamentary members. That decision established a closer connection between parliamentary members and constituents. The head of regency's position affected the votes and support for parliamentary members. Political parties' attempts to secure territorial power through the appointment of their party candidates were being challenged by the Court. When the Court annulled the election results and withdrew the political party head of region candidate from the arena of an election, it

[135] Simon Butt, *Indonesian Constitutional Court Decisions in Regional Head Electoral Disputes* (Centre for Democratic Institutions, Australian National University, 2013).

reduced political party 'control' over a regional election. Political parties did not consider that this was what the Court had been established to do.

5.7.4 Corruption Eradication Commission v Police cases

On 15 September 2009, Corruption Eradication Commission (KPK) commissioners Bibit Samad Riyanto and Chandra M Hamzah were named as suspects by the national police. In accordance with Article 32(1)(c) of *Law Number 30 of 2002 on the Corruption Eradication Commission*, the President temporarily suspended the two commissioners on 21 September 2009.[136] On 5 October 2009, Bibit and Chandra filed a judicial review case challenging the constitutional validity of Article 32(1)(c) of the *2002 Corruption Eradication Commission Law*. Article 32(1)(c) stated that the leadership of the Corruption Eradication Commission could be suspended or dismissed due to indictment for a felony. They claimed that that section violated the presumption of innocence and the principle of legal certainty protected by Article 28D(1) of the *1945 Constitution*. On 29 October, following the hearings, Bibit and Chandra were arrested by the national police.

The fight between the KPK and the police created a massive uproar in society and became known as the '*Cicak* v *Buaya* case' ('Lizard v Crocodile'). When the Constitutional Court resumed hearings on 3 November 2009, it granted the applicants' request to play surveillance tapes (Anggodo's taping case) that had been filed as evidence by the KPK. The Court session was beamed live on television and radio. The tapes exposed a conspiracy between Anggodo and a senior police officer in orchestrating Bibit and Chandra's criminal prosecution. This critically undermined the credibility of the law enforcement agencies and key senior officers.[137] In a speech on 23 November 2009, President SBY insisted that the prosecution be terminated. Two week

[136] President issued *Government Regulation in Lieu of Law 4 of 2009* and *Presidential Decree 27 of 2009* to fill the vacancies by appointing Tumpak Hatorangan, Mas Achmad Santosa and Waluyo as interim Corruption Eradication Commissioners.

[137] Faced with the social tensions which the case generated, President SBY, through *Presidential Decree 31 of 2009*, established a Fact Finding Team to make recommendations to the President to settle this matter. The team, which was famously called 'Team 8', handed its findings to the president recommending the following (1) Termination of the case of Bibit and Chandra; (2) Reform of the Police and the Attorney-General's Office; (3) Imposition of sanctions, including dismissal, of the state officials who had engineered the case.

later on 8 December 2009, the attorney general's office complied and Bibit and Chandra resumed their work as corruption eradication commissioners.

The Court's decision to play the tape was one of the main triggers for the attack on it. Through this decision, the Court exposed the government's rotten core to public view.[138] In the view of many, this was not the Court's function. As the parliamentary leader of the Democrat Party said:

> Why did the Court play the tape? Everybody understands that this is a gross action, but the Court was not the place to play the tape. Everybody knows how bad the police are for arranging that scenario. But it is the DPR's role to supervise the police, not the Court's.[139]

The Bibit and Chandra case was a watershed case in Indonesia's fight against corruption. It was a case of considerable complexity. Some of the core issues were still contested as part of the 2008 Bank Century saga involving national parliament members, Sampoerna's family, and the head of criminal investigation at the national police.[140] This case remained the most important case for Mahfud MD during his career as Chief Justice.[141] This case not only became a stepping-stone to other criminal cases,[142] but also triggered a war of psychological terror by the police against the Chief Justice.[143] The national police provided protection to all constitutional justices, including personal security for each justice. Upon the tape being played, the national police recalled all personal security and security guards from the Court.

The Court rendered its decision on 25 November 2011 and decided that Article 32(1)(c), which provided that KPK leaders shall be suspended or dismissed if indicted for committing a criminal act, was conditionally unconstitutional.[144] Article 32(1)(c), the Court held, was unconstitutional

[138] Interview with Mustafa Fahri (Faculty of Law University of Indonesia, 3 July 2014).
[139] Interview with Benny K Harman (DPR/Parliament Building, 18 June 2014).
[140] Muhammad Faiz Aziz and Mega Hapsari, 'The Bibit & Chandra Case' (2009) 2(Issue) *Quarterly Fact Sheet* 4–5.
[141] Interview with Mohammad Mahfud (MMD Initiative Office, Jakarta, 3 December 2013).
[142] Antasari's case, Susno's case, Bank Century's case and Arwana's case.
[143] Interview with Mohammad Mahfud (MMD Initiative Office, Jakarta, 3 December 2013).
[144] *Constitutional Court Decision 133/PUU-VII/2009 on Criminal Charge against Corruption Commisoner* (2009).

> unless interpreted to mean that an Eradication Commission Commissioner shall be suspended or dismissed after being convicted by a court in a decision that has obtained permanent legal force.[145]

5.8 Conclusion

Judges do not have a blank check to pursue progressive outcomes according to their own beliefs. To be sure, judges may have a vision radically to transform society. However, they cannot impose this vision themselves, but must rather facilitate the system's ability to deliver on the required changes. Consequently, a judge must accept that there is a difference between his or her own personal vision for social justice and the process of social transformation itself.

In general, two different conceptions of the rule of law exist. The first is a formal approach, which promotes obedience to pre-announced rules and the strict application of those rules. On this conception, when a judge decides a case, the most important value is the judge's duty to implement the law as it has been laid down. This may result in sub-optimal results from the point of view of substantive justice, but on this conception of the rule of law, this is something that the judge must leave to parliament to fix.

The second conception of the rule of law is more substantive. On this conception, a judge's primary duty is to ensure that justice is done in every case. In pursuing this goal, the judge may amend the rule at the point of application. Since the primary purpose of rules is to serve justice, judges are duty-bound to ensure that this happens.

There are strengths and weaknesses in both conceptions. From the legislature's perspective, a formal approach is usually preferable since it preserves the distinction between the political branches as political organs and the courts as implementers of political decisions. The substantive approach by contrast collapses law into politics and blurs the line between the Court as legal institution and political organisation. However, too formalistic an approach, in which the Court makes a rigid separation between law and politics, can result in the enforcement of laws that promote substantive injustice. Judges who adopt a formal approach can get around this problem by noting the

[145] Ibid [3.20].

discrepancy between a law's policy objectives and its implementation, and inviting the political branches to address the problem. That middle way preserves the separate functions of the Court and the legislature and promotes the Court's reputation as a politically impartial institution.

In general, this chapter has argued, the Jimly Court adopted a formal understanding of the rule of law whereas the Mahfud Court chose a more substantive approach. Thus, the Jimly Court, when issuing conditionally constitutional decisions, provided directions about how the law should be implemented.[146] It recognised the need to provide legal certainty and justice to the applicants, but generally left problems identified to the legislature to fix.[147]

There was thus a strong view on the Jimly Court that when the parliament drafted a law, it did not always foresee all the possible implementation problems. It was the role of the Court to make parliament aware of these negative consequences and to assist them in fulfilling their constitutional functions. However, the Court could not become a substitute legislator and enact legislation, as it did not have the authority to do that. This approach had the advantage of clarifying the judges' understanding of the law while preserving a role for parliament. The Jimly Court was in this way more respectful of the democratic branches – more careful, polite and democratic in its decision-making practices. If the Jimly Court found a law constitutionally invalid, it refused to amend the law by itself (through conditionally constitutional decisions) and rather returned it to the parliament.

The Mahfud Court abandoned this restrained approach in shifting from a formal to substantive conception of the rule of law. While the substantive justice approach has some powerful advocates, it generally tends to work better in countries, like the United States, where law has already established its autonomy from politics. In that kind of setting, there is a lower risk that judges' involvement in matters of substantive policy

[146] *Constitutional Court Decision 058-059-060-063/PUU-II/2004 on Water Resource Law* (2004); *Constitutional Court Decision 026/PUU-III/2005 on Education Budget* (2005); *Constitutional Court Decision 029/PUU-V/2007 on Board Film Censorship* (2007).
[147] *Constitutional Court Decision 012-016-019/PUU-IV/2006 on Corruption Court* (2006); *Constitutional Court Decision 026/PUU-IV/2006 on Education Budget* (2006); *Constitutional Court Decision 014-17/PUU-V/2007 on Past Criminal History* (2007); *Constitutional Court Decision 029/PUU-V/2007 on Board Film Censorship* (2007). The Jimly Court only issued one decision that inserted a new norm (*Constitutional Court Decision 010/PUU-VI/2008 on Domicile Requirement* [2008]).

will be seen as political. In countries like Indonesia, where law has long been instrumentalised in service to authoritarian ends, there is a great danger that the substantive justice approach will be misconstrued, and interpreted as judges' intruding into areas reserved for the political branches. This is indeed what happened in Indonesia, as the next chapter relates.

Chapter 6: The 2011 Attack Revisited

6.1 The drafting process

The plan to amend *Law 24 of 2003 on the Constitutional Court* began in 2007 during Jimly's chief justiceship after the Court's decision in the *Judicial Commission Case*. At first, President Susilo Bambang Yudhoyono saw no urgent need to prioritise the amendment, ranking it as legislative priority no 103 for 2007 on the National Legislation Program (Prolegnas).[1] The President at this stage was content to allow the minister in charge to develop a draft for later presentation to the parliament.[2] Various meetings were conducted (in the Court and in the ministerial office) to begin this process. However, these discussions only covered such technical issues as the administrative management of the Court, the role of the secretary general and registrar, and the tenure of the Chief Justice and deputy Chief Justice.[3] There was no discussion regarding the limitation of the Court's authority or of its supervision. Later, the appointment of new constitutional justices was included in the discussions. By this time, however, Mahfud MD had announced his intention to return the Court to its original jurisdiction. The amendment of the *Constitutional Court Law* was at the same time delayed by discussions between the parliament and the President over the amendment of the *Law on the Supreme Court*, the *Judicial Authority Law*, and the *Judicial Commission Law*.[4] The Court itself was also seen to be performing better during this period. For all these reasons, the amendment of the *Constitutional Court Law* was put on hold. Both the parliament and the President, it seemed, were at this stage content to await the appointment of the new constitutional justices in 2008, and to decide after that whether amendment of the *Constitutional Court Law* was still necessary.

In 2010, after it had become clear that the Court under Mahfud MD had not significantly changed direction, discussions to amend the *Constitutional Court Law*

[1] *Evaluasi Prolegnas 2005–2009* (*Badan Legislasi* DPR RI, 2009) 134.
[2] Interview with Ronald Rofliandi (Indonesian Centre for Law & Policies Studies Office, 11 December 2013).
[3] Author's experience.
[4] *Law 3 of 2009 on Second Amendment of Law Number 14 of 1985 on Supreme Court* (2009)*; Law 48 of 2009 on Judicial Power* (2009)*; Law 18 of 2011 Amending Law 22 of 2004 on the Judicial Commision* (2011*).*

revived. On 9 June 2010, the chair of the Indonesian Parliament's DPR-RI faction wrote a letter to President SBY requesting that discussions over the amendment of the *2003 Constitutional Court Law* be recommenced.[5] The next day, on 24 June 2010, President SBY appointed the Minister of Justice (*Menteri Hukum dan* [HAM]) and the Minister of State Empowerment (*Menteri Negara Pendayagunaan Aparatur Negara dan Reformasi Birokrasi*) to negotiate the amendment on the government's behalf.[6]

Parliament had by this time drawn up a draft amendment that it sent to the executive for discussion. In response, the President's office drew up a list of 228 discussion points (*daftar inventarisasi masalah*), 116 of which aligned with the parliament's draft,[7] leaving 172 for discussion in the drafting committee.[8] HA Dimyati Natakusumah of the PPP, who was also vice-chair of the Legislation Committee for the DPR-RI faction, was appointed chair of the drafting committee (*panja*).

The drafting committee conducted five meetings between October 2010 and May 2011. On 31 May 2011, the chair of the drafting committee reported on the draft's progress to the Legislation Committee and the Minister of Justice and Human Rights. This report was meant to lead to final approval through a plenary meeting of the DPR-RI. However, pending issues were not resolved in the drafting committee and had to be discussed in a special session. Leaders of the factions and the Minister of Justice and Human Rights conducted meetings on 6 and 9 June 2011. On 14 June 2011, the Legislation Committee (*Badan Legislasi*)[9] and the Minister of Justice and Human Rights agreed to the final version of the *First Amendment of Law 24 of 2003 on the Constitutional Court.* On 21 June 2011, a little more than a year after the revived discussions had commenced, after 13 meetings and almost 104 hours of debate (excluding lobbying),[10] the amendment was tabled in parliament. One month later, on 20 July 2011, the President signed the bill into law.

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[5] *Chairman of House of Representative Letter Number LG.01.01/4467/DPR-RI/VI/2010.*
[6] *President Republic Indonesia Letter Number R-50/Pres/06/2010 re: Appointment of Government Representative to debate Draft of Law on the Amendment of Law Number 24 Year 2003 on Constitutional Court.*
[7] Rather than discussing the specific provisions in a law, in practice parliament and the government used pointers to clarify their discussion. Agreed pointers were incorporated later by the special team into the law.
[8] DPR-Legislation Committee, *Parliamentary Debates*, 9 June 2011.
[9] This body comprised 50 parliamentary members from nine factions in parliament.
[10] Some of the pending issues had to be settled through lobbying between the government and the Legislation Committee.

In his concluding speech, upon accepting the drafting committee's draft, the Minister of Justice and Human Rights commented:

> [t]here should be a limitation on what the Constitutional Court can decide. Indonesia is governed by the rule of law. No State institution has unlimited authority.[11]

As the draft's initiator, parliament prepared an academic paper for consideration and argument on why parliament intended to amend the *2003 Constitutional Court Law*. One objective of the amendment was said to be the need to respond to the Court's decision in the 2006 *Judicial Commission* case[12] by creating a special Constitutional Court Ethics Council (*Majelis Kehormatan Mahkamah Konstitusi*). In 2006, the Court confirmed the constitutionality of the Judicial Commission's authority to supervise the Supreme Court justices, the Appeals Court and the District Court. However, the Court declared that the Judicial Commission's authority to supervise constitutional justices was unconstitutional. The Judicial Commission case was brought to the Court by 48 Supreme Court justices who challenged the constitutionality of the Judicial Commission to supervise Supreme Court justices.

The purpose of the Ethics Council, in turn, was described as being to receive reports and handle complaints against the Constitutional Court justices.[13] It was proposed that the Council's members should come from the Court, academia and the chair of the Judicial Commission.[14] In the DPR's view, the existing Council, which had been established by a regulation issued by the Court itself,[15] was not sufficient.[16]

In his introductory remarks at the first meeting between parliament and the government, Ignatius Mulyono (chair of the Legislation Committee) had reinstated the idea of

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[11] ANA NTA, 'DPR *Membatasi Kewenangan* MK—MK *Dilarang Memutus Melebihi Permohonan*', *Kompas Cetak* (Jakarta), 15 June 2011.
[12] *Constitutional Court Decision 005/PUU-IV/2006 on Judicial Commission* (2006). The Court confirmed the constitutionality of the Judicial Commission's authority to supervise the Supreme Court justices, the Appeals Court and the District Court. However, the Court declared that the Judicial Commission's authority to supervise constitutional justices was unconstitutional. The *Judicial Commission Case* was brought to the Court by 48 Supreme Court justices who challenged the constitutionality of the Judicial Commission to supervise Supreme Court justices.
[13] *Dewan Perwakilan Rakyat Republik Indonesia, 'Naskah Akademik: Rancangan Undang-Undang Perubahan Atas Undang-Undang Nomor* 24 *Tahun* 2003 *Tentang Mahkamah Konstitusi*' (2010) 33.
[14] Ibid 36.
[15] *Constitutional Court Regulation 9/PMK/2006 on Applying the Ethics Code and Behaviour Guidelines for Constitutional Court Justice* (2006).
[16] *Dewan Perwakilan Rakyat Republik Indonesia*, '*Naskah Akademik : Rancangan Undang-Undang Perubahan Atas Undang-Undang Nomor 24 Tahun 2003 Tentang Mahkamah Konstitusi*' (2010) 3.

supervising the constitutional justices. This was in response to the Court's striking down of the Judicial Commission's authority to perform this function.[17] In addition, parliament proposed to amend the Chief Justice's and Deputy Chief Justice's tenures, strengthen judicial independence, define the responsibility of the secretary general and Court Registrar, and introduce a minimum education and appointment age requirement for constitutional justices.[18] Later, the chair of the Legislation Committee also stressed the need to regulate court decisions that went beyond petitioner requests *(ultra petita)*.[19]

Responding to the chair of the Legislation Committee's remarks, the Minister of Justice stated that the government supported the intention to supervise constitutional justices:

> The Government's view is that supervision of constitutional justices is necessary to maintain the independence of the Constitutional Court. Therefore, a specific mechanism for supervising constitutional justices is needed.[20]

The government perceived that in handling local election result disputes the Court had 'gone too far',[21] and argued that it was questionable whether the *1945 Constitution* allowed *pilkada* election results disputes to be handled by the Court.

6.2 Parliament's motivation

As we have seen, parliament and the President's intention to amend the *Constitutional Court Law* had already arisen in 2007, during the DPR's 2004 to 2009 term. However, the amendment was not passed during that period due to a lack of time and political will.[22] The Legislation Committee in parliament intended to amend three laws simultaneously: the *Judicial Commission Law*, the *Constitutional Court Law* and the *Supreme Court Law on the Judiciary*. The idea was to synchronise provisions regarding the judiciary and the supervision of Supreme Court judges and Constitutional Court justices. Among those ambitious efforts, the DPR only successfully completed the amendment of the *Supreme Court Law*.[23] In the Legislative meeting on 7 September

[17] *Constitutional Court Decision 005/PUU-IV/2006 on Judicial Commission* (2006).
[18] DPR-Legislation Committee, *Parliamentary Debates*, 9 June 2011.
[19] Ibid 35–36.
[20] Ibid.
[21] Ibid.
[22] Interview with Mustafa Fahri (Faculty of Law University of Indonesia, 3 July 2014).
[23] *Law 3 of 2009 on Second Amendment of Law Number 14 of 1985 on Supreme Court* (2009).

2009, the Chair of the Drafting Committee, Agun Gunanjar, noted that less than ten parliamentary members were present in the meeting, nowhere near the 26 required for a quorum. As 30 September 2009 would be last date of the 2004 for 2009 parliamentary term, there was a greater chance that discussion of the amendment would start from the beginning of the next parliamentary period.[24]

As we have seen, from the very beginning, the Court had caused parliamentary members discomfort.[25] Members objected to the Court's stance as the 'sole constitutional interpreter', claiming that '[w]e, the Parliament, also interpret the constitution'.[26] The Court's extensive media relations exercise also caused problems. In a sense, the Court's strategy in this respect was too successful as the media was won over by the Court, and began to criticise any negative comments made by parliamentary members on the Court's performance.[27] Consequently, most parliamentary members were afraid to criticise the Court.[28] As one prominent parliamentarian put the point:

> As Chairman of the Law Commission in the Parliament my job was to supervise the Court's performance. But when I asked a question, I was attacked by the media because it saw my question as interference. And yet I was a parliamentary member chosen by the people. It was my responsibility to ask questions regarding the performance of this institution.[29]

As we have seen, the Court used the media, including public service television announcements, to urge the public to file judicial review cases. It saw this as part of its civic education strategy. Parliamentary members, however, took a different view:

> We respect the Court's decisions; that is why we pass laws to accommodate the Court's view. However, why does the Court not in turn respect us as lawmakers?[30]

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[24] RFQ FAT, *Nasib Paket Revisi Uu Bidang Peradilan Mengkhawatirkan* (8 September 2009) Hukumonline.com <http://www.hukumonline.com/berita/baca/hol23074/nasib-paket-revisi-uu-bidang-peradilan-mengkhawatirkan>.
[25] Interview with Philips Vermonte (CSIS Office, 12 December 2013).
[26] Interview with Benny K Harman (DPR/Parliament Building, 18 June 2014).
[27] CMS, *Komisi III Protes Dibilang Intervensi MK* (26 January 2010) www.Inilah.com <http://nasional.inilah.com/read/detail/307111/komisi-iii-protes-dibilang-intervensi-mk#.VCt2Rb7fjdk>.
[28] Interview with Agun Gunandjar (DPR/Parliament Building, 3 December 2013).
[29] Interview with Benny K Harman (DPR/Parliament Building, 18 June 2014).
[30] Interview with Achmad Rubaire (DPR/Parliament Building, 28 November 2013).

6.3 The involvement of the Constitutional Forum

When introducing the amendment to the *2003 Constitutional Court Law*, parliament appreciated the Court's strength and thus conducted the amendment process carefully. To support their reasons for amending the law, parliamentary members requested opinions from a body known as the Constitutional Forum (*Forum Konstitusi*). This body consisted of former members of *Panitia Ad Hoc* I and III MPR, who had been involved in the 1999 to 2002 constitutional amendment process. Established on 1 July 2005 with the goal of promoting public understanding of the amendments to the *1945 Constitution*,[31] the Forum was a custodian of sorts of the original intention behind the amendments. The Court itself had relied on the Forum's knowledge, having summoned its members to present evidence in various cases that had come before it. Parliament had also previously asked the Forum to provide guidance on the interpretation of the amended *1945 Constitution* and on questions regarding the constitutional compatibility of proposed laws. The Forum was in this sense a highly legitimate and effective source of opinion on the original intention behind the amendment of the *1945 Constitution* and the establishment of the Court in particular. This was so, even though, in practice, there was of course no such unified intention.[32]

In 2010, the Constitutional Forum produced a comprehensive report on the amendment of the *1945 Constitution*: 'Background, Process and Final Drafting' (*Naskah Komprehensif Perubahan Undang-Undang Dasar Negara Republik Indonesia Tahun* 1945: *Latar Belakang, Proses dan Hasil Perubahan*), which the Constitutional Court itself published.[33] Even though the MPR later produced its own 'transcript' of the *1945 Constitution*, by the time this was produced, *Forum Konstitusi* had provided the second

[31] The role of Chief Justice Jimly in establishing this forum and providing support is very significant. The Forum conducted meetings at the Court building. The Court did not only provide a place to meet but also the necessary staff and funds to accommodate the Forum's needs. The inauguration of this Forum conducted at the Constitutional Court building was attended by Chief Justice Jimly, the Chief of the MPR, and the former Chief of the MPR, Amien Rais who was the Chief during the amendment process.

[32] During the examination of the Judicial Commission case (*Constitutional Court Decision 005/PUU-IV/2006 on Judicial Commission* (2006)*)*, the Court summoned the Constitutional Forum to find the original intent behind the creation of the Judicial Commission. As there were different views on why the Judicial Commission had been established, the Court used its own interpretation.

[33] *Tim Penyusun Naskah Komprehensif perubahan UUD 1945, Naskah Komprehensif Perubahan Undang-Undang Dasar Negara Republik Indonesia Tahun 1945: Latar Belakang, Proses, Dan Hasil Pembahasan, 1999–2002 (Sekretariat Jenderal dan Kepaniteraan, Mahkamah Konstitusi*, 2010).

edition of 'Transcript of Making the 1945 Constitution' and made it accessible to the public.[34] It accordingly became the authoritative guide.

6.4 Technical issues

The DPR tried to regulate three issues in the *2011 Amendment*. The first was procedures and mechanisms that were not clearly covered in the *2003 Constitutional Court Law*. These included the mechanism to elect the Chief Justice and Deputy Chief Justice,[35] protection of financing and security to support judicial independence,[36] clear divisions between the Chief of Court Administration (Secretary General) and the Court Registrar,[37] definition of court decisions as final and binding,[38] education requirements for election as a constitutional justice,[39] the dismissal of constitutional justices,[40] the abolition of court fees,[41] procedural mechanisms, and evidence processes.[42] This first category also included a mechanism to allow the Supreme Court to become a party to disputes at the Court,[43] and a transition period for constitutional justices appointed before the enactment of the *2011 Amendment to the Constitutional Court Law*.[44]

This first group of amendments did not necessarily reduce the Court's authority. Further clarification was indeed necessary to resolve uncertainties in the *2003 Constitutional Court Law*, and thus the mere fact that this was proposed is not on its own suggestive of a plan to attack the Court. However, two issues in the first group of amendments stood out as potentially more problematic: the provisions relating to the tenure of the Chief

[34] http://www.mahkamahkonstitusi.go.id/index.php?page=web.Publikasi&id=5&pages=1.
[35] Article 4; this arrangement was also to fix the term of the Chief Justice and deputy Chief Justice from 3 to 2.5 years.
[36] Article 6.
[37] Article 7, 7A, 7B and 8. Before it was clearly divided between the secretary general and court registrar, conflict quite often arose regarding who had the proper authority to handle court management and personnel. The *2011 Law* determined that the Court should be assisted by one court registrar and one secretary general. It clearly defined that the president needs to establish specific benefits and career paths for substitute registrars as the core supporting function of the Court as stated in *President Regulation 49 of 2012* regarding the Registrar and Secretary General of the Constitutional Court.
[38] Article 10.
[39] Master's degree or doctoral degree and no obligation that all degrees should be linear law courses only (Article 15).
[40] Articles 23 and 26.
[41] Article 35(a). From the creation of the Court, Chief Justice Jimly imposed no Court fees to file an application. This was one strategy to increase the level of court acceptance and give more public access to the Court.
[42] Articles 33A, 34, 35A, 41, 42A, 48A, 51A, 60, 79.
[43] Repeal of Article 65.
[44] Article 87.

Justice and to mandatory retirement. These issues arose repeatedly during the drafting discussions, suggesting that they were central to parliament's concerns about the need to reduce the Court's authority.

Article 4(3) of the *2003 Constitutional Court Law* stated that the Chief Justice and Deputy Chief Justice should serve for three years. By contrast, each Constitutional Court justice was elected for a five-year term and could be re-elected once.[45] Read together, these two Articles thus gave rise to a potential discrepancy between the tenure of a Chief Justice who had been elected by his fellow judges to serve as Chief Justice for a second three-year term (totalling six years) and that justice's shorter, five-year tenure as an ordinary constitutional justice (if not re-elected to serve a second term). A similar discrepancy would arise were the sitting Chief Justice to be re-elected as an ordinary constitutional justice for second five-year term, but then not re-elected for a second three-year term as Chief Justice. Exactly this constitutional confusion had in fact arisen in August 2008 when the second batch of constitutional justices arrived at the Court.

As noted in the introductory chapter, Jimly was elected as Chief Justice for his first term on 18 August 2003 by five votes to three after an open plenary meeting of all the constitutional justices, as provided for in Article 4(3) of the 2003 *Constitutional Court Law*. Jimly was then re-elected as Chief Justice for a second term from 2006 to 2009, this time securing eight out of nine votes. Legally, he was entitled to serve as Chief Justice until 18 August 2009. And, indeed, when the second generation of constitutional justices was selected and sworn in on 16 August 2008, Jimly's view was that he was still Chief Justice, based on the constitutional justices' vote at the Plenary Meeting of 18 August 2006. However, the newly appointed constitutional justices took the view that, given the extent of the turnover of the Court's membership, they should be entitled to hold a fresh vote.[46] In the absence of a settled tradition on this issue, Jimly relented, and, at a plenary meeting on 18 August 2008, the newly composed Court chose Mahfud MD as Chief Justice.

[45] Article 22 of the *2003 Constitutional Court Law*.
[46] Personal experience during the author's period as a member of the Court's staff.

In light of this experience, the government in 2011 proposed that the Chief Justice's and Deputy Chief Justice's term should be reduced to one year. In effect, the justices would rotate the leadership among themselves, with each judge serving in a senior leadership position for one year. 'They are statesmen,' the Legislative Committee said, 'and they should not seek leadership positions. Any person could lead the Court. Through the yearly rotation system, the Court will become more dynamic.' [47] This formal justification, however, hid the government's real agenda, which was to reduce the Court's authority. The proposed system of annually rotated leadership would have prevented any possibility of strong judicial leadership emerging on the Court, and would have critically weakened the institution. The Chief of the Drafting Committee fortunately saw this as a problem and rejected the amendment, stating that:

> [t]he Court is not an ad hoc institution. Yearly rotation will politicise the Court, undermine judicial independence and destabilise the institution. Mahfud MD may be controversial, but eventually another Chief Justice will be appointed. [48]

The drafting committee instead proposed three options for the Chief Justice's term: five years (matching the Chief Justice's term as constitutional justice), three years (as provided in the *2003 Constitutional Court Law*) or two-and-a-half years. In the end, the drafting committee agreed on a period of two-and-half years.[49]

Another technical requirement that the drafting committee tried to impose on the Court was a statutory retirement age. According to the *Supreme Court Law*, the prescribed retirement age for a Supreme Court judge was 70 years.[50] The question arose (at the end of the drafting process in late June 2011) as to whether the drafting committee could impose a different retirement age on the Constitutional Court justices. Based on research produced by the Minister of Manpower (*Menpan*), the government proposed limiting the retirement age of constitutional justices to 65 on the grounds that their workload was of a different nature to that of a Supreme Court justice.[51] The Democrat

[47] DPR-Legislation Committee, *Parliamentary Debates*, 9 June 2011.
[48] Dimyati Natakusumah.
[49] Article 4(3). This consensus was settled through the lobby process.
[50] Article 11(b) of the *2009 Supreme Court Law*. The discussion regarding the retirement age for Supreme Court Justices deadlocked many times. There was no agreement regarding the exact age (63, 67 or 70). See Muhammad Nasir Djamil, *DPR-Legislation Committee*, *Parliamentary Debates*, 9 June 2011.
[51] Ibid.

Faction, PDI-P, Golkar,[52] Hanura[53] and PPP Faction[54], on the other hand, pushed for the retirement age to be similar to that of Supreme Court justices. This matter was eventually settled through the lobbying mechanism,[55] with the drafting committee agreeing that the statutory retirement age for constitutional justices would be 70 years.[56]

The second group of amendments concerned supervision of constitutional justices, and the third had to do with reducing the authority of the Court in handling local elections disputes and issuing decisions with regulatory effect. These two groups of amendments are discussed below.

6.5 The Ethics Council

Apart from the first group of amendments, which concerned technical matters, improving the mechanisms for supervising constitutional justices was parliament's major objective in introducing the amendments to the 2003 *Constitutional Court Law*. So much is plain from the academic paper attached to the bill, a large part of which was devoted to this issue.[57] As noted already, the DPR's proposal was that a special Constitutional Court Ethics Council (*Majelis Kehormatan Mahkamah Konstitusi*) should be established,[58] and that the Court should be obliged to adopt an ethics code and behavioural guidelines.[59] It was proposed that the Ethics Council should consist of a Constitutional Court justice, a Judicial Commission member, a DPR member, a government official dealing with legal issues, and a Supreme Court judge.[60] The structure, organisation and procedures of the Ethics Council would be regulated by a Constitutional Court Regulation upon the approval of the Ethics Council.[61]

This proposal was aimed at filling a gap in the 2003 *Constitutional Court Law*. As parliament was well aware, the Court had already on its own initiative set up an Ethics Council, together with an ethics and judicial behavioural code, based on the Bangalore

[52] Ibid.
[53] Ibid.
[54] Sarifuddin Sudding; Ahmad Yani.
[55] Ibid.
[56] Article 23(1) *Law 8 of 2011 Amending Law 24 of 2003 on the Constitutional Court* (2011).
[57] Interview with Muhammad Reza (Ministry of Law and Human Rights Building, 21 July 2014).
[58] Article 27A(2) *Law 8 of 2011 Amending Law 24 of 2003 on the Constitutional Court* (2011).
[59] Article 27A(1). The Court already had an Ethics Code and Behaviour Guidelines based on the Bangalore Principles and drafted in 2006.
[60] Article 27A(2).
[61] Article 27A(7) and *Elucidation* Ibid.

Principles.[62] At the time of the amendment, these regulations had already twice been confirmed.[63] Nevertheless, parliament took the view that, in light of the Court's decision to annul the Judicial Commission's authority to supervise it members,[64] the issue required re-regulation.

Another factor driving this particular amendment was the corruption scandal that had erupted in the middle of the drafting of the *2011 Constitutional Court Law*. During the discussion of the supervision provisions, two separate allegations of bribery were made against two of the constitutional justices. The first allegation was made by Refly Harun, a former Judicial Associate, who had published an opinion piece in the national newspaper, Kompas. Refly alleged that the Court was not free from bribery in its handling of the *pilkada* cases.[65] In particular, he stated that he had seen monies amounting to Rp 1 billion changing hands, allegedly to bribe constitutional justice Akil Mochtar.[66] In response, the Court established a fact-finding team, chaired by Harun, which failed to confirm the allegations.[67] The second bribery allegation, involving Court Substitute Registrar Mahfud (not the Chief Justice) and constitutional justice Arsyad Sanusi, was heard by the Court's own Ethics Council. In this case, Justice Arsyad Sanusi's daughter (Nesywati) and his brother-in-law (Zaimar)[68] had informally approached Court Substitute Registrar Mahfud and Justice Sanusi asking them to grant a judicial review petition filed by Dirwan Mahmud, a previous head of the South Bengkulu region who had been dismissed by the Court. After the Ethics Council upheld the allegations against him, Registrar Mahfud returned the money he had received and was dismissed without criminal charge.[69] The allegations against Justice Sanusi were not upheld, but he resigned after the Ethics Council decided that he 'must take

[62] *Constitutional Court Regulation 9/PMK/2006 on Applying the Ethics Code and Behaviour Guidelines for Constitutional Court Justices* (2006).
[63] *Constitutional Court Regulation 2/PMK/2003 on the Ethics Code and Behaviour Guidelines for Constitutional Court Judges (2003); Constitutional Court Regulation 7/PMK/2005 on Applying the Ethics Code and Behaviour Guidelines for Constitutional Court Judges* (2005).
[64] *Constitutional Court Decision 005/PUU-IV/2006 on Judicial Commission* (2006).
[65] Refly Harun, 'MK Masih Bersih?', *Kompas* (Jakarta), 25 October 2010.
[66] Simon Butt and Tim Lindsey, *The Constitution of Indonesia: A Contextual Analysis* (Hart Publishing, 2012) 147.
[67] Camelia Pasandaran and Armando Siahaan, 'Team Uncovers Likely Bribery at Constitutional Court', *Jakarta Globe* (Jakarta), 10 December 2010.
[68] Butt and Lindsey, above n 66, 147; ANA, '*Panitera Diduga Terlibat: Ketua MK Janji Tindak Lanjuti Temuan Dalam Lima Hari*', *Kompas* (Jakarta), 10 December 2010 4.
[69] *Constitutional Court Decision 120/PUU-VII/2009 on Past Criminal History (Dirwan Mahmud)* (2009).

responsibility [for his relatives' actions] in the interests of upholding the reputation of the Court'.[70]

In light of those two events, the drafting committee invited the Secretary General of the Court to explain the fact-finding committee's role, the legal basis for its establishment and whether it should be considered to be equivalent to the Ethics Council.[71]

Not long after Refly's allegation, the dismissal of Registrar Mahfud and the resignation of Justice Arsyad, news broke of a third bribery attempt, this time on the part of Democracy Party lawmaker and Treasurer, M Nazaruddin,[72] who was alleged to have attempted to bribe the Secretary General of the Court, Janedjri M Gaffar, in an amount of S$120.000.[73] Instead of reporting this allegation to the Corruption Eradication Commission, Chief Justice Mahfud reported it to the President.[74] After a meeting with the Chief Justice, President Susilo Bambang Yudhoyono conducted an unscheduled press conference at the Palace. He announced that Nazaruddin's behaviour was not related to party activities and needed to be processed through existing legal mechanisms.[75]

The final event that undermined the Court's reputation concerned a 'fake letter' written by the Court Registrar to the Election Commission (KPU). The Election Commission had asked for clarification from the Court about the vote in South Sulawesi I Electoral District for the Legislative Election 2009. The Commission received a letter allegedly written by the Court on 14 August 2009 regarding the confirmation of votes acquired by a legislative candidate from *Partai Hati Nurani Rakyat* (Hanura), Ms Dewie Yasin

[70] Butt and Lindsey, above n 66, 147; Dessy Sagita, 'Constitutional Court Justice Steps Down Over Kin's Alleged Bribery', *Jakarta Globe* (Jakarta), 12 February 2011; Ina Parlina, 'Justice Quits Over Family Bribery Scandal', *Jakarta Post* (Jakarta), 12 February 2010. Justice Sanusi resigned two months earlier than his mandatory retirement age on 14 April 2011.
[71] DPR-Legislation Committee, *Parliamentary Debates*, 9 June 2011.
[72] Nazarudin was later charged with corruption by the Corruption Eradication Commission regarding a bribe in the Hambalang Case, which also brought down Anas Urbaningrum, the Chairman of Democrat Party (President Susilo Bambang Yudhoyono's Party). Not long after that, the Minister of Sport and Youth was also charged.
[73] Bagus BT Saragih and Adianto P Simamora, 'Lawmaker "Tried to Bribe Court Official"', *Jakarta Post* (Jakarta), 21 May 2011.
[74] ASH, *Pemberian Nazaruddin Tak Terkait Kasus Di MK* (23 May 2011) Hukumonline.
[75] Inggried, *Ini Tanggapan Sby Soal Nazaruddin* (20 May 2011) <http://nasional.kompas.com/read/2011/05/20/16094494/Ini.Tanggapan.SBY.soal.Nazaruddin>. There is not charge against Janedjri M. Gaffar

Limpo.[76] The Court, however, denied sending the letter or making the decision in question. The Court's denial letter was sent on August 17 2009. Police started to investigate and arrested Bailiff Masyuri Hasan. Hasan was charged with forging the Court Registrar's letter and this led to the election of Dewi Yasin Limpo as a legislative member of the DPR.[77] The forged letter was examined in August 2009 and the police were aware of this case upon acceptance of the report from Chief Justice Mahfud. This case also involved Andi Nurpati, a former Commissioner at the Election Commission (who later became Chief of Communication in the Democrat Party), a former Court Registrar, former Constitutional Court Justice Sanusi and another court clerk.[78] The District Court of Central Jakarta rendered a decision and sentenced Masyuri Hasan to one year in prison. The Nazarudin case[79] and Andi Nurpati's saga erupted as Chief Justice Mahfud MD acted as a whistleblower, in this case to President Susilo Bambang Yudhoyono.[80]

In considering how best to supervise constitutional justices in light of these events, parliament and the President started their discussions by checking the original intention behind the creation of the Judicial Commission and the Constitutional Court. First, was it possible to supervise constitutional justices? Second, if constitutional justices were subject to supervision, which institution had this authority? Third, if a newly established body to supervise constitutional justices was created, what should the composition of this body be? Fourth, who had responsibility to create a code of ethics? Parliament was reluctant to support supervision through the Judicial Commission mechanism only. This form of supervision had already been provided for in the *2004 Judicial Commission Law*, but the Court had declared it unconstitutional.[81] A government representative, Professor Ramli, argued that, according to the government's previous discussions with the Court and Chief Justice Mahfud, the Court had no problem with being supervised by

[76] *Constitutional Court Letter Number: 112/PAN.MK/VIII/2009;* Later, Ms Dewie Yasin Limpo was arrested by the Corruption Eradication Commission on 21 October 2015 regarding bribery on a power plant project in Papua. See IAN, '*Proyek Unggulan Pemerintah Mulai Diincar*', *Kompas* (Jakarta), 22 October 2015.
[77] Susi Fatimah, *Kronologis Pemalsuan Surat Putusan MK* (21 June 2011).
[78] Ibid.
[79] Hindra Liu, 'Mahfud: Vonis Masyhuri Buktikan Ada Surat Palsu Di MK', *Kompas* (Jakarta), 5 January 2012.
[80] Legislasi: Aspirasi Atau Transaksi?: Catatan Kinerja DPR 2012/*Tim Penulis, Fajri Nursyamsi ... [Et Al.] ; Editor Substansi, Erni Setyowati ; Editor Bahasa, Amalia Puri Handayani* (*Pusat Studi Hukum dan Kebijakan* Indonesia, 2012).
[81] *Constitutional Court Decision 005/PUU-Iv/2006 on Judicial Commission* (2006).

the Judicial Commission. From the government's perspective, Mahfud MD had a different view to that of the constitutional justices who had earlier annulled the *Judicial Commission Law*.[82]

At this point, it is worth briefly summarising the 2006 *Judicial Commission* decision. The case had been brought by 31 Supreme Court judges, who asked the Constitutional Court to annul the Judicial Commission's authority to investigate their conduct. The Judicial Commission was a new institution, established as part of the constitutional reform process. It had the authority to nominate Supreme Court justices and to uphold the dignity of the judicial profession.[83] In exercise of this authority, the Commission was empowered to recommend sanctions against poorly performing judges to the Supreme or Constitutional Court.[84] Not long after its establishment, the Judicial Commission became engaged in a conflict with the Supreme Court. The conflict escalated when the Commission made public the names of 13 Supreme Court justices it called 'problematic', and then decided to summon those justices.[85] In their petition for constitutional review, the Supreme Court judges argued that Article 24B(1) of the *1945 Constitution* only gave authority to the Judicial Commission to supervise judges. Article 24B(1) states:

> There shall be an independent Judicial Commission, which shall possess the authority to propose candidates for the Supreme Court and to maintain the honour, dignity and good behaviour of judges.

According to the petitioners, the scope of the Commission's authority was only to supervise lower court judges and not the Supreme and Constitutional Courts. Moreover, the petitioners argued that the Commission was essentially a partner to the Supreme Court in supervising lower court judges. The Constitutional Court held that the supervisory role of the Judicial Commission was incompatible with the separation of powers, as the Judicial Commission was just a supporting organ of the Supreme Court.[86] The Judicial Commission did not possess judicial power. Secondly, the Court

[82] DPR-Legislation Committee, *Parliamentary Debates*, 9 June 2011.
[83] Article 13 *Law 22 of 2004 on the Judicial Commission*, Series Law 22 of 2004 on the Judicial Commission (trans, 2004).
[84] Ibid, Article 21.
[85] 'Commission to Grill 13 Justices', *The Jakarta Post* (Jakarta), 20 February 2006.
[86] *Constitutional Court Decision 005/PUU-IV/2006 on Judicial Commission* (2006) 182.

ruled that the Judicial Commission's supervisory role was vague. In particular, the Court held that:

> [t]he Commission's authority according to Article 24B(1) of the Constitution falls under the scope of implementation of the code of ethics and code of conduct of judges. Therefore, in the first place, there should be a norm that governs the meaning and scope of judges' behaviour... that includes who has the authority to make codes of ethics. The Judicial Commission Law does not cover those issues at all. It has created much uncertainty because the law assigns a supervisory role, but the judges' behaviour that becomes the subject of supervision is unclear.[87]

The Court further held that:

> [l]ack of clarity and detail in the statutory rules regarding supervisory authority over judges' behaviour has created the unintended consequence that the Judicial Commission and the Supreme Court have produced their own interpretations, which has created legal uncertainty. Therefore, the lawmakers should clarify the Judicial Commission's supervisory role in more detail.[88]

Finally, the Court concluded that all provisions in the *Judicial Commission Law* relating to its supervisory role, including supervision of constitutional justices, should be declared inconsistent with the Constitution and void as they created legal uncertainty.[89] It is interesting in this context to note Butt's view that, despite public criticism regarding the Court's refusal to be supervised, the Court's decision should be applauded for 'emphasiz[ing] the importance of judicial independence to a functioning State, legal system and judiciary'.[90]

The 2006 Judicial Commission decision was supported by Zen Badjeber, a member of the Constitutional Forum, who explained the original intention behind the creation of the Judicial Commission:

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[87] Ibid 187.
[88] Ibid 193.
[89] Ibid 201.
[90] Simon Butt, 'The Constitutional Court's Decision in the Dispute between the Supreme Court and the Judicial Commission: Banishing Judicial Accountability?' in Ross H McLeod and Andrew MacIntyre (eds), *Indonesia: Democracy and the Promise of Good Governance* (Institute of Southeast Asian Studies, 2007) 178.

> [a]s Statesmen, constitutional justices are not subject to the Judicial Commission. They have a special selection procedure that is different to that for judges of the Supreme Court. That is why the 1945 Constitution treats the Supreme Court (Article 24A), the Judicial Commission (Article 24B) and the Constitutional Court (Article 24C) separately.[91]

The statesperson-like nature of the constitutional justices, Badjeber continued, led them to create their own internal Ethics Council.[92]

Another constitutional drafter, Jacob Tobing, rejected this argument. He argued that the original intention behind the creation of the Judicial Commission was that it should supervise all judges, including Supreme Court judges and constitutional justices.[93] The difference of opinion between the constitutional drafters concerning 'what kind of judges ... should be supervised by the Judicial Commission' had also arisen during the preliminary hearing of the 2006 *Judicial Commission* case.[94]

In the result, there were three proposals regarding how to supervise constitutional justices. The government proposed an Ethics Council with members consisting of representatives of the constitutional justices (two members) and judicial commission commissioners (three members).[95] This first proposal was rejected on the grounds that it was likely to be overturned on review. The second proposal was that representatives from each institution (the Supreme Court, parliament and government) should nominate constitutional justices, in line with South Korea's experience. The third alternative for the composition of the Ethics Council was that it should include members from the Court, parliament, the executive, Supreme Court, judicial commission, and an academic or public figure. In the end, the drafting committee settled on the third alternative, in which each institution sent one person to sit in the Council.[96]

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[91] DPR-Legislation Committee, *Parliamentary Debates*, 9 June 2011. This understanding was also adopted by Jimly's bench in determining the *Judicial Commission Case.*
[92] Ibid, Zen Badjeber.
[93] Interview with Jacob Tobing (Indonesia Church Association (PGI) Office, 18 August 2014).
[94] *Constitutional Court Decision 005/PUU-IV/2006 on Judicial Commission* (2006) 177.
[95] DPR-Legislation Committee, *Parliamentary Debates*, 9 June 2011.
[96] Ibid.

Parliament's view was that its members were also responsible for maintaining the integrity of the Court.[97] Independence, on this view, required supervision of judges' credibility and accountability. Independence did not mean that constitutional justices should not be supervised by other parties.[98] Constitutional justices had to be accountable for the exercise of the powers vested in them as a necessary component of judicial independence.

6.6 Provisions directly reducing the Court's authority

The third category of amendments concerned limitations that parliament intended to impose on the types of decision the Court was able to issue. First, it restricted the Court's ability to act as a positive legislature by issuing conditionally constitutional decisions.[99] Second, *ultra petita* decisions were prohibited.[100] Third was a prohibition on the Court's reviewing a law's constitutionality as the basis for validity when it was inconsistent with another law.[101] Fourth was the requirement for the President and the DPR to follow up the Court's decisions by issuing necessary regulations.[102]

The idea of reducing the Court's activism in this way originated with the Minister of Justice and Human Rights, Patrialis Akbar, who represented the President in the drafting process. In his introductory speech on 30 September 2010, Patrialis stated:

> [t]he Court has become a super power and has exceeded its authority. The Court should not be given any other authority except for general elections (not head or vice head regency elections). The Court has gone too far. When the Court found contradictions, the Court did not just declare them unconstitutional, but also made regulations as if it was a positive legislator.[103]

6.7 The role of the Court's conditionally constitutional decisions

As we have seen, under Jimly's chief justiceship, the Court had started to issue two forms of conditionally constitutional decisions. One was when the Court stated that 'the

[97] Ibid.
[98] Interview with Denny Indrayana (Minister of Law and Human Rights, 23 December 2013).
[99] Article 57(2A).
[100] Article 45A.
[101] Article 50A.
[102] Article 59A.
[103] Ibid.

law was constitutional but only if it is interpreted the way the Court interprets it' ('reading down'). The second form of conditionally constitutional decision was when the Court inserted a new word into the law ('reading in'). In this form, the law reviewed was unconstitutional unless the new words were included. Article 57(2a) of the *2011 Amendment to the Constitutional Court Law* responded to these developments by prohibiting the Court from issuing a decision that contained a 'norm to replace a norm that has been declared unconstitutional'.

This amendment suggests that the Court's conditionally constitutional decisions were one of the primary triggers for the attack on the Court.[104] Parliamentary members considered that the Court had become more popular than the DPR.[105] By issuing conditionally constitutional decisions, the Court had also become a policy maker, usurping the authority of parliament. In contrast, according to the Constitution, the Court's authority was meant to be quite limited.[106] The Court was only supposed to declare whether a law was constitutional or unconstitutional. If there was a vacuum in the law due to the Court's decision, the Court had no right to fill that gap; that was parliament's function, not the Court's:[107] Through its conditionally constitutional decisions, however, the Court had redefined whole 'articles, words, and phrases'.[108] 'If everything has been decided by the Court,' one parliamentary member asked, 'what is our role as parliament members?'[109] The Court had in effect taken over parliament's mandate to make laws when its authority was simply to decide whether a law was unconstitutional.[110]

The government also perceived that the Court had become a positive legislator. The Minister of Law and Human Rights argued that '[t]he Court doesn't only declare the law unconstitutional, the Court also makes regulations. They have already become

[104] Interview with Patrialis Akbar (Constitutional Court Building, 17 December 2013); interview with Achmad Rubaire (DPR/Parliament Building, 28 November 2013); interview with Agun Gunandjar (DPR/Parliament Building, 3 December 2013); interview with Benny K Harman (DPR/Parliament Building, 18 June 2014); interview with Ali Safaat (Faculty of Law University Brawijaya, 5 December 2013); interview with Muhammad Reza (Ministry of Law and Human Rights Building, 21 July 2014).
[105] Interview with Saldi Isra (International Airport Soekarno Hatta Lounge, 16 June 2014); interview with Ali Safaat (Faculty of Law University Brawijaya, 5 December 2013).
[106] Interview with Benny K Harman (DPR/Parliament Building, 18 June 2014).
[107] Interview with Agun Gunandjar (DPR/Parliament Building, 3 December 2013).
[108] Interview with Benny K Harman (DPR/Parliament Building, 18 June 2014).
[109] Interview with Achmad Rubaire (DPR/Parliametn Building, 28 November 2013).
[110] Interview with Benny K Harman (DPR/Parliament Building, 18 June 2014).

stronger than the Parliament'.[111] In support, the Minister cited the Court's decision in which it intruded into the State's internal administration regarding the appointment of the Attorney General.[112] The Minister also cited the *KPK Commissioner* case, in which (as discussed in Chapter 5) the Court had played a 'tape recording supporting allegations against the corruption eradication commissioner'.[113] Parliament believed that the Court had already decided more than was permitted by the *1945 Constitution*. Through its conditionally constitutional decisions, the Court was already acting like a legislature, introducing new laws and imposing them on the parliament.

6.8 Ultra petita

Article 45A of the *2011 Amendment to the Constitutional Court Law* stated that 'the Court shall not issue decisions going further than the Petitioner's demands unless they are closely connected to the petition' (*ultra petita*). This provision indicates that another trigger for the drafting of the *2011 Law*[114] was a series of decisions in which the Court had gone beyond the confines of the redress sought.[115] In the 2008 *East Java* regency head election case,[116] as noted in Chapter 5, the petitioner had not sought a re-vote, but the Court ordered one nevertheless.

The debate about *ultra petita* decisions in fact arose long before the enactment of the *2011 Amendment to the Constitutional Court Law*. One argument was that, in criminal and civil cases, issuing *ultra petita* petitions was prohibited. However, in public law, it was unavoidable.[117] There was a possibility that the Court would find another article in the law, during the examination process, that contradicted the *1945 Constitution*. If the Court did not review that article, its decision would not work as intended. A second argument was that *ultra petita* was procedural law, and the Court should not deal with

[111] DPR-Legislation Committee, *Parliamentary Debates*, 9 June 2011.
[112] *Constitutional Court Decision 49/PUU-VIII/2010 on Status of Attorney General (Supandji Suparman)* (2010).
[113] *Constitutional Court Decision 133/PUU-VII/2009 on Criminal Charge against Corruption Commisoner* (2009).
[114] Interview with Ali Safaat (Faculty of Law University Brawijaya, 5 December 2013).
[115] *Constitutional Court Decision 001-021-022/PUU-I/2003 on Electricity Law* (2003); *Constitutional Court Decision 006/PUU-IV/2006 on Truth and Reconcliation Commission* (2006); *Constitutional Court Decision 005/PUU-IV/2006 on Judicial Commission* (2006): *Constitutional Court Decision 92/PUU-X/2012 on DPD Jurisdiction* (2012).
[116] *Constitutional Court Decision 041/PHPU.D-VI/2008 on East Java Head of Regency Election Result* (2008).
[117] Interview with Anonymous Participant C (Law Firm Office, 12 December 2013).

procedural law. How is the Court able to decide on something that it was not asked to decide, it was asked.[118] Parliament's view was that the Court abused its authority through *ultra petita* decisions. *Ultra petita* existed only to settle something that was not clear. For something that was already clearly regulated, there was nothing more to decide.[119] By issuing *ultra petita* decisions, the Court acted as a regulatory authority. Each State institution had specific authority given by the *1945 Constitution*. According to Parliament, this was the spirit of a checks and balances system, and the Court should not be able to disturb that balance.[120]

6.9 Enforceability of the Court's decisions

Two views existed in parliament regarding how it should view the Court's decisions. One held that parliament should follow the Court's previous decisions with no need to regulate further (self-executing). This view was supported by Partai Demokrasi Indonesia-Perjuangan (Indonesia Democratic Party-Struggle). In their view, the public had seen that the Court's decisions had already been considered law.[121] The other view was that there was no need for parliament to follow the Court's decisions. As parliamentary members elected by the people, the parliament should decide on appropriate legislation for the people. Ultimately, the former group won this discussion. Parliament tried to curtail the Court's authority by restricting the effect of the Court's decisions. Parliament provided that 'if necessary, changes to legislation that has been reviewed should be passed by the parliament and the President immediately upon the decision of the Constitutional Court'.[122]

6.10 Head of regency electoral result disputes

The Court's authority in respect of head of regency (*pilkada*) election results disputes was the second major issue that consumed a lot of the drafting committee's allocated time. In 2008, as we have seen, the *Regional Autonomy Law* had been amended to transfer authority in respect of disputes over the election of the regional head and vice

[118] Interview with HAS Natabaya (Constitutional Court Building, 10 December 2013).
[119] Interview with Achmad Rubaire (DPR/Parliament Building, 28 November 2013).
[120] Interview with Yasonna Laoly (Kuala Namu International Airport Lounge, 8 December 2013).
[121] DPR-Legislation Committee, *Parliamentary Debates*, 9 June 2011 (Arif Wibowo).
[122] Article 59(2) *UU MK 2011*.

heads of government from the Supreme to the Constitutional Court.[123] The Court itself had played an important role in this transfer: first by interpreting the constitutional concept of an election dispute in a very broad and expansive way, and second, by promoting the idea of transferring this authority to it in public debate. The third factor was its decision that election results disputes should ideally be settled in one court.[124] Fourth, Chief Justice Jimly approached the parliament to request the transfer.[125] The transfer of this authority to the Court also undoubtedly concerned the poor performance of the Supreme Court in handling election result disputes from 2005 to 2008. Nor did the Supreme Court particularly resist the move.[126] Starting in 2008, the Court issued 504 decisions on local head and regional elections.[127] Each *pilkada* election result dispute had to be settled within 30 business days.[128] Unsurprisingly, this jurisdiction rapidly became the most time-consuming aspect of the Court's work, to the point where it was seen as an obstacle to the Court's handling of regular statutory review matters.[129] The Legislation Committee conducted consultation meetings with the Supreme Court prior to drafting meetings of the *2011 Constitutional Court Law*. The drafting committee determined that the Supreme Court was also reluctant to get back jurisdiction over *pilkada* election result disputes. In the view of the Supreme Court, as recalled by Chairman of the Drafting Committee Dimyati Natakusumah, the Court had constitutional authority to review *pilkada* election result disputes.[130] Despite a strong indication from the government to move *pilkada* election result disputes from the Court (as shown in two speeches from the Minister of Justice[131]), not all factions agreed with

[123] *Law 12 of 2008 on Amendments to Law 32 of 2004 on Regional Government, Series Law 12 of 2008 on Amendments to Law 32 of 2004 on Regional Government* (trans, 2008).
[124] *Selesaikan Sengketa Pilkada Di Ma Melanggar Konstitusi* (12 September 2012) JPNN <http://www.jpnn.com/read/2012/09/12/139524/Selesaikan-Sengketa-Pilkada-di-MA-Melanggar-Konstitusi->.
[125] Hendrianto, *From Humble Beginnings to a Functioning Court: The Indonesian Constitutional Court, 2003–2008* (unpublished thesis, University of Washington, 2008).
[126] Chief Justice Bagir Manan said that the Supreme Court was happy to see this type of election result dispute transferred to the Constitutional Court (interview with Aria Suyudi).
[127] November 2008–February 2013.
[128] Since enactment of *Law Number 32 Year 2004 on Regional Autonomy*, the Head of Regency (city, regency, and province) should be elected through direct elections (Article 24).
[129] *Mahkamah Agung Akan Kembali Menangani Sengketa Pilkada* (9 September 2012) *Kompasiana* <http://hukum.kompasiana.com/2012/09/07/mahkamah-agung-akan-kembali-menangani-sengketa-pilkada-491620.html>.
[130] DPR-Legislation Committee, *Parliamentary Debates*, 9 June 2011.
[131] In the first two meetings, on 1 and 30 September 2010, the minister repeated the government's intention to remove *pilkada* elections from the Court.

the government's position. Again, there were two competing groups in the drafting committee regarding the role of the Court in handling *pilkada* election result disputes.

The Democrat Faction was reluctant to return *pilkada* election result disputes back to the Supreme Court, given its past performance.[132] The PDI-P Faction also supported the Constitutional Court as the appropriate forum to hear *pilkada* election result disputes. As argued by Hendrawan Supratikno, 'people [have] faith if the case is settled in Jakarta as the capital city instead of in a community area. By handling these cases centrally in Jakarta, the Court will have a helicopter view and have a comparative perspective, which local courts do not have'.[133] An additional factor was the social cost of having the cases settled in Jakarta; it would be less if the case were conducted locally. The Golkar Faction also supported maintaining the Court's authority in handling *pilkada* election result disputes.[134]

Against this, a majority of legislation committee members argued for the authority to hear the *pilkada* election result disputes to be transferred back to the Supreme Court. One argument was based on disappointment with the way the Constitutional Court had handled these disputes.[135] Another strong argument was that it was never intended that the Court should handle technical matters like the head of regency election result disputes; it should have maintained its focus on constitutional review. As argued by Yahdil Abdi Harapah of the National Mandate Party (*Partai Amanat Nasional*):

> [t]he Court should concentrate on its main job of constitutional review. The Court should not handle cases involving disputes over votes [head of regency election result disputes]. This diminishes the justices' role as statesmen. The Court was intended to hear judicial review cases, and we should not burden it further and downgrade the role of the Court.[136]

Zen Badjeber, a Constitutional Forum member who also participated in drafting the provisions pertaining to the Constitutional Court's authority in the *1945 Constitution*,

[132] DPR-Legislation Committee, *Parliamentary Debates*, 9 June 2011.
[133] Ibid.
[134] Ibid.
[135] Muhammad Nasir Djamil, Prosperous Justice Party, *Partai Kesejahateraan Sosial*, DPR-Legislation Committee, *Parliamentary Debates*, 30 September 2010.
[136] DPR-Legislation Committee, *Parliamentary Debates*, 9 June 2011.

shared this view.[137] He stated that the selection of the regional head and vice head should be conducted democratically, as provided for in Article 18(4) of the *1945 Constitution*. 'Democratic' means that the parliament decides whether the selection is conducted through direct elections or by local parliamentary members (provincial or regency parliamentary members). The authority of the Court was to settle election result disputes as defined in Article 22E of 1945. *Pilkada* election result disputes did not fall into that category. Rather, '[t]he Constitutional Court only received the authority [to hear them] by chance.[138] The Court has a closed and defined authority, which is different to the authority of the Supreme Court, which is 'open' (limitation terbuka)', Badjeber argued.[139] The role of the Supreme Court was to handle *pilkada* election result disputes itself, or to authorise the transfer of the dispute to a specific forum. For example, it could transfer the authority to settle such disputes to a district court, an appeals court or an administrative court as necessary.[140]

In the end, most of the drafting committee agreed that *pilkada* election disputes should be removed from the Court and transferred back to the Supreme Court.[141] However, the drafting committee realised that the Constitutional Court's authority to hear such disputes was contained in the *Regional Autonomy Law* and a range of other laws (*Law Number 12 Year 2008*,[142] *Law Number 22 Year 2007*[143] and *Law Number 48 Year 2009*[144]), not the *Constitutional Court Law*. As stated by the Chief of the Legislation Committee, Ignatius Mulyono:

> [We realized that if we wanted to address this issue] we would have to change the Regional Autonomy Law. If the Regional Autonomy Law was not changed, the position of the Court would be strengthened. To avoid holding up the drafting process, the Drafting Committee decided not to touch that issue [the transfer of the

[137] Ibid.
[138] Ibid.
[139] DPR-Legislation Committee, *Parliamentary Debates*, 8 October 2010.
[140] Ibid.
[141] DPR-Legislation Committee, *Parliamentary Debates*, 9 June 2011.
[142] *Law 12 of 2008 on Amendments to Law 32 of 2004 on Regional Government, Series Law 12 of 2008 on Amendments to Law 32 of 2004 on Regional Government* (trans, 2008).
[143] DPR-Legislation Committee, *Parliamentary Debates*, 9 June 2011.
[144] *Law 48 of 2009 on Judicial Power* (2009).

> Court's authority over *pilkada* election results disputes] because it was regulated by three other laws.[145]

In the result, therefore, the *2011 Constitutional Court Law* did not provide for the removal of the Court's authority over head of regency election result disputes. The government merely expressed its intention to take that authority from the Court, saying that the change would be made in a separate amendment to the *Regional Autonomy Law*.[146]

6.11 Conclusion

Parliament used the issue of supervision of the constitutional justices as the first basis for amending the *2003 Constitutional Court Law*. As the Court had decided that the Judicial Commission had no authority to supervise constitutional justices in the 2006 *Judicial Commission Case*, parliament took the view that there should be another body to supervise constitutional justices. After various incidents that increased doubt about the constitutional justices' capacity to supervise themselves, parliament started to initiate the amendment. The intention to establish a special Constitutional Court Ethics Council (*Majelis Kehormatan Mahkamah Konstitusi*) dominated the debate in the legislation committee.

While parliament did intend to reduce the authority of the Court, its actions may also be regarded as an attempt to restore the Court's legitimacy and in this way its independence. The amendment sought to balance the short-term interest of parliament in reducing the authority of the Court against the long-term interest of political parties in promoting judicial independence.[147]

In drafting the amendment, parliament was careful to align the changes with the original intention behind the amendments to the *1945 Constitution*. On several occasions, Parliament reminded the government of the possibility of judicial review of the provision that the government tried to re-enact in the *2011 Constitutional Court Law*,

[145] DPR-Legislation Committee, *Parliamentary Debates*, 9 June 2011.
[146] Ibid.
[147] Theunis Roux, *The Politics of Principle: The First South African Constitutional Court, 1995–2005* (Cambridge University Press, 2013) 25.

such as the inclusion of the Judicial Commission in the Constitutional Court Ethics Council.

Parliament also used this opportunity to curtail the Court's authority. Parliament and the government viewed that the Court had exceeded its original mandate and needed to be reined in. Parliament restricted the Court from issuing *ultra petita* and conditionally constitutional decisions. The government insisted that the leadership of the Court be rotated yearly, but this idea was rejected by parliamentary members as reducing judicial independence and the institutional stability of the Court. The middle ground option was to provide two and half years for the tenure of the Chief Justice and Deputy Chief Justice.

Even though this amendment seemed to harm to the Court, it was in fact an improvement. The amendment increased the mandatory retirement age from 67 to 70, similar to that for Supreme Court Justices. The overlapping jurisdiction and administration between the Court's Secretary General and the Court Registrar were also clarified through this amendment.

The debate among parliament's members was also influenced by how the Court handled the head of regency election result disputes. This aspect of its jurisdiction consumed a significant amount of time during the parliamentary debate. However, realizing that the authority to settle head of regency election result disputes was governed by *the Regional Autonomy Law*, the *2011 Constitutional Court Law* did not change the Court's authority to handle regency election result disputes.

Chapter 7: Explaining the Timing and Causes of the 2011 Attack and the Court's Response

7.1 The research questions answered

This dissertation asked three main questions. First, why did the DPR and the President attack the Court by trying to limit its authority in 2011? Second, how was the Court able to thwart that attack? Third, was the Court right to resist the attack?

To answer these questions, this thesis has examined both external and internal factors. External factors stress the background political conditions in which the Court operated and internal factors focus on issues of judicial agency – on what the Court itself might have done either to trigger or prevent the attack.

7.1.1 Timing and causes of the attack

Why did the DPR and the President attack the Court by trying to limit its authority in 2011? In other words, why did the attack occur in 2011, during the period of Mahfud MD's chief justiceship, and not before?

According to one influential theory of judicial empowerment, as explained in Chapter 2, a newly established constitutional court will succeed to the extent that it is able to distinguish itself in the public mind as a legally motivated actor. In order to do this, a court needs to develop rigorous legal reasoning methods and a coherent, principled framework for its decisions. By acting as 'forum of principle' in this way, the Court builds its reputation as a legal institution.[1] On this approach, judges need to avoid any impression of strategising when they decide a case. Rather, they should see themselves as bound by a duty to provide the 'best interpretation' of the law according to pre-existing legal-systemic values and practices.[2]

One explanation for the timing of the attack on the Indonesian Constitutional Court is a variation in the Court's capacity to present its decisions as principled and legally motivated. This largely had to do with the different composition of the Jimly and

[1] Ronald Dworkin, *A Matter of Principle* (Oxford University Press, 1985) 33-72.
[2] Ibid.

Mahfud Courts. As we have seen, the 2003 and 2008 nomination processes were very different. The 2003 nomination process, even within the short time frame allowed for the selection of candidates, produced a higher quality of candidate compared to the 2008 nominations. This was apparent both at an individual level, when one looks at the judges' legal-professional qualifications, and also collectively, when one considers the judges' performance in judicial deliberation meetings and their willingness to dissent when they felt compelled to do so.

The Jimly Court was able quickly to build its institutional legitimacy on the back of a relatively rigorous (compared to other Indonesian courts) reasoning style and principled jurisprudence. The generally quite academic intellectual environment and scholarly style that prevailed on the Jimly Court encouraged the justices to respond to their own legal-professional convictions about what the law required. In behaving this way, the Jimly Court was able to develop a reputation as a forum of principle. While this meant that its decisions were often inconvenient to the political branches, it was not attacked.

The Mahfud Court failed to sustain this notion of the Court as a 'forum of principle'. This was partly a function of the declining legal-professional quality of the justices appointed (as nominating institutions switched in 2008 to using their nomination power to place political loyalists on the Court) and partly a result of the Court's shift to a substantive justice approach, which dispensed with the Jimly Court's quite formalist reasoning style in favour of a more expansive, result-oriented style. At the same time, the Court's dissent rate declined and the length of its opinions shortened. Both those changes suggested that the Court was paying less attention to questions of legal principle and more to the judges' own sense of the challenges facing Indonesia's democracy.

The Mahfud Court's different approach was heavily criticised.[3] It is nevertheless hard to make a straight comparison between the two courts because the Jimly Court did not have to deal with head of regency electoral results disputes, which constituted a large and time-consuming part of the Mahfud Court's workload. All that one can say is that the quality of legal reasoning appeared to decline on the Mahfud Court, and that this probably fed into – and certainly did not alleviate – growing concerns about the Court's

[3] Saldi Isra, 'Memudarnya Mahkota MK', *Kompas* (Jakarta), 14 August 2013.

political role. Its decisions tended to get more one-sided and perfunctory. This may be because the justices were simply less capable, or because they were overwhelmed by the sheer number of cases filed in the Court after the transfer to it of the head of regency electoral results disputes. In any event, at just the time the Court needed to be shoring up its legal-professional credentials, it exposed itself to charges of political decision-making.

On the 'forum of principle' view, then, the attack on the Court occurred in 2011 because the Mahfud Court failed to sustain the Jimly Court's reputation as a legal actor. The problem with this explanation is that the Jimly Court was not exactly popular when the justices' first term expired in 2008. The Court's decision in the *Education Budget Case*, in particular, had upset the DPR and President. By taking a principled approach in that case, and ignoring the inconvenience its decision caused to the political branches, the Jimly Court tested the limits of the political branches' patience. Although Jimly was shortly afterwards re-elected to the Court, there is evidence to suggest that the DPR and the President engineered his substitution as Chief Justice, or at least did nothing to resist Mahfud MD's bid for the position. As elaborated further below, it is thus possible to construe Jimly's non re-election as Chief Justice as an attempted attack on the Court – one that delayed the onset of the more determined 2011 attack. If that is correct, the 'forum of principle' approach needs to be supplemented. It was not simply the case that the Court was attacked in 2011 because the Mahfud Court was seen to be less principled than the Jimly Court. Many of the triggers for the 2011 attack were already present in 2008.

Does an understanding of judicial empowerment as a function of strategic judicial choices help? According to this approach, as explained in Chapter 2, a Court builds its institutional power, not by growing its reputation as a legally motivated actor, but by doing just the opposite: working out other institutions' policy preferences and strategically adjusting its decisions to accommodate those preferences.[4] On this approach, the key to a Court's institutional legitimacy is to hand down decisions with

[4] Michael J Gerhardt, 'Judicial Decision Making: Attitudes about Attitudes: The Supreme Court and the Attitudinal Model Revisited. By Jeffrey A Segal and Harold J Spaeth' (2003) 101 *Michigan Law Review* 1733.

which other institutions comply.[5] A court that does that builds its institutional legitimacy as an effective and influential policy maker.[6]

As we have seen, the Jimly Court developed quite a formalist reasoning style. This does not mean, however, that it was insensitive to the way its decisions were perceived or to the possibility that they might be seen to intrude on the political branches' sphere of competence. In its conditionally constitutional decisions in particular, the Court went to great lengths to preserve a space for the DPR and the President to respond to its interpretation of the law. Rather than usurping their functions, the Court tried to give clear guidelines on how laws should be implemented in a constitutional way. Though not calculating the 'tolerance interval' for its decisions, the Jimly Court was generally respectful of the separation of powers.

The Mahfud Court abandoned this self-restrained approach. If the Jimly Court sought accommodation with the political branches, the Mahfud Court took a more assertive line, trusting that its substantive justice approach would win it the public support needed to overcome any conflict with the DPR or the President. This can be seen in the tremendous increase in the rate of conditionally constitutional decisions, from 12.2% (5 of 41 decisions) under Jimly to 55.1% (54 of 98 decisions) under Mahfud MD. If we focus on the period immediately prior to the enactment of the 2011 amendment to the *Constitutional Court Law* (2009-2011), the Mahfud Court's conditionally constitutional decision rate was even higher, at 79.25% (42 of 53 decisions).

The Mahfud Court also decided a number of matters that brought great discomfort to parliament and the President. The 2008 *Open List Case* decision,[7] the *Head of Regency Electoral Disputes Case* decision,[8] and the decision in *Cicak and Buaya's Case*[9] were all decisions that arguably exceeded parliament's and the President's tolerance interval. Of these, the 2008 *Open List Case* decision has had the most far-reaching and controversial impact on Indonesia's legislative election system. It changed the open list

[5] Lee Epstein and Jack Knight, *The Choices Justices Make* (CQ Press, 1998) 12.
[6] Ibid.
[7] *Constitutional Court Decision 002/PUU-II/2004 on Open List* (2004) 24.
[8] Simon Butt, *Indonesian Constitutional Court Decisions in Regional Head Electoral Disputes* (Centre for Democratic Institutions, Australian National University, 2013).
[9] *Constitutional Court Decision 133/PUU-VII/2009 on Criminal Charge against Corruption Commisoner* (2009).

system to a simple majority system to determine a candidate's seat. Through this decision, the Court took away political parties' authority to determine elected candidates through their candidate lists, and give that authority to simple majority rule.

In handling the head of regency electoral result disputes, the Mahfud Court introduced the TSM test for gross violation of the electoral law. This newer understanding changed the Court's approach to election results disputes and was internally inconsistent.[10] Using the TSM test, the Mahfud Court ordered recounts and re-votes, dismissed elected candidates, disqualified candidates, annulled election results and ordered re-nominations of the candidates. None of those decisions fell under the *2003 Constitutional Court Law* or the *2008 Regional Law*.

The final push to escalate the attack against the Court came with the *Cicak and Buaya Case*. Here, it will be recalled, the Court granted a request to play surveillance tapes that had been filed as evidence by the KPK. The tapes exposed a conspiracy between Anggodo and a senior police officer in orchestrating the KPK Commissioner's criminal case. It included trumped up charges, and critically undermined the credibility of the law enforcement agencies and key senior officers.[11]

The *Open List Case*, head of regency electoral results decision and the *Cicak and Buaya Case* dominated the discussion during the drafting of *2011 Constitutional Court Law* and thus all contributed to the attack.

Drawing all of this together, the best explanation for the causes and timing of the 2011 is that the Jimly Court had already upset the political branches by the time Mahfud MD was appointed as Chief Justice. Mahfud MD's appointment, however, delayed the full-scale attack on the Court. Whether deliberately intended as a court-curbing strategy, or simply the fortuitous consequence of the constitutional justices' decision to choose Mahfud MD as Chief Justice from among their number, his appointment put a temporary stop to more serious jurisdiction-curbing measures. The expectation was that Mahfud MD would deliver on his undertaking to return the Court to its original jurisdiction. As things turned out, that hope was not realized. Mahfud MD did not act as

[10] Simon Butt, *Indonesian Constitutional Court Decisions in Regional Head Electoral Disputes* (Centre for Democratic Institutions, Australian National University, 2013).
[11] See the full discussion in section 5.7.4 above.

he had promised in his confirmation hearing. In fact, he furthered the Court's judicial activism. In this way, Mahfud MD's appointment acted as a delaying factor. It explains both why the Court was not attacked before 2011 and also why parliament and the President eventually moved to this more extreme form of reprisal.

7.1.2 Why was the attack so easy to thwart?

In his 'Democratic Hedging' paper, Professor Samuel Issacharoff argued that, in new democracies, the very purpose of establishing a constitutional court is to consolidate democratic institutions and guard against backsliding into authoritarianism.[12] For this reason, the constitutional transition provides a window period within which the Court is able to act forcefully, without any concerns about the counter-majoritarian legitimacy of what it is doing.

In Indonesia's case, there was initially a tremendous groundswell of support for the Constitutional Court and a widespread commitment to its success as an institution. This amounted to something like a 'honeymoon period' during which the Court was able to define its role in the political system. The Jimly Court was fully aware of this when it started its work in 2003. In the first few years, the Court was able to decide numerous importance cases, thus establishing its reputation as a significant institution in Indonesian politics. The Court's rapid rise to prominence was fairly unexpected as few people, apart from academics,[13] really understood what a constitutional court was for and what it was capable of doing. This also benefited the Court, as it was able to fashion an institutional role for itself without initially having to consider traditional expectations about what its mandate was. The Court's capacity to withstand the attack on it in 2011 undoubtedly had something to do with the residual institutional legitimacy that the Mahfud Court still enjoyed given this strong start.

In addition to this, the Court also benefitted from the fragmented nature of Indonesian party politics and, in particular, form the fact that no single political party was able to command the support required to amend the Constitution. One of the agendas of the 1999-2002 reform process, upon Suharto's fall, was to remove all restrictions on

[12] Samuel Issacharoff, 'Constitutional Courts and Democratic Hedging' (2010) 99 *Georgetown Law Journal* 961, 965.
[13] Interview with Achmad Roestandi (Residence, 19 December 2013).

political parties. During the Suharto era (1966–1998), Indonesia had only three political parties, one of which was controlled by the President and had become a dominant political party. After 1999, the newly unregulated political party system resulted in the establishment of party coalitions in most regions.[14] With a high number of political parties, it was thought that the DPR might well produce 'weak government with a high degree of internal conflict and immobilisation'.[15] Indeed, this has turned out to be the case. The configuration of political parties in Indonesia has been unstable from 1999 to date, with no party able to dominate the government. Currently, ten political parties have a seat in the DPR. The Court thus operates in an environment in which there is no dominant political party. Additionally, there is also often no unified bloc of parties capable of attacking the Court when its decisions prove inconvenient.[16]

As discussed in Chapter 2, political fragmentation theory suggests that this sort of diffuse political environment presents numerous opportunities for a constitutional court to build its institutional legitimacy by presenting itself as the guardian of the ground rules of democratic politics. The court functions in this way as a form of insurance for democratic rights, guaranteeing every political party an opportunity fairly to compete for power. This was undoubtedly true of the Indonesian Constitutional Court, although, as noted in Chapter 5, its record in head of regency electoral disputes was less compelling than in presidential, parliamentary and provincial elections.[17]

This thesis to this extent confirms the explanatory power of the political fragmentation thesis, and shows that it has application even in new democracies. Provided that there is no single political party capable of quickly subordinating the courts to its purposes, political fragmentation would appear to support judicial independence. This is particularly so where, as in the Indonesian case, the constitutional reform process proceeds incrementally, and where there are aspects of the Constitution, such as the role of religion in the state, that are off limits. Under those conditions, a constitutional amendment to curb the court's power may be impossible to achieve, meaning that the

[14] Particularly for the Regional and Head of Regional Elections in which political parties often turned to coalition partners to nominate their candidate.
[15] Donald L Horowitz, *Constitutional Change and Democracy in Indonesia* (Cambridge University Press, 2013) 56.
[16] Gretchen Helmke, 'The Logic of Strategic Defection: Judicial Decision Making in Argentina under Dictatorship and Democracy' (2002) 96 *American Political Science Review* 291.
[17] Edward Aspinall, Sebastian Dettman and Eve Warburton, 'When Religion Trumps Ethnicity: A Regional Election Case Study from Indonesia' (2011) 19 *South East Asia Research* 27.

court is effectively in a position to strike down ordinary laws curbing its jurisdiction on the grounds that they infringe the constitutional guarantee of judicial independence.

A further factor supporting the Court's independence and its ability to thwart the 2011 attack was the strong desire in Indonesia for a clean, accessible judiciary.[18] In the short period since its establishment, the Court has largely been able to fulfil these expectations, providing a clean, modern justice system for the people. The Court has also been able to understand the gap between public expectations for a reformed judiciary and the reality on the ground,[19] which the Supreme Court has to date not been able to grasp.

Public support also enhanced the Court's capacity to thwart the attack. A survey conducted by Cirus Surveyors and Indonesia Indicator on public perceptions of the quality of democracy and public policy has shown that public perception of political parties in Indonesia is still negative. The majority of respondents (74–80%) thought that political parties did not fulfil their function of informing the public about their programs nurturing new leaders, and structuring relationships between parliamentary members and the public.[20] Similar results (47–53%) were also found regarding parliament not performing its function properly.[21] A survey that has been conducted by Transparency International since 2004 (Barometer Global Corruption) named the national parliament as the most corrupt institution in Indonesia in 2013. Law enforcement bodies were said to be the second most corrupt, followed by judicial institutions.[22] The Constitutional Court and KPK, however, were named as institutions with positive public acceptance.[23] In 2012, 56.8 per cent of respondents agreed that the Court had positive public image. However, upon the arrest of Akil Mochtar in 2013, public support for the Court reduced to 8.8 per cent.[24] The rapid action and response of the Court regarding Akil's arrest had an impact. A similar survey conducted in mid-December 2013 (one-and-a-half months after the arrest of Akil) saw public support for the Court back at 27.2 per cent.[25]

[18] Interview with HAS Natabaya (Constitutional Court Building, 10 December 2013).
[19] Ibid.
[20] Faj, '*Kualitas Demokrasi: Partai Politik Dan Dpr Dinilai Negatif*', *Kompas* (Jakarta), 6 January 2014.
[21] Faj, '*Pemecatan Wanda Bentuk Pemasungan*', *Kompas* (Jakarta), 17 September 2014.
[22] Deborah Hardoon and Finn Heinrich, *Global Corruption Barometer* (Transparency International, 2013).
[23] Yohan Wahyu, 'Menjaga Kualitas Pemilu', *Kompas* (Jakarta), 7 January 2014, 5.
[24] Ibid.
[25] Ibid.

There is no obvious reason why the political conditions that have supported the Court's independence to date should change in the near future. For as long as corruption remains a problem in Indonesia, the Court will have a better public reputation than the DPR and the presidency, and will be able to rely on this factor to see it through periods of legislative attack. Whether this is a positive condition for democratisation in Indonesia in the long run is another question. The Court's capacity to resist attacks on its independence does not necessarily translate into a capacity to promote democracy, beyond the steps it has already taken. The next section takes up this issue.

7.1.3 Was the Court right to thwart the attack?

Was it a good thing that the Court overturned the improved judicial accountability measures in the 2011 legislative package?

The Court's history of resisting supervision by other institutions started well before 2011. In 2006, the Court concluded that all provisions of the *Judicial Commission Law* relating to its supervisory role, including supervision of constitutional justices, should be declared inconsistent with the Constitution and void as they created legal uncertainty.[26] Simon Butt argued at the time that, despite public criticism regarding the Court's refusal to be supervised, the Court deserved appreciation. He stated that 'the court emphasized the importance of judicial independence to a functioning State, legal system and judiciary'.[27]

The 2011 amendments to the *2003 Constitutional Court Law* were an attempt, in part, to restore these supervision arrangements. Again, the Court rejected the supervision proposed in Articles 27A(2)(c), (d) and (e) and declared those articles unconstitutional. Even though, Simon Butt and Tim Lindsey found the Court's argument 'were particularly weak'.[28] In the Court's view, the fact that the Ethics Council drew its members from the Judicial Commission, parliament, the Government, and the Supreme Court posed a threat to judicial independence because there was a possibility that all

[26] Ibid 201.
[27] Simon Butt, 'The Constitutional Court's Decision in the Dispute between the Supreme Court and the Judicial Commission: Banishing Judicial Accountability?' in Andrew MacIntyre and Ross McLeod (eds), *Democracy And The Promise Of Good Governance* (2009) 178.
[28] Simon Butt & Tim Lindsey, *The Constitution of Indonesia: A Contextual Analysis* (Hart Publishing, 2012) 149.

these institutions would have an interest in the Court's decisions.[29] The composition of the Ethics Council, the Court held, 'threatens and interferes either directly or indirectly with the independence of the constitutional justices in performing their duties and responsibilities'.[30]

Another way of looking at this particular amendment, however, is to see it as a legitimate accountability measure. While there might have been some threat to judicial independence of the kind the Court described, the Court's independence is equally threatened by a lack of accountability to the constituents it is set up to serve. In reality, judicial accountability and independence are flipsides of the same coin, and no court that is unaccountable should expect to remain independent for long. Accountability is in this sense a pressure valve for political-branch frustrations with the Court, allowing those frustrations to be expressed in a manageable way. Viewed from that perspective, the Court's rejection of Articles 27A(2)(c), (d) and (e) seems a bit dogmatic – as though the Court was holding on to a conception of judicial independence more appropriate to the Suharto era than to the post-reform context. In an authoritarian regime, a strong conception of judicial independence is required to protect individual liberties. However, as Stephen Holmes has argued, this needs to be adjusted as a country democratises and as the political branches take on a legitimate role in the promotion of freedom.[31]

In October 2013, two years after the Court's rejection of the 2011 amendments, Chief Justice Akil Mochtar was arrested on corruption charges, for which he was eventually sentenced to life imprisonment. In response, the President issued *Government in Lieu 1 of 2013*. The same parliamentary members who endorsed the *2011 Constitutional Court Law* endorsed this executive measure and it was enacted as *Law 1 of 2014 on the Second Amendment of the 2003 Constitutional Court Law* (the *2014 Constitutional Court Law*).

The *2014 Constitutional Court Law* provided for a selection team to appoint constitutional justices and obliged prospective applicants for positions on the Court to leave their political party at least seven years prior to becoming a constitutional justice.

[29] *Constitutional Court Decision 49/PUU-IX/2011* on Constitutional Court (2011), p 73.
[30] Ibid 72.
[31] Stephen Holmes, 'Judicial Independence as Ambiguous Reality and Insidious Illusion ' in Ronald Dworkin (ed), *From Liberal Values to Democratic Transition: Essays in Honours of Janos Kis* (Central European University Press, 2004) 293.

The *2014 Law* also established an Ethics Council to supervise the constitutional justices.[32] Once again, the Court rejected these reforms, declaring the entire *2014 Law* unconstitutional.[33] This latest round in political branch-Constitutional Court relations in Indonesia indicates that the Court is still very powerful and capable of resisting what it perceives to be attacks on its autonomy, but also that it has not yet learned to distinguish a genuine attack on its independence from legitimate accountability measures.

The term 'independence' is generally used to characterize the relationship of the judiciary to other institutions or agencies.[34] An independent judge is one who is not under the influence or control of someone else. An element of ambiguity arises, however, because there are several different kinds of institutions or agencies from which the judge is supposed to be independent. It is always thus necessary to specify from whom independence is enjoyed and for what purpose. Also, judges are never entirely independent in the extreme sense that they are beyond influence.[35]

As Barry Friedman has argued, 'too much judicial independence may threaten popular sovereignty'.[36] Increased judicial power at some point detracts from a commitment to democracy.[37] Judicial independence requires impartiality and a measure of insulation from political influence,[38] but it is legitimate for the democratically elected branches of government to exercise some influence over the judiciary. Courts, after all, do not operate in a political vacuum,[39] and some measure of accountability is appropriate.

By contrast, the Indonesian Constitutional Court has thus far treated independence and accountability as a zero sum game. This conception was inappropriate in 2011 and even more so in 2013 after Chief Justice Akil Mochtar's arrest. The circumstances

[32] *Law 4 of 2014 on Enactment of Government in Lieu Number 1 of 2013 on Second Amendment of Law 24 of 2003 on the Constitutional Court*.
[33] *Constitutional Court Decision 1-2/PUU-XII/2014 on 2014 Constitutional Court Law* (2014).
[34] Irwin P Stotzky (ed), *Transition to Democracy in Latin America: The Role of the Judiciary* (John Hopkins University Press, 1993).
[35] Stephen B Burbank and Barry Friedman (eds), *Judicial Independence at the Crossroads: An Interdisciplinary Approach* (Sage Publications, 2002) 6.
[36] Barry Friedman, 'The History of the Countermajoritarian Difficulty, Part II: Reconstruction's Political Court' (2002) 91 *Georgetown Law Journal* 2.
[37] Ran Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (Harvard University Press, 2004).
[38] Owen Fiss, 'The Right Degree of Independence' in Irwin P Stotzky (ed), *Transition to Democracy in Latin America: The Role of the Judiciary* (Westview Press, 1993) 56.
[39] H.P. Russell, 'Toward a General Theory of Judicial Independence' in P H Russell and D O O'Brien (eds), *Judicial Independence in the Age of Democracy* (University Press of Virginia, 2001) 1, 11-12.

surrounding that arrest showed that the Court is not immune to corruption and scandal and that improved accountability measures are not unjustified. The role and composition of the Ethics Council clearly needs to be changed. While the Court emerges from the 2011 and 2013 attacks looking like a strong institution, its dogmatic stance on judicial independence leaves cause for concern. Paradoxically, the Court's very success in contributing to the strengthening of Indonesia's democracy means that it needs to develop a new understanding of judicial independence, one that is more sensitive to democratic preferences.

7.2 The Court's future

Indonesia had a long history of living under dictatorship and as a totalitarian country under the presidencies of Suharto and Sukarno. People were tired of the quiescent role that the judiciary played under Suharto. The Constitutional Court's rapid rise to prominence in Indonesian politics after 2003 was partly due to this history. The second reason for the Court's rise was its tremendous popular support. The Court was able to present itself as a modern, transparent Court and protector of the *1945 Constitution*.

The Court's forceful start was crucial to the success of Indonesia's democracy. The gradual constitutional reform process meant that many elements of the old authoritarian regime, especially the military, were still involved in democratic politics.[40] The transition to democracy was in this sense fragile and the Court needed to play a strong role in preventing a slide back into authoritarianism. However, this did not necessarily mean that the Court needed to remain forceful forever.[41] As the democratic system began to function better, the Court arguably needed to adjust its role and become less interventionist in democratic politics. The fact that it did not do this both explains and provides some justification for the 2011 attack.

The broader comparative lesson to be learned from the Indonesian experience is thus that a constitutional court's very success in normalising democratic politics may require it to reduce its policymaking role. As a court helps to stabilise democratic institutions, it needs continually to adjust its role in democratic politics and its conception of judicial

[40] Horowitz, above n 15.
[41] See Theunis Roux and Fritz Siregar, 'Trajectories of Curial Power: The Rise, Fall and Partial Rehabilitation of the Indonesian Constitutional Court' (2016) 16 *Australian Journal of Asian Law* 1.

independence. If a court fails to do this, and resists legitimate accountability measures, it both exposes itself to more thoroughgoing political attack and betrays the constitutional values it is established to serve.

At the time of writing, the Indonesian Constitutional Court shows no sign of having learned this lesson. In 2014, the Court issued fifteen conditionally constitutional decisions out of twenty one granted decisions, or 71%. This percentage increased in 2015 to 73% (eight conditionally constitutional decisions out of eleven granted decisions). Parliament's and the President's objections to the Court's issuing this type of decision have clearly been ignored by the Court.

To continue to survive, the Court needs to use its independence to rebuild its reputation for rigorous, principled legal reasoning – a reputation it enjoyed when Jimly was Chief Justice but which it has subsequently lost. If the Court does that, it will be able to protect itself against changes to the political context that truly threaten its independence.

There are still major concerns regarding the quality of democracy in Indonesia. On the one hand, Indonesia has had numerous successful elections (local, general and presidential), in which the results have been accepted. On the other, there remains a lot of corruption in the political process. There are also still residual authoritarian elements in political parties. The Court needs to balance its responsibility to protect Indonesia's democracy against these elements with its responsibility to respect democratic outcomes where the system is seen to have functioned well.

One cause for hope is the removal of the Court's jurisdiction in head of regency electoral disputes. This may help the Court to focus better on its original mandate under the amended 1945 Constitution.[42] Against this, the PDI-P (the Indonesian Democratic Party of Struggle) has proposed the idea, during its first national working meeting in 2016, of passing a fifth limited Constitutional Amendment.[43] This proposal has been accepted by the DPD (Regional Representative Council), which has already conducted a

[42] *Law 1 of 2015 on the Stipulation of Interim Emergency Law 1 of 2014 on Election of Governor, Regency and Major,* Series Law Number 1 of 2015 on the Stipulation of Interim Emergency Law Number 1 of 2014 on Election of Governor, Regency and Major (trans, 2015), Article 157

[43] *Pdip Encourages MPR to Carry out Limtied Amendment to Constitution* (2016) antaranews.com <http://www.antaranews.com/en/news/102472/pdip-encourages-mpr-to-carry-out-limited-amendment-to-constitution?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A+antaranews%2FuyZZ+%28ANTARA+-+National+News%29>.

workshop to discuss it. If the Court continues to resist calls for improved accountability measures, there is a possibility that its jurisdiction and powers might be curtailed by constitutional amendment.

APPENDIX

Appendix Item 1: Human Research Ethics Approval

Human Research Ethics Advisory Panel B
Arts, Humanities & Law

Date: 06.11. 2013

Investigators: **Fritz Siregar**

Supervisors: Theunis Roux; Simon Butt

School: School of Law

Re: Constitutional politics in Indonesia (2003-2013)

Reference Number: 13 120
The Human Research Ethics Advisory Panel B for the Arts, Humanities & Law is satisfied that this project is of minimal ethical impact and meets the requirements as set out in the National Statement on Ethical Conduct in Human Research*. Having taken into account the advice of the Panel, the Deputy Vice-Chancellor (Research) has approved the project to proceed.

Your Head of School/Unit/Centre will be informed of this decision.

This approval is valid for 12 months from the date stated above.

Yours sincerely

Associate Professor Anne Cossins
Panel Convenor
Human Research Ethics Advisory Panel B

Cc: Ms Carolyn Penfold
Head of School
School of Law

* http://www.nhmrc.gov.au/

Appendix Item 2: Participant Information Statement and Consent Form

THE UNIVERSITY OF NEW SOUTH WALES
Faculty of Law
Approval No 13 120

PARTICIPANT INFORMATION STATEMENT AND CONSENT FORM

Constitutional Politics in Indonesia (2003 – 2013)

Participant Selection and Purpose of Study
You are invited to participate in a study of Indonesian Constitutional Politics from 2003 to 2013. As an SJD student at the University of New South Wales I, Fritz Siregar, hope to learn about the role of the Indonesian Constitutional Court in the Indonesian political system during this period.

You were selected as a possible participant in this study because of your knowledge of the Indonesian Constitutional Court and/or the political environment in which it operates.

Description of Study and Risks
If you decide to participate, I will conduct an anonymous interview with you, which should take approximately sixty minutes of your time.

I will not record your name, title or position or any personal details in any way that could be used to link you to your comments. It is not anticipated that there are any personal, reputational, emotional or professional risks that should arise from being involved in this interview.

The interview will be audio-recorded for personal purpose only, with your consent.

Confidentiality and Disclosure Information
Any information that is obtained in connection with this study and that could be used to identify you will remain confidential and will be disclosed only with your permission, except as required by law. If you give me your permission by signing this document, I plan to discuss and publish the results in conferences and articles and in my final SJD thesis. In any publication, information will be provided in such a way that you cannot be identified.

Complaints may be directed to the Ethics Secretariat, the University of New South Wales, Sydney 2052, Australia (phone 9385 4234, fax 9385 6648. Email ethics.sec@unsw.edu.au). Any complaint you make will be investigated promptly and you will be informed of the outcome.

Compensation for Participation
We cannot and do not guarantee or promise that you will receive any benefits from this study.

Feedback to Participants
The final draft of the research thesis will be sent to all participants.

Your Consent
Your decision whether or not to participate will not prejudice your future relations with the University of New South Wales. If you decide to participate, you are free to withdraw your consent and to discontinue participation at any time without prejudice.

If you have questions, please feel free to ask us. If you have any additional questions later, Professor Theunis Roux (612) 9385 3418, will be happy to answer them. You will be given a copy of this form to keep.

You are making a decision whether or not to participate. Your signature indicates that, having read the information provided on the participant information sheet, you have decided to participate.

.....	.....
Signature of Research Participant	Signature of Witness
.....	.....
(Please PRINT name)	(Please PRINT name)
.....	.....
Date	Nature of Witness

REVOCATION OF CONSENT

Constitutional Politics in Indonesia (2003 – 2013)

I hereby **WITHDRAW** my consent to participate in the research proposal described above and direct that any data collected from me be destroyed.

I understand that such withdrawal **WILL NOT** jeopardize any treatment or my relationship with The University of New South Wales,

.....	.....
Signature	Date

.....
Please PRINT Name

The section for Revocation of Consent should be forwarded to Professor Theunis Roux, Faculty of Law, University of New South Wales, Sydney 2052 Australia. (phone (612) 9385 3418, fax (612) 9385 1175, email t.roux@unsw.edu.au)

Appendix Item 3: Interview Questions to Constitutional Court Justices, Court Researchers and Registrars

1. After the Indonesian Constitutional Court was created in 2003, it had to fight for independence from the executive and legislature. Are such threats to the Court's independence still relevant today, and is preserving independence something about which judges worry consciously?
2. The Court enjoys significant public trust among Indonesians (65%, according to *Kompas* [18 June 2012]). Do you think that public trust is important for the Court, and is the maintenance of that trust something about which judges worry?
3. The public holds great support for the Court. However, implementing Court decisions relies on the executive's obedience. In 10 years of the Court's history, the Court has encountered no rejections from the executive regarding Court decisions. What explains this obedience? Does the probability of executive obedience affect the Court's position?
4. It seems that the Indonesian parliament and the DPR worry about growing public support for the Court. Do you think that this observation is correct, and if so, why do you think the DPR is so worried?
5. Unlike the Anglo-American common law system, with its *stare decisis* principle, Indonesia's Constitutional Court is not obliged to follow precedent. However, precedents are necessary to establish the rule of law and legal certainty. Is it important for Indonesia's Constitutional Court to follow precedent?
6. In deciding cases, Justices are expected to apply constitutional interpretations (original intent, textualism, progressive). Which approach do you think the Court should employ?
7. Legal realism has secured a place in Indonesian judicial culture where formalism had long dominated. Chief Justice Mahfud introduced a 'substantive justice' principle. This has changed the paradigm from one of formalism to realism that recognises discretion and choice. Do you agree that the Court has already become 'realist'?

8. The Court has issued decisions in which constitutionality has been made conditional. These could be perceived as policy-making decisions. Lately, this type of decision has become dominant among the Court's granted decisions. Not only has the Court provided interpretation of articles, it has also inserted 'new words' into specific articles. Consequently, the president and DPR could feel threatened by this activism. Do you predict a backlash from the president and the DPR? If so, does the Court have a strategy to avoid such a backlash?
9. In many countries, the courts hesitate to attack the parliament/government or take a different direction, due to budgetary issues. The courts fear that the parliament/government will reduce their budget for upcoming years. However, this threat has not eventuated for Indonesia's Constitutional Court, even though the DPR has tried to reduce the Court's authority. Can you say why the budget has not been cut?

Appendix Item 4: Interview Questions to Parliamentary Members and Government Officials

1. After the Indonesian Constitutional Court was created in 2003, it had to fight for independence from the executive and legislature. Are such threats to the Court's independence still relevant today, and is preserving independence something about which judges worry consciously?
2. The Court enjoys significant public trust among Indonesians (65%, according to *Kompas* [18 June 2012]). Do you think that public trust is important for the Court, and is the maintenance of that trust something about which judges worry?
3. The public holds great support for the Court. However, implementing Court decisions relies on the executive's obedience. In 10 years of the Court's history, the Court has encountered no rejections from the executive regarding Court decisions. What explains this obedience? Does the probability of executive obedience affect the Court's position?
4. It seems that the president and the DPR worry about growing public support for the Court. Do you think that observation is correct and, if so, why do you think the DPR is so worried?
5. Unlike the Anglo-American common law system, with its *stare decisis* principle, Indonesia's Constitutional Court is not obliged to follow precedent. However, precedents are necessary to establish the rule of law and legal certainty. Is it important for Indonesia's Constitutional Court to follow precedent?
6. In deciding cases, Justices are expected to apply constitutional interpretations (original intent, textualism, progressive). Which approach do you think the Court should employ?
7. Legal realism has secured a place in Indonesian judicial culture where formalism had long dominated. Chief Justice Mahfud introduced a 'substantive justice' principle. This has changed the paradigm from one of formalism to realism that recognises discretion and choice. Do you agree that the Court has already become 'realist'?

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9. In many countries, the courts hesitate to attack the parliament/government or take a different direction, due to budgetary issues. The courts fear that the parliament/government will reduce their budget for upcoming years. However, this threat has not eventuated for Indonesia's Constitutional Court, even though the DPR has tried to reduce the Court's authority. Can you say why the budget has not been cut?

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'Constitutional Court Decision 059/PHPU.D-VI/2008 on South Bengkulu Head of Regency Election Result' (2008)

'Constitutional Court Decision 066/PUU-II/2004 on Article 50' (2004)

'Constitutional Court Decision 68/ PUU-IX/2011 on Doctoral Requirement' (2011)

'Constitutional Court Decision 69/ PUU-X/2012 on Arrest Order in Supreme Court Decision' (2012)

'Constitutional Court Decision 072-73/ PUU-II/2004 on Regional Election' (2004)

'Constitutional Court Decision 085/ PUU-XI/2013 on Water Resource Law' (2013)

'Constitutional Court Decision 092/ PUU-VII/2009 on Regional Representative Council' (2009)

'Constitutional Court Decision 92/ PUU-X/2012 on DPD Jurisdiction' (2012)

'Constitutional Court Decision 97/ PUU-XI/2013 on Constitutionality of Court to Settle Pilkada Election Result Dispute' (2013)

'Constitutional Court Decision 102/ PUU-VII/2009 on Electoral Roll' (2009)

'Constitutional Court Decision 110-111-112-113/ PUU-VII/2009 on Seat Allocation for Second and Third Round' (2009)

'Constitutional Court Decision 120/ PUU-VII/2009 on Past Criminal History (Dirwan Mahmud)' (2009)

'Constitutional Court Decision 133/ PUU-VII/2009 on Criminal Charge against Corruption Commisoner' (2009)

Supreme Court Decision No. 11 P/Hum/2014 on Restriction on Concurrent Position for Supreme Court and District Court Judge' (2014)

C. Indonesian Statutes and Constitutional Court Regulations

Indonesian Statutes

Law 22 of 2004 on the Judicial Commission

Law 24 of 2003 on Constitutional Court

Law 32 of 2004 on Regional Government

Law 12 of 2008 on Second Amendment of Law 32 of 2004 on Regional Government

Law 3 of 2009 on Second Amendment of Law 14 of 1985 on Supreme Court

Law 48 of 2009 on Judicial Power

Law 8 of 2011 on Amendment of Law 24 of 2003 on the Constitutional Court

Law 18 of 2011 on Amendment of Law 22 of 2004 on the Judicial Commision

Emergency Law Number 1 of 2014 on Election of Governor, Regency and Major

Law 22 of 2014 on Election of Governor, Regency and Major

Law 23 of 2014 on Regional Autonomy

Law 17 Year 2014 on MPR, DPR, DPR and DPRD

Law Number 1 of 2015 on the Stipulation of Interim Emergency Law Number 1 of 2014 on Election of Governor, Regency and Major

Law 8 of 2015 on Amendment of Law Number 1 of 2015 on the Stipulation of Interim Emergency Law Number 1 of 2014 on Election of Governor, Regency and Major

Constitutional Court Regulations

'Constitutional Court Regulation 2/PMK/2003 on the Ethics Code and Behaviour Guidelines for Constitutional Court Judges' (2003)

'Constitutional Court Regulation 6/PMK/2005 on the Guideline on the Judicial Review Proceedings' (2005)

'Constitutional Court Regulation 7/PMK/2005 on Applying the Ethics Code and Behaviour Guidelines for Constitutional Court Judges' (2005)

'Constitutional Court Regulation 9/PMK/2006 on Applying the Ethics Code and Behaviour Guidelines for Constitutional Court Justice' (2006)

D. Interviews

Indonesian Constitutional Court

Chief Justice Arief Hidayat
Justice Maria Farida Indrati
Justice Patrialis Akbar
Justice Wahiduddin Adams
Justice I Dewa Gede Palguna

(Retired)
Chief Justice Jimly Asshiddiqie
Chief Justice Mahfud MD
Chief Justice Hamdan Zoelva

Justice M. Laica Marzuki
Justice Harjono
Justice Abdul Mukhie Fadjar
Justice HAS Natabaya
Justice Achmad Roestandi

Justice Maruarar Siahaan
Justice Ahmad Sodiki
Justice Soedarsono
Justice Fadlil Sumadi

Court Registrars, Researchers and Substitute Registrars

Hani Adhani
Pan Mohamad Faiz
Zainal Hoesein
Nalom Kurniawan
Fajar Laksono
Muhidin
Kholidin Nasir
Kasianur Sidahuruk
Mardian Wibowo
Lutfi Widadgo

Parliamentary Members and Political Party Activists

Ferdiansyah
Agun Gunandjar
Benny K Harman
Achmad Rubaire
Jacob Tobing

Government Officials

Yasona Laoly, Minister of Justice and Human Rights (interviewed while in Parliament)
Denny Indrayana (interviewed while Deputy Minister of Justice and Human Rights)
Agus Hariadi, Head of Legal Drafting Office, Ministry of Justice and Human Rights
Prahesti Pandanwani, Senior Staff Member, Ministry of Planning
Muhammad Reza, Legal Drafter, Ministry of Justice and Human Rights

Public Defenders, Non-Governmental Organizations

Taufik Basari
Gita Putri Damayanti
Eryanto Nugroho
Ronald Rofliandi
Dian Rosita
Aria Suyudi
Abdul Khoir
Muji Kartika Rahayu

Academia

Mustafa Fahri
Saldi Isra
Ali Safaat
Ramlan Surbakti
Philips Vermonte
Djayadi Han