

INDONESIA CONSTITUTIONAL COURT CONSTITUTIONAL INTERPRETATION METHODOLOGY (2003-2008)

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Abstract

Nine Indonesian Constitutional Justices have the authority to annul a law drafted by 550 Parliament members and the President. The Constitutional Court of the Republic of Indonesia (“the Court”), particularly in deciding *cases of judicial review*, has the capability to declare words, sentences, paragraphs, articles or the law unconstitutional. Consequently, it is essential for the Court to take into account legal arguments. The fundamental element of these legal arguments is constitutional interpretation, which serves as a parameter in determining constitutionality of the laws. However, in exercising its authority, the Court needs to interpret the Constitution as a basis for deciding a case. The standards for determining the constitutionality of a law must be the text of the Constitution, not what the judges would prefer the Constitution to mean. Constitutional supremacy necessarily assumes that a superior rule is what the Constitution says it is, not what the judges prefer it to be. [Craig R. Ducat: E3]. The Court period 2003–2008 were the Court’s the formative years, and as such are important to understand the methodology and interpretative approaches adopted by the Court. Many observers of the Court’s early decisions are still unsure of the overarching approach and methodology adopted by the Court. Thus, there is a need for a close analysis and criticism of the Court’s early decisions to determine which methods and approaches it has adopted and whether these are appropriate in the Indonesian context. The Court has openly referred to the experiences of foreign jurisdiction in constitutional law, and therefore it would be appropriate to analyze the court’s decisions in a broader comparative context of constitutional interpretative approaches from around the world.

Key words: Constitutional Interpretation, Judicial Review, Constitutional Court, Constitution

I. INTRODUCTION

The idea for this paper arose during my engagement with the Indonesian Constitutional Court. I worked for Constitutional Court of Indonesia from April 2004 to April 2009 as an Associate to Justice Maruarar Siahaan. I recall that in the early months of working at the Court, no one really knew where the Constitutional Court building was located. I had to direct my taxi driver to reach the Court. When I left the Court in 2009, the 16-floor gothic building remained standing firm close to the Presidential State Palace in central Jakarta.

During my time working at the Court, I was required to attend court hearings, provide legal opinions and do research for the Justices. Somehow, during that time, I could sense the importance of the cases faced by the Court. At times, the government and parliament objected to the Court as a newly established institution and to the role of the Court to protect the fulfilment of the 1945 Indonesian Constitution. There were moments when the Court had to temper and slow down their activism to avoid negative reaction from the Government and Parliament to the Court's performance.

This paper explains the approach to constitutional interpretation exercised by the Court in interpreting the Indonesian Constitution against the cases brought before it. It should be kept in mind that the tradition of judicial review did not exist before the establishment of the Court. Thus, the Court needed to learn how to interpret the Constitution with the resources available and a lack of existing constitutional law precedent. The Court is not a political machine, but through its decisions, it has shaped the democratization and democratic process in Indonesia, acted as a protector of human rights and enhanced the rule of law in Indonesia.

It is worth noting that this paper limits its scope to the first bench of the Indonesian Constitutional Court in the period from 2003 to 2008 only. Upon the end of the first bench period, Chief Justice Mahfud MD brought substantive justice and a responsive approach to the Court. This approach was continued by subsequent Chief Justices Akil Mochtar, Hamdan Zoelva and Arief Hidayat.

Examining the entire court approach in constitutional interpretation is not feasible for the scope of this paper.

This paper is based on four themes. The first is the idea to create a constitutional court in Indonesia, second, the tenure and profile of the first Constitutional Court justices, third, defining constitutional interpretation methodology in Indonesia, and fourth analysis of cases heard by the Constitutional Court in the given period. Finally, observations are given as to the progressiveness of the Court's decisions.

II. DISCUSSION

Constitutional Court and Constitutional Interpretation Constitutional Interpretation

Jeffrey Goldsworthy argued that written constitutions are not self-actualizing. If they are to be maintained over time, they require interpretation and adaptation to changing circumstances. The Constitutional Court is responsible for analysing and developing reliable approaches to interpretation that successfully keep faith with the principles and underlying values of the constitutional text. The standards for assessing the constitutionality of a law must be the text of the Constitution, not what the judges would prefer the Constitution to mean.

This controversy centered around a set of questions as to what the constitution 'means' and how it should be interpreted. Is the meaning of a particular text equivalent to a statement of its author's belief and intention, or does the meaning of this text change over time and vary with the changing perspective and interest of its interpreter? Central to any theory of constitutional interpretation is an understanding of the role of a court in a democracy, and if judicial review is authorized, what role, if any, does judicial deference to political actors play? What weight should be accorded the constitutional views of legislative majorities? How majoritarian should interpretive theory be; should judicial understandings be open to normative influence from social movement as reflected either in legislation or in changing public opinion, or should interpretive theory emphasize

more the role of independent judicial judgment on legal values in securing the constitutional bases for a democratic government, under law, to function?-

Constitutional interpretation is an extraordinarily difficult enterprise, which requires striking an appropriate balance between competing, weighty considerations. The distinction between legitimate and illegitimate changes depends on a number of other difficult distinctions, such as between determinacy and indeterminacy, purpose used to clarify meaning and purpose used to change it, genuine implications and spurious ones, evidence of intention or understanding that illuminates original meaning and that which does not, changes in the application of a provision and changes in its meaning, and so on.-

Modern legal scholars recognize six main methods of constitutional interpretation namely textual, historical, functional, doctrinal, prudential, equitable, and natural interpretation.- Prof. Jimly Asshiddiqie, the first Chief Justice of the Constitutional Court stated the options to interpret constitution namely textual, grammatical, history, sociology, sociologies, philosophy, teleology, holistic, thematic.-

Vicki Jackson offers a simplified three category approach for constitutional interpretation , namely (1) historical interpretation by reference to past decisions (by relevant public decision makers) embodied in positive law, whether written or unwritten, (2) purposive interpretation by reasoning about constitutional purposes, (3) multi-valences approaches that draw on original understanding, purposes, structure, history, values, and consequences to arrive at constitutional judgment.- Multi-valence interpretative theories embrace textualism and purposivism, precedent and history, as well as concern for constitutional values and pragmatic concern for consequences. Multi-valence interpretation does not incorporate confidence in the existence of single right answer, and may in some cases view a range of answers as constitutionality tolerable or plausible.

Constitutional Interpretation Methodology

An important divide among interpretive approaches across national courts is between those who argue that constitutional meaning is fixed at a particular

moment in the past, known as originalism, and those who believe constitutional meaning is legitimately subject to evolving understanding, known as non-originalism-. With an originalist approach, to enforce the Constitution is to enforce it as originally understood by the framers.- Thus, for originalism the interpretation of a constitutional provision comprises two interpretive moments, the moment at which the original meaning / understanding of the provision is ascertained and a second moment when when that meaning becomes significant to the case being presided over.-

Originalists look to the intent of the framers proposes and treat the Constitution as if it were the product of a single author. However, often texts are in fact the result of quarrelsome collaboration and endless series of compromises among the many framers.¹ Goldsworthy introduces the definition of originalism as ‘the thesis that the content of a constitution is determined partly by the intentions or purpose of its founders, of the understandings of the founding generation’.²

For non-originalists, the constitutional text is meaningful but it is not singular. The one meaning of the constitutional text, to the originalist, is the original meaning. To a non-originalist, the original meaning is not the only meaning of the constitutional text.³ Some provisions of the constitutional text have a meaning *in addition* to the original meaning, where those provisions reflect fundamental aspirations of the framer. There is more complexity than just the original meaning.⁴ A non-originalist judge is interested in the original meaning of the Constitution but to them, this is only one meaning of the text.

Justification of Constitutional Interpretation Methodology

In reviewing judicial review cases of the Indonesian Constitutional Court from 2003 to 2008, I have used five types of constitutional interpretation. The reason for choosing each of these approaches is elaborated in the following discussion on each method.

¹ Ball, above n Error! Bookmark not defined., 138.

² Goldsworthy, above n 40, 322.

³ Perry, above n 52, 246.

⁴ Ibid 247.

Textual Interpretation

According to this approach, a judge has to decide what the meaning of the constitutional provision is for current existing circumstances. Sotiros adds that a textualist defines what the Constitution means by consulting the *plain words* of the constitutional document.⁵

In understanding the constitution through textual interpretation, judges should decide for themselves what these provisions mean for the case they have to review.⁶

Original Intent Interpretation

Original intent is almost the same as purposive interpretation. This is a methodology defined by trying to find out what was the intention of the constitutional framers when they drafted the constitution text. Bork emphasizes that intentionalism would be mandatory for judges even if the framers had not intended intentionalism for judges.⁷ Scalia, as a great supporter for original meaning approach, argues that indeed judges should be limited to determining what the constitutional text meant when it was adopted.⁸

Pragmatic Interpretation

Pragmatic interpretation is an approach whereby the Justice looks to the effect of the applicability of the Constitution provision. Another name for this approach is consensualist. After a Justice considers a number of potential effects, the Justice will decide one effect that is suited to current conditions, and decide that as the meaning of that constitutional provision. Scholars who use the term “pragmatism” in discussions of constitutional matters agree that it is an “umbrella term” covering different views about law. It is also considered legal instrumentalism, a condition where law is instituted to serve social purposes and should be interpreted in that way.⁹ One understanding of this general idea

⁵ Sotiros A. Barber and James E. Fleming, *Constitutional Interpretation : The Basic Question* (Oxford University Press, Inc. , 2007) 67.

⁶ Ronald Dworkin, 'Taking Rights Seriously ' (1977) *Harvard University Press* 136.

⁷ Barber and Fleming, above n 81.

⁸ Jackson, above n 61, 602.

⁹ Richard A Posner, 'What Has the Pragmatism to Offer Law' (1990) (63) *Southern Law California Law Review* 156.

is that the Constitution is what it says it is, an instrument of ends like justice, the general welfare, and national security, and should be interpreted to facilitate these ends.¹⁰

Proportionality Interpretation

The proportionality approach has little to do with how a judge reads constitutional provisions. Instead it is applied when justifying limits on democratic rights and fundamental rights. Kommers claimed proportionality interpretation is at the heart of the judicial process on basic rights in Germany, Canada, South Africa and India.¹¹ Robert Alexy defends the proportionality approach as an essential tool for constitutional interpretation.¹²

Structural Interpretation

In the narrow sense, structural interpretation focuses not on the meaning of specific, isolated clauses, but rather on the location of the clause and its relation to the whole text. In a broader sense, it seeks unity and coherence not only in the text, but in the larger political order that the text signifies.¹³ An example of structural interpretation is defined by the German Constitutional Court. In *Southwest State (1951)*, the German Constitutional Court drew a line for the critical importance of the Constitution's unity, stating, "no single constitutional provision may be taken out if its context and interpreted by itself. "Every constitutional provision," it continued, "must always be interpreted in such a way as to render it compatible with the fundamental principles of the Constitution as a whole."¹⁴

Cases on Constitutional Interpretation Methodology

Original Intent Interpretation

Electricity Case¹⁵

The Petitioners were made up of the Association of Indonesian Counselors of Law and Human Rights and some individuals. The petitioners claimed that

¹⁰ Barber and Fleming, above n 59, 171.

¹¹ Kommers, above n 41, 202

¹² Jackson, above n 61, 604.

¹³ Kommers, above n 41,199.

¹⁴ 1 BVerfGE 14,32 (1951)

¹⁵ Case Number 001-021/PUU-I/2003.

Article 33 of the 1945 Constitution had been violated by a Law on Electricity that granted privatization to electrical power plants, which they asserted, as one of the most essential production branches dominating many people's interests, should be controlled by the State. The process of privatization meant that, as a result of unbundling a system that leads to the pricing being determined by fair and normal competition, the public as consumers of electricity had to pay for electricity at higher prices. Article 33 (2) of 1945 Constitution states: "Essential services which are important for the state and which affect the livelihood of the public shall be *controlled by the state*."

The Court argued that the interpretation of "*controlled by the state*" must cover the broad meaning of state domination, which originated from the concept of Indonesian sovereignty over all sources of wealth and water, all domestic natural prosperity.

The Court referred to founding father's intention in drafting Article 33 in 1945, as stated by Mohammad Hatta. The Court stated that,

"the interpretation of control by the state is that the state has to strengthen the essential services that it owns so that gradually it will be able to independently provide for the needs which concern the livelihood of many people and replace the positions of the national and foreign private companies."¹⁶

However, the Court further argued if electricity as the essential service is still considered important to the state and/or to dominate many people's interests, the Government must still dominate this essential service by ruling, caring for, managing, and supervising it to be utilized to the greatest people's welfare as an objective of the Preamble of 1945 Constitution.

Capital Punishment is Constitutional¹⁷

The Petitioner consisted of Indonesian and foreign individuals. The Petitioners were convicted and sentenced to death under the Narcotics Law. The Petitioners argued that capital punishment is contrary to and in violation of the 1945 Constitution. The Petitioners argued that capital punishment under the Narcotics

¹⁶ Case Number 001-002/PUU-I/2003, 348.

¹⁷ Case Number 002-3/PUU-V/2007.

Law violated Article 28A and Article 28I (1) of the 1945 Constitution. Article 28A stated that: “Every person shall have the right to live and to defend his/her life and living”. The Petitioners claimed that the phrase, *which cannot be reduced under any circumstances whatsoever*, clearly prohibits capital punishment.

However, according to the framers of human right articles in the 1945 Constitution, those articles should not be read the way Petitioners claimed. Lukman Hakim Saifuddin and Patrialis Akbar, members of an ad hoc committee responsible for drafting the human rights articles in the 1945 Constitution, stated that it was not the intention of the framers that human rights could be enforced absolute.¹⁸ The spirit is to regulate the protection of human rights, but this has limitations, as long as the limitations are conducted by way of law. Therefore, the chapter of human rights articles in the 1945 Constitution ended in the adoption of Article 28J (2), which states:

“in exercising his/her rights and freedom, every person shall have the duty to accept the restrictions established by law for the sole purposes of guaranteeing the recognition and respect of the rights and freedoms of others and of satisfying just demands based upon considerations of morality, religious values, security and public order in a democratic society.”

By referring to the framers’ intention, the Court declared that capital punishment under the Narcotics Law is constitutionally valid.

Textual Interpretation

Bali Bombing Case¹⁹

In this case the Court decided that human rights are limited as long as the limitation is conducted through law by referring to the framers’ intention, and further in the *Bali Bombing Case*, the Court adopted a strict approach to what the 1945 Constitution said, specifically, “*right shall not be prosecuted with retroactive clause*”.

The Petitioner Masykur Abdul Kadir, had been convicted under the Eradication of the Criminal Acts of Terrorism Law Number 16 Year 2003 (*Terrorism Law*)

¹⁸ Case Number 002-003/PUU-V/2007.

¹⁹ Case Number 013/PUU-I/2003.

with respect to his participation in the *Bali Bombing*. As background, the *Bali Bombing* happened on 12 October 2002. On 18 October 2002, the Government issued Government Regulation in Lieu of Law No. 1 Year 2002 on Eradication of the Criminal Acts of Terrorism. At the same time, the Government also issued Government Regulation in Lieu of Law No. 2 Year 2002 on Eradication of the Criminal Acts of Terrorism for the Bali Bombing Incident on 12 October 2002. The latter, Government Regulation in Lieu of Law No. 2 Year 2002 was adopted by the DPR into Law Number 16 Year 2003.²⁰

The Petitioner considered his rights to have been impaired by Law Number 16 Year 2003, namely the rights regulated under Article 28I (1) of the 1945 Constitution which reads: “.... the right to be recognized as a person before the law, and *the right not to be prosecuted under retroactive law* shall constitute a human right which cannot be reduced under any circumstances whatsoever”. The Petitioner claimed that in fact, a retroactive law had been applied to the petitioner.

In deciding this case, the Court was of the opinion that basically, law must be applicable prospectively. The application of the retroactivity principle in criminal law has an exception, namely that it may only be applied on gross violation of human rights as an extraordinary crime. Terrorism is not categorized as a gross violation of human rights as intended in the 1998 Rome Statute.²¹ The Court further opined that:

“Though the legislator has the authority to create law, but the prosecution against every form of committed crime should be implemented through just and certain law enforcement, not by new law making through the formulation of new laws.”

The Court declared Law Number 16 Year 2003 as constitutionally invalid because it contradicts Article 28I(1) of the 1945 Constitution.

²⁰ Article 22 of the 1945 Constitution allows the President to enact this type of law in compelling circumstances as an interim regulatory measure. A *Peraturan Pemerintah Pengganti Undang-Undang / Perppu* (Government Regulation in Lieu of Law) lapses unless the DPR confirms it in its first sitting following the issuance of the law.

²¹ Case Number 013/PUU-I/2003, 44.

Provision on 20% for Education Budget

The constitutional provision on the Education Budget is a classic example of the application of textual interpretation. In this case, the Petitioners were teachers and the Indonesian Teachers Association. The Petitioner argued that the provision of section 31 (4) of the Indonesia, which states, “*The state shall prioritise the budget for education to a minimum of 20% of the State Budget and of the Regional Budgets to fulfil the needs of implementation of national education,*” is imperative..

From 2005, the Petitioners annually filed a judicial review case against the State Revenues and Expenditure Budget Law. In 2005, *Education 1st Budget case*²², the Court dismissed the petitioner’s petition. In 2006 and 2007, *Education 2nd Budget case*²³ and *Education 3rd Budget Case*²⁴, even though the Court granted the petition, considering the legal effects caused if that State Revenue and Expenditure Budget Law was declared constitutionally invalid, the Court only declared the existing percentage of the education budget in 2006 State Revenues and Expenditure Budget as violating the Constitution.

In 2008, *Education 4th Budget Case*,²⁵ the educational budget in the Revised 2008 State Revenues and Expenditures Budget Law was only 15.6%. Considering those three previous decisions, the Court held that:

“There are sufficient reasons for the Court to assess that there is intention of the regulator to violate the 1945 Constitution. As a consequence, the Court declared the entire Revised 2008 State Revenues and Expenditures Budget Law as constitutionally invalid”²⁶

The Court rejected the Government’s argument that the Government had to allocate budget for energy subsidies and to pay foreign debt on the grounds that if the budget for energy subsidies and foreign debt is set aside from the State budget, the educational budget would be at the 20% required by the Constitution.²⁷ Despite the rise of oil prices and Indonesia’s obligation to pay

²² Case Number 012/PUU-III/2005, Judicial review of Law Number 36 Year 2004 regarding the 2005 State Revenue and Expenditure Budget.

²³ Case Number 026/PUU-III/2006, Judicial review of Law Number 13 Year 2005 regarding the 2006 State Revenues and Expenditures Budget.

²⁴ Case Number 0026/PUU-IV/2006, Judicial review of Law Number 18 Year 2006 regarding the 2007 State Revenues and Expenditures Budget.

²⁵ Case Number 013/PUU-VI/2008.

²⁶ Case Number 013/PUU-VI/2008, 100.

²⁷ Case Number 013/PUU-VI/2008, 101.

national foreign debt and economy security to handle turbulence in the economy crisis resulting from the global financial crisis in 2008, the Court was firm with Government and Parliament to allocate education 20% of State Budget and Expenditure Budget as required by article 31(4) of 1945 Constitution.

Education requirement for Indonesian Migrant Workers²⁸

The Petitioner was an organization working for the interests of Indonesian migrant workers overseas. The Petitioner argued that article 35 (d) on Placement and Protection of Indonesian Workers Abroad Law contradicts the 1945 Constitution. Article 35(d) read as follows:

“Recruitment of Indonesian worker candidates by private organizers must be conducted for candidates having complied with the requirements of... d) having at least graduated from Junior High School or equivalent.”

The Petitioner claimed that article 35(d) violated the Petitioner’s right as provided by Article 28D (2) of 1945 Constitution, which provides that “every person shall have the right to work and to receive fair and proper recompense and treatment in employment.”

The Court argued that an adult requires a job to be able to fulfill the necessities of life both for himself and his family without discriminating whether that person is a graduate of Junior High School or not. If he/she cannot gain employment, the Court further argued it can be assured that such a person will not be able to provide for himself of his family, and therefore his right to survival will be compromised, moreover his right to a prosperous life.

In this case, the Court explained that the requirement to access for a job as stated by Article 28D (2) shall not be limited by introduction of a law. If that person cannot get a job because the qualification required is not suitable to his/her circumstance, that person may apply for another job, however, the law shall not prohibit people from getting access to a job because of his/her educational background. In this case, the Court focused on the implementation of access to occupancy as required by Article 28D (2) of 1945 Constitution.

²⁸ Case Number 019-020/PUU-III/2005.

Pragmatic Interpretation Supervision on Advocate Case²⁹

This case was related to the conflict between two different laws on the supervisory authority over private legal practitioners. The Petitioners were individual lawyers who tried to challenge the constitutionality of article 36 (and its elucidation) of Law No. 5 Year 2004 that Amended Law No. 14 Year 1985 on Supreme Court, which provides that, “the Supreme Court and Government shall supervise private legal practitioners and notaries.”³⁰

The Petitioner argued that Law No. 5 Year 2004 was in conflict with Law No. 18 Year 2003 on Advocates, which provides that it is the Bar Association that has the authority to supervise private legal practitioners. The Petitioner then tried to argue that the Supreme Court Law provision regulating the supervision of legal practitioners should be declared unconstitutional because it is in conflict with the Advocate Law.

The first issue that the Court dealt with was whether or not the Court in fact had authority to review conflicts between two different statutes. The Court decided that it should intervene because the conflict between the Advocate Law and the Supreme Court Law would generate legal uncertainty. Moreover, the Court believed that it should intervene because the lawmakers could not exercise their authority in the proper way. Thus, the Court held:

The Court did not find any violation of constitutional rights as the Petitioner has claimed... however, it is obvious that the legislature did not exercise its authority with prudence and it has produced inconsistency between one statute and another. This inconsistency might have ended up with legal uncertainty, that can potentially violate the constitutional provision of article 28D(1) which states that, Every person shall have the right to the recognition, the guarantee, the protection and the legal certainty of just laws as well as equal treatment before the law..³¹

²⁹ Case Number 067/PUU-II/2004.

³⁰ The elucidation of article 36 states that, “in general, the supervision and stewardship upon private legal practitioner and notary is responsibility of government. With regards to their tasks that relate to judiciary, private legal practitioner and notary are under the supervision of the Supreme Court. In supervising, the Supreme Court and government should respect and guard the independence of private legal practitioner and notary in the performance of their tasks. Whenever disciplinary action should be necessarily taken against private practitioner and notary such as dismissal and removal, including temporary suspension, respective professional organization should be heard in advance.”

³¹ Case Number 067/PUU-II/2004, 31.

Furthermore, the Court held that:

Regardless of the Petitioner's inability to prove his claim, the Court has concluded that the error in the law-making process (inconsistency between two statutes) has created legal uncertainty. therefore article 36 of the Supreme Court law is inconsistent with article 28D (1) of the 1945 Constitution (equal protection clause) and the Petitioner's petition should be granted.³²

Through a unanimous decision, the Court struck down article 36 of the Supreme Court Law and expanded its jurisdiction by asserting that the Court can resolve inconsistencies between two different statutes. Even though the constitutional injury had not arisen, the inconsistency between the Supreme Court Law and the Advocate Law led to uncertainty for the Petitioner.

I categorized this case as a pragmatic approach because the Court clearly stated that there is no constitutional injury concerning the enactment of Supreme Court Law. However, due to the application of two overlapping laws that conflicted in their regulation of the same thing, the result was legal uncertainty for the Petitioners.

The Judicial Commission Case ³³

This case is an example where the Court rejected the originalist interpretation and opted instead for a textual interpretation. The Petitioners were 31 Supreme Court Justices who asked the Constitutional Court to annul the authority of *Komisi Yudisial* (Judicial Commission) to investigate them. The Judicial Commission was a newly established institution with authority to nominate Supreme Court Justices and to uphold the dignity of judges³⁴, under which authority the Commission may recommend sanctions against poorly performing judges to the Supreme Court or Constitutional Court.³⁵ Not long after its establishment, the Judicial Commission was engaged in a conflict with the Supreme Court. The conflict escalated when the Commission later made public the names of 13 justices it

³² Case Number 067/PUU-II/2004, 32-33.

³³ Case Number 005/PUU-IV/2006.

³⁴ Judicial Commission Law art 13.

³⁵ Judicial Commission Law art 21.

called “problematic” and the Commission decided to summon those 13 Supreme Court Justices.³⁶

In their petition for constitutional review, the Petitioners argued that article 24B(1) 1945 Constitution only gives 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 Supreme Court Justices and shall possess authority to maintain the honor, dignity and behavior of judges.”

According to the Petitioners, the scope of the Commission’s authority was only to overview lower court judges and not those of the Supreme Court and the Constitutional Court. Moreover, the Petitioners argued that Commission was essentially a partner to the Supreme Court in supervising lower court judges.

The Court held that the supervisory role of the Judicial Commission could not be constructed in the context of the separation of powers because the Judicial Commission was simply a supporting organ of the Supreme Court.³⁷ The Judicial Commission held no judicial power. Second, the Court ruled that the supervisory role of the Judicial Commission was vague, on which the Court held,

The Commission’s authority according to article 24B(1) of the Constitution is 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 judge’s behavior... that includes who has authority to make codes of ethic. 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 judge’s behavior that becomes the subject of supervision became unclear.³⁸

The Court further held that:

Lack of clarity and detail of statutory rules of the supervisory authority and judge’s behavior has created the unintended consequences that the Judicial Commission and the Supreme Court came out with their own interpretations, which ended with legal uncertainty. Therefore, the lawmakers should clarify the Judicial Commission supervisory rule in more detail.³⁹

³⁶ *The Jakarta Post*, Commission to Grill 13 Justices, 20 February 2006.

³⁷ Case Number 005/PUU-IV/2006, 182.

³⁸ Case Number 005/PUU-IV/2006, 187.

³⁹ Case Number 005/PUU-IV/2006, 193.

Finally, the Court concluded that all provisions in the Judicial Commission Law that relate to its supervisory role should be declared inconsistent with the Constitution and void on the grounds that they created legal uncertainty.⁴⁰ The Court refused to interpret this case using the original intent methodology because the framers that provided testimony in the Court came to opinions as to what was meant by “judges”.⁴¹ It is interesting to observe the opinion of Butt, who felt that, despite public criticism towards this decision, appreciation should be given to the Court. He stated that ‘the court emphasized the importance of judicial independence to a functioning state, legal system and judiciary.’⁴²

Structuralist Interpretation

Regional Election Commission is not responsible to DPRD.⁴³

The Petitioners were private legal entities having concerns and interests in democratic and honest administration of General Elections for Regional Heads and Deputy Heads (Head of Regency Election) and Chairpersons of the Provincial General Election Commission. The Petitioners argued that article 57 (1) and article 66(3) of Law Number 32 Year 2004 on Regional Government contradicts Article 22E of the 1945 Constitution. Article 57 (1) of Law Number 32 Year 2004 on Regional Government Law states that the Regional General Election Commission “...is responsible to the Regional People’s Representative Council,” as well as Article 66 (3) that reads “...request for the accountability on the performance of the Provincial General Election Commission”.

In the Petitioner’s argument, the requirement for the Provincial General Election Commission to be responsible and report to the Provincial General Election was argued to breach the principle of an election being fair and independent as required by Article 22E of the 1945 Constitution, of Article 22E (5) which provides that, (5) General elections shall be organized by national, permanent and independent commissions for general elections.

⁴⁰ Case Number 005/PUU-IV/2006, 201.

⁴¹ Case Number 005/PUU-IV/2006, 177.

⁴² Simon Butt, ‘The Constitutional Court’s Decision in the Dispute between the Supreme Court and the Judicial Commission : Banishing Judicial Accountability?’ (2009) 09(31) *Legal Studies Research Paper*.

⁴³ Case Number 072-073/PUU-II/2004.

The Government in its reply stated that a local election is not under the regime of governed elections. Head of Regency elections are governed by Article 18(4) of 1945 Constitution, which provides: (4) Governors, Regents and Mayors as the respective heads of provincial, regency, and municipal governments shall be elected democratically.

The Court was of the view that arranging a direct election for the head of the region must be based on general election principles, i.e., direct, public, free, confidential, fair and carried out by an independent organizer as required by Article 22E of the 1945 Constitution. Such objectives could not be achieved if the Regional General Election Commission as the organizer of the election for the head of the region was accountable to the DPRD, which consists of political parties who compete in such direct elections. The Regional General Election Commission must be accountable to the public instead of to the DPRD.⁴⁴ The Court declared article 57 (1) and article 66(3) of Law Number 32 Year 2004 on Regional Government Law as constitutionally invalid. In this case, the Court settled the confusion between the meaning of “general election” as stated in Article 22E and its relation to Article 18(4) of the 1945 Constitution. The Court was also able to decide that principles applicable to elections should apply to all types of election.

Proportionality Interpretation

Film Censorship⁴⁵

The Petitioners argued that film censorship violates the 1945 Constitution. The Petitioners included an actress, a film maker, a film producer, a film festival organizer and a film lecturer. The Petitioners’ argument was that the existence of censorship and a censorship institution violates Article 28C(1) of the Constitution.

Even though Article 28C(1) the 1945 Constitution provided the right to enjoyment of art and culture and film is one product of art, however, the Court determined that preemptive steps must be taken to restrict certain types of art

⁴⁴ Case Number 072-073/PUU-II/2004, 114.

⁴⁵ Case Number 029/PUU-V/2007.

before they are made available in the public domain.⁴⁶ A film that is not first censored may do damage that cannot be undone. To further these goals, an institution should be created to evaluate films and prevent films from circulating that may harm or injure another person's human rights. Nevertheless, the Court suggested that the implementation of film censorship must be in compliance with current standards not the original rationale under which the law was drafted. The Court decided that the Law on Film Censorship was constitutional.

In this case, the Court acknowledged that the enjoyment of art is protected by the Constitution. The Court also acknowledge that art should be enjoyed in "a complete" way without any 'scratch' that may reduce the quality of the art. However, the Court tried to put in the perspective that censorship is still needed in order that the public not suffer because of the art. The Court pointed out that enjoyment of art should be put in balance with the protection of society. Film Censorship is required to protect the public from imbalances or unnecessary values.

Truth and Reconciliation Commission is unconstitutional.⁴⁷

The Petitioners were individuals who had been victims of forceful disappearances by the military in 1998 and groups of people who had a common interest in human rights. The Petitioners argued that article 27 of Truth and Reconciliation Commission Law is constitutionally invalid. Article 27 of Truth and Reconciliation Commission Law has made the victims right to compensation and rehabilitation dependent on the granting of amnesty. Amnesty as required by article 27 requires the existence of the perpetrator. Consequently, without the existence of the perpetrator, it is impossible to grant amnesty, thus the victims do not obtain the guarantee for rehabilitation.⁴⁸

The Court recalled that the Government has an obligation to the fulfillment of human rights as ordered by Article 28I(4) of the 1945 Constitution:(4) The protection, promotion, enforcement and fulfillment of human rights shall be the responsibility of the state, particularly the Government.

⁴⁶ Case Number 029/PUU-V/2007, 227.

⁴⁷ Case Number 006/PUU-IV/2006.

⁴⁸ Case Number 006/PUU-IV/2006, 21.

The Court accepted the Government's argument that one of the objectives of Truth and Reconciliation Commission was to provide compensation for victims. However, the applicability of article 27 was flawed in its emphasis on individual perpetrators' criminal responsibility as it is difficult to identify the individual perpetrators, victims, and witnesses of human rights violations. This situation led to article 27 of Truth and Reconciliation Commission Law to contradict with Article 28D of 1945 Constitution which provides, (1) Every person shall have the right to the recognition, the guarantee, the protection and the legal certainty of just laws as well as equal treatment before the law.

Due the fact that article 27 is the spirit of the Truth and Reconciliation Commission Law, the Court declared the whole law as constitutionally invalid. In this case, the Court considered the right for victims to get compensation for past violations and the difficulty to obtain such compensation.

Why the Court Moves Further than Framers Intention

The first generation of the Justices of the Constitutional Court ended their term on 18 August 2008. In their era as the first generation of Indonesian Constitutional Justices, the Constitutional Court rendered important decisions and was recognized as the most respectful judiciary in Indonesia. The Court received 169 judicial review cases, 274 general election result dispute case for 2004 general election result disputes, one Presidential and Vice President Election Result dispute, and 10 cases on disputes between State institutions. At the time of the writing of this paper, the Constitutional Court has never received a case on the impeachment of the President or the Vice President.⁴⁹ The Court also struck out two laws, as wholly constitutionally invalid and revised numerous other laws. What is the reason for that action? Are there any specific forces that drove the Constitutional Court to act so progressively? In order to answer that question, I propose three possible possibilities. First is lack of constitutional law support, second, the nature of the 1945 Constitution, and third, the role of Chief Justice Jimly Asshiddiqie.

⁴⁹ Mahfud MD, 'The Role of the Constitutional Court in the Development of Democracy in Indonesia' (Paper presented at the World Conference on Constitutional Justice Cape Town 2009).

Lack of Constitutional Law Support

For many years, the New Order military regime, under President Suharto that ruled Indonesia for more than 30 years, relied on political repression to maintain the regime's authoritarian ideology. The use of intimidation also applied to academic institutions. Any voice of opposition from a scholar would automatically be suppressed by the regime.⁵⁰ In such circumstances, scholars who seriously studied constitutional law would be subjected to political pressure whenever they produced critical writing on government structures and practices. Consequently, the study of constitutional law is not well developed because there were not many scholars willing to risk challenging the authoritarian government through critical writing.⁵¹

Moreover, there was a lack of interest in the study of constitutional law, caused by great skepticism from Indonesia law students over the job prospects of being a constitutional lawyer in Indonesia.⁵² Indeed, without a constitutional court as a forum for constitutional lawyers to appear, the jobs for constitutional lawyers were severely limited. As a result, most Indonesian law students tended to focus on private law instead of public law, which includes constitutional law.

Existing constitutional theories affect how justices will decide certain kinds of controversial cases.⁵³ In Indonesia's experience, constitutional court practice probably often dominates constitutional law theory. Judges may often move to theories that support what they want, i.e. to theories that support the interpretive style they want to engage in. The existence of constitutional theories is justification for particular constitutional interpretations that are brought into question.⁵⁴ In making their arguments, Justices may be influenced by their own ideology, biases and references.⁵⁵ Constitutional law consists of methodological principles, doctrines and interpretation of specific provisions either in the bare text of the constitution or what is reliably known of its founders' intentions and

⁵⁰ Ariel Heryanto, *State Terrorism and Political Identity in Indonesia: Fatally Belonging* (Routledge, 2006).

⁵¹ Jimly Asshidiqqie, *Pokok-Pokok Hukum Tata Negara Indonesia Pasca Reformasi (the Principle of Indonesian Constitutional Law in Post Reformation)* (Bhuana Ilmu Populer, 2007) 38.

⁵² *Ibid.*

⁵³ Mark V Tushnet, 'Does Constitutional Theory Matter?: A Comment' (1986 - 1987) 65(4) *Texas Law Review* 777 778.

⁵⁴ Perry, above n 1 257.

⁵⁵ Robert A Dahl, *How Democratic is the American Constitution?* (2001) 55.

purposes.⁵⁶ Interpreting the Constitution calls for a combination of constitutional law and moral philosophy from the Justices.⁵⁷ The existing constitutional law is needed to maintain a connection between constitutional adjudication in the constitutional court with the society in which it functions.⁵⁸

Consequently, even though I have argued this in gross simplicity, this condition leads constitutional Justices to decide constitutional cases on the strength of their personal political preferences, not their answers to such philosophic questions as the nature of the Constitution and the best approach to finding constitutional meaning.⁵⁹ This condition will lead the Court to move to find rationalization in “judicial philosophies”, “constitutional principles” and after-the-fact window dressing for decisions reached on personal political grounds.⁶⁰

On the other hand, the lack of previous practice of judicial review and the lack of constitutional law development in Indonesia created a “freedom environment” for the Constitutional Court. The Constitutional Court could adopt other constitutional court practices in deciding their cases. The Court used practices from the South Korean Constitutional Court and German Constitutional Court, such as the principle of *erga omnes / ultra petita*,⁶¹ and conditional constitutionality.⁶²

The Nature of The 1945 Constitution

Another argument that I would like to present to support the assertion is the nature of the 1945 Constitution and its defects. As mentioned earlier, the amendment to the constitution was conducted in four phases, and the framers decided from the beginning that the amendments were to be conducted in this way. Once an area had been settled, the framers did not revisit the related articles.⁶³ As Indrayana resumed, the amendment process was conducted through “accident not design.”⁶⁴

⁵⁶ Goldsworthy, above n 40, 321.

⁵⁷ Dworkin, above n 60, 189.

⁵⁸ Jackson, above n 61, 606.

⁵⁹ Barber and Fleming, above n 43, 8.

⁶⁰ *Ibid.*

⁶¹ Case Number 001-021.PUU-I/2003, Electricity Case.

⁶² Case Number 058-059-060-063/PUU-II/2004 and 008/PUU-III/2005, the Management of Water Resources.

⁶³ Indrayana, above n 335.

⁶⁴ *Ibid* 332.

The framers were also hesitant to grant ‘full’ human rights protection in Article 28 of 1945 Constitution. However, the framers ‘locked’ the implementation of human rights with Article 28J as follows,

- (1) Every person shall be obligated to respect the human rights of another person in the orderly life of community, nation and State;
- (2) In exercising his/her rights and freedoms, every person must submit to the restrictions stipulated in laws and regulations with the sole purpose to guarantee recognition of and respect for other people’s rights and freedoms and fulfill fair demand in accordance with the considerations of morality, religious values, security, and public order in a democratic society.

Chief Justice Jimly Asshiddiqie

I believe the strongest driving force in the Court’s approach was the role of Chief Justice Jimly Asshiddiqie in orchestrating and managing his brethren. When the Constitutional Court officially opened on 19 August 2003, it had no funding, no office and no support staff. Chief Justice Jimly frequently stated that he started the Court with only three pieces of paper: the Constitution, the Constitutional Court Law and the Presidential Decree that appointed the Constitutional Court Justice.⁶⁵ With no office and no infrastructure, the Court had to use the Chief Justice’s personal mobile phone as its first contact number.⁶⁶ Chief Justice Jimly, as he was commonly referred to, was the only constitutional law scholar from a prominent university among the initial Justices and the only Justice with a strong constitutional law background.

As someone who closely followed the constitutional reform process, Chief Justice Jimly was aware that the Government 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 is to evaluate legislation and if the Court remains compliant to the government, the whole existence of Constitutional Court will be meaningless.⁶⁷

⁶⁵ Jimly Asshiddiqie, ‘*Bermodal Tiga Lembar Kertas (With Three Pieces of Paper)*’, *Republika* 11 January 2004.

⁶⁶ Chief Justice Jimly’s mobile phone is kept at Constitutional Court Museum.

⁶⁷ Hendrianto, above n 16, 106.

Therefore, Chief Justice Jimly immediately moved to declare that the Constitutional Court had the authority to invalidate statutes whenever they violate the Constitution. Chief Justice Jimly argued that the Court's decision to invalidate a Law is part of the democratic process, in other terms protecting what he called the voice of the general populace.⁶⁸ The Chief Justice explained that:

“A Law that is passed by Parliament and the Government is a reflection of majority voice. However, majority voice may not equal the voice of the general (populace), because there is a constitution that reflects the voice of the general (populace). So, whenever a Law does not comply with the Constitution it breaks the voice of the general (populace). Whenever a Law violates one constitutional right, it has violated the voice of the general (populace) and the Court should invalidate such statute.”⁶⁹

Scholars of the early years of the Indonesian Constitutional Court conclude that the Court tried to position itself as the guardian of the Constitution by upholding the principle of the rule of law (*negara hukum*).⁷⁰ It was Chief Justice Jimly who fought for the recognition of judicial status for the Constitutional Court and it was also he who devised the strategy to raise the profile of the Court in its early years of operation.⁷¹

From the beginning, Chief Justice Jimly believed that the Court should win the hearts of constitutional stakeholders and that the Court should become an alternative forum for the public to defend their rights.⁷² Chief Justice Jimly was fully aware that the Court would not be able to exercise its authority if nobody appeared before it. Therefore, Chief Justice Jimly tried to employ a generous strategy.⁷³ One example of this is his generous treatment of standing. In the Electricity Case,⁷⁴ the Petitioners were public interest advocacy groups. The Court held that Every citizen as a taxpayer had the constitutional right to question every law closely connected with economic policy having implications for their welfare.⁷⁵

⁶⁸ Personal communication with Chief Justice Jimly, 18 August 2004.

⁶⁹ Hendrianto, above n 16, 106.

⁷⁰ Butt, above n ; Petra Stockmann, *The New Indonesian Constitutional Court: A Study into its Beginnings and First Years of Work* (Hans Seidel Foundation, 2007)

⁷¹ Hendrianto dissertation explained further the role of Chief Justice JimlyAsshiddiqie in driving Indonesia Constitutional Court (2003-2008).

⁷² Personal communication with Chief Justice, 18 August 2004.

⁷³ JimlyAsshiddiqie, interview by Hendrianto, 31 July 2006.

⁷⁴ Case Number 001-021-022/PUU-I/2003.

⁷⁵ Ibid.

His constitutional law training made Chief Justice Jimly realize the importance of judicial institutions. Chief Justice Jimly was fully aware that the whole point of establishing a constitutional court was to scrutinize legislation, but if the government circumscribed the Court's authority, then there would be no point in establishing a Constitutional Court. Therefore, Jimly believe that the Court should invalidate a Law whenever it violated the Constitution.⁷⁶

III. CONCLUSION

There is no exact constitutional interpretation in my view. Each citizen may view the constitution according to his or her beliefs, understandings, values and expectations as to what the constitution means. Constitutional scholars, judges and Justices also have their own views and opinions as to which approaches to constitutional interpretation best reflect the true meaning of a constitution. In exercising their authority, a Constitutional Court Justice sees constitutional interpretation as a tool to find the truth or the best understanding of the Constitution as an instrument to claim justice and to protect the general welfare, and the other goods listed in the constitution.

Why does constitutional interpretation methodology matter? If a court decision cannot be expressed in terms of the nature of what the Constitution prescribes and what its words mean, then it is hard to see how society and scholars discern the authority of a judicial decision. It is undeniable that the Constitutional Court's presence in the Indonesian constitutional system has contributed greatly to the development of democracy and the enforcement of law in Indonesia. Since the Constitutional Court was established, legislative institutions are no longer able to formulate laws based on political strength alone, because despite having been produced democratically, the entire law or part of its substance can be annulled by the Court if its making or substance is contradictory to the Constitution. The discussion and data presented above shows how the Indonesian Constitutional Court has played an important role in

⁷⁶ Personal communication with Chief Justice Jimly, 18 August 2004.

the development of democracy in Indonesia. Similarly, after the Constitutional Court was established, the President can no longer be threatened by impeachment merely because of a political decision he or she makes.

Through its methodology, the Court has placed itself as the guardian of the constitution and the protector of human rights. Although the Court does not have a political mandate, all the actions of the Court and its decisions must be in line with political realities. This is not because it is the Court's preference to do so but because the Court's decisions will impact upon the political machinations. There is acceptance in Indonesia that the Court has a role in policing the democratic systems.

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