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THE CONSTITUTIONAL COURT OF THE REPUBLIC OF INDONESIA

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TEH CONSTITUTIONAL COURT OF
THE REPUBLIC OF INDONESIA

CONSTITUTIONAL REVIEW
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Constitutional Review

Note From Editors

Constitutional Review (CONSREV) Journal Volume 4 Number 2 is the last edition of CONSREV in 2018 published by Center for Research and Case Analysis and Library Management of the Constitutional Court of the Republic of Indonesia. The aim of this journal is to disseminate research, conceptual analysis, and other writings which focus on constitutional issues. Articles published by CONSREV cover various topics on constitution, constitutional courts, constitutional courts decisions and issues on constitutional law in any country.

This edition provides six articles discussing various topics such as the empirical study of possible determinants of decisions of Indonesian Constitutional Court's judges over the period 2003-2018, a comparative perspective on judicial review in Indonesia after the establishment of the Constitutional Court in 2003, the presidential impeachment happened in South Korea, the use of international human rights law as references in Indonesian constitutional adjudication, the constitutional retrogression in Indonesia during President Joko Widodo's Government, and the role that should be presented by the Constitutional Court of the Republic of Indonesia to harmonize the ideology of *Pancasila* in the Indonesia legal substance.

The first article is written by Björn Dressel and Tomoo Inoue. The authors' main discussion is about the megapolitical cases before the Constitutional Court

of Indonesia since 2004. It is an empirical study which tried to find the possible determinants of the decisions of its judges over the period 2003-2018. Based on the analysis, authors found declining dissent among justices on the bench over time and also provides evidence of strategic behaviour of justices at the ending of their own terms.

The next article written by Theunis Roux provides a comparative perspective on judicial review in Indonesia after the establishment of the Constitutional Court in 2003. A well-known story of the "transformation of American law" over the first half of the last century is provided as the introduction. At the end, the author proposed that the Court urgently needs to present a coherent account of its legitimate claim to authority if it is to continue playing an effective role.

The third article is written by Jin Wook Kim. This paper aims to discuss how the Constitutional Court has developed its strategic position in terms of political dynamics, by analyzing the two presidential impeachment cases. Kim concludes that the recent two impeachment cases decided by the Constitutional Court of Korea, respectively in 2004 against President Roh and in 2017 against President Park might be classic examples of how the state institutions including the Court interact with other institutions in a very political case like presidential impeachment, in terms of political dynamics.

Then, an article by Bisariyadi mainly talks about the use of international human rights law in Indonesian constitutional adjudication as reference. Additionally, this study also aims to answer the question of what underlies the Court to made reference to international human rights law. As the result of the study, the author mentioned that the practice of referring to international law demonstrates the open attitude of Indonesian constitutional justices to the universal nature of fundamental rights.

The fifth article is provided by Abdurrachman Satrio. It mainly discusses the constitutional retrogression in Idonesia under President Joko Widodo's Government. This paper examines whether constitutional retrogression, the process through which democratically elected rulers use formal legal measures gradually to undermine democracy, has occurred in Indonesia, especially during the reign of President Joko Widodo.

Finally, an article written by Tedi Sudrajat focuses on the harmonization of regulation based on the value of *Pancasila* through the Constitutional Court of Indonesia. The finding of the study shows that the paradigm development of *Pancasila* based on legal state should demand the development of a democratic constitutional state, which juxtaposes the principles of a rule-of-law (nomocracy) with harmonious and complementary principles of the sovereignty of the people (democracy). This role can be solved by the Constitutional Court to harmonize the ideology of *Pancasila* in the Indonesia legal substance.

The editors of CONSREV journal expect that all issues presented in this current issue might give some new judgement, insight, and understanding on constitutions, constitutional court decisions, and constitutional issues in broader nature to the reader of this journal.

Editors.

Megapolitical Cases before the Constitutional Court of Indonesia since 2004: An Empirical Study

Björn Dressel and Tomoo Inoue

Constitutional Review, Vol. 4, No. 2, December 2018, pp. 157-187

The Constitutional Court of Indonesia is considered one of Asia's most activist courts. Here we investigate empirically possible determinants of the decisions of its judges over the period 2003–18. The findings are based on a unique data set of 80 high-profile political cases, complemented by data on the socio-biographic profiles of 26 judges who served during that period. Testing for common perceptions of the Constitutional Court since its inception, we first describe patterns in judicial decision-making across time and court composition before testing specifically for the impact of the judges' professional backgrounds, presidential administrations, the influence of the Chief Justice, and cohort behaviour. The analysis finds declining dissent among justices on the bench over time and also provides evidence of strategic behaviour of justices at the ending of their own terms. But there is little statistical evidence that judicial behaviour has been affected by work background (except for those coming from the executive branch), appointment track or generation – hence suggesting that justices seem to retain more independence than the public seems to perceive. We then discuss the results in the context of Indonesia's evolving constitutional democracy and look at the implications for comparative studies of judicial behaviour.

Keywords: Constitutional Court, Judges, Judicial Behaviour, Indonesia, Megapolitical Cases

Indonesia's Judicial Review Regime in Comparative Perspective

Theunis Roux

Constitutional Review, Vol. 4, No. 2, December 2018, pp. 188-221

This paper provides a comparative perspective on judicial review in Indonesia after the establishment of the Constitutional Court in 2003. It starts by retelling the well-known story of the "transformation of American law" over the first half of the last century. As narrated by Morton Horwitz, that story is about how nineteenth-century industrialisation processes destabilised the premises of "Classical Legal Thought", and then about how the legal realist movement exploited the ensuing crisis to transform the way Americans think about law and its relationship to other social systems. Mining this story for generalisable concepts, the paper argues that the establishment of strong-form judicial review necessarily draws on and, in turn, influences prevailing conceptions of legal and political authority. These conceptions vary along a continuum, in the first case, from public confidence in law's autonomy to a conception of law as deeply immersed in politics, and, in the second case, from a conception of legitimate political authority as contingent on a fairly won democratic mandate to a conception of political authority as residing in the power holder's capacity to promote important social goals, such as national security or economic prosperity. Each of these variables may change independently of the other. In certain situations, however, they may also combine to form a relatively stable *judicial review regime* – a hegemonic legitimating ideology in which conceptions of legal and political authority lock into and mutually support each other. The fourth section uses this conceptual framework to assess the Indonesian Constitutional Court's approach to its mandate after 2003. Under its first two chief justices, the paper notes, the Court engaged in a concerted effort to build public understanding of its legitimate role in national politics. The Court's abrupt switch between its first Chief Justice, Jimly Asshiddiqie's legalist conception of law's authority and his successor, Mohammad Mahfud's more instrumentalist conception, however, has impeded the consolidation of a determinate judicial review regime. Given the considerable threats still confronting Indonesia's democracy, this situation is worrisome. The Court urgently needs to present a coherent account of its legitimate claim to authority if it is to continue playing an effective role.

Keywords: Constitutional Court, Indonesia, Judicial Review, Legal and Political Authority

Korean Constitutional Court and Constitutionalism in Political Dynamics: Focusing on Presidential Impeachment

Jin Wook Kim

Constitutional Review, Vol. 4, No. 2, December 2018, pp. 222-248

The Constitutional Court of Korea, which should be a product of the June Democracy Movement in 1987, has transformed Korea's constitutionalism ever since its inception. The recent two impeachment cases decided respectively in 2004 against President Roh and in 2017 against President Park might be classic examples of how the state institutions including the Court interact with other institutions in a very political case in terms of political dynamics. In the impeachment case against President Roh, the Court positioned itself strategically by establishing the 'grave violation of law' rationale, where it sided with the impeaching parliament by finding three counts of violations of law but dismissed the case in its entirety through the operation of the 'grave violation of law'. In the impeachment case against President Park, the Court basically followed the grave violation logic but reached a different conclusion to remove the President, which might be another strategic position taken by the Court, which is in line with the will of the super-majority of the Korean public. This paper aims to discuss how the Constitutional Court has developed its strategic position in terms of political dynamics, by analyzing the two presidential impeachment cases.

Key Words: Grave Violation of Law, Korean Constitutional Court, Presidential Impeachment

Referencing International Human Rights Law in Indonesian Constitutional Adjudication

Bisariyadi

Constitutional Review, Vol. 4, No. 2, December 2018, pp. 249-270

The power of the Indonesian Constitutional Court to review laws is a constitutional adjudication process. It is a forum to resolve constitutional issues where a citizen can challenge Law that has injured his rights. The Court's reasoning provides audiences with the debates for its deliberation. Audiences may find reference to the international human rights law. It is an interesting practice. However, there is no studies yet about the information on the statistic of the Court made reference to international human rights law. As such, this study aims to identify reference to international human rights law in the Court's decision on judicial review cases from 2003 to 2016. Additionally, this study also aims to answer the question of what underlies the Court to made reference to international human rights law. As many studies show, the objective of Constitutional Court's references to the international human rights law is to strengthen constitutional rights protection. Nonetheless, the Court did not pay any interests to the global agenda of transnational constitutionalism or a convergence of rights and legal pluralism. The article is divided into 5 (five) sections, commencing with the introduction. The second part discusses the status of international human rights law in Indonesia. As the third presents information on Court's decision which cited international human rights law. Then, the fourth presents typical function of the decision that made reference to international human rights law. It concluded that the practice of referring to international law demonstrates the open attitude of Indonesian constitutional justices to the universal nature of fundamental rights.

Keywords: Constitution, Constitutional Adjudication, Constitutional Court, International Human Rights Law, Judicial Review

Constitutional Retrogression in Indonesia Under President Joko Widodo's Government: What Can the Constitutional Court Do?

Abdurrachman Satrio

Constitutional Review, Vol. 4, No. 2, December 2018, pp. 271-300

This paper examines whether constitutional retrogression, the process through which democratically elected rulers use formal legal measures gradually to undermine democracy, has occurred in Indonesia, especially during the reign of President Joko Widodo. To this end, the paper analyzes the impact of the Widodo government's policies on three fundamental requirements of a democratic state: a democratic electoral system, rights to speech and association, and the rule of law. The paper finds that Widodo's government, in its efforts to contain the threat of Islamist populism, has indeed undermined all three of these elements to varying degrees. While Indonesia's democracy may yet be saved by the Constitutional Court, an institution that Widodo's government has until now failed to control, the Court cannot save democracy by itself. Its chances of doing so will depend on public support.

Keywords: Constitutional Court, Constitutional Retrogression, Democracy; Joko Widodo, Indonesian

Harmonization of Regulation Based on *Pancasila* Values Through The Constitutional Court of Indonesia

Tedi Sudrajat

Constitutional Review, Vol. 4, No. 2, December 2018, pp. 301-325

The legal system which is adopted and applied in Indonesia was based on the formation from the founding fathers which is adjusted to the condition and the spirit of Indonesia as a nation known for its legal system as *Pancasila*. Ideally, *Pancasila* serves as the philosophy for the nation of Indonesia, as state's ideology and as the basis of the state. However, in reality, vertical conflicts (government and society) and horizontal conflict (inter-society) have created a variety of concerns, in which the sense of nationalism and diversity has diminished. The trigger is because *Pancasila* can only be understood as the ideology and the basis of the state, without saturating the meaning contained therein. The paradigm development of *Pancasila* based on legal state should demand the development of a democratic constitutional state, which juxtaposes the principles of a rule-of-law (nomocracy) with harmonious and complementary principles of the sovereignty of the people (democracy). This role can be solved by the Constitutional Court to harmonize the ideology of *Pancasila* in the Indonesia legal substance. When the legal development is integrated into meaning, the legal development which characterized by *Pancasila* can be realized to resolve the variety of community conflicts.

Keywords: Constitutional Court, Ideology of *Pancasila*, Legal Development, Legal Harmonization

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Megapolitical Cases before the Constitutional Court of Indonesia since 2004: An Empirical Study

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Abstract

The Constitutional Court of Indonesia is considered one of Asia's most activist courts. Here we investigate empirically possible determinants of the decisions of its judges over the period 2003–18. The findings are based on a unique data set of 80 high-profile political cases, complemented by data on the socio-biographic profiles of 26 judges who served during that period. Testing for common perceptions of the Constitutional Court since its inception, we first describe patterns in judicial decision-making across time and court composition before testing specifically for the impact of the judges' professional backgrounds, presidential administrations, the influence of the Chief Justice, and cohort behaviour. The analysis finds declining dissent among justices on the bench over time and also provides evidence of strategic behaviour of justices at the ending of their own terms. But there is little statistical evidence that judicial behaviour has been affected by work background (except for those coming from the executive branch), appointment track or generation – hence suggesting that justices seem to retain more independence than the public seems to perceive. We then discuss the results in the context of Indonesia's evolving constitutional democracy and look at the implications for comparative studies of judicial behaviour.

Keywords: Constitutional Court, Judges, Judicial Behaviour, Indonesia, Megapolitical Cases

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I. INTRODUCTION

Courts have become major players in Asia's evolving political arenas. As countries in the region democratised and liberalised over the last 25 years, since the 1990s there has been growing judicial involvement and assertiveness in political matters. This has contributed to claims that in the region politics is becoming ever more judicialized,[1] a trend that has been well-documented for some time in other parts of the world.[2]

The Constitutional Court of the Republic of Indonesia (*Mahkamah Konstitusi*, MK) is a good illustration for this trend. In the past 15 years, the MK has revised seventy-four laws, annulled four completely, and nullified portions in the course of granting just over a quarter of all petitions. Perhaps more important, it has not shied away from political controversy; in fact some of its high-profile decisions are recognised as having had major political and economic repercussions; for instance it has invalidated the privatisation of electricity utilities; condemned government budgets that failed to allocate sufficient funds for education, and protected religious, ethnic and sexual minorities from government discrimination.[3] Combined with its regular engagement in contested electoral matters, it is thus not surprising that the court is considered unusually activist.[4]

Such high-level engagement, although vulnerable to the dangers shown by the constitutional court in Thailand,[5] seem to have done little to impugn the reputation of the Indonesian court. Much to the contrary, relying on its initial leadership and a 'built up stock of political capital because of its apparent integrity

[1] Björn Dressel, *The Judicialization of Politics in Asia* (Abingdon and New York: Routledge, 2012).

[2] Rachel Sieder, Line Schjolden, and Alan Angell, eds., *The Judicialization of Politics in Latin America* (New York and Houndsmills: Palgrave Macmillan, 2005); Neal C. Tate and Torbjörn Vallinder, eds., *The Global Expansion of Judicial Power* (New York: New York University Press, 1995).

[3] Simon Butt, *The Constitutional Court and Democracy in Indonesia* (Leiden: Brill Nijhoff, 2015).

[4] Dominic Nardi, "*Demand-Side Constitutionalism: How Indonesian NGOs Set the Constitutional Court's Agenda and Inform the Justices*" (Policy Paper., Centre for Indonesian Law , Islamic Society, 2018); Simon Butt, "Indonesia's Constitutional Court: A Reform Over-Achiever?," *Inside Indonesia* 87, no. July-September (2006).

[5] Björn Dressel and Khemthong Tonsakulrungruang, "Coloured Judgement? The Work of the Thai Constitutional Court, 1998–2016,"*Journal of Contemporary Asia* early print (13 June 2018).

and good faith'[6] over the years, the court has experienced a 'remarkable rise'[7] in public standing and found wide support in public opinion polls, despite a short, abrupt, but temporary drop in 2013 after its Chief Justice, Akil Mochtar, was arrested.[8] As a result, together with the Corruption Eradication Commission (*Komisi Pemberantasan Korupsi,* KPK), it is one of the most respected institutions in the country[9] – one that has been widely credited with helping the country's democratic consolidation.[10]

Yet more recent developments suggest that the court is confronted with growing problems and criticism. For instance, the arrests for corruption of Chief Justice Akil Mochtar in 2013 and Justice Patrialis Akbar in 2017 have raised questions about the MK's independence and evoked widespread public concerns that its judges are not immune from the endemic clientelist-corrupt practices in Indonesia's broader justice sector.[11] Civil society actors, meanwhile, have begun questioning the quality of appointments to the court, based on what is perceived to be an increasingly politicized appointment process,[12] and academics have expressed concerns about a decline in leadership[13] and the quality of decisions in terms of legal reasoning, consistency and the evidence base in high-profile cases.[14] In general, then, the perception seems to be growing that

6 Donald Horowitz, *Constitutional Change and Democracy in Indonesia* (Cambridge and New York: Cambridge University Press, 2013): 243.

7 Theunis Roux and Fritz Edward Siregar, "Trajectories of Curial Power: The Rise, Fall and Partial Rehabilitation of the Indonesian Constitutional Court," *Australian Journal of Asian Law* 16, no. 2 (2016): 2.

8 An IFES poll in 2005 showed that 68% approved the court (with 11% disapproving); a number that dropped to 28% when the Mochtar scandal broke (see, https://www.ifes.org/surveys/public-opinion-indonesia-2005). A 2018 LSI poll shows trust in the MK at 76%, only surpassed by TNI (90.4%); KPK (89%); National Police (87%) and BPK (79%); see for results: https://nasional.kompas.com/read/2018/07/31/17242921/survei-lsi-dpr-lembaga-negara-dengan-tingkat-kepercayaan-terendah.

9 See Kompas survey at: https://nasional.kompas.com/read/2017/10/21/07122651/survei-kompas-citra-tni-naik-hingga-94-persen-citra-dpr-terendah.

10 Marcus Mietzner, "Political Conflict and Democratic Consolidation in Indonesia: The Role of the Constitutional Court," *Journal of East Asian Studies* 10, no. 3 (2010).

11 See "Judicial Mafia: Corruption as a barrier to justice in Indonesia", found at: https://www.ibj.org/2010/08/13/judicial-mafia-corruption-as-a-barrier-to-justice-in-indonesia.

12 See, "Justice appointment 'a setback to democracy', Jakarta Post (July 31, 2013) at: http://www.thejakartapost.com/news/2013/07/31/justice-appointment-a-setback-democracy.html

13 Stefanus Hendrianto, "The Rise and Fall of Heroic Chief Justices: Constitutional Politics and Judicial Leadership in Indonesia," *Washington International Law Journal* 25, no. 3 (2016).

14 Simon Butt, "Indonesian Constitutional Court decisions in regional head electoral disputes," (CDI Policy Papers on Political Governance., Australian National University, 2013), 1-37; Simon Butt, "The Constitutional Court's Decision in the Dispute Between The Supreme Court and the Judicial Commission: Banishing Judicial Accountability?," in *Indonesia. Democracy and the Promise of Good Governance*, ed. Ross H. McLeod and Andrew MacIntyre (Singa-

Constitutional Court judges "are less competent, more partisan, and corrupt" in the words of a well-known observer during an international symposium.[15]

How well founded are these allegations? More specifically, what factors, other than the law, may influence the decisions of judges in high-profile cases? These questions are of particular relevance now: In 2019 another round of contested elections is likely to draw in the Constitutional Court.[16]

Answers to this question from scholars have been limited. While the MK has certainly garnered much attention in academic writing, there have been few studies from a positivist, empirical viewpoint. Instead, legal scholars have mainly described the MK's institutional powers and processes and the text of its decisions.[17] Political scientists and socio-legal scholars have drawn attention to a variety of issues ranging from the foundation of the court;[18] its role in democratic consolidation;[19] the political environment,[20] or aspects of court leadership.[21] With only a few exceptions,[22] studies of the MK generally make no appeal to hard quantitative evidence; most simply draw conclusions from a handful of selected cases, or apply only narrowly to specific issues, such as electoral law.

Unlike studies to date, then, we here apply an empirical methodology to the analysis of how the judges of the MK make decisions. The judicial behaviour at the Constitutional Court is explored using an original dataset we collected covering the period 2004–18 based on a stringent methodology for identifying

pore: Instititute of South East Asian Studies, 2007), 178-99; Stefanus Hendrianto, "The Indonesian Constitutional Court and the Crisis of the 2019 Presidential Election," *I-CONnect Blog*, no. Sept. 19, 2018 (2018).

15 Unassigned quote from Indonesia update, ANU Sept. 15, 2018 (correspondence on file with author).

16 Hendrianto, "The Indonesian Constitutional Court and the Crisis of the 2019 Presidential Election".

17 Butt, "Indonesian Constitutional Court decisions in regional head electoral disputes."; Stefanus Hendrianto, "Convergence or Borrowing: Standing in The Indonesian Constitutional Court," *Constitutional Review* 1, no. 1 (2015).

18 Petra Stockmann, *The New Indonesian Constitutional Court: A Study Into its Begining and First Years of Work* (Jakarta: Hanns Seidel Foundation, 2007). Hendrianto, "Institutional Choice and the New Indonesian Constitutional Court," in *New Courts in Asia*, ed. Andrew Harding and Penelope Nicholson (Oxon and New York: Routledge, 2010), 158-77.

19 Mietzner, "Political Conflict and Democratic Consolidation in Indonesia: The Role of the Constitutional Court."

20 Fritz Siregar, "The Political Context of Judicial Review in Indonesia," *Indonesia Law Review* 2(2015).

21 Stefanus Hendrianto, *Law and Politics of Constitutional Courts: Indonesia and the Search for Judicial Heroes* (New York: Routledge, 2018).

22 Dominic Nardi, "Demand-Side Constitutionalism: How Indonesian NGOs Set the Constitutional Court's Agenda and Inform the Justices," CILIS Policy Papers (Melbourne 2018).

megapolitical cases. We complement this dataset of 80 cases with socio-biographic profiles of the 26 judges who served on the MK bench during this period. Patterns of judicial alignment and dissent are tested using the original dataset to explore the extent to which the court plays a counter-majoritarian role in Indonesia's political system.

Our systematic analysis of descriptive data and the results of the regression analysis fail to support the claim that MK is politicized and thus lacks independence – measured narrowly here in terms of votes for and against the sitting government.[23] While it is true that over time there has been a decline in dissent on the bench, we found no statistical evidence that traits such as work background, paths to appointment, or cohort behaviour, influenced MK decisions for or against the government in high-profile cases. The results are thus somewhat surprising given the wave of recent pessimism about the MK's judicial behaviour. And although we do not in any way suggest that our findings can be read without deep consideration of the context and content of each decisions, we do expect our study to help forward a much-needed better understanding of the behaviour of MK judges by providing the first systematic account of their decision making – one that is more positive than standard accounts in current scholarship.

The paper is structured as follows: To fully appreciate how MK judges behave, in Section I, we address the MK's institutional background and performance. Section II briefly summarises theories of judicial behaviour and the initial hypothesis, followed by discussion of the empirical results in Section III. Section IV sets out final conclusions.

[23] There is a large and complex literature on judicial independence (e.g., Julio Rios-Figuero and Jeffrey K. Staton, "An Evaluation of Cross-National Measures of Judicial Independence," *The Journal of Law, Economics, and Organizations* 30, no. 1 (2009); Peter H. Russel, "Towards a General Theory of Judicial Independence," in *Judicial Independence in the Age of Democracy. Critical Perspectives from around the World*, ed. Peter H. Russel and David M O'Brian (Charlottsville and London: University of Virginia Press, 2001). For the approach chosen here see, Desiree A. Desierto, "Judicial Independence: Evidence from the Philippine Supreme Court (1970-2003)," in *The Political Economy of Governance*, ed. Norman Schofield and Gonzalo Caballero (Cham: Springer International Publishing, 2015), 41-57.

II. Establishment, Powers and Performance of the The Constitutional Court of the Republic of Indonesia

The Constitutional Court of the Republic of Indonesia (*Mahkamah* Konstitusi, MK) was established by statute in August 2003;[24] the idea had been discussed in a working committee of the People's Consultative Assembly (*Majelis Permusyaratn Rakya*t, MPR) and was revived and brought to fruition during Indonesia's prolonged process of constitutional amendment process (1999–2004). Given a sense of urgency caused by the constitutional crisis triggered in 2001 by the impeachment process against then-president Abdurrahman Wahid (1999–2001), and despite considerable resistance from political and some legal actors (among them the Supreme Court), the Constitutional Court was seen as a way to fill a judicial gap that had caused legal uncertainty and prolonged political disputes since independence in 1945.[25]

The Constitutional Court Act gave the MK five specific mandates: judicial review of legislation for adherence to the constitution; resolving disputes about the relative jurisdiction of state institutions; dissolving political parties; hearing electoral disputes (Art. 24C(1)), and deciding on motions to impeach the president or vice president (Art 24C(2)). Later laws to curtail some of these powers have not only been rejected by the MK but also countered by its broad interpretation of its powers,[26] which led some observers to wonder if the court had morphed from the envisioned 'negative' legislator to a 'positive' legislator despite attempts at self-restraint (e.g., review limited to norms, prospectivity).[27]

Safeguards for judicial independence are strong – at least formally. The law provides for both a multiple-track appointment system and budget autonomy.

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[24] The Court's governing law, the 2003 Constitutional Law, was passed on 13 August 2003. Provisions had been made for the Court's establishment in the third amendment to Indonesia's Constitution, approved on 9 November 2001, and the fourth amendment (10 August 2002).

[25] Butt, *The Constitutional Court and Democracy in Indonesia*: 9-32; Stockmann, *The New Indonesian Constitutional Court: A Study Into its Begining and First Years of Work*.

[26] See Constitutional Court Decision 066/PUU-II/2004 [Chamber of Industry Case (2004)]; for historical account of the debates on Art. 50 of the Constitutional Court Law, see Butt 2013: 90-91

[27] Simon Butt, "Indonesia's Constitutional Court: Conservative Activist or Strategic Operator?," in *The Judicialization of Politics in Asia*, ed. Björn Dressel (Abingdon; New York: Routledge, 2012).

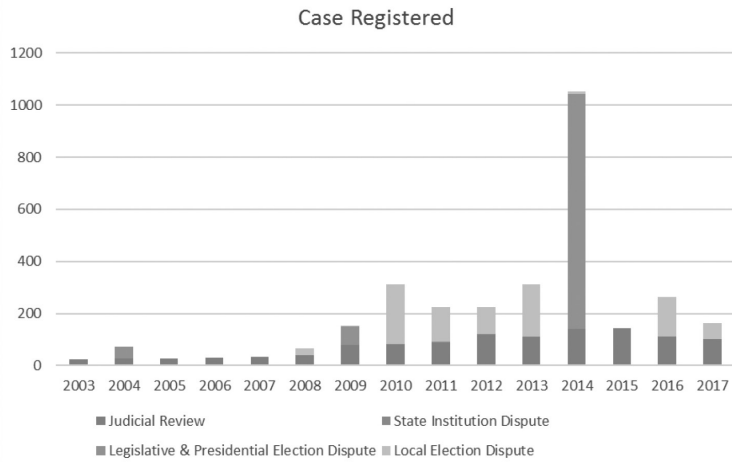
Of the nine Constitutional Court Judges, who serve five-year terms, renewable once, and have to retire at 70 (67 until 2011), three a nominated by the president, three by the legislature, and three by the Supreme Court. Modelled after appointment to the South Korean Constitutional Court,[28] this mechanism aims to prevent a single institution from monopolizing the court and seeks a healthy balance between executive, legislative, and judicial appointments. Judges who seek renewal of their terms may explore all three avenues, reducing their dependence on the institution that initially nominated them.[29] Similarly, full budget autonomy is meant to insulate the institution and its judges from Indonesia's notorious political and judicial corruption.[30]

However, concerns about the inner working of the court in light of alleged ethics violations and widely publicized corruption cases have prompted changes to the 2003 Constitutional Court Law. In 2011 the Indonesian parliament changed the arrangements for the Court's ethics council, strengthening the qualifications and experience required for appointment of justices (already high with the requirement of a PhD); a reduction in the term of the court chair (akin to Chief Justice) and deputy chair from three to two and a half years, and in October 2013, following the arrest of Akil Mochtar, Indonesian president Yudhoyono issued a regulation-in-lieu-of-law (known as a *Peraturan Pemerintah Pengganti Undang-undang or Perpu*) that would require justices to have had no links to a political party for seven years and to undergo screening by an independent selection panel.[31] However, in 2014 the court rejected this *Perpu* in its entirety.[32]

The court has had a high workload for the last 15 years. This is because the number of cases filed has gradually increased, with considerable spikes during election times when the court has to deal with large amounts of disputes related to local as well as presidential and legislative elections (see figure 1).

[28] Hendrianto, "Institutional Choice and the New Indonesian Constitutional Court," 161.
[29] So far, only two judges have made use of this option (i.e., Harjono and Palguna).
[30] Daniel S. Lev, "State and Law Reform in Indonesia," in *Law Reform in Developing and Transitional States*, ed. Timothy Lindsey (London and New York: Routledge, 2007).
[31] Haeril Halim and Ina Parlina, 'House endorses SBY's MK reform plan', *The Jakarta Post*, 20 December 2013
[32] Constitutional Court Decision 1-2/PUU-XII/2014.

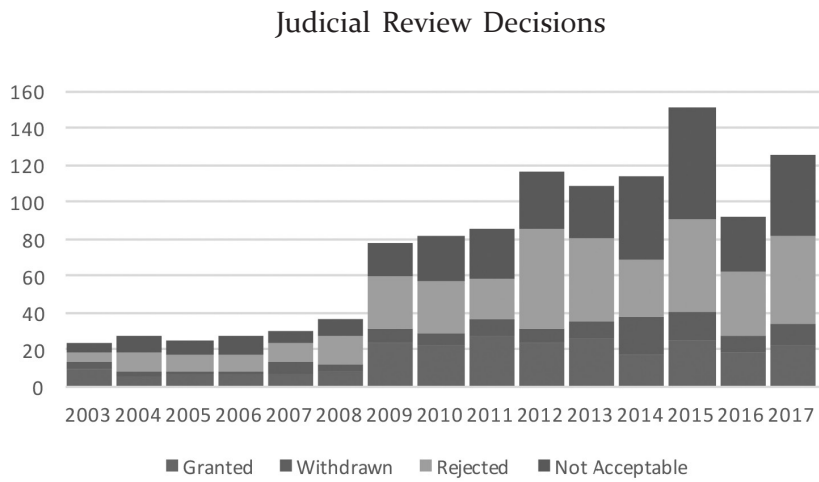
Figure 1: Constitutional Court Case Petitions by Type, 2003–17



Source: MK.

Judicial review cases also steadily increased, though they have plateaued over the last five years. On average, about 25 percent of these petitions are granted; on average the court has rejected outright more than a third of the petitions – a trend that has been rising in the last five years, together with some applications becoming 'non-acceptable' (figure 2).

Figure 2: Judicial Review Decisions by Category, 2003–17



Source: MK.

While the court is understood to have maintained high standards under high workload,[33] it has also faced growing criticism. Perhaps because of the high case load, some observers have noted that debate among justices is declining in high-profile cases and even suggested that as a result rulings are shorter.[34] Cases of corruption by justices on the bench (e.g., CJ Mochtar in 2013 and Patrialis Akbar in 2017) have also intensified public concerns about whether the bench is independent of political and business interests,[35] if not the 'quality' of its justices over time. Some authors have suggested qualitative differences between the 'generations' of justices on the bench,[36] and a decline in court leadership,[37] both stemming from a more politicized appointment process despite new regulations.[38] Others have suggested that court decisions are largely driven by public opinion, particularly in high-profile political cases, and there is some empirical evidence of that.[39]

Taken together, these suggestions ultimately reveal concerns about what is driving the behaviour of judges on one of Asia's most activist courts: How do Constitutional Court justices make decisions, particularly in cases where political influence is likely to be exerted on them. Keeping such perceptions in mind, the next section will briefly review some current theories about judicial behaviour, before we test assumptions empirically.

III. Theory and Hypothesis

Judicial decision-making in high courts, whether supreme or constitutional courts, is a result of multiple variables. Personal attributes and attitudes matter (including policy preferences, for example, dispositions about outcomes and policies). Intra-court interaction also matters (natural pressure for consensus;

33 Butt, *The Constitutional Court and Democracy in Indonesia*: 6

34 Butt, *The Constitutional Court and Democracy in Indonesia*: 62.

35 See, Is the Indonesian Constitutional Court Corrupt?, Leiden Law Blog, https://leidenlawblog.nl/articles/is-the-indonesian-constitutional-court-corrupt.

36 Hendrianto, "The Rise and Fall of Heroic Chief Justices: Constitutional Politics and Judicial Leadership in Indonesia."

37 Stefanus Hendrianto, *Law and Politics of Constitutional Courts: Indonesia and the Search for Judicial Heroes*.

38 Pan Mohamad Faiz, "A Critical Analysis of Judicial Appointment Process and Tenure of Constitutional Justice in Indonesia," *Hasanuddin Law Review* 2, no. 2 (2016): 152-68.

39 Nardi, "Demand-Side Constitutionalism: How Indonesian NGOs Set the Constitutional Court's Agenda and Inform the Justices."

concern for court reputation; a common objective to empower the court over competing political and judicial actors). Party politics may also be relevant (for example, loyalty to the appointer). Finally, these variables interact in a specific constitutional and doctrinal environment, some with more, others with less legal formalism.

The relative importance of these variables varies with explanatory theory.[40] For instance, the *legal* model assumes that judges decide in conformity with laws and precedent.[41] Fostering an image of judges as neutral and apolitical, they use technical interpretation skills to ascertain the law that best applies to the specific case.[42] Other approaches portray judges as individuals with discernible political motivations—*attitudinal* models argue that ideological positions and policy preferences shape judicial decisions, especially in courts of last resort.[43] They downplay the influence of law and portray judges as focused on *legal policy*.[44] The *strategic* model of judicial decision-making, also guided by the notion of judicial policy preferences, acknowledges that judges take into account the views of other actors and the institutional context, and may even deviate from a preferred outcome to take those views into account.[45]

A full discussion of these theories is beyond the scope of this paper. Suffice it to say that recent academic debates have increasingly raised concerns about the reach of certain models beyond the West.[46] Legal, attitudinal, and strategic

[40] See a good overview in Lawrence Baum, *Judges and Their Audiences: A Perspective on Judicial Behavior* (Princeton: Princeton University Press, 2006), 1-21; Theunis Roux, *The Politico-Legal Dynamics of Judicial Review: A Comparative Analysis*, Comparative Constitutional Law and Policy (Cambridge: Cambridge University Press, 2018).

[41] Michael A. Bailey and Forrest Maltzman, *The Constrained Court: Law, Politics and the Decisions Justices Make* (Princeton: Princeton University Press, 2011).

[42] Martin Shapiro, *Courts: A Comparative and Political Analysis* (Chicago: Chicago University Press, 1981).

[43] Jeffrey A. Segal and Harold J. Spaeth, *The Supreme Court and the Attitudinal Model* (New York: Cambridge University Press, 1993); Jeffrey Segal, *The Supreme Court and the Attitudinal Model Revisited* (Cambridge: Cambridge University Press, 2002).

[44] Lawrence Baum, "What Judges: Judges' Goals and Judicial Behavior," *Political Research Quarterly* 47, no. 3 (1994): 749-68.

[45] Lee Epstein and Jack Knight, *The Choices Justices Make* (Washington, DC: CQ Press, 1998); Mark J. Ramseyer, "The Puzzling (In)Dependence of Courts: A Comparative Approach," *Journal of Legal Studies* 23(1994); Pablo Spiller and Rafael Gely, "Strategic Judicial Decision-making," in *The Oxford Handbook of Law and Politics*, ed. Keith E. Whittington, Daniel R. Kelemen, and Gregory A. Caldeira (Oxford: Oxford University Press, 2010).

[46] Theunis Roux, "American Ideas Abroad: Comparatiove Implications of US Supreme Court Decision-Making Models," *I Con* 13, no. 1 (2015); Björn Dressel, Raul Sanchez Urribarri, and Alexander Stroh, "Courts and Informal Networks: Towards a Relational Perspective on Judicial Politics beyond Western Democracies," *International Political Science Review* 39, no.5 (2018): 573-584.

accounts tend to assume that political institutions and legal systems are solidly institutionalized—hardly the case in the Global South. They also tend to portray judges as insulated conflict adjudicators, motivated by individual preferences and engaging with other legal and political actors solely to advance their own goals. Yet the motivations of judicial behaviour are complex; often they are not based on ideological fault-lines, particularly in settings best described as clientelist, weakly institutionalized, and highly relational.[47] As a consequence, in such settings, the interplay between law and politics attracts more attention.[48]

The model we propose here is loosely inspired by the strategic model identifiable in the literature.[49] We first explore and then, in line with the model, test some of the broader perceptions of the behaviour of Constitutional Court judges. Hence, we start by presenting basic statistics describing the background of judges and the composition of the bench, before testing specifically for the effects of the presidential administration; the work background of judges; and the generational cohort. We also control for age, gender and decision tendency over time. In other words, we do not assume that ideological preferences, which in the Indonesian political context are hard to discern, affect decisions for or against the government in high- profile cases, but rather that the dynamics might be driven by personal traits such as work background, appointments, and generational cohort – broadly in line with the strategic model.

Recognizing the widespread public perceptions and criticisms of the court, we test for five different sub-hypotheses broadly in line with a strategic understanding of the behaviour of the MK justices:

> (H1) While the appointer is in office, the justices are loyal to the President for reasons loosely similar to those of the attitudinal or strategic model. However, once the presidential term is nearing completion, strategic

[47] Björn Dressel, "The Informal Dimension of Judicial Politics: A Relational Perspective," *Annual Review of Law and Social Science* 13 (2017): 413-30.

[48] Roux, *The Politico-Legal Dynamics of Judicial Review: A Comparative Analysis*.

[49] The attitudinal model, which assumes that judicial behaviour takes the form of sincere ideological voting due to the combination of life tenure, no judicial superiors, docket control, and no career ambition, seems ill-adapted to the MK bench given mandatory retirement age, limited docket control, renewed appointments and post-judicial career trajectories.

defection is likely, thus increasing the likelihood of a vote against the presidential administration.

(H2) The closer justices are to retirement age, or the closer the end of the president's term, the more likely justices are to vote against the current administration for reasons similar to those of the strategic model.

(H3) There are distinct differences in behaviour between the various generations of MK judges. Compared to the first generation of justices (the first 9 appointees), subsequent generations are less likely to vote against the government.

(H4) The previous work background of justices matters. Compared to career justices, in high-profile cases those who have worked in the executive or legislative branch are more likely to vote pro-government, while scholars are more likely to vote anti-administration.

Members and Decisions of the Constitutional Court. As the hypotheses make clear, many perceptions of the court have emerged over the years. We start testing some of the assumptions by first (a) providing descriptive statistics on the court bench and its members, and then (b) looking more closely at individual voting behaviour of justices, including some inferential statistics on how certain traits may account for their individual voting behaviour in the sample of political cases.

IV. DATA SET AND METHODS

We analysed and coded 80 decisions issued by the Constitutional Court of Indonesia from 2004 to 2018 (see Appendix). As explained earlier, we included only cases that are (mega)political, chosen based on (1) coverage on the front page of two major newspapers; (2) citations in publications about the MK; and (3) vetting by local experts. Megapolitical cases are of particular interest here because we expect personal and political factors to become particularly important to decision making due to the nature of the issues and the weaker doctrinal basis for decisions in these matters.

The individual votes of each justice in the 80 cases give us 710 observations. The outcome of interest, the dependent variable in the regression analysis, is a vote against the administration in power. We also amassed socio-biographic data for the 26 judges who voted in these cases, such as time on the bench, university affiliation and year of graduation, and professional career and workplace before appointment.

V. FINDINGS

5.1. The Bench

The sample period, 2004–18, coincides with the administrations of presidents Megawati (2001–04); Susilo Bambang Yudhoyono (SBY; 2004–14) and Joko Widodo (2014–present). Within this period, 26 justices were appointed and 10 reappointed: 9 under Megawati, 20 under SBY and 7 under Joko Widodo (see Table 1).

Table 1: Demographic Profiles of Who Sits on the Bench

		Megawati	Yudhoyono	Widodo
No. of Appointments		9	20	7
Gender	Male	100%	90%	86%
	Femaleo	0%	10%	14%
University	UI	22%	20%	0%
	Hasanuddin U	11%	25%	0%
	Islam Indonesia	0%	5%	14%
	Gadjah Mada	11%	5%	14%
	Udayana U	11%	0%	14%
	Other	44%	45%	57%
Prior Position	Judicial	33%	30%	43%
	Academic	11%	25%	29%
	Executive	33%	20%	29%
	Parliament	22%	25%	0%
Region	Java	44%	40%	29%
	Sumatra	33%	20%	43%
	Kalimantan	0%	10%	0%
	Sulawesi	11%	20%	0%
	Nusa Tenggara	11%	10%	29%

Source: compilation by authors from MK and public records

With the exception of gender, these justices are quite diverse, perhaps reinforced by the mixed appointment process. No university dominates appointments to the bench. In fact, only the University of Indonesia and University of Hasanuddin have ever managed to have two or three graduates on the bench simultaneously, and only for a small number of cases. Other popular universities are the University of Airlangga, University of Islam Indonesia and University of Udayana. Justices from Java and Sumatra are the principal groups on the MK, which makes Sumatra over-represented relative to population distribution (Table 1).

During the sample period, a third of MK positions were consistently assigned to career justices, consistent with the nomination pathway from the Supreme Court. Justices with experience in the executive branch before ascending to the bench are the second largest group (though this group fell to zero in the middle of the sample period). Justices with a legislative background reached a maximum of seven, though currently none is on the bench. Interestingly, throughout the same period there is always at least one MK justice with a scholarly background (perhaps a minor consequence of the PhD requirement), and scholars seem to be equally likely to have been nominated by parliament or the president. By contrast, there seems to be a slight preference for presidential appointees to themselves come from the executive office. Only two of the justices reappointed were nominated by two different institutions (see Table 2).

Table 2: Work Background of Justices by Appointing Institution

		Job Prior Appointment				
		Executive	Judiciary	Parliamentary	Scholar	Total
Appointed Institution	Parliament	3	0	5	4	12
	President	6	0	2	4	12
	Supreme Court	0	12	0	0	12
	Total	9	12	7	8	36

Note: A justice who served two terms may be appointed by the same institution or by different institutions. Therefore, we counted the number of combinations for each term. 10 justices served two terms either continuously or after a break, and 15 justices served one term.

Table 3: Reasons for Leaving the Bench

Reason for End of Tenure	Total Number	Percentage (%)
Retirement	7	41
Resignation	2	12
One Term Only	3	18
Two Term Limit	3	18
Dismissed	2	12
Sum	17	100

Combined, our data reveals a highly diverse (notably except for gender)[50] and a relative stable bench over the sample period. Unlike other high courts in the region (e.g., Thailand, Philippines, Malaysia), appointments to the bench are not dominated by certain universities, nor is the pathway limited to certain work backgrounds (e.g., career judiciary). Much of this may be a direct result of the mixed appointment process that – although it may be increasingly politicized – has also allowed for a diverse group of judges who meet the vetting process and selection criteria to be appointed.

5.2. Voting Patterns, 2004–18

The number of megapolitical cases rose gradually over time, except for surges in 2008 and 2014 due to elections. This is also reflected in the distribution of cases by category; almost a third of cases dealt with electoral disputes (28%) and slightly more with rights and civil liberties (33%); the rest related to separation of powers (24%), economics (9%) and executive prerogatives (6%). Although 39 cases (49%) had at least one dissenter, the remaining 41 were decided unanimously (51%).

Only 80 cases (of a total sample of 89) were considered relevant to this study. Of these, the Constitutional Court decided almost 75% against and only 25% for the sitting government. In cases involving separation of

[50] Recent appointment of Justice Enny Nurbaningsih by president Joko Widodo as replacement for retiring justice Maria Farida Indrati from a female-only shortlist of candidates might be seen as a growing awareness of gender imbalance on the bench.

powers (80%) and executive prerogatives (80%) the court voted most often against the government; the majority of cases dealing with economic issues were decided (57%) for the government.

Overall, the MK granted 83% of the petitions in our sample. This number is significantly higher than the total of petitions received during this period (e.g., roughly a quarter), but this might also be because since 2005 the Court has granted a growing number of petitions only partially, as part of its rulings of cases as 'conditionally' unconstitutional (48% of the petitions granted in our sample). This tendency has increased over time, and become particularly pronounced under Chief Justice Arief Hidayat: of 23 decisions during his tenure, 15 were judged conditionally (un)constitutional (see Table 4).[51]

Table 4: Case Outcomes by Chief Justice

	Granted (Fully)	Granted (Partially)	Rejected	Not Accepted	Total
Jimly Asshiddiqie	13	1	3	1	18
Moh. Mahfud MD	17	8	4	0	29
Akil Mochtar	1	3	0	0	4
Hamdan Zoelva	1	4	0	0	5
Arief Hidayat	2	15	4	2	23
Anwar Usman	0	1	0	0	1
Total	34	32	11	3	80

As for the average dissent rate of the bench – here defined as the number of anti-administration votes over total votes – there are two peaks, one in the first third of the sample, and the other in the last third. In fact, early in the sample period, anti-administration votes reached 80%, but gradually dropped to 55%; it then rose about 90% in 2012 before easing to about 50% in 2018. Overall, anti-administration rates differed depending on who was president. During the last third of the sample, the rates declined gradually, perhaps because doctrinal positions were more established.

[51] See good overview, Bisariyadi, "A Typical Rulings of The Indonesian Constitutional Court," *Hasanuddin Law Review* 2, no. 2 (2016): 225-40; Bisariyadi, "The Application of Legal Construction in the Rulings of the Constitutional Court," *MIMBAR HUKUM* 29, no. 1 (2017): 135-49.

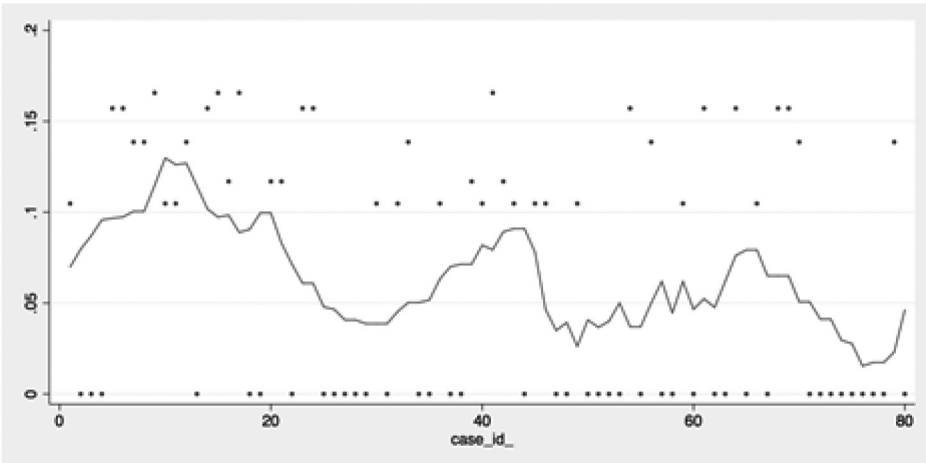
Table 5: Dissent Rate by President

	Dissent Rate	No. of Cases
Megawati Soekarnoputri	44%	2
Susilo Bambang Yudhoyono (1)	68%	26
Susilo Bambang Yudhoyono (2)	86%	28
Joko Widodo	54%	24

Note: Note: Average dissent rates for the bench are calculated by taking a simple average of case-specific dissent rates. Dissent rate takes one when justices voted against the administration in power unanimously; zero when justices voted for the administration unanimously.

Equally interesting is the fact that the dispersion of decisions among MK justices as measured by standard deviation declined over the sample period and decisions have become increasingly unanimous (Figure 3).

Figure 3: Dispersion of Decisions on the Bench



Note: A standard deviation of votes by bench is used as a measure of dispersion. The red line is calculated by taking 11-case centered moving average of dispersion by case.

In short, while there is little ground to suggest that the court has become more likely to vote for the government (as it is sometimes suggested in public discourse), it is certainly true that there is less disagreement

among the justices. This is particularly true since 2014 with Joko Widodo as president (last 24 cases). There are also sharp differences in dissents under CJ Hamdan Zoelva and CJ Arief Hidayat, which might perhaps suggest the CJ has a subtle influence on the voting patterns of MK (though short CJ tenures also limit that).

5.3. Individual Voting and Regression Findings

What about behavioural differences between individual justices? A closer look at their voting records reveals sharp differences in votes for and against the government (see Table 6). For instance, in the sample of high profile cases considered here Justices I Dewa Gede Palguna, Ahmad Syarifuddin Natabaya and Suhartoyo voted for the sitting administration more than 50% of the time. By contrast, five justices—Ahmad Fadlil Sumadi, Hamdan Zoelva, Muhammad Alim, Moh. Mahfud MD, and Saldi Isra—voted against the government more than 80% of the time.

Table 6: Top 5 Voters for and against the Sitting Administration

Top Voters For Government		%	Top Voters Against Government		%
(1)	I Dewa Gede Palguna (E)	59	(1)	Ahmad Fadlil Sumadi (J)	83
(2)	Ahmad Syarifuddin Natabaya (E)	56	(2)	Hamdan Zoelva (P)	83
(3)	Suhartoyo (J)	52	(3)	Muhammad Alim (J)	82
(4)	Manahan M.P. Sitompul (J)	47	(4)	Moh. Mahfud MD (P)	81
(5)	Achmad Roestandi (P)	44	(5)	Saldi Isra (S)	80

Note: Letters in brackets indicate the professional affiliation of judges immediately before nomination to the MK bench: P-Parliament; E-Executive; J-Judiciary; S-Scholar

Similarly, there are considerable differences between justices in their willingness to dissent from the majority opinion. For instance, Justice Achmad Roestandi dissented in half of the cases he was involved in, and Justices I Dewa Gede Palguna and Ahmad Syarifuddin Natabaya did so in almost a third of their cases. Perhaps even more interesting is that Justices Hamdan Zoelva and Jimly Asshiddiqie never dissented from the majority, closely

followed by Justices Anwar Usman, Muhammad Alim, and Arief Hidayat (Table 7). That four of these five were also CJ during their tenure suggests that Chief Justices have an important role in marshalling these majorities.

Table 7: Top 5 Dissenting and Non-Dissenting Justices

Top Dissenters on the Bench		%	Top Non-Dissenters on the Bench		%
(1)	Achmad Roestandi (P)	59	(1)	Hamdan Zoelva (P, CJ)	83
(2)	Ahmad Syarifuddin Natabaya (E)	56	(2)	Jimly Asshiddiqie (S,CJ)	83
(3)	I Dewa Gede Palguna (E)	52	(3)	Anwar Usman (J, CJ)	82
(4)	Suhartoyo (J)	47	(4)	Muhammad Alim (J)	81
(5)	Saldi Isra (S)	44	(5)	Arief Hidayat (S,CJ)	80

Note: Letters in brackets indicate the professional affiliation of judges immediately prior to the nomination to the MK bench: P-Parliament; E-Executive; J-Judiciary; S-Scholar. CJ stands for Chief Justice.

Such differences then raise a broad question: do individual traits shape the voting patterns of MK justices? In other words, can we associate the variation of voting behaviour with the character of justices?

To find out we engage in some basic inferential statistics. Our dependent variable is binary, with a value of one if the vote is against the administration in power or zero if not. Independent variables are:

- Tenure remaining_as_President: the number of years left for the current president, assuming two terms for SBY and Jokowi .
- Tenure remaining_as_Justice: the remaining number of years as justice.
- Appointing institution dummy variables: setting the Supreme Court as a benchmark.
- Job prior to appointment dummy variables: setting judiciary background as a benchmark.
- Chief Justice dummy variables: setting the period of CJ Asshiddiqie as a benchmark.
- Generation dummy variable: setting the justices in the first generation as a benchmark.

Since we draw on 710 votes by the 26 justices in 80 cases from 2004 to 2018, the panel data structure is highly unbalanced; the votes of individual justices ranged from 5 to 61, and the average was 28.4 votes. We therefore fitted a random effects Probit model and estimated the parameters by maximum likelihood. The results are presented in Table 8.

Table 8: Regression Results

	Model-1	Model-2	Model-3	Model-4
Remaining_Tenure_of_President	-0.112***	-0.105***	-0.029	-0.103***
	[0.017]	[0.018]	[0.030]	[0.018]
Remaining_Tenure_as_Justice	-0.084**	-0.090***	-0.098***	-0.094***
	[0.035]	[0.035]	[0.036]	[0.035]
Appointing institution				
by_Parliament	-0.171			
	[0.125]			
by_President	-0.131			
	[0.125]			
Job prior to appointment				
Executive		-0.282**	-0.238*	-0.261*
		[0.135]	[0.141]	[0.138]
Parliamentary		-0.116	-0.188	-0.098
		[0.145]	[0.153]	[0.147]
Scholar		-0.022	-0.025	-0.034
		[0.143]	[0.149]	[0.144]
Chief Justice				
CJ2_MohMahfudMD			0.315*	
			[0.171]	
CJ4_HamdanZoelva			0.683**	
			[0.340]	
CJ5_AriefHidayat			-0.155	
			[0.144]	
Generation				
Post_Generation_1				0.091
				[0.115]
N	710	710	665	710

Standard errors in brackets
* $p < 0.10$, ** $p < 0.05$, *** $p < 0.01$

Notes: The dummy variables take one if a justice corresponds to the specified category, zero otherwise. For each classification of dummy variables, the benchmark category is explained in the text.

5.3.1. Model-1: Baseline Regression

The findings reported in Table 5 are broadly in line with findings in the literature. The coefficient of *Remaining Tenure of President* has the expected negative sign and is statistically significant at the 1% level. That means the closer the end of the administration, the more likely that justices will vote against it. Similarly, the coefficient for *Remaining Tenure as Justice* is negative and significant at the 5% level, suggesting that the closer justices get to retirement, the more likely they are to vote against the administration. These findings are broadly in line with reported strategic behaviour (including strategic defection). Perhaps most interesting is the fact that none of the appointing pathways is statistically significant, though the direction differs. In other words, it does not matter what institution appointed the judge, though those appointed by parliament and by president are slightly more likely than career judges to vote with the government.

5.3.2 Model-2: Does Work Background Matter?

Model 2 replaces information about the appointing institution with previous work background in the estimation. Interesting here that, although the direction is negative, only executive background is statistically significant at the 5% level, which means that justices who before their appointment had worked for the executive were more likely to vote with the current government.

5.3.3. Model-3: Does the Chief Justice Influence Decisions?

Model 3 adds a set of new variables to Model 2 to test for differences in judicial behaviour of the bench under different Chief Justices. For all four high-profile cases under the tenure of CJ Akil Mochtar (2013), decisions are unanimously against the sitting administration. On the other hand, there is only one case during the tenure of CJ Usman in our sample, and the decision was unanimously for the sitting administration. Since for these 45 individual votes (i.e. 36 observations under CJ Akil Mochtar and 9 under CJ Usman), voting patterns are perfectly predictable by the CJ dummy

variables, these observations were dropped from the sample dataset. When compared to first CJ Asshiddiqie (2003-2008), the benches under the tenure of CJs Mahfud (2008-2013) and Zoelva (2013-2015) were more likely to vote against the sitting government (unlike under Arief Hidayat, 2015-2018), and their effects are statistically significant.

5.3.4. Model-4: Generational Differences?

Finally, Model 4 tests for the effects of generational cohorts on the bench. Although the coefficients are not statistically significant, justices after the first generation were more likely to vote against the sitting government.

Taken together our regression results only partly confirm widely held perceptions of the behaviour of Indonesian Constitutional Court justices. While we present evidence for strategic behaviour (if not defection) of justices toward the end of a presidential term, and closer to a justice's retirement, we do not find any evidence for differences in judicial behaviour by appointment track, generation, or work background (except for justices from the executive branch). In short, in ruling on the 80 high-profile political cases in our sample, the voting behaviour of the justices may have been more independent than academics and the public are willing to credit.

VI. CONCLUSION

The Constitutional Court of Indonesia makes for a fascinating study of judicial behaviour. Often considered perhaps the most activist court in the region, in the last fifteen years the MK has nevertheless earned considerable acclaim within Indonesia's highly dysfunctional legal system. When adjudicating highly charged political matters, it has survived many challenges from within and outside, even as it limited its decision-making in some ways and radically expanded it in others. However, some decisions, and above all corruption scandals, have heightened public concerns and raised a number of questions about its competence, if not impartiality, in politically charged cases.[52]

[52] Stefanus Hendrianto and Fritz Siregar, "Developments in Indonesian Constitutional Law: The Year 2016 in Review," in *The I·CONnect-Clough Center 2016 Global Review of Constitutional Law (August 3, 2017)*, ed. Richard Albert, et al. (Boston: Clough Center for the Study of Constitutional Democracy, 2017).

Taking widespread public and academic concerns as a starting point, this paper offers one of the first empirical accounts of the MK's judicial behaviour in high-profile political cases. Such megapolitical cases are particular suitable for this type of investigation; it is reasonable to assume that strategic behaviour and attitudinal positions come to the fore given the nature and uncertain legal basis of many of the cases. It is our hope that our findings, while certainly no replacement for legal-interpretivist scholarship, offer a much-needed empirically grounded, and ultimately more nuanced, perspective on the performance of the MK in its first 15 years.

In our carefully selected sample, we found little evidence to support some of the most common claims. For instance, while it is true that there is less dissent among justices on the bench over time, it is not clear that the court is deciding less often against government than previously. And while there is evidence of strategic behaviour of justices as the ending of their own terms and that of a president approach, there is little statistical evidence that judicial behaviour has been affected by work background (except for those coming from the executive branch), appointment track or generation. What this suggests is that despite an increasingly politicised nomination process, justices seem to retain more independence than the public seems to perceive – their personal characteristics do not seem to influence the pattern of votes for and against the government.

There is much room for speculation on why this might be. As shown in the diversity and stability on the bench, despite obvious shortcomings, clearly the mixed appointment process has been able to limit the ability of the executive to stack the court as has happened in the Philippines[53] and other authoritarian regimes in the region. Paradoxically, the competitive clientelist party system – while perhaps partly to blame for declining quality in justice selection processes – has also ensured that nomination has remained competitive and is relatively

[53] Björn Dressel and Tomoo Inoue, "Informal Networks and Judicial Decisions: Insights from the Philippines Supreme Court, 1986-2015," *International Political Science Review* 39, no. 1 (2018): 616-633.

transparent to civil society[54] – unlike what has happened in Thailand, where the military regime has gradually gained control over not only nominations to the Constitutional Court but also ultimately over its decision-making process.[55] Compared to such neighbours, the MK seems to be doing rather well.

To be sure, given developments in the region the situation can change quickly; and the judiciary remains vulnerable to attempts to politicize the courts.[56] Recent corruption scandals in particular illustrate that no matter what institutional safeguards are in place, courts in the region remain deeply enmeshed in clientelist-political structures, including informal practices of obligation and loyalty that might affect the work behaviour of justices on even the highest courts.[57] These factors, while often hard to grasp empirically, deserve more scholarly attention,[58] and certainly need to become part of a broader empirical research agenda on courts throughout the Global South.[59]

The Constitutional Court of the Republic of Indonesia surely deserves continuing attention. How it exercises its role and guards its powers in years to come will be crucial to how the rule of law and judicial practice evolve not only in Indonesia but throughout a region confronted by consistent challenges to rule-based practice.[60] Though not always perfect, the MK has certainly done well considering not only the regional context but also the institutional environment in which it operates. It is our hope that this study helps capture its remarkable achievement, and provides a much-needed evidential benchmark for continuing critical evaluation.

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54 Faiz, "A Critical Analysis of Judicial Appointment Process and Tenure of Constitutional Justice in Indonesia."

55 Dressel and Tonsakulrungruang, "Coloured Judgement? The Work of the Thai Constitutional Court, 1998–2016."

56 Björn Dressel, "Governance, Courts and Politics in Asia," *Journal of Contemporary Asia* 44, no. 2 (2014): 259-78.

57 Björn Dressel, "The Informal Dimension of Constitutional Politics in Asia: Insights from the Philippines and Indonesia," in *Constitutional Courts in Asia*, ed. Albert H.Y. Chen and Andrew Harding (Cambridge: Cambridge University Press., 2018), 60-86.

58 Roux, *The Politico-Legal Dynamics of Judicial Review: A Comparative Analysis*.

59 Dressel, Sanchez Urribarri, and Stroh, "Courts and Informal Networks: Towards a Relational Perspective on Judicial Politics beyond Western Democracies."

60 Melissa Curley, Björn Dressel, and Stephen McCarthy, "Competing Visions of the Rule of Law in Southeast Asia: Power, Rhetoric and Governance," *Asian Studies Review* 42, no. 2 (2018): 192-209.

Appendix: List of Megapolitical Cases, 2004-2018

Case ID	Case Number	Date of Decision	Case Type
1	011/PUU-I/2003	2004/2/24	Bill of Rights/Liberties
2	062/PHPU.B-II/2004	2004/8/9	Election (Political Contest)
3	18/PUU-I/2003	2004/9/11	Separation of Powers
4	001/PUU-I/2003	2004/12/15	Economic
5	065/PUU-II/2004	2005/3/3	Bill of Rights/Liberties
6	066/PUU-II/2004	2005/4/12	Separation of Powers
7	012/PUU-III/2005	2005/10/19	Bill of Rights/Liberties
8	026/PUU-III/2005	2006/3/22	Bill of Rights/Liberties
9	13/PUU-IV/2006	2006/12/6	Bill of Rights/Liberties
10	006/PUU-IV/2006	2006/12/7	Bill of Rights/Liberties
11	16/PUU-IV/2006	2006/12/19	Separation of Powers
12	026/PUU-III/2005	2007/5/1	Bill of Rights/Liberties
13	6/PUU-V/2007	2007/7/17	Bill of Rights/Liberties
14	5/PUU-V/2007	2007/7/23	Bill of Rights/Liberties
15	2-3/PUU-V/2007	2007/10/30	Bill of Rights/Liberties
16	18/PUU-V/2007	2008/2/21	Separation of Powers
17	10/PUU-VI/2008	2008/7/1	Election (Political Contest)
18	13/PUU-VI/2008	2008/8/11	Bill of Rights/Liberties
19	41/PHPU.D-VI/2008	2008/12/2	Election (Political Contest)
20	22-24/PUU-VI/2008	2008/12/23	Bill of Rights/Liberties
21	57/PHPU.D-VI/2008	2009/1/8	Election (Political Contest)
22	4/PUU-VII/2009	2009/3/24	Election (Political Contest)
23	9/PUU-VII/2009	2009/3/25	Election (Political Contest)
24	98/PUU-VII/2009	2009/7/2	Election (Political Contest)
25	99/PUU-VII/2009	2009/7/2	Election (Political Contest)
26	102/PUU-VII/2009	2009/7/6	Election (Political Contest)
27	108-109/PHPU.B-VII/2009	2009/8/12	Election (Political Contest)
28	117/PUU-VII/2009	2009/9/30	Separation of Powers
29	133/PUU-VII/2009	2009/11/25	Separation of Powers
30	10-17-23/PUU-VII/2009	2010/3/25	Bill of Rights/Liberties
31	11/PUU-VII/2009	2010/3/31	Executive Prerogatives
32	140/PUU-VII/2009	2010/4/19	Bill of Rights/Liberties
33	49/PUU-VIII/2010	2010/9/22	Executive Prerogatives
34	23/PUU-VIII/2010	2011/1/12	Separation of Powers
35	79/PUU-IX/2011	2011/6/5	Executive Prerogatives
36	5/PUU-IX/2011	2011/6/20	Separation of Powers
37	15/PUU-IX/2011	2011/7/4	Election (Political Contest)
38	55/PUU-VIII/2010	2011/9/19	Bill of Rights/Liberties
39	49/PUU-IX/2011	2011/10/18	Separation of Powers
40	46/PUU-VIII/2010	2012/2/17	Bill of Rights/Liberties

Case ID	Case Number	Date of Decision	Case Type
41	2/SKLN-X/2012	2012/7/31	Executive Prerogatives
42	52/PUU-X/2012	2012/8/29	Election (Political Contest)
43	36/PUU-X/2012	2012/11/13	Economic
44	10/PUU-X/2012	2012/11/22	Separation of Powers
45	5/PUU-X/2012	2013/1/8	Executive Prerogatives
46	114/PUU-X/201	22013/3/28	Bill of Rights/Liberties
47	35/PUU-X/2012	2013/5/16	Bill of Rights/Liberties
48	39/PUU-XI/2013	2013/7/31	Election (Political Contest)
49	14/PUU-XI/2013	2014/1/23	Election (Political Contest)
50	1-2/PUU-XII/2014	2014/2/13	Separation of Powers
51	34/PUU-XI/2013	2014/3/6	Bill of Rights/Liberties
52	20/PUU-XI/2013	2014/3/12	Bill of Rights/Liberties
53	83/PUU-XI/2013	2014/4/26	Bill of Rights/Liberties
54	97/PUU-XI/2013	2014/5/19	Separation of Powers
55	35/PUU-XI/2013	2014/5/22	Separation of Powers
56	50/PUU-XII/2014	2014/7/3	Election (Political Contest)
57	76/PUU-XII/2014	2014/11/21	Separation of Powers
58	18/PUU-XII/2014	2015/1/21	Other
59	74/PUU-XII/2014	2015/6/18	Bill of Rights/Liberties
60	85/PUU-XI/2013	2015/2/18	Economic
61	21/PUU-XII/2014	2015/4/28	Bill of Rights/Liberties
62	68/PUU-XII/2014	2015/6/18	Bill of Rights/Liberties
63	33/PUU-XIII/2015	2015/7/8	Election (Political Contest)
64	42/PUU-XIII/2015	2015/7/9	Election (Political Contest)
65	46/PUU-XIII/2015	2015/7/19	Election (Political Contest)
66	100/PUU-XIII/2015	2015/9/29	Election (Political Contest)
67	6/PUU/XIV/2016	2016/8/4	Separation of Powers
68	51/PUU-XIV/201	2016/8/23	Election (Political Contest)
69	21/PUU-XIV/2016	2016/9/7	Bill of Rights/Liberties
70	20/PUU-XIV/2016	2016/9/7	Bill of Rights/Liberties
71	63/PUU/XIV/2016	2016/12/14	Economic
72	59/PUU/XIV/2016	2016/12/14	Economic
73	58/PUU/XIV/2016	2016/12/14	Economic
74	57/PUU/XIV/2016	2016/12/14	Economic
75	49/PUU/XIV/2016	2017/2/21	Separation of Powers
76	92/PUU/XIV/2016	2017/7/10	Separation of Powers
77	71/PUU-XIV/2016	2017/7/19	Election (Political Contest)
78	53/PUU/XIV/2016	2017/7/19	Separation of Powers
79	53/PUU-XV/2017	2018/1/11	Election (Political Contest)
80	16/PUU-XVI/2018	2018/6/28	Separation of Powers

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Indonesia's Judicial Review Regime in Comparative Perspective

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Abstract

This paper provides a comparative perspective on judicial review in Indonesia after the establishment of the Constitutional Court in 2003. It starts by retelling the well-known story of the "transformation of American law" over the first half of the last century. As narrated by Morton Horwitz, that story is about how nineteenth-century industrialisation processes destabilised the premises of "Classical Legal Thought", and then about how the legal realist movement exploited the ensuing crisis to transform the way Americans think about law and its relationship to other social systems. Mining this story for generalisable concepts, the paper argues that the establishment of strong-form judicial review necessarily draws on and, in turn, influences prevailing conceptions of legal and political authority. These conceptions vary along a continuum, in the first case, from public confidence in law's autonomy to a conception of law as deeply immersed in politics, and, in the second case, from a conception of legitimate political authority as contingent on a fairly won democratic mandate to a conception of political authority as residing in the power holder's capacity to promote important social goals, such as national security or economic prosperity. Each of these variables may change independently of the other. In certain situations, however, they may also combine to form a relatively stable *judicial review regime* – a hegemonic legitimating ideology in which conceptions of legal and political authority lock into and mutually support each other. The fourth section uses this conceptual framework to assess the Indonesian Constitutional Court's approach to its mandate after 2003. Under its first two chief justices, the paper notes, the Court engaged in a concerted effort to build public understanding of its legitimate role in national politics. The Court's abrupt switch between its first Chief Justice, Jimly Asshiddiqie's legalist conception of

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law's authority and his successor, Mohammad Mahfud's more instrumentalist conception, however, has impeded the consolidation of a determinate judicial review regime. Given the considerable threats still confronting Indonesia's democracy, this situation is worrisome. The Court urgently needs to present a coherent account of its legitimate claim to authority if it is to continue playing an effective role.

Keywords: Constitutional Court, Indonesia , Judicial Review, Legal and Political Authority

I. INTRODUCTION

Constitutions are seldom written on blank slates. In most cases, they draw on contested societal understandings of a range of issues: the social, political and economic history of the country concerned; the role that past constitutions have played in the regulation of political conflict; the challenges facing the country; the potential role of the constitution in addressing these challenges; and the relevance of foreign constitutional models and experiences. Unless the constitution is imposed from the outside or by authoritarian fiat, these contested understandings will shape the constitutional drafting process. On its enactment, the constitution will come to embody – in general and sometimes ambivalent language – a purportedly shared conception of the legitimate basis for the exercise of political power and the role of the judiciary and other state institutions in controlling the abuse of such power.

To the extent that it validates some ways of thinking about these issues rather than others, a constitution represents a victory of sorts for the ideas it embodies. But such victories are inevitably temporary. As soon as it begins to function, a constitution reinvigorates public discussion of the range of issues just listed, only this time with the text of the constitution as the central reference point. Sometimes, ongoing public discussion may lead to the amendment of the constitutional text to better reflect a new societal understanding of a particular issue or an understanding that an identifiable sub-group has been able to enforce. Even when the constitution is not amended, however, societal understandings of the purposes and value of constitutional government continue to evolve.

For this reason, it is always advisable to distinguish a society's constitutional tradition from its constitution in the narrower sense of a body of authoritative legal norms governing the allocation of state power. Constitutional traditions underpin and interact with constitutions in this narrower sense, but they are not identical to them. In many societies, the constitutional tradition long predates the current written constitution. While the drafters of the written constitution may have tried to embody that tradition, such attempts rarely succeed completely. In the absence of societal consensus, the constitutional text may fudge some questions to give all the competing elements of a tradition a semblance of victory. Or certain aspects of the tradition may be just too complex to embody perfectly. There will thus always be some tension between the written constitution as adopted and the constitutional tradition it seeks to reflect.

In other cases, the written constitution may have been adopted precisely to transform the country's constitutional tradition, which may be problematic for various reasons. In such cases, an even sharper contrast may develop between the society's constitutional tradition and the text of the written constitution. In some cases, there may be a lag-effect as the new written constitution takes some time to influence the tradition it is trying to transform. In other cases, the written constitution may wholly fail to transform the existing tradition, either because actors slip back into familiar thought-ways and patterns of behaving, or because there was never really any political will to change.

The purpose of this paper is to consider one dimension of this dynamic process and then to apply a general understanding of it to the Indonesian case. Of all the factors making up constitutional traditions, this paper argues, two are particularly important to the comparative study of constitutionalism and judicial review. These are societal understandings, on the one hand, of law's legitimate claim to authority and, on the other, of political authority. What makes those two variables so important is that they are integral to the evolution of constitutional traditions in societies that have adopted so-called

"strong-form" judicial review[1] – the most common form of written constitution in the world today.[2]

In giving courts the power to strike down legislative or executive action for non-conformance with their prescriptions, constitutions that provide for strong-form judicial review in theory elevate law to a position of social-systemic equivalence to politics.[3] They in effect say that law is a social system with its own claim to authority that may in certain cases trump the rival authority claim of politics. The adoption of this form of constitution thus necessarily implicates the society's tradition of thinking about the law/politics relationship in the ongoing process of constitutional development. Of all the different aspects of its constitutional tradition, the one that takes centre stage is the nature of law's claim to authority and its relationship to political authority. If we want to study constitutional development in such a society, therefore, we need to study the way in which societal conceptions of the law/politics relationship shape and are in turn shaped by the institution of judicial review. That aspect of the phenomenon, as partial as it may seem, will be a central part of the drama.

The next section grounds the discussion in a real-world example: the transformation of societal understandings of the law/politics relationship that occurred in the United States over the first half of the last century. This period in American constitutional development is the most widely known instance of this phenomenon while at the same time richly illustrative of its dynamics. The third section extracts the key elements from the American experience that might help to build a comparative framework. The generalisable part of the American experience, this section argues, is the causal significance of

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1 The term "strong-form judicial review" was coined in Mark Tushnet, *Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law* (Princeton, NJ: Princeton University Press, 2008). It refers to situations in which the judiciary has been given the power to review statutes for conformance with the constitution, and to strike down offending parts of a statute. The term "judicial review" will be used in this paper to refer to this specific power. In relation to Indonesia, this means the Constitutional Court's power in Article 24C(1) of the amended 1945 Constitution to review statutes for conformance with the Constitution rather than the Supreme Court's power in Article 24A(1) to review ordinances and regulations.

2 By 2006, 87% of world constitutions provided either explicitly or in practice for strong-form judicial review. See David S. Law and Mila Versteeg, "The Evolution and of Global Constitutionalism," *California Law Review* 99, no. 5 (2011): 1163, 1199.

3 For a longer version of the argument, see Theunis Roux, *The Politico-Legal Dynamics of Judicial Review: A Comparative Analysis* (New York: Cambridge University Press, 2018).

two factors: (1) the destabilisation of the ideology of so-called "Classical Legal Thought" by the changes to the American economy that occurred in the late nineteenth century; and (2) the opportunistic internal challenge to this ideology mounted by the legal realist movement in the 1920s. Those two factors suggest that settled understandings of the law/politics relationship change when there is some exogenous shock to prevailing conceptions of law's authority and a group of committed legal-cultural actors willing and able to exploit the shock to drive the relevant change. If that is correct, the key to developing a comparative understanding of this phenomenon is to construct a typology of possible stable combinations of legal and political authority and then to use that typology as a heuristic to examine the dynamics of constitutional-cultural change in various settings. The rest of the third section proceeds to classify constitutional traditions into four ideal types according to their distinctive combinations of legal and political authority. The fourth section then uses the conceptual logic underlying these ideal types to reinterpret recent developments in Indonesian constitutional politics. The fifth section concludes.

II. DISCUSSION

2.1. The American Experience

The discussion has been very abstract so far, so let us ground it in a well-known example of the sort of process this paper seeks to explain: the transformation of societal understandings of the law/politics relationship that occurred in the United States during the first half of the last century. As the story of that period in America's constitutional development is usually told, law's legitimate claim to authority at the beginning of the twentieth century was bound up with the ideology of "Classic Legal Thought".[4] Law according to that ideology was identified with judge-made common law

[4] See Duncan Kennedy, "Toward an Historical Understanding of Legal Consciousness: The Case of Classical Legal Thought in America, 1850-1940," *Research in Law and Sociology* 3 (1980): 3; Robert W. Gordon, "Legal Thought and Legal Practice in the Age of American Enterprise, 1870-1920," in *Professions and Professional Ideologies in America*, ed. Gerald L Geison (Chapel Hill: University of North Carolina Press, 1983), 70; Morton J. Horwitz, *The Transformation of American Law, 1870-1960: The Crisis of Legal Orthodoxy* (New York: Oxford University Press, 1992).

and was thought to consist of a coherent body of norms that was relatively autonomous from politics. The role of legal academics, as famously explained by Dean Christopher Columbus Langdell at Harvard University,[5] was to rationalise this body of norms so that every case decided by a court could be assessed according to its conformance to applicable legal principles. Judges in turn were legal technicians, and their claim to authority lay in their perceived professionalism and detachment from politics.

This understanding of law's claim to authority steadily changed from 1900, both in response to external forces and in response to endogenous challenges.[6] Externally, the American economy had been developing over the second half of the nineteenth century from a mainly agricultural economy into an industrialized one.[7] Accompanying this change, there had been a massive population influx to new urban centres like New York and Chicago. The conditions of employment in these new centres were harsh and living arrangements unhealthy.[8] In response, state legislatures began to enact minimum wage laws and other social welfare legislation.[9] The new laws constituted an attempt to expand the scope of the state legislatures' authority. Before 1900, the ideology of laissez-faire, the economic counterpart to Classical Legal Thought, had held that private economic relations were strictly off-limits to state legislatures – an aspect of social life governed by the politically autonomous common law of contract. As a matter of constitutional law, this understanding of the law/politics relationship had been concretised in the so-called "police power" doctrine, which held that state legislatures could intrude into the market only to protect public health, safety and morals.[10] Thus, when state legislatures began enacting social welfare legislation, they were initially perceived as intruding into areas beyond the legitimate scope of their authority.

5 See Thomas C. Grey, "Langdell's Orthodoxy," *University of Pittsburgh Law Review* 45 (1983): 1.

6 In addition to Horwitz, *The Transformation of American Law*, this account draws on Howard Gillman, *The Constitution Besieged: The Rise and Demise of Lochner Era Police Powers Jurisprudence* (Durham, NC: Duke University Press, 1993).

7 *Ibid*.

8 *Ibid*.

9 *Ibid*.

10 *Ibid*.

The conflict over state legislatures' attempt to expand the scope of their authority famously came to a head in the case of *Lochner v. New York*[11] and then continued in a series of cases decided by the US Supreme Court between 1905 and 1937.[12] In *Lochner*, the Supreme Court decided that a maximum working hours law for bakers was unconstitutional against the Fourteenth Amendment's due process clause. The decision was roundly criticised by Justice Oliver Wendell Holmes in dissent and by academic commentators as a political decision driven by the justices' support for an outdated laissez-faire ideology that it was in any case not their role to enforce from the Bench.[13] In substantive content, however, the majority decision was a straightforward application of the police power doctrine.[14] To be sure, it was an open legal question whether the maximum working hours legislation at issue could be said to have been enacted in pursuit of public health, safety or morals (as opposed to the private interests of the bakers qua employees), but the Supreme Court's approach to this question followed a line of reasoning that was pretty standard at the time. In that sense, it was a legally legitimate decision – well within the scope of the Court's authority as it was then understood. What caused the controversy in *Lochner* was not the fact that the case was obviously wrongly decided, but that it came at a time when the abovementioned changes to the American economy were beginning to destabilise the premises of Classical Legal Thought. What had hitherto been a stable relationship between the common law's claim to authority over the regulation of private economic matters and state legislatures' claim to authority over any social problem falling within their democratic mandate, began to collapse.

At roughly the same time as the *Lochner* line of cases was playing itself out, a group of prominent American legal academics mounted an internal challenge to the premises of Classical Legal Thought. Inspired by

[11] *Lochner v. New York* 198 US 45 (1905).
[12] The end of the era is marked by the Court's decision is *West Coast Hotel v. Parrish* 300 US 379 (1937) (when Justice Roberts famously "switched" his vote to favour the constitutionality of New Deal legislation).
[13] See *Lochner v. New York* (Holmes J dissent).
[14] See Gillman, *The Constitution Besieged*.

the German *Freirechtsschule*,[15] Roscoe Pound and others began critiquing the idea that judges were operators of a technical legal machine.[16] On the contrary, Pound argued, the law was often indeterminate, and judges were then essentially in the position of having to decide between competing social interests without any authoritative guidance. To do justice in that situation, judges had to resort to social science – to the best knowledge available about which of several competing legal rules would best promote the public interest.[17] In arguing thus, Pound seized on the Supreme Court's decision in *Lochner* as a classic instance of "mechanical jurisprudence" – an implausible attempt to deduce the legal content of freedom of contract from the semantic scope of the word "liberty" in the Fourteenth Amendment. In fact, as noted, the Supreme Court's decision in *Lochner* was based on a settled line of precedent.[18] It was not particularly formalist in the way Pound made it out to be. Nevertheless, Pound was able to capitalise on the decision's unpopularity to use it as ammunition in his attack on Classical Legal Thought.

Though he later famously fell out with Karl Llewellyn,[19] Pound is today regarded as someone whose ideas and thinking paved the way for legal realism – the jurisprudential movement that gained a foothold in several prominent American law schools in the 1920s and 1930s and forever changed the way American lawyers, and the American public more broadly, think about law's claim to authority. The full story of the rise of the legal realist movement and its impact on American legal thought is contested and too complicated to summarise here.[20] At its heart, however, was a critique of

[15] See Albert S. Foulkes, "On the German Free Law School (Freirechtsschule)," *Archiv für Rechts- und Sozialphilosophie /Archives for Philosophy of Law and Social Philosophy* 55 no. 3 (1969): 367; Kristoffel Grechenig and Martin Gelter, "The Transatlantic Divergence in Legal Thought: American Law and Economics vs. German Doctrinalism," *Hastings International and Comparative Law Review* 31 no. 1 (2008): 295.

[16] Roscoe Pound, "Mechanical Jurisprudence," *Columbia Law Review* 8 (1908): 605.

[17] *Ibid*.

[18] Gillman, *The Constitution Besieged*.

[19] See William Twining, *Karl Llewellyn and the Realist Movement* 2ed. (Cambridge, Cambridge University Press, 2012).

[20] See, for example, Horwitz, *The Transformation of American Law*; Brian Z. Tamanaha, *Beyond the Formalist-Realist Divide: The Role of Politics in Judging* (Princeton, NJ: Princeton University Press, 2010); Frederick Schauer, "Foreword," in William Twining, *Karl Llewellyn and the Realist Movement* 2ed. (Cambridge, Cambridge University Press, 2012), ix.

the determinacy of law and legal reasoning, and a positive programme, drawing on Pound's insights, of fixing that problem by resort to social science. The philosophical writings of John Dewey also exerted a strong intellectual influence on the movement,[21] so that it is has been depicted as changing the American view of law to one of "pragmatic instrumentalism".[22]

For purposes of this article, the significant issue is that, in a complex interaction between the changes to the American economy just described, the controversy over the *Lochner* line of cases, and the sometimes quite opportunistic arguments of legal realism, societal understandings of law's claim to authority in the US progressively changed from 1900 through 1937. Whereas law's claim to authority before the turn of the twentieth century had been premised on its assumed autonomy from politics, after 1937 its authority was increasingly based on its instrumental value in promoting concededly partisan-political visions of the public interest and social welfare.

The story of the evolution of the American "judicial review regime" – the complex of legitimating ideas that make up the hegemonic understanding of the law/politics relationship in the US – is still unfolding, as most recently illustrated in the ructions over Brett Kavanaugh's Senate confirmation hearing. As it functions today, the regime is one in which the US Constitution is seen as standing for two competing, even diametrically opposed visions of the just society – one based on conservative and the other on liberal values. In addition to the factors already mentioned, this has occurred because the outdated text of the US Constitution has proved malleable enough to allow generations of conservative and liberal judges to plausibly claim that their preferred political ideology corresponds to the true American constitutional project.[23] While each side of politics thus presents its interpretation of the Constitution as a precedent-based legal interpretation, the dominant societal understanding is that the Constitution

[21] See Robert S. Summers, "Pragmatic Instrumentalism in Twentieth Century American Legal Thought – A Synthesis and Critique of our Dominant General Theory about Law and its Use," *Cornell Law Review* 66 (1981): 861; Richard A. Posner, "What Has Pragmatism to Offer Law?" *Southern California Law Review* 63 (1990): 1653.

[22] Summers, "Pragmatic Instrumentalism".

[23] Duncan Kennedy, *A Critique of Adjudication (Fin de Siècle)* (Cambridge, MA: Harvard University Press, 1997).

has two equally plausible interpretations, each of which is determinate according to its ideological premises.[24] The stability of this judicial review regime, such as it is, comes from the fact that political power regularly rotates through democratic elections, meaning that each side of politics is eventually given the opportunity to appoint a sufficient number of Supreme Court justices to transform its political ideology into constitutional law.

Now that we have illustrated the abstract idea of the evolution of judicial review regimes with a practical example, can we generalise it? Are there recurrent patterns in the way societal understandings of the law/politics relation change character over time that might help us to reinterpret well-known constitutional developments in other societies?

2.2. Generalising the American Experience

Consider again what happened in the US during the first half of the last century. An external development – the transformation of the American economy – forced a change in the scope of the state legislatures' claim to political authority. Whereas before 1900, the scope of that authority had not extended to regulating the conditions of employment in the new cities and other aspects of social welfare, changing economic conditions prompted state electorates to demand action on that front. In enacting the new social welfare legislation, state legislatures began intruding into what was previously thought to be the exclusive domain of law's authority – private economic relations as governed by the common law of contract.

It is important to be precise at this point. The basic form of the state legislatures' claim to political authority had not changed. As before, their authority extended to whatever social issues democratic electorates had given them a mandate to regulate. What had changed, was the *scope* of that claim in its extension to social welfare legislation and its consequent intrusion into areas previously thought to be reserved to the common law

[24] James L. Gibson and Gregory Caldeira, "Has Legal Realism Damaged the Legitimacy of the U.S. Supreme Court?" *Law & Society Review* 45, no. 1 (2011): 195 (finding, on the basis of extensive social surveys, that the American public understands that constitutional adjudication is driven by the justices' political ideologies but accepting nevertheless that they have principled resort to those ideologies when deciding cases).

of contract. The external development, America's changing economy, had driven a change in the scope of the state legislature's political authority and brought it into conflict with extant understandings of the scope of law's authority. That conflict in turn caused a rupture in the premises of Classical Legal Thought that the legal realist movement was able to exploit. In sometimes opportunistic ways, legal realists drove a new understanding of law's authority as contingent, not on its autonomy from politics, but on law's usefulness as an instrument for the pursuit of political goals. This new understanding progressively locked into extant understandings of political authority as deriving from a democratic mandate to form a new judicial review regime. The key concepts are thus: societal understandings of law's legitimate claim to authority and its relationship to legitimate political authority, the capacity of these two forms of authority mutually to support each other in a stable judicial review regime, the possibility of an exogenous shock to that regime, and the role of legal-cultural actors in driving a transition to a new regime. These are the elements of the American experience that provide the building blocks for a comparative framework.

In constructing such a framework, the obvious place to start is with the idea of claims to legal and political authority. Neither law nor politics makes claims, of course; both are just abstract concepts whereas constitutional politics is about real people with real interests. Nevertheless, we can use the idea of legal and political authority claims as a kind of shorthand for what happens when social actors make claims to authority in the name of law or politics. A judge handing down a decision thus claims the authority to do that as a duly mandated interpreter of the constitution, say, while parliamentarians enacting legislation rely on the authority of their democratic mandate, and so on.

In each case, the claim needs to be legitimated. Until that happens, a claim is just a claim: it is in competition with other claims to authority to regulate the same conduct or distribute the same material resources. What then legitimates claims to legal or political authority? One answer is

to see such claims as being legitimated by their conformance to dominant societal understandings of the appropriate relationship between law and politics. These understandings, as we have seen, are an aspect of a society's constitutional tradition. In countries that have adopted a system of supreme-law judicial review, legal and political actors draw on them when they engage in constitutional politics. Even before this, constitutional drafters are influenced by societal understandings of the law/politics relationship when deciding the nature and scope of authority to be conferred on various institutions.

As an aspect of its constitutional tradition, societal understandings of the law/politics relationship are specific to each country. Constitutional traditions are autochthonous and expressive – deeply revealing of the unique political history of the country with which they are associated. Once consolidated, each country will have its own ever-evolving judicial review regime in that sense – a hegemonic societal understanding of the law/politics relationship like the one that prevailed in the US before 1900. Nevertheless, for comparative purposes, it is possible to identify a more limited number of judicial review regimes using a sociological research strategy made famous by Max Weber.[25] The strategy proceeds by distinguishing the two main ways in which claims to legal and political authority are typically made and then by combining those conceptual possibilities into four ideal types.

Drawing again on the American experience, the two main conceptions of law's claim to authority that may be distinguished are legalism and instrumentalism. Both these conceptions have deep roots in Anglo-American legal theory, but also in other jurisprudential traditions, including the German.[26] On a legalist conception, law's authority lies in its autonomy as a social system. In practical terms, this is expressed as a dominant legal-cultural ideology rather than an empirically provable fact. The core tenet of legalism is that methods of legal reasoning provide politically impartial

[25] Max Weber, *Economy and Society*, ed. Günther Roth and Claus Wittich (New York: Bedminister Press, 1968).
[26] They roughly correspond, for example, to Weber's notion of formal and substantive rationality (*ibid*).

ways for judges to decide cases. It is not necessary for the maintenance of this ideology that these decisions should be seen to be uniquely correct, provided that the methods judges use are seen to be capable of excluding the influence of political factors, such as the judges' personal world views or their partisan political loyalties. There is a complex interaction between the development of these legal reasoning methods and public confidence in law's autonomy,[27] but for now we can leave it at that.

Certain countries develop this faith in law's autonomy only to lose it. This is what happened in the US during the *Lochner* era. As we have seen, in a complex interplay between the Supreme Court's increasingly strained interpretation of the Fourteenth Amendment, the legal realists' assault on the determinacy of law, and the rise of pragmatism as the dominant societal philosophy, Americans lost their faith in law's capacity to exclude ideological attitudes from legal reasoning processes. In legal academia, this was reflected in a turn to social science. If law itself could not provide determinate answers to legal questions from within its own immanent logic, then the study of legal doctrine was pointless. Legal academics instead should take up social science so that they could provide reliable guidance on law's likely consequences. In legal practice, the loss of faith in law's autonomy was similarly reflected in a shift towards consequentialist reasoning. In a dispute over which of two legal rules should apply, the semantic scope of the rules and their fit with extant legal principles became less important than their provable social consequences.[28]

This new American way of seeing law's authority is aptly described as instrumentalist: law's authority derives not from its claimed political neutrality but from the desirability of the outcomes it produces. The US is not the only country whose judicial review regime has undergone such a transformation. A similar process occurred in India after the 1975-1977

[27] See section 4 below.

[28] See Patrick S. Atiyah and Robert S. Summers, *Form and Substance in Anglo-American Law: A Comparative Study of Legal Reasoning, Legal Theory, and Legal Institutions* (Oxford: Clarendon Press, 1987).

Emergency.[29] In that country, the Supreme Court's poor performance during the Emergency discredited legalism and paved the way for a new understanding of the Indian Constitution as an instrument for uplifting the poor and other marginalised groups.[30]

Instrumentalism also tends to be the dominant conception of law's authority in societies in which law has never established its autonomy from politics – where law is seen, and always has been seen, as a mere projection of political power. In societies like that, law's claim to authority is derivative in the sense that it is only as strong as the authority claim of the political power holder that enlists law in service to its ends. This makes law's claim to authority in such societies seem like law's claim to authority in democratic societies that have lost their faith in law's autonomy. Instrumentalism in such societies, however, is crucially different from instrumentalism in democratic societies. In the latter instance, the existence of a functioning democratic system means that there are always at least two competing visions of the just society that law is enlisted to serve. Political parties' claim to authority is in turn legitimated by the authenticity of their democratic mandates, in this way lending democratic legitimacy to law's claim to authority.

Claims to political authority may likewise be divided into two main variants. According to the first, political authority derives from the authenticity of a democratic mandate. No political party may wield power unless it can point to a democratic mandate received in consequence of a free and fair election. In the other main variant, political authority derives from some or other societal goal that the political power holder claims to be promoting, whether that be inter-ethnic harmony, economic prosperity, national security, or the furtherance of anti-colonial revolutionary tradition.[31] In societies where this second view of political authority prevails, democratic elections may play some role in legitimating political authority, but in the

[29] See Upendra Baxi, *The Indian Supreme Court and Politics* (Lucknow: Eastern Book Co, 1980).

[30] For a compelling recent account of this process, see Anuj Bhuwania, *Courting the People: Public Interest Litigation in Post-Emergency India* (Cambridge: Cambridge University Press, 2017).

[31] Singapore is a good example of this type of society. See Jothie Rajah, *Authoritarian Rule of Law: Legislation, Discourse and Legitimacy in Singapore* (New York: Cambridge University Press, 2012).

end, when the principle of democracy and the political power holder's interests come into conflict, the power holder's claim to be promoting some superior conception of the national interest trumps the need to respect the democratic system – and political opponents' views and activities are suppressed in the name of the political power holder's pursuit of that supposedly more important social goal.

At a conceptual level, therefore, we have two main variants of each type of authority claim. Both variants of each type may in theory combine with either variant of the other type, meaning that there are four possible combinations, as depicted in the following table:

Table 1: Typology of Judicial Review Regimes

	Political authority based on a mandate derived from a fully competitive democratic system that respects liberal political rights	Political authority based on asserted need to subordinate the democratic system to some overarching and democratically non-negotiable conception of the public interest
Law's authority based on public confidence in the autonomy of law from politics	Democratic Legalism	Authoritarian Legalism
Law's authority based on its perceived usefulness as an instrument for the pursuit of political goals	Democratic Instrumentalism	Authoritarian Instrumentalism

As noted, the assumption underlying Table 1 is that either variant of legal authority may lock into either variant of political authority to produce a relatively stable understanding of the appropriate relationship between

law and politics. An example of the social process through which this might occur is given in the discussion of the Indonesian case in section 4 below. For the moment, the discussion turns to the mutual legitimation logic that binds each of these regimes together.[32]

Under the first ideal type, democratic legalism, law's authority is founded on the claimed capacity of legal reasoning methods to exclude the influence of judges' personal political values and partisan political commitments on judicial decision-making. This understanding of law's authority is paired with a conception of political authority as stemming from a democratic mandate received under conditions of free and fair political competition. Once consolidated, the ongoing stability of this type of regime depends on the judiciary's observance of the reasoning methods that have come to be associated with the ideal of law's autonomy from politics. Provided the judiciary is seen as staying within these limits, or develops these reasoning methods only incrementally, its power of judicial review is respected. More than this, judicial review serves an important legitimating function in the construction of political authority. Judicial review fulfils this function, first, by authenticating electoral mandates as the product of a fair and competitive democratic process, and secondly, by legitimating those laws and executive acts that are not struck down for lack of conformance to the Constitution.[33]

Authoritarian legalism, by contrast, describes a situation in which a public commitment to the separability of law and politics functions, not as the legitimate basis on which law speaks truth to political power, but as a pretext for certain areas of social life to be put beyond the reach of law.[34] In such regimes, judicial review continues to operate, and may in

[32] The following exposition of the four ideal types is reproduced from Roux, *The Politico-Legal Dynamics of Judicial Review*.

[33] Cf. David M. Trubek, "Complexity and Contradiction in the Legal Order: Balbus and the Challenge of Critical Social Thought about Law," *Law & Society Review* 11 (Winter 1977): 529, 540 (the "neutrality and autonomy of law forms one basis for the claims of political systems in capitalist societies to legitimate authority" (citing Weber, *Economy and Society*, 941-54)).

[34] Cf. Terence C. Halliday and Lucien Karpik, "Political Liberalism in the British Post-Colony: A Theme with Three Variations," in *Fates of Political Liberalism in the British Post-Colony: The Politics of the Legal Complex,* ed. Terence C. Halliday, Lucien Karpik and Malcolm Feeley (Cambridge, Cambridge University Press, 2012), 3, 15 (analysing the path of "despotic order" in British post-colonial states).

fact flourish in certain areas, but is ineffective in the crucial sense that it provides few resources for proponents of a more open and competitive democratic system to challenge authoritarian power holders. While not necessarily dispensing with the holding of elections, power holders' claim to authority in authoritarian legalist regimes rests on some alternative basis, such as the preservation of ethnic harmony, the promotion of economic prosperity or the provision of security from some or other external threat. The stability of this regime comes from the residual legitimating role that law continues to play in these circumstances, together with power holders' skill in prosecuting their alternative, less than fully democratic claim to authority.

Authoritarian instrumentalism describes a situation where law operates as a mere instrument of authoritarian rule, and where law is thus not autonomous from politics in any meaningful sense. Here, stability is a function of naked force and non-legal forms of legitimation, with law acting as a projection of political power rather than a constraint on it. Law has no legitimating role in such regimes. Because there are virtually no significant areas of social life over which judges exert independent control, law's claim to being autonomous from politics has no credibility. In such regimes, law really does function as a subsystem of politics in the sense that it is a fully subordinated system with no autonomous capacity to thwart or even significantly regulate the abuse of political power. While judicial review formally exists, it functions neither to legitimate nor to check political power. Rather, judicial review serves a series of purely instrumental functions, such as the extension of central political control over regional areas, the provision of information to central power-holders, and the transmission and implementation of centralized political commands.[35]

[35] See Tamir Moustafa and Tom Ginsburg "Introduction: The Functions of Courts in Authoritarian Politics," in *Rule by Law: The Politics of Courts in Authoritarian Regimes*, ed. Tom Ginsburg and Tamir Moustafa (New York, Cambridge University Press, 2008) 4-11; Martin Shapiro, *Courts: A Comparative and Political Analysis* (Chicago: University of Chicago Press, 1986).

The final ideal type, democratic instrumentalism, brings us back full circle to a relatively stable understanding of the relationship between law and politics that arises where political authority is founded on the authenticity of a democratic mandate. As with democratic legalism, no political party is able to compete for, let alone hold, political power in such a regime without expressing its commitment to multiparty democracy, and all major political players accept that they must relinquish power if defeated in a democratic election. (This does not mean that the democratic system actually is free from corruption and the influence of moneyed interests. It simply means that all parties are outwardly committed to the principle of free and fair elections.) What distinguishes this type of judicial review regime from democratic legalism is that law's authority is premised, not on the strenuous denial of the irreducibly political nature of constitutional adjudication, but on the frank embrace, or at least grudging acceptance, of this fact. In place of the denial of law's politicality, law's authority is premised on its claimed capacity to promote substantively just outcomes and on decision-makers' candour about the politics of constitutional adjudication, which is dealt with by foregrounding rather than suppressing the value-laden choices that are being made.

2.3. Indonesia: In Search of a Determinate Judicial Review Regime

The four judicial review regimes just presented are conceptual constructs – theoretically possible ways in which claims to legal and political authority may reinforce each other in a stable legitimating ideology. Actually-existing judicial review regimes do not conform exactly to these ideal types. Indeed, as soon as one considers real-world examples, it is apparent that in every society that has adopted a system of strong-form judicial review there is a unique and constantly evolving set of societal understandings of legal and political authority. Nevertheless, the idea of judicial review regimes may be used to explain periods of relative stability in the evolution of these understandings – periods, that is, where claims to legal and political authority, even as they conflict in the daily business of constitutional

politics, support each other at some deeper level. The conceptual framework in section 2.2 may also be used to understand the social process through which actually-existing judicial review regimes come to stabilize. The rest of this section illustrates these points by using the framework to analyse the evolution of conceptions of legal and political authority in Indonesia after the establishment of a constitutional court with the power of strong-form judicial review in 2003.

The first thing to emphasize is that the decision to provide for strong-form judicial review in Article 24C(1) of the amended 1945 Constitution was not the product of a conscious decision to elevate law to a position of co-equal status with politics. As with most real-world constitutional reform processes, Indonesia's path to judicial review was marked by political bargaining in circumstances of limited information about how the institutions being created would function in practice.[36] On one view, the establishment of judicial review came about as a side-effect of the pursuit of other political goals. The "proximate cause" of the creation of the Constitutional Court, on this understanding, was the need for an impartial institution to oversee the presidential impeachment process.[37] Once the decision to create a Court for that reason had been taken, additional responsibilities were conferred on it, including the power to review statutes for conformance with the Constitution.[38] On another view, the establishment of judicial review was the fulfilment of a long-standing demand for *negara hukum* (the rule of law) that had been consistently voiced in previous (failed) liberal constitutional reform processes.[39] Even on this understanding, however, it is fair to say that the full implications of giving the Constitutional Court the power of

[36] See Donald L. Horowitz, *Constitutional Change and Democracy in Indonesia* (Cambridge, Cambridge University Press, 2013); Fritz Edward Siregar, "*Indonesian Constitutional Politics: 2003–2013*" (Doctoral dissertation., UNSW Sydney, 2016), 123; Simon Butt, *The Constitutional Court and Democracy in Indonesia* (Leiden: Brill Nijhoff, 2015), 11-13; Stefanus Hendrianto, *Law and Politics of Constitutional Courts: Indonesia and the Search for Judicial Heroes* (London, Routledge, 2018), 41 (describing the establishment of the Court as a "joke that turned serious").

[37] Hendrianto, *Law and Politics of Constitutional Courts*, 52.

[38] *Ibid*.

[39] Butt, *The Constitutional Court and Democracy*, 19-32; Daniel S. Lev, "Judicial Authority and the Struggle for an Indonesian Rechtsstaat," *Law & Society Review* 13 no. 1 (Autumn 1978): 37.

judicial review were not fully appreciated.[40] Rather, it was left to the first group of judges to spell them out – to translate the Constitution's promise of independent judicial review into a functioning institution.

This somewhat uncertain start, along with other factors,[41] has complicated the consolidation of a determinate judicial review regime in Indonesia. Had there been a clearer understanding of the full implications of the institution that was being created, the path to consolidation would undoubtedly have been smoother. Making matters worse, the Court's first two chief justices, Jimly Asshiddiqie and Mohammad Mahfud, promoted equally valid, but very different, understandings of law's legitimate claim to authority – the first discernibly legalist in flavour and the second more instrumentalist. The Court's alternation between those two understandings has further delayed the consolidation of a determinate judicial review regime.

That the 1999-2002 constitutional reform process called for a revised conception of the law/politics relationship in Indonesia is beyond dispute. The amended 1945 Constitution's provision for free and fair elections and multi-party political competition clearly signalled a fundamental change to the nature of political authority. Both President Soekarno's Guided Democracy and the New Order regime of President Soeharto had built their claim to legitimacy on a combination of charismatic leadership and the asserted need to unify the nation in the turbulent Cold War period.[42] With Soeharto's departure in 1998, the constitutional reform process marked a decisive shift towards an understanding of legitimate political authority as contingent on a democratic mandate. Although still under periodic threat from authoritarian elements,[43] Indonesia has maintained a steady commitment to that understanding ever since.[44] At the same time,

[40] Hendrianto, *Law and Politics of Constitutional Courts*, 77.

[41] These other factors, to list them in one place, include the damage done to law's authority under previous authoritarian administrations, and particularly that of President Soeharto; Indonesia's civil-law tradition, which supports a judicial reasoning style that is arguably not conducive to the sort of role the Constitutional Court has been asked to play; and the various corruption scandals that have afflicted the Court over the years.

[42] Butt, *The Constitutional Court and Democracy*, 21-24; Hendrianto, *Law and Politics of Constitutional Courts*, 43.

[43] See Marcus Mietzner, "How Jokowi Won and Democracy Survived," *Journal of Democracy* 25, no. 4 (2014): 111.

[44] https://freedomhouse.org/report/freedom-world/2017/indonesia.

there have been sustained attempts to rebuild the independence of the judiciary.[45] Law now plays a crucial role in holding political office bearers to account, and the courts and other institutions are extensively involved in monitoring the fairness of the electoral process.[46] It is thus beyond dispute that Indonesia has decisively broken with past authoritarian understandings of the law/politics relationship. What is less clear, however, is what kind of judicial review regime Indonesia is moving towards.

This kind of uncertainty is not unusual, it should immediately be said, for a country in Indonesia's situation. Comparative experience shows that, in the wake of profound constitutional changes of the kind that Indonesia has undergone, a new hegemonic conception of the appropriate relationship between law and politics may take some time to stabilize.[47] In Hungary, for example, the amendments to its 1989 Constitution have failed to drive the anticipated transition to democratic legalism, despite the best efforts of an initially powerful Constitutional Court.[48] As things stand, Hungary is slipping back into a type of authoritarian legalism based on its pre-Communist, ethno-nationalist tradition.[49] In Zimbabwe, too, neither its 1979 nor its 2013 Constitution has been able to break the stranglehold of its historically dominant authoritarian-legalist regime.[50]

In Indonesia's case, the task of articulating the amended 1945 Constitution's conception of the law/politics relationship initially fell to the first Bench of the Constitutional Court, and particularly to its first Chief Justice, Jimly Asshiddiqie. Asshiddiqie, everyone agrees,[51] was acutely aware of the enormity of the responsibility that had been thrust upon him.

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45 See Butt, *The Constitutional Court and Democracy*, 20-21. The story of President Soeharto's assault on the Supreme Court is told in Sebastiaan Pompe, *The Indonesian Supreme Court: A Study of Institutional Collapse* (Ithaca, NY: Cornell Southeast Asia Program Publications, 2005).

46 Butt, *The Constitutional Court and Democracy*, 147-290.

47 See Roux, *The Politico-Legal Dynamics of Judicial Review*, 269-280.

48 The Hungarian Constitutional Court under its first President, László Sólyom.

49 Miklós Bánkuti, Gábor Halmai and Kim Lane Scheppele, "Hungary's Illiberal Turn: Disabling the Constitution," *Journal of Democracy* 23, no. 3 (2012): 138.

50 See Roux, *The Politico-Legal Dynamics of Judicial Review*, 193-241.

51 Hendrianto, *Law and Politics of Constitutional Courts*; Butt, *The Constitutional Court and Democracy*; Siregar, *Indonesian Constitutional Politics*.

Appreciating that the Constitution's promise that law would enjoy a status co-equal with politics could not simply be taken for granted, he insisted that the Constitutional Court should be accommodated in a fashion worthy of the role it had been asked to perform.[52] The Court's imposing Graeco-Roman building, with its nine pillars and central location in Jakarta, has done much to ensure that its decisions are taken seriously.[53] In addition to this, the Court under Asshiddiqie's chief justiceship worked hard to develop consistent standards, both for the holding of judicial conferences and for what was expected of judges when writing their opinions.[54] The Court also took proactive steps to explain its institutional role to the Indonesian public.[55]

Judging by the nature of these initial steps, it is fair to say that Asshiddiqie set about building a legalist understanding of the Court's authority. One of the things Asshiddiqie did, for example, was to establish a new practice of reasoned opinion-writing that departed from the declaratory style associated with Indonesia's civil law tradition.[56] He also encouraged the writing of dissents, thus presenting the decision-making process as one in which judges strive to give their own good-faith account of the law.[57] At the same time, the first Bench's remedial orders were generally non-intrusive – a species of weak-from review.[58] By suspending orders for invalidity, using prospective overruling, and granting conditionally constitutional orders, the Court under Asshiddiqie's leadership preserved a sense of the political branches' primary responsibility for policy.[59] Together with the other steps taken, this went some way towards building an understanding of law as an autonomous system of logically ordered norms that has the capacity to constrain both politically partisan and ideologically motivated judicial decision-making.

[52] Hendrianto, *Law and Politics of Constitutional Courts*, 79.
[53] *Ibid*. (The building was completed in 2007, just one year before Asshiddiqie left office.)
[54] Siregar, *Indonesian Constitutional Politics*, 99-102.
[55] *Ibid*, 115.
[56] Siregar, *Indonesian Constitutional Politics*, 123; Butt, *The Constitutional Court and Democracy*, 61.
[57] Butt, *The Constitutional Court and Democracy*, 67.
[58] Hendrianto, *Law and Politics of Constitutional Courts*.
[59] *Ibid*, 103-127. The major seeming exception to this cautious approach was the Asshiddiqie Court's *Education Budget V* decision (Constitutional Court Decision No, 13/PUU-VI/2008) in which the Court ordered compliance with the constitutional requirement that 20% of the budget be set aside for education.

By the time Asshiddiqie came up for re-election as Chief Justice in 2008, therefore, he had done much to put Indonesia's judicial review regime on a path to consolidation around a version of democratic legalism. The particular version of this regime that the Court was helping to build was one in which its claim to authority would have been contingent on its reputation for impartial enforcement of the ground rules for sound democratic governance. But Asshidiqqie, of course, was not re-elected. For reasons that are hard to establish with certainty, he was defeated in an intra-curial vote for the chief justiceship by Mahfud, a then newly appointed judge who had promised at his nomination hearing to adopt a more deferential approach to the implementation of the Court's mandate.[60]

Much has been written about the Court's change of direction under its second chief justice.[61] For present purposes, the key point is that Mahfud's accession to the chief justiceship cut across the democratic-legalist understanding of the Court's authority that Asshiddiqie had propounded. This was the consequence not so much of a deliberate change in strategy as the fact that Mahfud had a very different conception of law's authority. Taking shape during his doctoral research at Gadjah Mada University, Mahfud MD's personal judicial philosophy was influenced by two theorizations of law in particular: Nonet and Selznick's idea of "responsive law" and Satjipto Rahardjo's so-called "progressive legal approach" (*hukum progresif*).[62] Both these theorizations conceive of law's authority as residing, not in its autonomy from politics, but in its capacity to promote a certain kind of politics: participatory, engaged, and social-justice-seeking.

On his elevation to the Bench, Mahfud began to operationalize this conception in the form of a "substantive justice" approach to decision-

[60] Although the chief justiceship was decided by internal judicial vote, there were some suggestions of political influence. See Theunis Roux and Fritz Siregar, "Trajectories of Curial Power: The Rise, Fall and Partial Rehabilitation of the Indonesian Constitutional Court," *Australian Journal of Asian Law* 16, no. 2, Article 2 (2016): 1, 10.

[61] See Hendrianto, *Law and Politics of Constitutional Courts*; Butt, *The Constitutional Court and Democracy*; Siregar, *Indonesian Constitutional Politics*.

[62] Phillippe Nonet and Philip Selznick, *Toward Responsive Law: Law & Society in Transition* (New Brunswick, NJ: Transaction Publishers, 2001). See Siregar, *Indonesian Constitutional Politics*, 115; Hendrianto, *Law and Politics of Constitutional Courts*, 161.

making.[63] Under his chief justiceship, the Court's opinions became more reliant on broad concepts like justice and fairness as opposed to direct references to constitutional provisions.[64] Ideologically, too, the Mahfud Court began to articulate a more explicit pro-poor agenda.[65] As Simon Butt puts it, the Court under Mahfud became "arguably more concerned with resolving immediate political issues and building popularity than with applying or creating legal principles that could be readily applied in future cases".[66] Its remedial orders at the same time became more intrusive.[67] If Asshiddiqie's leadership style had been one of "prudential-minimalism", Mahfud was a chief justice in a more traditionally "heroic" mould.[68] In the conceptual vocabulary developed here, the Court under Mahfud's chief justiceship began to stake out its claim to authority on noticeably more instrumentalist grounds. What mattered was the consequences of the Court's decisions, and whether they were perceived to be just or not.

As should now be clear, this second way of conceiving of law's authority is perfectly valid in the abstract. Other courts have defended their authority in this way and this has proved in certain circumstances to be a basis for stable constitutional governance. There is a question in Indonesia's case, however, about whether the timing of the Court's adoption of such an overtly instrumentalist conception of its authority was right – both because this conception came as such a sudden corrective on the Asshiddiqie Court's approach and because Indonesia's constitutional democracy was still in its infancy.

It is interesting in this respect that Mahfud's views were so strongly influenced by Nonet and Selznick's work. In their book, *Toward Responsive Law*, these authors distinguish three kinds of legal order – repressive, autonomous and responsive – and express a normative preference for

[63] See Siregar, *Indonesian Constitutional Politics*, 115; Butt, *The Constitutional Court and Democracy*, 80; Hendrianto, *Law and Politics of Constitutional Courts*, 167.
[64] Butt, *The Constitutional Court and Democracy*, 63.
[65] Hendrianto, *Law and Politics of Constitutional Courts*, 163.
[66] Butt, *The Constitutional Court and Democracy*, 64.
[67] *Ibid*, 124.
[68] Hendrianto, *Law and Politics of Constitutional Courts*, 4.

the latter.[69] They are careful to say, however, that there is no necessary developmental progression between these modes and that there are considerable risks associated with a transition to responsive law.[70] In particular, because the responsive conception (which is similar to what this paper has been calling an instrumentalist conception) is founded on law's openness to political influence, there is a risk that a deliberate attempt to drive a transition towards it will politicize the judicial process, making it harder for the Court to establish its legitimacy.

Nonet and Selznick's advice is borne out by comparative experience. As we have seen, there are two countries in which a transition to democratic instrumentalism has successfully occurred – the US and India. In both these cases, however, judicial review was firmly established at the time the transition took place. Each country had also enjoyed a long tradition of judicial independence. In the US, the transition to democratic instrumentalism came on the back of profound economic changes and the sustained ideational work done by the legal realist movement. In India, the transition was aided by the damage done to legalism by the Court's performance during the 1975-77 Emergency and the charismatic leadership provided by the post-Emergency justices, Bhagwati and Krishna Iyer JJ. Another crucial factor in India's case was that these two justices had the backing of Prime Minister Indira Gandhi, whose pro-poor political program they were in effect implementing.[71] In both the US and India, therefore, the risks that Nonet and Selznick talked about were reduced.

The situation was quite different in Indonesia. As noted, Mahfud had been appointed on the back of a promise to adopt a more deferential approach. He consequently lacked the political support that Bhagwati and Krishna Iyer JJ had enjoyed when implementing their pro-poor vision of the Indian Supreme Court's role. Without that kind of political support,

[69] Nonet and Selznick, *Toward Responsive Law*.
[70] *Ibid*.
[71] Granville Austin, *Working a Democratic Constitution: A History of the Indian Experience* (New Delhi: Oxford University Press, 1999), 485-97.

there was a risk that Mahfud's well-intentioned efforts to turn the Court into a forum for promoting substantive justice would be misconstrued as the pursuit of a purely private agenda.

In South Africa, when the American Critical Legal Studies scholar, Karl Klare, recommended that the Constitutional Court should adopt a more openly politicized understanding of its mandate, the Court was appropriately circumspect.[72] While it did adopt Klare's reading of the 1996 South African Constitution as embodying a commitment to "transformative constitutionalism", it supported that reading in traditionally legalist fashion with references to the constitutional text. In this way, the Court was able to present its decisions as conforming to orthodox understandings of law's authority even as those decisions intruded ever further into the democratic process.[73] The German Constitutional Court adopted a similarly legalist approach to its understanding of its mandate.[74]

These processes are complex, and the lines of causation are far from clear. But the Mahfud Court's move to a more politicized conception of law, coupled with the greater intrusiveness of its remedial orders when compared to the Asshiddiqie Court, certainly did not help to fortify the Court's position. By abruptly changing the basis for the Court's claim to authority, Mahfud's substantive justice approach arguably exposed it to charges of judicial overreach. In 2011,[75] and again in 2013,[76] the Dewan Perwakilan Rakyat (DPR) amended the Court's governing statute in an attempt to return it to its original "negative legislator" mandate.[77]

Over and above their immediate policy rationales, the 2011 and 2013 amendments should be understood as an attempt to redraw the boundary

[72] Theunis Roux, "Transformative Constitutionalism and the Best Interpretation of the South African Constitution: A Distinction without a Difference?" *Stellenbosch Law Review* 20, no. 2 (2009): 258.

[73] Theunis Roux, "The South African Constitutional Court's Democratic Rights Jurisprudence: A Response to Samuel Issacharoff," *Constitutional Court Review* 5 (2014): 33.

[74] Michaela Hailbronner, *Traditions and Transformations: The Rise of German Constitutionalism* (Oxford: Oxford University Press, 2015).

[75] Law 8 of 2011.

[76] In presidential emergency interim order (PERPU) 1 of 2013 confirmed by Law 4 of 2014.

[77] See Simon Butt and Tim Lindsey, *The Constitution of Indonesia: A Contextual Analysis* (Oxford: Hart Publishing, 2012), 144-146.

between law and politics. As the President and the DPR saw things, the Court had expanded the scope of its authority beyond what had originally been intended. There was no question of judicial review regime change – of anyone seeking a return to authoritarian legalism. Rather, what was being attempted was the contraction of the scope of law's authority along the lines of what occurred in the US in 1937 when the Supreme Court, under the threat of Roosevelt's court-packing plan, relinquished authority over economic legislation.[78]

Understood in these terms, the 2011 and 2013 amendments constituted an important opportunity for the Constitutional Court to try to build a shared understanding of its legitimate role in national politics. This opportunity, however, was not taken up. Instead, the Court struck down many of the 2011 amendments,[79] depicting the legislation as an attack on its independence. Given that the amendments were in part driven by legitimate concerns about the personal integrity of some of the justices,[80] this stance appears somewhat dogmatic. From a comparative perspective, at least, the Court's strong defence of its independence was arguably not appropriate to a situation where (a) there were genuine reasons for the political branches to introduce more effective judicial accountability measures; (b) Indonesia's democracy, though still under threat from authoritarian elements, was improving and capable of legitimately expressing the people's desire for such measures.[81]

Something similar happened in 2013, when there was even more reason, given the Akil Mochtar corruption scandal,[82] for the Court to try to find an accommodation with the political branches. While the Court's striking down

[78] Robert G., McCloskey, *The American Supreme Court* 4th ed revised by Sanford Levinson (Chicago: University of Chicago Press, 2005), 101.

[79] Constitutional Court Decision 48/PUU-IX/2011 and Constitutional Court Decision 49/PUU-IX/2011.

[80] Stefanus Hendrianto, "The Indonesian Constitutional Court at a Tipping Point," *International Journal of Constitutional Law Blog*, October 3, 2013, http://www.iconnectblog.com/2013/10/the-indonesian-constitutional-court-at-a=tipping-point.

[81] See Owen M. Fiss, "The Right Degree of Independence," in *Transition to Democracy in Latin America: The Role of the Judiciary*, ed. Irwin P. Stotzky (Boulder, CO, Westview Press, 1992) 55; Stephen Holmes, "Judicial Independence as Ambiguous Reality and Insidious Illusion," in *From Liberal Values to Democratic Transition: Essays in Honour of János Kis*, ed. Ronald Dworkin (Budapest, Central European University Press, 2004), 3, 9.

[82] See Hendrianto, *Law and Politics of Constitutional Courts*, 196-98.

of the 2013 amendments again appeared forceful, it was the wrong kind of forcefulness. A Court's legitimate claim to authority in a constitutional democracy, on either a legalist or an instrumentalist conception, comes not from dogmatic defence of its prerogatives, but from its ability to present a defensible account of its role in national politics. It is not clear how the Court's decisions on the 2011 or 2013 amendments did that.

While the Court has recovered from the immediate damage done to its public support by the Mochtar scandal,[83] its rather crude defence of its independence in 2011 and 2013 raises questions about the future of Indonesian constitutionalism. To be sure, the Court is still playing an important role in safeguarding democracy – demonstrated, for example, by its decisions on the losing candidate, Prabowo Subianto's challenge to the 2014 presidential election outcome[84] and the so-called "MD3 law",[85] which threatened rights to freedom of speech and association. But the Court has on two other occasions avoided taking decisions on democracy-threatening measures. In the first of these, the Court suspended its order of invalidity on the constitutionality of staggered legislative and presidential elections until after the 2014 elections.[86] In the second, it first rejected a challenge to a 20% presidential election threshold requirement,[87] and then delayed deciding a renewed challenge until after the 2019 elections.[88] These decisions suggest that the Court is less certain than it used to be about its ability to survive a direct confrontation with the political branches. Part of the reason for this, this article has argued, is its equivocation between a legalist and instrumentalist conception of its authority. Until the Court settles

[83] Bjoern Dressel and Tomoo Inoue, "Megapolitical Cases before the Constitutional Court of Indonesia since 2004: An Empirical Exploration" (unpublished paper presented at the 2nd Indonesian Constitutional Court International Symposium on the "Constitutional Court and Constitutionalism in Political Dynamics," Yogyakarta, 1-3 October 2018).

[84] Constitutional Court Decision 1/PHPU.Pres-XII/2014

[85] Constitutional Court Decision 16/PUU-XVI/2018.

[86] Constitutional Court Decision 14/PUU-XI/2013.

[87] Constitutional Court Decision 53/PUU-XV/2017.

[88] Abdurrachman Satrio, "Constitutional Retrogression in Indonesia under President Joko Widodo's Government: What Can the Constitutional Court Do?" (unpublished paper presented at the 2nd Indonesian Constitutional Court International Symposium on the "Constitutional Court and Constitutionalism in Political Dynamics," Yogyakarta, 1-3 October 2018).

on one or the other of these conceptions (preferably the former, given the problems with instrumentalism in the transitional context), it cannot hope to build a defensible public understanding of its legitimate role in national politics. Instead, its public support will continue to fluctuate with changing public perceptions of the personal moral integrity of the justices and the competence and reliability of other institutions. Whether this will be enough is questionable given the profound challenges facing Indonesia's democracy.[89] In the circumstances, the Court would do well to re-dedicate itself to the work that Chief Justice Asshiddiqie began. That means paying attention to the technical quality of its decisions, presenting an account of its authority as stemming from the impartiality of its reasoning processes rather than from the justices' personal conceptions of social justice, and engaging in continued efforts to educate the public about the nature of its role in Indonesia's democracy.

III. CONCLUSION

This paper presented a comparative framework for understanding the evolution of judicial review regimes and then applied that framework to examine the development of Indonesia's judicial review regime after 2002. It started by relating the well-known story of the transformation of American law that occurred over the first half of the last century. As told by Morton Horwitz and others, that story is about how the premises of Classical Legal Thought were destabilised by the changes to the American economy that occurred in the second half of the nineteenth century, and about how the legal realist movement exploited the ensuing crisis to transform the dominant American conception of the law/politics relationship. Mining that well-known story for generalizable concepts, the paper posited that the two main variables driving constitutional development in systems of strong-form judicial review are societal conceptions of law's claim to authority, on the one hand, and societal conceptions of political

[89] See Marcus Mietzner, "Fighting Illiberalism with Illiberalism: Islamist Populism and Democratic Deconsolidation in Indonesia," *Pacific Affairs* 91, no. 2 (2018): 261; Edward Aspinall, "Twenty Years of Indonesian Democracy: How Many More?" http://www.newmandala.org/20-years-reformasi/.

authority, on the other. Each of those variables, the paper argued, is liable to change independently of the other. Under certain conditions, however, they may also lock into each other to form a relatively stable judicial review regime. The paper then set out four ideal-typical such regimes defined by their distinctive combinations of legal and political authority. The fourth section applied this framework to Indonesia, arguing that the Constitutional Court's equivocation between a legalist and instrumentalist conception of its claim to authority has delayed the consolidation of a determinate judicial review regime. The stabilisation of such a regime, the paper concluded, is vitally necessary if the Court is to continue to play an effective role in supporting Indonesia's democracy.

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Korean Constitutional Court and Constitutionalism in Political Dynamics: Focusing on Presidential Impeachment

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Abstract

The Constitutional Court of Korea, which should be a product of the June Democracy Movement in 1987, has transformed Korea's constitutionalism ever since its inception. The recent two impeachment cases decided respectively in 2004 against President Roh and in 2017 against President Park might be classic examples of how the state institutions including the Court interact with other institutions in a very political case in terms of political dynamics. In the impeachment case against President Roh, the Court positioned itself strategically by establishing the 'grave violation of law' rationale, where it sided with the impeaching parliament by finding three counts of violations of law but dismissed the case in its entirety through the operation of the 'grave violation of law'. In the impeachment case against President Park, the Court basically followed the grave violation logic but reached a different conclusion to remove the President, which might be another strategic position taken by the Court, which is in line with the will of the super-majority of the Korean public. This paper aims to discuss how the Constitutional Court has developed its strategic position in terms of political dynamics, by analyzing the two presidential impeachment cases.

Key Words: Grave Violation of Law, Korean Constitutional Court, Presidential Impeachment.

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I. INTRODUCTION

The June Democracy Movement[2] that generated massive nationwide demonstrations in Korea from June 10 to June 29 in 1987 protesting against the prolonged rule of the authoritarian regime was a landmark in Korea's constitutionalism. It brought about June 29th Declaration by then ruling party's presidential candidate Roh Tae-Woo[3], in which he promised a direct presidential election and peaceful transfer of state power through constitutional amendment. Roh's concession was a response to civil society's long request for people's direct voting in presidential election, ultimately bringing down a longstanding military regime after all.[4] Among the key features of the 9th amendment of the Korean Constitution in 1987 was the introduction of the independent Constitutional Court system.

Under the *Yushin* Constitution, promulgated in 1972 by then President Park Chung-Hee[5] and under the 1980 Constitution, promulgated after Chun Doo-Hwan rose to power in a military coup, jurisdiction for constitutional adjudication was granted to the Constitutional Committee and constitutionality review before the Committee should be requested by the Supreme Court of Korea, which failed to make a single request before the Committee.[6] Prior to the Constitutional Committee system, the Supreme Court of Korea had jurisdiction over constitutionality review as well as over other general legal matters, like the U.S. Supreme Court.[7]

With regard to the constitutional review system before the establishment of the Constitutional Court in 1988, Korea's constitutionalism in general and constitutional adjudication in particular had remained only at a nominal level

[2] It is also called as the 6.10 Democracy Movement.

[3] June 10th's announcement by President Chun Doo-Hwan's military regime that it nominates Roh Tae-Woo, Chun's friend and former military general, as his successor triggered the Movement.

[4] Under the 1980 Korean Constitution, Korean president shall be elected indirectly by 5,000 members of the Electoral College, elected by the Korean people only for the purpose of presidential election.

[5] Park Chung-Hee rose to power in 1961 through a military coup and since then had led Korea until he was assassinated by KCIA director Kim Jae-Gyu on October 26, 1979.

[6] Constitutional Court of Korea, *Thirty years of the Constitutional Court of Korea* (South Korea: Constitutional Court of Korea, 2018), 83-89.

[7] *Ibid*., 64-67. Korea then followed the American model of judicial review in which the power to review the constitutionality of statutes is diffused throughout the courts as a decentralized model of constitutional adjudication.

so as to declare only four statutes unconstitutional for the past 40 years.[8] For this reason, the political circle did not expect much from the Constitutional Court when it was established in September, 1988. Contrary to such expectations, however, the Korean Constitutional Court began to actively engage Korean society by producing many meaningful decisions from the beginning.[9] The Court has nullified as many as more than 580 statutes to date by its en banc decisions,[10] often to the embarrassment of the ruling party and its rival institution, the Supreme Court of Korea.[11]

With the establishment of the Constitutional Court of Korea, it is safe to say that the Korean public is now having an effective mechanism to enforce the Constitution, and one of the important instruments to implement the constitutional norms is the constitutional complaint system, in which individuals may file complaints directly before the Court when their constitutional rights are violated,[12] or their requests for adjudication on constitutionality of a statute in a pending lawsuit are dismissed by a court.[13] Constitutional complaint was also one of the main reasons why an independent Constitutional Court system could be introduced through the constitutional amendment in 1987.[14]

During its history, 2004 was an unforgettable year for the Constitutional Court, in which it became deeply involved in political dynamics of Korean society, and produced two landmark decisions affecting the Korean political

8 Lee, Kang-Kook, "The Past and Future of Constitutional Adjudication in Korea," *Current Issues in Korean Law* (The Robbins Collection Berkeley Law: University of California at Berkeley, 2014), 10.

9 The Constitutional Court of Korea has jurisdiction over the following matters: 1) Constitutionality of a statute upon the requests by the courts, 2) Impeachment, 3) Dissolution of a political party, 4) Competence disputes between state agencies, between state agencies and local governments, and between local governments, and 5) Constitutional complaints.

10 This statistics is from the Court's official website: www.ccourt.go.kr.

11 Kyong-Whan Ahn, "The influence of American Constitutionalism on South Korea," Southern Illinois Law Journal 22 (2017), 76.

12 According to Article 68 Section 1 of the Constitutional Court Act, any person whose constitutional rights have been violated by exercise or non-exercise of government institutions, excluding court judgments, may request adjudication on constitutional complaint before the Constitutional Court. This type of constitutional complaint is called Article 68(1) constitutional complaint.

13 This unprecedented type of constitutional complaint is called Article 68(2) constitutional complaint and under this system, "any party to an ordinary court proceeding has recourse to the Constitutional Court to receive a final decision on the constitutionality of the statutes" if the request for constitutionality review was dismissed by the court of original jurisdiction. Lee, Kang-Kook, "The Past and Future of Constitutional Adjudication in Korea," 13.

14 Constitutional Court of Korea,*Thirty years of the Constitutional Court of Korea,* 95-96.

dynamics tremendously. One was the decision on the impeachment motion by the parliament against President Roh, decided on May 14, 2004, and the other was the decision on Korea's capital city relocation,[15] decided on October 21, 2004,[16] and in the presidential impeachment case, the Court stressed that impeachment adjudication is a system designed to protect and maintain the Constitution/constitutional order from violations by high-ranking government officials of the executive and/or the judicial branch.[17]

From late October 2016 to March 2017 many South Koreans took to the street and staged a series of protests with candle lights in hands, denouncing a political scandal involving President Park Geun-Hye herself and calling for her resignation or impeachment. That is now called the Candlelight Struggle or 2016-2017 South Korean Protests, and is regarded as one of the key driving forces of President Park's impeachment.

This paper aims to assess Korea's constitutionalism in relation to the Constitutional Court of Korea and especially in the context of political dynamics. Since constitutional governance should honor a separation of powers among state institutions (i.e. the legislature, the executive, and the judicial branch) and should keep checks and balances between those institutions, and presidential impeachment in which the legislature tries to remove the head of the executive

[15] The case was about relocation of the administrative functions of Korea's capital from Seoul to Chung-Cheong Province, one of President Roh's key campaign pledges. After being elected as president, President Roh and the ruling party introduced a Special Act on the Construction of a New Administrative Capital ("Special Act"), but the Constitutional Court held the Special Act unconstitutional. The Court said that Seoul has been the capital of Korea for over 600 years and Seoul's status as the nation's capital has become a customary constitutional norm, thus a constitutional amendment, not an enactment of a special law must be required for the relocation of the capital. Ibid., 283-291.

[16] In the wake of the ruling of the capital relocation case, some political scientists heavily criticized that the Court's decision is a classic example of a political decision by the judiciary or judicialization of politics, even deploring that an "imperial judiciary" has now come in Korea.
Choi Jang-Gip, Commentary on *The Korean edition of How Democratic is the American Constitution, by Robert Dahl* (Humanitas, 2004), 49-57.

[17] The Court elaborated further by saying, "Article 65 of the Korean Constitution includes the President in defining 'public officials' who are subject to impeachment, having a discernible position that even the President who has been elected by the Korean public, thus being endowed with democratic legitimacy directly from the public, may be impeached in order for the preservation of the Constitution or the constitutional order and that even a political chaos that might be caused by the removal decision of the President should be deemed as an inevitable cost for democracy for the purpose of protecting 'the basic order of liberal democracy'. Therefore the system that subjects the President to impeachment is for the realization of the rule of law, in which every person is under the law without exception and even the state power's holder such as president cannot be above the law." Constitutional Court of Korea, *Korean Constitutional Court Decisions ("KCCR") Vol. 16-1* (Constitutional Court of Korea, 2004), 632-633.

must involve political dynamics among state institutions. In this vein, it is worth studying Korea's recent two presidential impeachment cases, among which the first was President Roh Moo-Hyun's impeachment in 2004 and the second was the impeachment of President Park Geun-Hye in 2016-2017, and this study is with a goal to understand how the Constitutional Court interacts with other state institutions in the context of political dynamics, by analyzing the two cases.

II. ANALYSIS OF THE PRESIDENT ROH IMPEACHMENT CASE

2.1. Government Structure and Impeachment Clause in Korea

The Korean government is structured based upon separation of powers principle, like other modern governments. It has mostly had a presidential system of government since the founding Constitution of 1948, with the exception of the short-lived parliamentary cabinet system under the third and fourth revisions of the Constitution from mid-1960 to late 1962.

The Korean Constitution has had an impeachment clause against the president since its founding Constitution and the state institution that initiates the impeachment is the National Assembly.[18] The impeachment clause in the current Constitution reads as follows.

Article 65 (Impeachment)

(1) In case the president, the prime minister, members of the State Council, ministers, justices of the Constitutional Court, judges, members of the National Election Commission, the chairperson and members of the Board of Audit and Inspection, and other public officials designated by statutes have violated the Constitution and/or other statutes in the performance of official duties, the National Assembly may pass motions for their impeachment.

(2) A motion for impeachment prescribed in paragraph (1) may be proposed by one third or more of the total members of the National Assembly, and shall require a concurrent vote of a majority of the total members of the National Assembly for passage: *Provided*, that a motion for the impeachment of the president shall be proposed by a majority of the total members of the National Assembly and approved by two thirds or more of the total members of the National Assembly.

[18] Korea has a unicameral parliamentary system.

(3) Any person against whom a motion for impeachment has been passed shall be suspended from exercising his/her power until the impeachment has been adjudicated.

(4) A decision on impeachment shall not extend further than removal from public office: *Provided*, that it shall not exempt the person impeached from civil or criminal liability.

2.2. Background of Roh Impeachment Case

Roh Moo-Hyun was elected as president in December 2002 and took office in February 2003 with a five-year term with no possibility of renewal. From the beginning of his term President Roh had to face opposition from the Grand National Party (GNP) with the majority seats (149 seats) in the National Assembly. To make the matter worse, the President's own party, the Millennium Democratic Party (MDP) had its internal power struggle and 40 pro-Roh lawmakers defected from MDP and formed a new party, the Uri Party with 47 seats in November 2003, leaving remaining MDP lawmakers (63 members) bearing a grudge against the President and causing them to share anti-Roh sentiments with GNP lawmakers.[19]

As the general election, scheduled for mid-April 2004, was approaching, President Roh made some election related remarks with the hope of getting the majority seats for the Uri party in the National Assembly, which both GNP and MDP members of the parliament vehemently resisted. They became bitter, threatening to impeach the President, and began to form an anti-Roh coalition, which in turn became a driving force of President Roh's impeachment.

On February 18, 2004, the President said at a press conference with six news media organizations, "..... I simply cannot say what will happen if the quorum to block a constitutional amendment attempt by the opposition succeeds in this election."[20] He added at a press conference with the Korean Network Reporters Club, which was broadcast nation-wide on February 24, 2004, "I am expecting that the Korean public will support the Uri party overwhelmingly," and "I intend to do everything that is legally allowed if it may lead to the party's win in this

[19] Youngjae Lee, "Law, Politics, and Impeachment: The Impeachment of Roh Moo-Hyun from a Comparative Constitutional Perspective," *American Journal of Comparative Law 53* (2005): 408-409.

[20] It means that the opposition continues to take the super-majority in the parliament.

election," and, "Once the public elected me as president, they should give me their support in this election as well, in order for me to continue my job as president. Otherwise, I may step down from the presidency if they decide to give me a disapproval vote in this election."[21]

In early March, the National Election Commission sent a warning letter to President Roh, mentioning his above remarks and requesting that he should remain neutral in the upcoming general election as a public official, and the opposition demanded an apology from the President for his remarks, with threats to file impeachment against him. In response, President Roh said at a press conference on March 11 that he is not persuaded by the Commission's view that his support for the ruling party had violated political neutrality.[22]

A day later on March 12, 2004, the National Assembly passed a motion to impeach President Roh with 193 supporting votes for his impeachment out of 273 total members and the office of the President became suspended immediately according to Article 65 Section 3 of the Korean Constitution.[23]

2.3. Court's Findings on the President's Violations

During the impeachment trial at the Constitutional Court, the lawyers for the President asserted that in order to impeach the sitting president, there must be a grave and clear violation of law, not just a violation of law, but the lame-duck parliament rebutted that the ground for impeachment should be any act in violation of the Constitution and/or statutes, and should not be limited to a grave violation of law. The National Assembly further insisted that not only an act in violation of the Constitution and/or statutes by the President but his/her political incompetency and decision making errors should also constitute a ground for impeachment, and that the parliament, which is a democratically elected institution, should be the final arbiter of whether the President's violation of law amounts to his/her removal decision, not the Constitutional Court, and added that the Court's job should be limited to whether the specific violation

[21] Constitutional Court of Korea, *KCCR Vol. 16-1* (2004), 634.
[22] Youngjae Lee, "Law, Politics, and," 410-411.
[23] Constitutional Court of Korea,*Thirty years of the Constitutional Court of Korea,* 283-284.

of law constituting the ground for impeachment exists, and the constitutionality or legality of the impeachment proceeding.[24]

The Court delivered its final decision on May 14, 2004 a month after the April 15th general election, in which President Roh's ruling party more than tripled its seats in the National Assembly from 47 to 152 seats (out of 299 total seats) while the GNP party retained 121 seats (from 149 seats before) and the MDP party secured only 9 seats (from 63 seats before).[25]

The Constitutional Court found that President Roh violated the Constitution and/or other statutes on the following three instances, but dismissed the case after all.

2.3.1. Election Related Remarks

The basic facts about the contents of the President's election related remarks are described in the above background of the case (basically remarks on Feb. 18 and Feb. 24, 2004 by the President) and the Court found that the President's remarks violated his duty to maintain political neutrality in elections.

In its rationale, the Court cited Article 7 of the Constitution,[26] and interpreted it as follows: the Constitution mandates that state institutions should serve the entire population and act neutrally in a competition among political parties or political factions, and no state institution should exercise influence over an election by identifying itself or taking sides with a particular political party or a candidate. The Court also viewed that the Korean president is a 'public official' under the Article 9 of the Public Officials Election Act ("POEA").[27]

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[24] Constitutional Court of Korea, *KCCR Vol. 16-1* (2004), 647-648.

[25] Youngjae Lee, "Law, Politics, and," 412.

[26] It says, "All public officials shall be servants of the entire Korean people and shall be responsible to the people."

[27] The Court said, "A public official or a person who is obligated to maintain political neutrality shall not exercise any undue influence over an election or perform any act likely to affect the outcome of an election." Although it acknowledged the President maintains party membership after being elected as president and retains an affiliation with a political party, it held that the President should work for the entire nation and is obligated to unify the entire society, including those who supported him/her and those who opposed him/her as well. In this way, the Court found that the President violated the obligation to maintain political neutrality in elections by making the statements.
Constitutional Court of Korea, *KCCR Vol. 16-1* (2004), 634-641.

Political scientists harshly criticized this reasoning of the Court, saying that the Court's rationale completely misunderstood and ignored the dual status of the president: one as head of the administration and the other as a leader of a political party, and that if the Court's reasoning that President Roh should keep political neutrality in public officials' elections had been a reasonable decision, all the former presidents should have been impeached as well.[28]

Constitutional law scholars also criticized the Court's reasoning, saying that the President should not be categorized as a public official under Article 9 of the POEA who should keep political neutrality in elections, considering the political nature of the presidential office under pluralist democracy and that the president is a public official whose political activities are allowed under the State Officials Act, and other laws.[29]

2.3.2. Reaction to the National Election Commission

President's Press Secretary Lee Byung-Wan said on March 4, 2004, in response to a warning letter from the Commission, "I would like to make it clear that the Commission's decision is not persuasive at all," "Now we should change the election system and practice as our democracy advances," "The time when the president manipulated the state institutions to win election is now a thing of the past, and election laws should also be changed in line with the new election culture."

The Court found that the above statements were denigrating the current law as the 'vestige of the era of the government-interfered elections' and raising questions about the constitutionality and/or legality of the election law publicly do not conform to his obligation to abide by and protect the Constitution and other laws.[30]

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[28] Myung-Lim Park, "Constitution, Constitutionalism, and Democracy in South Korea: Focusing on the Presidential Impeachment by the National Assembly in 2004," *Political Scientists Society Review 39-1* (2005): 258-259.

[29] Jong-Cheol Kim, "What Does the Korean Constitutional Court Miss or Misunderstand in The Impeachment Trial against President Roh Moo-Hyun?" *World Constitutional Law Review 9* (2004): 14-17.

[30] The Court also held that had the President tried to question the constitutionality of a bill passed by the National Assembly and believed that such a law be improved by revision, he should have asked for reconsideration by the parliament by returning the bill or by submitting a new bill with constitutionality issue being taken care of. Accordingly, the Court concluded that the statements by the Presidential Office, also called the Blue House were denigrating the current election law as a response to and in the context of the Commission's warning for violation

Constitutional law scholars criticized the Court's ruling, saying that looking into the basic facts of the case, the President's Press Secretary mentioned first that the Commission's decision should be honored, and then expressed that there might be some disagreements over the interpretation of the relevant clauses of the election law additionally, thus the reaction by the Presidential office should not be interpreted as a violation of the rule of law principle.[31]

2.3.3. Proposal for a National Referendum

The third violation of law is about whether the President's proposal for a confidence vote as a referendum violates the Constitution. President Roh proposed a national referendum as vote of confidence in his presidency during his address at the National Assembly on October 13, 2003 by saying, "I announced last week that I would submit myself for public confidence. Although it may not be a matter that I am able to decide, I think a national referendum is a right way to implement that idea."

The Court held that Article 72 of the Constitution (referendum clause) does not allow a national referendum as a way to cast a confidence vote in the presidency, since that type of referendum is not expressly prescribed in the referendum clause.[32] The Court concluded that although the President merely proposed an unconstitutional national referendum and did not follow up his proposal, mere proposal in itself is in violation of the Constitution, which is also not in conformity with the President's obligation to implement and protect the Constitution.[33]

2.4. Grave Violation of Law and the Court's Strategic Positioning

As we see from the above facts of the case, the violations found by the Court are basically remarks either by the President himself or his Press Secretary, whether

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of the election law cannot be deemed as a proper attitude respecting law and order, rather being considered against the spirit of the rule of law and in violation of the President's obligation to protect the Constitution. Constitutional Court of Korea, *KCCR Vol. 16-1* (2004), 647-648.

31 Jong-Cheol Kim, "What Does the," 17-18.

32 It says, "The president may submit important policies relating to diplomacy, national defense, unification and other matters relating to the national destiny to a national referendum, if he deems it necessary."

33 Constitutional Court of Korea, *KCCR Vol. 16-1* (2004), 648-650.

it is an election related remark or a reactionary remark to the Commission or a referendum proposing remark, all of which are political in nature.

As for the election related remarks, the President was so keen on the upcoming general election and the parliamentary seat distribution after the election so as to make some remarks on the eve of the election in support of the Uri party despite expected fierce opposition, since if his party did not win the majority seats in the general election, his policies would be blocked in the parliament by the opposition. As for the lawmakers of both GNP and MDP parties who formed the super-majority in the lame-duck parliament, they were also very keen on the general election as to demand immediate apologies from the President for those remarks, since they all wanted to keep their seats and their party's share in the parliament. So all the activities involving the President and the opposition lawmakers on the eve of the election were inevitably very political in nature, striving to get or keep power in the parliament by getting the approval from the general public, which must be a core of the politics.

When it comes to the Constitutional Court, it had to pronounce its final decision on the impeachment motion against the President within a period of maximum six months since the reception of the case,[34] especially under enormous pressure of the constitutional crisis as the presidential office was suspended for the first time in Korean history. It was in a very difficult position as a young Court (in its existence of some fifteen years) to be forced to decide whether to side with the impeaching parliament, dominated by the supermajority of the opposition parties of GNP and MDP, or to side with the impeached President, in this high profile case with paramount political implications. The Court finally took a very strategic position to partly side with the parliament by finding three violations by the President guilty but partly side with the President by dismissing the case in its entirety, which was only possible through the mechanism of 'grave violation of law' that was derived from its interpretations of Article 53 of the Constitutional Court Act ("CCA"), and Article 65 of the Constitution.

[34] See Article 30 Section 1 of the Constitutional Court Act.

2.4.1. Court's Reasoning on 'Grave Violation of Law'

(1) The Court's interpretation of Article 53 of the CCA

The Court begins with the interpretation of Article 53 of the CCA, which says, "When a request for impeachment is well founded, the Constitutional Court shall pronounce a decision to remove the respondent from his/her relevant public office." One interpretation of Article 53 of the CCA is that the Court shall automatically issue a removal decision as long as there is any legal ground for impeachment set forth in the impeachment clause (Article 65 of the Constitution), and according to that interpretation, the Court is bound to issue a removal decision upon finding any violation of law without regard to gravity of the violation. Should the respondent be removed from public office for any and all violation of law, however, it would be against the principle of proportionality that requires a balance between a violation and a punishment, according to the Court. Therefore the Court concluded that the existence of the 'well founded ground for request for impeachment' should mean the existence of a 'grave violation of law', sufficient to justify the removal of the President, not being merely any violation of law.[35]

The Court further noted that now the question is whether there is a grave violation of law or whether the removal of the President is justified in this case, and it should be determined by balancing the gravity of the violation of law and the impact of the removal decision, which is, balancing between the degree of the negative influence or harm caused by the violation of law upon the constitutional order and the impact to be caused by the removal decision.[36]

(2) What constitutes a grave violation of law?

The Court then said as follows:[37] Although it is very difficult to describe in general terms what should constitute a grave violation of

35 Constitutional Court of Korea, *KCCR Vol. 16-1* (2004), 654-655.
36 Constitutional Court of Korea, *KCCR Vol. 16-1* (2004), 655.
37 Constitutional Court of Korea, *KCCR Vol. 16-1* (2004), 655- 656.

law, sufficient to justify the removal of the president, we should take into account that impeachment adjudication is designed to protect the Constitution/constitutional order from abuse of power on one hand, and that the removal decision would deprive the public's trust entrusted to the president on the other hand, and thus following two standpoints should be regarded as important standards.

From the first standpoint that impeachment adjudication is dedicated to the protection of the Constitution, a removal decision of the president may be justified only when the president's violation of law has a significant meaning in terms of protecting the Constitution and restoring the impaired Constitution/constitutional order by the removal decision. From the second standpoint that the president is a state institution representing the people's will directly entrusted with democratic legitimacy through election, a reasonable ground for impeaching the president should be found only when the president has lost the public trust by his/her violation of law so that the public may reclaim that trust during the tenure of the president.[38]

2.4.2. Whether to Remove the President

After elaborating its views on when to remove the president from office in general, the Court moved on to whether to remove the President in this case. It basically held that the remarks either by the President or his Press Secretary were made not in a way that was premeditated or willful, but in a way that was passive and incidental when answering reporters' questions or responding to the Commission, without the intention to stand against the

[38] The Court added: Now to be more specific, the constitutional order, which is designed to be protected by the impeachment adjudication should mean the 'basic order of liberal democracy', which consists of the two principles, rule of law and democracy. The key elements of rule of law are respect for human rights, separation of powers, and independence of judiciary, and the essential elements of democracy are parliamentary system, multi-party system, and public officials' election. Thus a violation of law viewed from the first standpoint of protecting the Constitution/constitutional order means a violation of law threatening the basic order of liberal democracy, which means a 'willful violation' of the fundamental principles of rule of law and democracy. From the second standpoint of the public trust, an act that betrays the public trust entrusted to the President means other violations of law of him/her that may not threaten the basic order of liberal democracy, whose typical examples include bribery, corruption, and other acts obviously harming state interests.
Constitutional Court of Korea, *KCCR Vol. 16-1* (2004), 656.

basic order of liberal democracy or against the rule of law principle (the first and the second violations), and that the confidence vote proposal (the third violation) was merely a proposal during his speech at the National Assembly, not being considered a willful violation of the fundamental principles of the Constitution such as democracy, nor to have caused a significant harm to the constitutional order.

2.4.3. Understanding 'Grave Violation of Law' Logic

The Constitutional Court made it clear through its ruling that the impeachment adjudication is solely to determine whether a ground for impeachment exists from a legal perspective, and it is the Court's task, not the legislatures' to make a final decision on presidential impeachment.[39] And as noted in the above, what the Court basically said in this case is that in order to remove the President from office, first there must be a violation of law, and second the violation of law must be grave enough to remove him/her from office, both of which are legal judgments, not an issue politically decided.

I believe that by establishing 'grave violation of law' rationale, the Court was able to pronounce that the removal decision is solely at the discretion of the Court, dismissing the Roh impeachment case in its entirety and reclaiming the presidency after all, even after finding a couple of violations of law by the President guilty[40], since whether there is a grave violation of law is a legal judgment belonging to the Court, not to a political institution like parliament, according to the Court's rationale. Then the question arises where this idea of 'grave violation of law' comes from? One possibility might be from the idea of "high crimes and misdemeanors" in the U.S. Constitution.[41]

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39 Constitutional Court of Korea, *KCCR Vol. 16-1* (2004), 654.

40 The idea that the Court has a discretion to remove or not to remove the President even when he/she is found to have violated the Constitution, might come from or at least be influenced by Article 56 Section 2 of the Act on Federal Constitutional Court of Germany, which says, "In the event of a conviction, the Federal Constitutional Court may declare that the Federal President has forfeited his or her office."

41 Jin-Wook Kim, "An Essay on Grounds for Impeachment," *State and Constitution I* (2018), 1717-1719, Bobmun Sa.

2.4.4. Court's Strategic Positioning

As it may be seen from the background of this case and the Court's findings above, this impeachment case is comparable to President Johnson's impeachment in 1868 in the United States.

President Johnson, who succeeded President Lincoln as vice-president after Lincoln's assassination in 1865, had conflicts with the majority of his own Republican members, so called the Radicals, who controlled both Houses of the parliament, trying to keep their own Reconstruction policies over the South, which Johnson opposed. Johnson wanted to remove Edward Stanton, the Secretary of War who was in charge of the military reconstruction policy and also a Radical, but the Congress passed the Tenure of Office Act in 1867, aimed to make the Secretary's removal dependent upon the consent of the Senate, over Johnson's veto. Johnson's immediate dismissal of Stanton enraged the Radicals and the impeachment against President Johnson was filed in the Congress, but he escaped conviction in the Senate by one vote in 1868.[42]

As the Johnson impeachment which began with differing views on key policies such as the Reconstruction of the South and a power struggle between the President and the majority of his own Republican Party, was obviously a politically motivated impeachment, the Roh impeachment also began with a power struggle in his own party and became a political weapon for the opposition to use, to deter the President's political speeches on the eve of the general election.

One key thing to understand the Roh impeachment is that the impeachment itself was so unpopular that seven out of ten Koreans were against it, and there were nation-wide demonstrations protesting the impeachment filing by the parliament. Naturally the presidential impeachment became a key campaign issue in the April 2004 general election in the middle of the impeachment trial, which it turned out that

[42] Berger, Raoul, *Impeachment: The Constitutional problems* (London: Harvard University Press, 1973), 252-263. The removal consent clause of the Tenure of Office Act was held unconstitutional by the U.S. Supreme Court later in Myers v. United States (1926).

the President's Uri party won the majority by more than tripling their seats in the National Assembly.[43] The Presidential impeachment in March and the general election and the ruling party's unexpected win in April and the Constitutional Court's dismissal of the impeachment in May, 2004 were such a quick turn of events in terms of political dynamics. I believe that it was a wise decision for the Court to dismiss the impeachment in its entirety, even after finding three violations guilty through the mechanism of the grave violation of law, and that as long as the decision whether there is a grave violation of law in impeachment case is a legal decision that should be decided by the Court, I suppose that the Constitutional Court can always make a strategic decision even in this sort of highly political case, in terms of political dynamics between state institutions of the Korean government

When it comes to the internal political dynamics within the Court, a reporter who covered the impeachment case from beginning to end revealed that there had been three unpublished dissenters with the opinion that the three counts of the President's violations were grave enough to remove him from the presidency.[44] I think that the existence of three those dissenters might explain why the Court developed the 'grave violation of law' logic in this case, since through that mechanism, I believe the Court was able to find some violations guilty but still dismiss the case after all.

2.4.5. Legal Issues with the Grave Violation of Law Logic

Although the grave violation of law logic itself may not be that unique, but what constitutes 'grave violation' is very unique in the Roh impeachment case, having some legal issues that should be dealt with.

The first issue in the 'grave violation of law' requirement might be that the Court did not make any difference between a violation of the Constitution and a violation of other statutes. While violations of statutes might greatly vary from a violation of the criminal code with a possibility of heavy penalty, such as bribery to a minor violation, such as traffic violation, a violation of

[43] Youngjae Lee, "Law, Politics, and Impeachment," 412.
[44] Lee, Beom-Jun, *Constitutional Court: Tells about Korea's recent history*, (KungRee, 2009), 357-359.

the Constitution should be different in nature and weight from a violation of a statute, since if the Constitution is found to be violated, the gravity of the violation may not be comparable to a minor violation of a simple statute, to the degree that we can even say that if there is a violation against the Constitution, the gravity of the violation is presumed.[45] Considering that the idea of "high crimes and misdemeanors" in the U.S. Constitution originally meant the crimes and misdemeanors against the state or against the United States, [46] a violation against the Korean Constitution can be easily understood as a violation against the Republic of Korea and thus presumably a grave violation.

In this sense, it is understandable that when the Constitutional Court discussed the gravity of the violation, the first standpoint/standard should be the constitutional order, and the gravity should be estimated by assessing the damage or harm done upon the order by the President. But the problem is that the Court equated the constitutional order with the 'basic order of liberal democracy' without any further explanation, which is the same standard to be applied in the dissolution of the political party. Since the 'basic order of liberal democracy' only includes the rule of law and democracy according to the Constitutional Court's precedents, if the constitutional order has such a limited meaning, it seems that the first standard/standpoint, established in relation to the constitutional order, is too narrow,[47] which might show some reluctance of the Court to remove the President in this case.

Another issue in the Court's rationale is that while the Court said that a grave violation of law from the first standpoint, which is equated with the basic order of liberal democracy, means a 'willful violation' of the rule of law and democracy, the reason why only the 'willful violation' can be a grave violation is not clear.

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45 Jin-Wook Kim, "The Grounds for Presidential Impeachment under the Korean Constitution," *The Justice 161* (2017): 18-19, The Korean Legal Center.

46 Cass Sunstein, "Impeaching the President," *University of Pennsylvania Law Review 147* (1998): 285-289.

47 Ha-Yeol Kim, "Presidential Impeachment – 2017.3.10. 2016Hun-na1 decision," *Beobjo 722* (2017), 410-411, Beobjo Association.

Some critics pointed out that the grave violation rationale began with a different interpretation of Article 53 of the Constitutional Court Act from that of Article 65 of the Constitution, simply mentioning, "a violation of the Constitution and/or other statutes" as grounds for impeachment, asserting that both grounds for impeachment in the Constitution and the Act cannot be different but the same, and that the grave violation logic by the Court is unnatural and unreasonable.[48] I suppose that the idea of the 'willful violation' requirement might come from or at least be influenced by Article 56 Section 1 of the Federal Constitutional Court Act of Germany, which says, "The Federal Constitutional Court shall declare in its judgment whether the Federal President is guilty of *intentionally violating* the Basic Law or a federal law, which must be clearly specified."

The last issue with the Court's grave violation analysis is that even though the Court elaborated on the second standpoint that the President is a state institution entrusted with democratic legitimacy through a national election, the Court just briefly mentioned that the President has not betrayed the Korean people's trust entrusted to him through election from the second perspective, but failed to provide any reasoning why the President had not betrayed the public trust in this case.

III. ANALYSIS OF THE PRESIDENT PARK IMPEACHMENT CASE

3.1. Background of the Case[49]

The political scandal or crisis that led to the impeachment of President Park Geun-Hye[50] went back to the press report in late July, 2016 concerning the contributions to the Mir and K-Sports Foundations by some *Chaebols* (large business conglomerates) such as Samsung and Hyundai. The presidential office, also called the Blue House was reportedly involved deeply in the establishment of those two sports related foundations, which is quite unusual.

[48] Lee, Seung-Woo, "Case Study on President Roh's impeachment",*Constitutional Decision's Study 6* (Korean Constitutional Decision's Study Society, 2004), 288-290.

[49] This background of the case comes mostly from the Court's ruling at Constitutional Court of Korea, *KCCR Vol. 29-1* (2017), 9-10.

[50] Park Geun-Hye, a daughter of former President Park Chung-Hee, a military dictator, was elected as president in late 2012.

In the midst of the scandal, there came a decisive report on October 24 that key Blue House documents had been leaked to President Park's old confidante Mrs. Choi Sun-Sil ("Mrs. Choi"), and that she had intervened in state affairs completely behind the scene. The news immediately shocked the nation, and public sentiment began to turn its back on the President, condemning her connection with Mrs. Choi. The next day, President Park delivered a national address saying, "I admit that I had taken Mrs. Choi's advice from time to time on some wordings of my speeches or PR documents, but I dropped that practice after the Blue House secretarial office was fully staffed. It all began from good intentions, but if it caused any trouble to the people, I now want to make my sincere apologies."

Despite that national address, there came out other reports on Mrs. Choi's secret intervention in state affairs, and on November 3, she was arrested just after returning to Korea from Germany, on charges of abuses of power and other allegations. On the next day, President Park had to deliver a second national address, offering her second apology to the effect that she is even willing to take her own responsibility, if any.

On November 6, her Senior Secretary for Policy Coordination, Ahn Jong-Beom, was arrested on charges of attempted coercion and abuses of power, and her Secretary for Personal Affairs, Mr. Chung was also detained for allegedly leaking secret documents to Mrs. Choi. They were indicted on November 20, and a few days later, the opposition parties agreed to jointly draft and submit a motion to impeach the President. At that, President Park offered her third apology on November 29, and said, "I will leave it up to the National Assembly whether I should resign from or remain in office, and whether my remaining term as president should be shortened."

Despite her willingness to resign from the presidency in accordance with the National Assembly's decision, the parliament launched a special committee to conduct an investigation into suspicions that a civilian had secretly intervened in state affairs, and an independent counsel to conduct criminal investigation into that matter was appointed by the President immediately. On December 3, 171

lawmakers submitted a motion for presidential impeachment, and it was passed with the super-majority of 234 members of the parliament voting in favor of the impeachment (out of 300 total members) on December 9, 2016.

3.2. Court's Findings on Park's Violations

After deliberation, the Court found that Park violated the Constitution and other statutes on the following three instances. Those are in essence, the violation of the obligation to serve public interests and stay away from special interests, the infringement on the property rights and freedom of business of some *Chaebol* companies by abusing her presidential power, and the violation of duty to confidentiality.

First, the Court found that the President appointed a number of people referred by Mrs. Choi to key government positions, including the Minister of Culture, Sports, and Tourism, and some appointees, by using their positions and power, helped Mrs. Choi to pursue her own personal gains.[51] The President also appointed, at Mrs. Choi's referral, Kim Jong-Duk, Mr. Cha's college professor to the Minister of Culture, Sports, and Tourism, and Kim Jong-Ryul, Mr. Cha's uncle, to the President's Senior Secretary for education and culture. Kim Jong from time to time sent his ministry's classified documents to Mrs. Choi and tried to incorporate her comments into the policies of the ministry.[52]

The Court further found that President Park instructed her staff, including her Senior Secretary for Economic Affairs, Ahn Jong-Beom that Mir and K-Sports foundations should be established by being contributed by some *Chaebol* companies abusing her presidential power, but they were not able to involve in the management of the foundations at all, even if they funded all the money, whereas Mrs. Choi did involve in the management of the two foundations from the beginning to the degree that the executives and the staff called Mrs.

[51] For example, at the referral of Mrs. Choi, President appointed Kim Jong, a professor majoring in sports industry to vice Minister of the Ministry of Culture, Sports, and Tourism, and appointed Cha Eun-Taek, who ran an advertisement agency, to a member of the Presidential Committee for Cultural Advancement, and later became the head of the Creative Center for Cultural Convergence with the help of Mrs. Choi.

[52] Constitutional Court of Korea, *KCCR Vol. 29-1* (2017), 25.

Choi the Chairperson, working under her instructions. Mrs. Choi also had the foundations enter into many business dealings with her companies such as Playground (advertising company), the Blue K (sports management company), both of which were under her ownership and control.

President Park had been involved even in the management of some private companies such as KT (a leading telecommunication company in Korea) and Hyundai Motor Company by asking for the employment of Mrs. Choi's acquaintance or for signing contracts with Mrs. Choi's companies like Playground.[53]

Upon those findings, the Court held that President Park had violated Article 7 of the Constitution, which it interpreted that public officials shall be independent from special interests of a political party or a group he/she belongs to, and other statutes which are in line with Article 7 of the Constitution[54], by abusing her presidential power for the purpose of giving favor to Mrs. Choi and/or other her close associates.[55]

The second was the infringement on the property rights and freedom of business of the private companies. Citing that President Park either in person or via the Senior Secretary for Economic Affairs, Mr. Ahn requested that some *Chaebol* companies such as Samsung, Hyundai Motors, SK group, LG group etc. make contributions to establish Mir and K-Sports foundations, and considering the president's extensive power and influence in the financial and economic sectors, and the unusual way through which the foundations were established and managed, those contribution requests are tantamount to coercion, not a voluntary cooperation, which in turn are estimated as a violation of property rights and freedom of business of those companies.

The Court also found that President Park interfered with the management of private companies by asking KT to hire Mrs. Choi's referral or demanding Hyundai Motor Company to sign a supply contract with a company run by Mrs. Choi's acquaintance, concluding that the President infringed upon the property

53 Constitutional Court of Korea, *KCCR Vol. 29-1* (2017), 26-37.
54 See Article 59 of the Public Officials Act, and Article 2-2 of the Public Servants Ethics Act.
55 Constitutional Court of Korea, *KCCR Vol. 29-1* (2017), 37-39.

rights and freedom of business of those companies by abusing her presidential power.[56]

The third was the violation of the duty to confidentiality, which is prescribed in Article 60 of the State Officials Act[57]. The Court mentioned that the presidency has many occasions when becoming aware of classified government information in the course of making high-level policy decisions, and pointed out that numerous government documents were leaked to Mrs. Choi under the President's instruction or acquiescence, whose information includes the President's schedules, foreign policies, and government's personnel matters, etc., which may well be classified as 'official secrets'.

3.3. Whether to Remove the President

The Court in this case basically followed the 'grave violation of law' rationale in the Roh impeachment precedent, which weighs the gravity of the violation from the two perspectives, concluding as follows:

The President repeatedly allowed Mrs. Choi to interfere with state affairs while keeping it a complete secret, and when suspicions arose that the President was heeding the advice of powerful secret aids like Mrs. Choi, on several occasions, she continued to deny it in its entirety. Thus the President's conduct, which allowed Mrs. Choi's interference and pursuit of her own interests, and kept it a complete secret, has undermined the principle of representative democracy and the rule of law, and amounts to a grave violation of her duty to serve the public and stay away from special interests.

The President, however, did not make any effort to regain the public trust, but repeatedly made meaningless apologies to the Korean people, failing to keep her own word, so that it is difficult to find any definite will on the part of the President to protect the Constitution.

To conclude, the President's violation of the Constitution and other statutes should be considered a grave violation of law that cannot be condoned from the

[56] Constitutional Court of Korea, *KCCR Vol. 29-1* (2017), 39-40.

[57] According to the article, public officials must keep the information confidential that they became aware of in the course of performing his/her official duties.

perspective of protecting the Constitution, *which is also regarded as a betrayal of the public trust*. The negative impact caused by the President's violations of law is so serious that the benefits of removing the President for the purpose of protecting the Constitution may well overwhelmingly outweigh the national loss incurred by the removal decision.

3.4. Grave Violation of Law and the Court's Positioning

3.4.1. Court's Reasoning on 'Grave Violation of Law'

While the Court in this case basically followed the 'grave violation of law' rationale in the Roh impeachment precedent, which weighs the gravity of the violation from the two perspectives, it did not lump together a violation of the Constitution and a violation of a statute, different from the Roh decision. Although the motion to impeach President Park involved five counts of violations of the Constitution including the violation of the principle of representative democracy and the rule of law, and eight criminal violations including bribery and abuses of power,[58] the Court tried to accelerate the impeachment trial despite opposition from the President's lawyers and render a final decision as soon as possible in order to shorten the power vacuum due to the suspension of the presidential office incurred by the passage of the impeachment motion on December 9, 2016.

The Court handed down its final decision on impeachment on March 10, 2017 after holding three preparatory hearings and seventeen oral hearings, calling twenty-six witnesses and examining and cross-examining them within three months' impeachment trial, which taken together was a great workload completed within a relatively short amount of time.[59] Like the President Roh case, the Court acknowledged that all three counts of President Park's violations that were found to be guilty constitute grave violations of law, citing the two standpoints/perspectives, among which the first standpoint is that impeachment adjudication is a procedure dedicated to protecting the Constitution/constitutional order, and the second perspective is that

[58] Constitutional Court of Korea, *KCCR Vol. 29-1* (2017), 10-14.
[59] Constitutional Court of Korea, *KCCR Vol. 29-1* (2017),14.

the President is a representative institution to which the public has directly entrusted democratic legitimacy.[60] Thus the criticism set forth in the Roh case against the grave violation rationale should be still valid in this case as well.

One thing to note is that the Court did not mention or examine whether there was a 'willful violation' of the 'basic order of liberal democracy' when discussing the grave violation of law in this case, especially from the first perspective, and I suppose that might be seen as a progress in terms of the reasoning of the Court.[61]

Another thing to note in this decision is that even though the Court goes after the Roh impeachment precedent in following the grave violation logic by citing the two standards/perspectives, it did not clearly announce which standard/perspective is considered in the assessment of the grave violation requirement when concluding this case, and it seems that the Court chose to say rather vaguely to the effect that this case may well satisfy both standards in terms of the assessment of the gravity requirement, as opposed to the previous Roh impeachment case.[62]

3.4.2. Court's Strategic Positioning

As it may be seen from the background of this case and the Court's findings above, this impeachment case is comparable to President Nixon's impeachment in 1974 in the United States since both cases involve serious abuses of presidential power during office. Even though President Nixon resigned from his office just after the articles of impeachment against him were passed by the House Judiciary Committee on July 27, 1974, he is believed to be removed from his office if he is tried in the Senate, considering the gravity of his violations, especially in terms of "high crimes and misdemeanors" in the U.S. Constitution to the degree that all three counts of the violations of the articles end like this: "In all of this, Richard M. Nixon has acted in a manner contrary to his trust as President and subversive of constitutional

[60] Constitutional Court of Korea, *KCCR Vol. 29-1* (2017), 20-21.
[61] Jin-Wook Kim, "The Grounds for Presidential Impeachment under the Korean Constitution," 25-27.
[62] Jin-Wook Kim, "The Grounds for Presidential Impeachment under the Korean Constitution", 38-39.

government, to the great prejudice of the cause of law and justice and to the manifest injury of the people of the United States."[63]

I suppose that the two points summarized in the above conclusion of the articles of impeachment for Nixon well describe the two standards or perspectives of the grave violation requirement in the Korean impeachment precedents, one of which is the subversion of constitutional government or the great prejudice of the cause of law and justice (which might be equivalent to the first standard/perspective in both the Roh and Park cases), and the other of which is the betrayal of public trust or the manifest injury of the public (which might be equivalent to the second standard/perspective in both cases).

Unlike the Roh case, in terms of political dynamics involving the Korean public, the motion to impeach President Park was so popular that more than 80 percent of the Korean population supported the impeachment[64] and the President became so unpopular that her approval ratings dropped to about 5 percent around the impeachment motion[65] and even her own party's many lawmakers decided to turn their back to approve the impeachment. That might explain the 8:0 impeachment decision on March 10, 2017 by the Constitutional Court (after the Chief Justice left the Court due to his tenure expiration), *which I believe was a strategic positioning as it is in line with the supermajority of the Korean public*.

With regard to the second standard/perspective about the betrayal of public trust, even though the Court set that standard to assess the grave violation of law against the President as if it were a purely legal matter, it may not be a legal judgment but a factual (political) judgment, if the will of the people should be considered. Thus if the Court makes a decision on presidential impeachment by using that standard/perspective, it is to be considered a political judgment rendered by the Court, not on its own but

[63] See the full text of the Articles of Impeachment adopted by the House Judiciary Committee on July 27, 1974.
[64] "*86% of public approves of Park's impeachment*," Korea Herald, March 10, 2017.
[65] "*Park's approval rating remains at record low*," Korea Herald, December 2, 2016.

on behalf of the general public, and only in that case, the Court's judgment may be justified both legally and politically.[66]

IV. CONCLUSION

The recent two impeachment cases decided by the Constitutional Court of Korea, respectively in 2004 against President Roh and in 2017 against President Park might be classic examples of how the state institutions including the Court interact with other institutions in a very political case like presidential impeachment, in terms of political dynamics.

In the impeachment case against President Roh, the Court positioned itself strategically by establishing the 'grave violation of law' rationale, where it sided with the impeaching parliament by finding three counts of violations of law but dismissed the case in its entirety through the operation of the 'grave violation of law', which might show its reluctance to remove the president. In the impeachment case against President Park, the Court basically followed the grave violation logic but reached a different conclusion to remove the President, which might be another strategic position taken by the Court, which is in line with the will of the super-majority of the Korean public.

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[66] Jin-Wook Kim, "An essay on grounds," 1725-1728.

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Referencing International Human Rights Law in Indonesian Constitutional Adjudication

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Abstract

The power of the Indonesian Constitutional Court to review laws is a constitutional adjudication process. It is a forum to resolve constitutional issues where a citizen can challenge Law that has injured his rights. The Court's reasoning provides audiences with the debates for its deliberation. Audiences may find reference to the international human rights law. It is an interesting practice. However, there is no studies yet about the information on the statistic of the Court made reference to international human rights law. As such, this study aims to identify reference to international human rights law in the Court's decision on judicial review cases from 2003 to 2016. Additionally, this study also aims to answer the question of what underlies the Court to made reference to international human rights law. As many studies show, the objective of Constitutional Court's references to the international human rights law is to strengthen constitutional rights protection. Nonetheless, the Court did not pay any interests to the global agenda of transnational constitutionalism or a convergence of rights and legal pluralism. The article is divided into 5 (five) sections, commencing with the introduction. The second part discusses the status of international human rights law in Indonesia. As the third presents information on Court's decision which cited international human rights law. Then, the fourth presents typical function of the decision that made reference to international human rights law. It concluded that the practice of referring to international law demonstrates the open attitude of Indonesian constitutional justices to the universal nature of fundamental rights.

Keywords: *Constitution, Constitutional Adjudication, Constitutional Court, International Human Rights Law, Judicial Review.*

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I. INTRODUCTION

The interest of legal researchers and academics of political science for court decisions that make references to foreign and international law is immense. Theoretical approaches and comparative studies on the topic have been written in research papers as well as books. Scholars identify different concepts and coin different terms for the different approaches, such as transplants,[1] borrowing,[2] reception,[3] and migration.[4]

In practice, the approach of judicial institutions mandated to carry out constitutional adjudication towards foreign law varies considerably. Some show resistance, whereas others evidence an open attitude to embrace a comparative approach. An illustration may provide a glimpse of the divergent use of comparative approaches by national courts. The German Federal Constitutional Court rarely has recourse to a comparative approach. During the period 1991-2005, the Court issued three decisions that take a comparative approach in its reasoning.[5] Similarly, the High Court of Japan made no legal comparison in its decisions, between 1990 and 2008. However, there are 11 dissenting opinions that make references to foreign or international law in the same time frame.[6] In Taiwan, the High Court also rarely refers to the praxes of other countries and international legal instruments. There are only four decisions that use the legal comparison in the Courts decisions between 1949 and 2008.[7]

On the other hand, the High Court of Australia regularly employed a comparative legal approach between 1998 and 2008.[8] A high number of references

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1 Edward M. Wise, "The Transplant of Legal Patterns", *The American Journal of Comparative Law* 38, (1990): 1–22.

2 Berry Friedman and Cheryl Saunders, "Introduction to the Symposium on Constitutional Borrowing," *International Journal of Constitutional Law* 1, No. 2 (2003): 177-180; Wiktor Osiatynski, "Paradoxes of Constitutional Borrowing", *International Journal of Constitutional Law* 1, No.2, (2003): 244-268.

3 Wolfgang Wiegand, "Reception of American Law in Europe," *American Journal of Comparative Law* 39, no. .2, (1991): 229-248.

4 Sujit Choudhry, "Migration as a New Metaphor in Comparative Constitutional Law," in *The Migration of Constitutional Idea,* ed. Sujit Choudhry (Cambridge: Cambridge University Press, 2006), 1-37.

5 Basil Markesinis and Jorg Fedtke, *Judicial Recourse to Foreign Law* (New York: Routledge-Cavendish, 2006), 77.

6 Akiko Ejima, "Enigmatic Attitude of the Supreme Court of Japan towards Foreign Precedents – Refusal at the Front Door and Admission at the Back Door," *Meiji Law Journal* 16, (2009): 28.

7 Wen-Chen Chang and Jiunn-Rong Yeh,"The Use of Foreign Precedents in the Constitutional Court in Taiwan" (Preliminary Report for the IACL Research Group, 2008).

8 Cheryl Saunders, "Judicial Engagement with Comparative Law," in *Comparative Constitutional Law*, ed. Tom Ginsburg and Rosalind Dixon (Chetenham: Edward Elgar, 2011): 573.

to foreign sources also appear in the jurisprudence of the Constitutional Court of South Africa. The Court used a comparative approach on more than 300 decisions since 1994.[9] One reason behind the high statistical figure is that Art. 39 (1) b and c of the South African Constitution stipulate that in interpreting the bill of rights, the courts should consider international legal instruments and may refer to the practice of law in other countries.

The definition of comparative law includes a reference to the instruments of international law. The practice of refering to international law is triggered by the development of global constitutionalism that which makes evident the connection between constitutional protection to human right in domestic law with the protection in international human rights law. The rapid development of this discussion is based on the idea of unification of universal values. Scholars that endorse the idea coined the terms "internationalization of constitutional laws" and conversely "constitutionalization of international laws".[10]

However, interest on the topic is not followed by research projects in Asian countries. Literature that provides information on the topic is lacking, especially in Indonesia. A study by Diane Zhang examined the Constitutional Court rulings from 2003 to 2008. She identifies 813 references to foreign legal excerpts from 62 Court's decisions.[11] The figure shows a high number of references to foreign law in the Court's decisions. In her research, Zhang does not focus only on instruments of international law, but also includes foreign laws as well as excerpts from the relevant scientific literature. Her research includes the Court reference to Joseph Stiglitz, a Nobel prize winner whose book "Globalization and its Discontent" is quoted in one of the decisions.[12]

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9 Ursula Bentele, "Mining for Gold: The Constitutional Court of South Africa's Experience with Comparative Constitutional Law," *Georgia Journal of International and Comparative Law* 37, no. 2 (2009): 219.

10 Herman Schwartz, "The Internationalization of Constitutional Law," *Human Rights Brief* 10, no. 2 (2003); Vicki C. Jackson, *Constitutional Engagement In A Transnational Era* (Oxford University Press, 2010); Nicholas Tsagourias, *Transnational Constitutionalism: International And European Models*, (Cambridge: Cambridge University Press, 2007); Jiunn-Rong Yeh and Wen-Chen Chang, "The Emergence of Transnational Constitutionalism: Its Features, Challenges and Solutions," *Pennsylvania State International Law Review* 27, no. 1, (2008): 89.

11 Diane Zhang, "The Use and Misuse of Foreign Materials by the Indonesian Constitutional Court: A Study of Constitutional Court Decisions 2003-2008" (Master Thesis, The University of Melbourne, 2010).

12 Decision 001-021-022/PUU-I/2003, 331

Beyond Zhang's research, the study of comparative law and the influence of international law in the Constitutional Court's decisions is still left unexplored. To fill the gap in the Indonesian academic literature on the use of foreign sources in the decisions of the Constitutional Court, this study will identify the court's practice on the use of a comparative approach with focus on reference to the international human rights law.

This paper will discuss the Court's jurisprudence on judicial review cases from 2003 to 2016. In addition to identifying decisions, it also examines the reasons underlying the use of international human rights law by the Court. Accordingly, this article will be divided into five sections beginning with the introduction. The second section will discuss the status and enforceability of international law in the Indonesian legislation. The third section will present data on judicial review decisions containing references to international law. The fourth section discusses the reasons and the function of international human rights law references in judicial review cases before the Indonesian Constitutional Court. The last section is the conclusion.

II. THE STATUS OF INTERNATIONAL LAW IN THE INDONESIAN LEGAL ORDER

Indonesia adopted civil law tradition as it is inherited from the Dutch in the colonial era. In relation to the adoption of international law into domestic law, civil law tradition tends to use the monist approach,[13] where international law automatically forms part of domestic law.[14] This apply in practice of the Netherlands,[15] Taiwan,[16] and South Korea.[17] However, Indonesia's position, in this case, is still in debate.[18]

[13] Daniel Lovric, "A Constitution Friendly to International Law: Germany and Its *Volkerrechtsfreundlichkeit*," *Australian Year Book of International Law* 25, (2006): 75.

[14] J.G. Starke, *Pengantar Hukum Internasional* [The Introduction of International Law], trans. Bambang Djajaatmadja (Jakarta: Sinar Grafika, 2008), 96-103.

[15] Gerhard van der Schyff and Anne Meuwese, "Dutch Constitutional Law in a Globalising World," *Utrecht Law Review* 9, no. 2 (2013): 1.

[16] Wen-Chen Chang, "An Isolated Nation with Global-minded Citizens: Bottom-up Transnational Constitutionalism in Taiwan", *National Taiwan Law Review* 4, No.3 (2009): 209.

[17] Suk Tae Lee, "South Korea: Implementation and Application of Human Rights Covenants," *Michigan Journal of International Law* 14, (1993): 728.

[18] Simon Butt, "The Position of International Law Within the Indonesian Legal System" *Emory International Law Review,* 28, no. 1, (2014): 5

In Indonesia, international law needs to be ratified in order to be enforced. Yet, the form of legislation is still in question.[19] The trigger to this debate is the ambiguity in the constitutional text. Article 11 of the 1945 Constitution provides that "the President with the consent of the House of Representatives declares war, makes peace and agreements with other countries". The amendment of the 1945 Constitution, in 1999-2002, added a more detail provision to the requirement of international treaty-making arrangements. Article 11 (2) of the 1945 Constitution reads,

> "The President in making other international treaties which have a broad and fundamental effect on the lives of the people in association with the financial burden of the state, and / or requiring the amendment to the Law shall be subject to the approval of the House of Representatives."

Nonetheless, the additional provision does not mean much in giving a clear understanding to the Indonesian approach to international law.

The government has issued different arrangement policies to enforce international law as a translation to Article 11 of the 1945 Constitution. The policies are divided into three legal regimes, (1) Policy in the period of 1945-1960 with three different constitutions: the 1945 Constitution, the 1949 Constitution of Republic of Federal Indonesia (*Republik Indonesia Serikat*) and the Temporary Constitution of 1950 (*Undang-Undang Dasar Sementara Tahun 1950*); (2) Policy in the period of 1960-2000 based on Presidential Letter No. 2826/1960; and (3) Period of 2000 - current pursuant to the enactment of Law No. 24 of 2000 on International Agreements.[20]

The phrase "subject to approval of the House of Representatives", as provided in Article 11(2) of the Indonesian constitution added the complexity of the adoption of international law in domestic law. The provision stipulates

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[19] Mochtar Kusumaatmadja and Etty R Agoes, *Pengantar Hukum Internasional,* (Bandung: Penerbit Alumni, 2003), 88-94; M. Fajrul Falaakh in Expert Witness as delivered at the Constitutional Court Session as cited in Decision 33/PUU-IX/2011, 121.

[20] Damos Dumoli Agusman, "Dasar Konstitusional Perjanjian Internasional Mengais Latar Belakang dan Dinamika Pasal 11 UUD 1945 [Constitutional Foundation on International Treaty: Taking the Background and the Dynamic of article 1 of the 1945 Constitution of the Republic of Indonesia]," *Opinio Juris* 4 (Januari-April 2012): 1; Damos Dumali Agusman, "The Dynamic Development of Indonesia's Attitude Toward International Law," *Indonesian Journal of International Law* 13, No. 1 (October 2015): 5-15.

that government's policy in ratifying international treaties must be manifested in the Statute (*Undang-Undang*) simply because the type of legislation issued in the joint approval of the President and the House of Representatives is the law.

The Constitutional Court, in the review of constitutionality of Law No. 38 of 2008 on ratification of Association of South East Asian Nations (ASEAN) Charter, gave an interpretation to Article 11 of the 1945 Constitution. The Court concluded that Law, as a legislative product to ratified international treaties must be take a second consideration.[21] The Court argued that the obligations imposed to the state parties by international treaties are not born when the treaty is ratified as a law.[22] Based on the principle of *pacta sunt servanda*, the obligations of the parties are born when the state as a party have declared their consent to be bound. The practice is also affirmed in the Vienna Convention on the Law of Treaties.[23] The enactment of international agreements in the Law serves as a form of internal mechanism of ratification. In Indonesia, the mechanism is provided under Article 11 of the 1945 Constitution. In view of the Court,

> "Article 11 of the 1945 Constitution does not mention that the form of ratification to international treaty is in a law, but states that the President with the approval of Parliament makes an international agreement. If this mechanism is associated with the enactment of the Law, it is a legal product of the President and the House of Representatives. However, this does not mean that every legal product issued by the President and the House of Representatives is in a Law."

The policy to ratify international treaties by the issuance of the Law is a common practice.[24] International treaties ratification means that the treaties come into force in the domestic legal order by the issuance of the law.

In Indonesian practice, however, there is international law on human rights that was adopted not by the issuance of the law. The Convention on the Rights of the Child was ratified by Presidential Decree (table 1).

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[21] Decision 33/PUU-IX/2011, 196.
[22] Decision 33/PUU-IX/2011, 195.
[23] Article 2 (1)b and Article 11 to 15 Vienna Convention.
[24] Pierre-Hugues Verdier and Mila Versteeg, "International Law in National Legal Systems: An Empirical Investigation," *The American Journal of International Law* 109, no. 3 (July 2015): 518-522.

Table 1.
Ratification of Major International Human Rights Law Treaties by Indonesia

No.	Human Rights Instruments	(Ratification in) Indonesian Laws
1.	Convention on the Elimination of All Forms of Discrimination against Women	Law No. 7 of 1984
2.	Convention on the Rights of the Child	Presidential Decree No. 36 of 1990
	a. Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict	Law No. 9 of 2012
	b. Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography	Law No. 10 of 2012
3.	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment	Law No. 5 of 1998
4.	International Convention on the Elimination of All Forms of Racial Discrimination	Law No. 29 of 1999
5.	International Covenant on Economic, Social and Cultural Rights	Law No. 11 of 2005
6.	International Covenant on Civil and Political Rights	Law No. 12 of 2005
7.	Convention on the Rights of Persons with Disabilities	Law No. 19 of 2011
8.	International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families	Law No. 6 of 2012

Source: author

III. REFERENCING INTERNATIONAL HUMAN RIGHTS LAW

In judicial review cases, individual may appear as plaintiffs before the Constitutional Court in order to challenge the constitutionality of domestic laws. The Law requires that person or entities must be able to prove that their constitutional rights have been impaired by the enactment of the law under review in order to admissable as parties.[25]

The catalogue of the bill of rights in the constitution is intertwined with human rights.[26] One distinction lies in the legal instruments through which the rights are governed. The human rights as provided in the Constitution are referred to as constitutional rights. In terms of domestic law, constitutional rights sit at the top since the constitution is the supreme law of the land.[27] The question lies in where are the human rights as provided in international law sits in domestic law? Do human rights as provided in international law have a higher hierarchy than constitutional rights? If the human rights as governed in international law are not in the bill of rights catalogue in the Constitution, does the court has the power to consider them as constitutionally protected rights?

In theory, these questions have served as a framework of reference for the research of legal academics and political scholars. In practice, the approach taken by countries varies. South Africa is the example of the state with open attitude towards the interpretation to the rights in international legal instruments. Article 39 (1) b of the Constitution of South Africa states "(w)hen interpreting the Bill of Rights, a court, tribunal or forum: ..must consider international law". Then, where does the Indonesian Constitutional Court stand?

Since 2003, the Court has decided more than one thousand cases. This study limits the scope of the decision between 2003 and 2016. It aims to give a complete picture of the decisions issued during the period. The study does not include cases registered in 2017 as during the research the cases are still being examine before the Court. It also limits the scope of the decision

[25] Art. 51 (2) Law No. 24 of 2003 on Constitutional Court (as amend Law No. 8 of 2011).
[26] Gerald L. Neuman, "Human Rights and Constitutional Rights: Harmony and Dissonance", *Stanford Law Review* 55, no. 5 (May 2003): 1863-1900.
[27] Art. 7 (1) Law No 12 of 2011 on Regulation Drafting.

to decisions where the Court decided to "reject" and "grant" the petition. Therefore, inadmissible decisions are not included in the study. This is because the Court's consideration in inadmissibility decisions only discusses as far as the administrative and admissibility issues of the case and does not touch the merits on the constitutionality of the Law.

The study included international human rights instruments of both non-binding and binding nature. The non-binding nature of international human rights law covers Universal Declaration on Human Rights (UDHR), the Basic Principles on the Independence of the Judiciary, and The Cairo Declaration on Human Rights in Islam. Under binding international human rights law the study incorporates the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), and the International Convention on the Elimination of All Forms of Racial Discrimination (CERD).

Within this limitation, the study identifies 597 decisions. The study finds that there are 52 rulings (8.7%) in which the majority opinion provided citations to international human rights law as a reference. On average, the Constitutional Court's decisions that provide reference to international human rights law per year are 3.7. Table 2 describes in detail the decisions of the Constitutional Court which refer to international law compared to the number of decisions that become the basis of analysis data each year.

Table 2.
Number of Constitutional Court decisions containing international legal references per year

Year	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016
"Granted" and "Rejected" Holdings	15	13	16	16	18	23	52	51	50	78	70	64	76	55
Reference to Intl Law in Decision	3	3	1	2	2	4	5	6	1	2	4	5	6	8

Source: author

The international human rights law instruments that serve as reference more frequently are the ICCPR, UDHR and ICESCR (Table 3). The ICCPR is widely used as a reference especially in relation to the interpretation on the definition of "discrimination".

Discrimination became a central issue in a number of cases before the Constitutional Court of Indonesia. The plaintiff mostly argue that a certain requirement to hold public office as stipulated in the law has a different treatment. The difference, according to the plaintiff, is a form of prohibited discrimination. For example, in the determination of number of seats for members of parliament (Decision No. 130/PUU-VII/2009) and policies that differentiated the requirement of incumbent to run for second terms with the incumbent to run for public office in the different region (Decision No. 55/PUU-XIV/2016). Those policies are challenged on the ground that they injured the plaintiff's constitutional rights, especially the right to equal treatment and prohibition of discriminatory acts. The Court explained that discrimination must be interpreted in accordance with Article 2 of the ICCPR whereby the protection and recognition of the rights of every person shall be conducted "...without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." In addition, the Court also elaborates the definition of discrimination, whereas

> "...the requirements prescribed by the law to fill a particular public office does not necessarily mean in direct contradiction to the 1945 Constitution simply because (hypothetically) it contains a different moral standard from what the public understood and believed to be "evil", but the requirements determined by the law would inevitably be contradictory to the 1945 Constitution if, among other things, contain discriminatory provisions, that is, if it contains the discriminatory character of persons based on religion, race, ethnicity, language, gender, political beliefs, or other specific social status."[28]

[28] Decision 15/PUU-VI/2008, 15.

Table 3.
International Law as a Reference in Constitutional Court Decisions

International Law Instrument	Number of Citation
International Covenant on Civil and Political Rights	22
Universal Declaration on Human Rights	13
International Covenant on Economic, Social and Cultural Rights	8
Convention on the Elimination of All Forms of Discrimination against Women	2
Convention on the Rights of the Child	1
International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families	1
ILO Convention concerning Labour Inspection in Industry and Commerce	2
UN Convention Against Corruption	2
UN Convention on the Law of the Sea	1
The Cairo Declaration on Human Rights in Islam	1
Basic Principles of the Independence of the Judiciary	1

Source: author

The issue of discrimination is not limited only to definitions. It is also relevant for the application of law, as demonstrated by the cases concerning equal treatment in the right to vote. The protection to the right to vote is one the most fundamental in the democratic society. Nonetheless, the 1945 Constitution does not express the right to vote in the bill of rights catalogue. In the examination of the government policy on the restriction requirements to be candidates for member of Parliament (Decision 011-017/PUU-I/2003), the Constitutional Court relates the discrimination policy to the Article 2 of UDHR and Article 25 of the ICCPR. Both provisions emphasize the importance of the protection of rights to vote rights without any discrimination. The Constitutional Court for its part held that

> "...the constitutional right of citizens to vote and right to be candidate is a right guaranteed by the constitution, international law and convention, the limitation of deviations, omissions and the abolition of such rights constitutes a violation of the human rights of the citizen."[29]

[29] Decision 011-017/PUU-I/2003, 35.

In this reasoning, the Court did not only review the constitutionality of the policy that create discrimination to the right to vote but, at the same time, the Court held that right to vote is a constitutional right even though the constitution did not expressly mention it.[30]

Other than decision by the majority opinion, the Court allows dissents opinion which incorporated in the decision. The personal views of constitutional justices as expressed in dissenting opinions also contain a number of references to international law (table 4). However, the format of the Constitutional Court's decision makes it impossible to identify the personal views of each judge. The drafter for the majority is not mentioned. As it is a common tradition in the format of the court decision in civil law countries. The main reason for this practice is to emphasize solidity and common-shared views. In fact, the publication of dissenting opinions is an unusual practice. It is far difference with the writing of court decisions on common law countries.[31]

Therefore, the analysis on the dissenting opinion as written by the individual constitutional justices may provide a glimpse of their views on the use of international law as a reference in the decisions of the Constitutional Court. However, there are also some shortcomings from a quantitative point of view. The large number of dissenting opinions provided by the single judge does not necessarily represent his open attitude towards making reference international human rights law. It is possible for a judge to have an open mind towards international law but rarely disagree with the majority of the judges. This study provides information that constitutional judges, in their personal views, have an open attitude towards making references to international law.

Another important question that needs to be addressed is the reason the constitutional judges use international law as a matter of consideration. What is the function of international legal references in the decision of a constitutional case?

[30] Bisariyadi, "Hak Pilih Sebagai Hak Konstitusional: Hak Konstitusional Turunan Ataukah Hak Tersirat? [Right to Vote as Constitutional Right: A Constitutional Derivative Right or An Implied Right?]", in Al Khanif et.al eds., "Hak Asasi Manusia: Dialektika Universalisme vs Relativisme di Indonesia [Human Rights: Universalism v. Regionalism]", (Yogyakarta: LKiS, 2017), 199-220.

[31] Michael Kirby, "Judicial Dissent – Common Law and Civil Law Tradition," *Law Quarterly Review* 4, http://www.hcourt.gov.au/assets/publications/speeches/former-justices/kirbyj/kirbyj_06.pdf accessed 21 April 2018.

Table 4.
Dissenting Opinion which made references to international law

Constitutional Justices	Number of references to IHRL
HAS Natabaya	2
Harjono	2
Maruarar Siahaan	3
M. Laica Marzuki	4
Abdul Mukhtie Fadjar	1
I Dewa Gede Palguna	3
Maria Farida Indrati	2
M. Arsyad Sanusi	3
Hamdan Zoelva	2
M. Akil Mochtar	1
Aswanto	1
Anwar Usman	1
Patrialis Akbar	1

Source: author

IV. TYPICAL FUNCTION

The references to international law by constitutional courts in different countries serve as an effort to protect the rights of citizens.[32] Therefore, a small number of reference of international human rights law in the Constitutional Court's decision to protect the rights of citizens is not the main issues. Decisions referring to international law are not used as the main arguments in the constitutional reasoning as constructed by the Constitutional Court. This study identifies that the use of international human rights law arguments in the Constitutional Court's decision serves to (1) provide additional arguments as a support to protect the citizens' constitutional rights, and (2) to include basic rights not yet contained in the Constitution.

[32] Jackson, *Constitutional Engagement*, 43-44; Melissa A. Waters, "Creeping Monism: The Judicial Trend Toward Interpretative Incorporation of Human RightsTreaties", *Columbia Law Review*, 107 (2007): 648.

4.1. Provide Persuasive Arguments

The government's attitude toward the adoption of international law is also reflected in the attitude of the courts in making international law as a reference. International law is not used as the main reference or argument first proposed in the Constitutional Court's consideration as an effort to protect the rights of citizens. International law is used by the judges as an additional reference to support his arguments of reasoning.

In connection with the integration of international law with national law, David Haljan categorizes that there are two approaches in the context.[33] The first is an approach based on the Martti Koskenniemi hypothesis which states that international law is used as a framework for government in issuing policies. A second approach based on Kant's thought that international law is both a legal obligation and a binding moral force.

Using the categorisation, the Constitutional Court tends to practices the approach based on the hypothesis of Koskenniemi.[34] International law is used merely as a sounding board by the Constitutional Court to provide validity and legitimacy of the decisions issued. The Constitutional Court takes advantage of international law "...not as law *per se* but as a moment of sober second thought instead".[35] It is also agreed by Justice I Dewa Gede Palguna who argues that the Court reference to international law "... merely as an additional tool to help ascertain the Court in interpreting the Constitution which will help it to build a comprehensive consideration...".[36]

One example to this is when the Constitutional Court gives an interpretation of discriminatory treatment. Article 28I (2) of the 1945 Constitution states, "Every person shall have the right to be free from discriminatory treatment on any basis...". In giving the interpretation of the phrase "on any basis", the Constitutional Court refers to Article 2 of the

[33] David Haljan, *Separating Powers: International Law Before National Courts* (The Hague: TMC Asser Press, 2013), 289.
[34] Martti Koskenniemi, *From Apology to Utopia,* (Cambridge: Cambridge University Press, 2005), 474-475.
[35] Haljan, *Separating Powers*.
[36] I Dewa Gede Palguna, "The Influence of International Law in the Indonesian Constitutional Court Decision" (Paper (unpublished) presented for General Lecture, The Hague University of Applied Science, The Hague, 24 October 2017).

ICCPR. The provisions of the Convention provide that the discriminatory is a different treatment on the grounds "...race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

In a case of a policy review of differences in requirements for an incumbent to run for second term, the plaintiff argued that a difference in treatment for an incumbent running in another area with an incumbent running in the same area is a discrimination. The Constitutional Court concludes that there is no discriminatory treatment in the policy. The Court suggests that

> "...Article 7 paragraph (2) letter p and Article 70 paragraph (3) of Law 10/2016 does not contain discriminatory treatment because it treats differently to different things. According to the Court, the definition of discrimination is also in line with the notion of discrimination in the International Covenant on Civil and Political Rights (ICCPR)..."[37]

The use of the ICCPR argument in its decision is merely use as a supporting argument for the definition of discriminatory treatment.

A different nuance of the use of international law also feels very strong in the consideration of the decision of the policy of applying the retroactive principle in the Bali Bombing case.[38] The case was decided on a split chamber of 5 to 4. Both camps, the majority and the dissents, use international law as a reference. The majority cites international legal instruments which emphasize that non-retroactive principles should not be violated, including Article 11 (2) of UDHR; Article 7 European Convention for the Protection of Human Rights and Fundamental Freedoms; Article 4 of the ICCPR; Article 9 of the American Convention on Human Rights; and Articles 22 and 23 of the Rome Statute of the International Criminal Court.[39] Whereas the dissents, the instruments of international law are used as the proposition

[37] Decision 55/PUU-XIV/2016, 67.
[38] Decision 013/PUU-I/2003.
[39] Decision 013/PUU-I/2003, 39-41.

that the non-retroactive principle can be set aside as long as it is limited in a particular situation.[40]

4.2. Adding New Constitutional Rights

The second function of the use of international law in the decision is to add the fundamental rights provided in the international treaties as a constitutional right. In practice, the addition of the right to be constitutionally protected through judicial decisions is a practice that has been widely encountered. The concept of derivative constitutional rights[41] and implied rights[42] provide theoretical basis for the possibility of the court to give a certain rights a status of a constitutionally protected rights.

There are three rights that are not expressly mentioned in the Constitution, but in accordance to the Court's interpretation in the decision, these rights have the status of constitutional rights: the right to water, the right to vote, and the right to presumption of innocence. The interpretation of these rights as a constitutional right pertains to the existence of those rights guaranteed in international conventions.

In the case of the Water Resources Law (Law No. 7 of 2004),[43] the Court held,

> "...the constitutional basis of water regulation is Article 33 paragraph (3) of the 1945 Constitution and Article 28H of the 1945 Constitution which provides the basis for the recognition of the right to water as part of the right to live a prosperous and spiritual life which means to be a content of human rights".[44]

In other words, the Constitutional Court provides an interpretation that the right to water is a part of the citizens' constitutional rights set forth in Article 28H, the right to live prosperous, physically and mentally. Before

[40] Decision 013/PUU-I/2003, 65-71.
[41] Robert Alexy, *A Theory of Constitutional Rights* (Oxford: Oxford University Press, 2010), 33-38.
[42] Adam Lamparello, "Fundamental Unenumerated Rights Under the Ninth Amendment and the Privileges or Immunities Clause," *Akron Law Review* 49, no. 1 (2015): 181; Adrienne Stone, "The Limits Of Constitutional Text and Structure: Standards of Review and The Freedom Of Political Communication," *Melbourne University Law Review* 23, no. 3, (1999): 695.
[43] Decision 058-059-060-063/PUU-II/2004 and 008/PUU-III/2005.
[44] Decision 058-059-060-063/PUU-II/2004 and 008/PUU-III/2005, 488.

coming to the conclusion, the Constitutional Court considered Article 12 (1) of the ICESCR stating "(t)he States Parties to the present Covenant recognizes the right of all to the enjoyment of the highest attainable standard of physical and mental health." The UN General Comment on the article illustrates that the right to health includes not only the right to health care but also factors that determine good health including access to safe drinking water.[45]

In relation to the right to vote, the Constitutional Court concludes that "... the constitutional right of citizens to vote and right to be candidate is a right guaranteed by the constitution, international law and convention...".[46]In giving the interpretation that the right to vote is categorized as a constitutional right, the Constitutional Court cites Article 21 (3) UDHR and Article 25 of the ICCPR.

Meanwhile, in granting the status of constitutional rights to the right of presumption of innocence, in the review of Law on the Corruption Eradication Commission (Law No. 30 of 2002), the Constitutional Court held that

> "...due process of law and presumption of innocence is a central principle of a democratic constitutional state... The principle is recognized as a fundamental human right that must be protected. Implicitly, these rights are recognized and can be constructed as part of human rights and constitutional rights guaranteed and protected by the 1945 Constitution...".[47]

The interpretation of the Constitutional Court is to use international legal references, namely Article 11 (1) UDHR and Article 14 (2) of the ICCPR stating "everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence".[48]

[45] Decision 058-059-060-063/PUU-II/2004 and 008/PUU-III/2005, 486-487.
[46] Decision 011-017/PUU-I/2003, 35.
[47] Decision 133/PUU-VII/2009, 68-69.
[48] Decision 133/PUU-VII/2009, 67.

V. CONCLUSION

The Constitutional Court have shown an open attitude toward the use of international human rights law as reference. International human rights treaties have several functions in the constitutional review decisions of the Constitutional Court. Among them are as additional propositions in support of the reasoning constructed by the judges. In addition, international human rights law is also referred to in several decisions where the Constitutional Court upholds a basic right as a guaranteed and constitutionally protected right.

The practice of referring to international law demonstrates the Indonesian constitutional justices view towards the universal nature of fundamental rights. On the other hand, the universal nature must also be interpreted contextually with the specific culture and traditions prevailing in Indonesia. Therefore, the attitude of openness shown by the Court is still followed by prudence. Especially when accompanied by the discourse of convergence in the framework of transnational constitutionalism.

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Constitutional Retrogression in Indonesia Under President Joko Widodo's Government: What Can the Constitutional Court Do?

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Abstract

This paper examines whether constitutional retrogression, the process through which democratically elected rulers use formal legal measures gradually to undermine democracy, has occurred in Indonesia, especially during the reign of President Joko Widodo. To this end, the paper analyzes the impact of the Widodo government's policies on three fundamental requirements of a democratic state: a democratic electoral system, rights to speech and association, and the rule of law. The paper finds that Widodo's government, in its efforts to contain the threat of Islamist populism, has indeed undermined all three of these elements to varying degrees. While Indonesia's democracy may yet be saved by the Constitutional Court, an institution that Widodo's government has until now failed to control, the Court cannot save democracy by itself. Its chances of doing so will depend on public support.

Keywords: *Constitutional Court, Constitutional Retrogression, Democracy, Joko Widodo, Indonesian.*

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I. INTRODUCTION

The most important issue in comparative constitutional law right now is how constitutions may be designed and used to protect democratic order. This issue has become important because of the massive recent decline in democratic quality around the world. This phenomenon is occurring not only in newly established democratic countries but also in seemingly stable democracies.[1] According to Freedom House, democracy is facing "its most serious crisis in the decade".[2]

What makes this phenomenon so disturbing for comparative constitutional scholars is not the number of countries that are degrading the quality of democracy, but the way they are doing so.[3] In contrast to authoritarian rulers of the past, who seized power and demolished democracy blatantly using non-juridical mechanisms such as military coups or by using emergency power mechanisms, the new generation of rulers is destroying democracy using constitutional mechanisms. Typically, they gain power through democratic elections, then destroy democracy using lawful measures provided for in the constitution.[4]

The use of legal mechanisms to destroy democracy is manifest through actions such as silencing the opposition using existing criminal law provisions rather than extrajudicial acts; establishing a neutral-looking electoral law under the guise of creating political stability, but in fact undermining the opposition's ability to win the next election;[5] or launching legal reforms that weaken the ability of other institutions to impose checks on executive power.[6] There are now numerous studies of this phenomenon,[7] with scholars using a variety of different

[1] Examples of countries that passed through the transition period and then experienced a decline in democratic quality are Poland, Russia, and Turkey. An example of a stable democracy that has recently experienced democratic decline is the United States, especially after the 2016 Presidential Election. See Aziz Huq and Tom Ginsburg, "How to Lose a Constitution al Democracy", *UCLA Law Review* 65, (forthcoming 2018).

[2] "Freedom in the World 2018 Democracy in Crisis," Freedom House, accessed 3 July 2018, https://freedomhouse.org/report/freedom-world/freedom-world-2018.

[3] Kim Lane Scheppele, "Autocratic Legalism," *The University of Chicago Law Review* 85 (2018): 547.

[4] Ozan Varol, "Stealth Authoritarianism," *Iowa Law Review* 100 (2015): 1677.

[5] *Ibid*, 1679.

[6] Scheppele, "Autocratic Legalism", 547.

[7] Many studies about this phenomenon are listed at https://www.democratic-decay.org, a resource created by comparative constitutional law scholar, Tom Gerald Daly, focusing on studying the global trend toward incremental deterioration of democratic governance without any abrupt or clear breakdown of the democratic system.

labels to describe it, including 'autocratic legalism',[8] 'abusive constitutionalism',[9] 'stealth authoritarianism'[10] and 'constitutional retrogression'.[11] For the purposes of this essay, I will use the latter term, as defined by Aziz Huq and Tom Ginsburg.

The central question that this paper asks is whether this phenomenon is also occurring in Indonesia. Twenty years after the *reformasi* – the series of democratic amendments to the 1945 Constitution that liberated Indonesia from Suharto's authoritarian New Order regime[12] – the quality of Indonesia's democracy, once hailed as the most stable in Southeast Asia,[13] is clearly deteriorating, especially in the era of President Joko Widodo's government.[14] Earlier this year, for example, the Economist's Intelligence Unit reported Indonesia's democracy index as experiencing its most significant decline over the last 10 years.[15] In order to examine whether this decline fits the pattern of constitutional retrogression, this paper analyzes whether the actions of President Joko Widodo's government have compromised three fundamental elements that are necessary to the proper functioning of a democratic state: (1) a democratic electoral system; (2) rights to speech and association; and (3) the rule of law.[16] The paper's central argument is that these three elements are indeed being compromised, not because Widodo's government is directly opposed to them, but because the way it has chosen to

8 Scheppele, "Autocratic Legalism."

9 David Landau, "Abusive Constitutionalism," *UC Davis Law Review* 189 (2013).

10 Varol, "Stealth Authoritarianism".

11 Huq and Ginsburg, "How to Lose a Constitutional Democracy," *UCLA Law Review* 65 (2018).

12 Susi Dwi Harijanti and Tim Lindsey, "Indonesian general election tests the amended Constitution and the new Constitutional Court", *International Journal of Constitutional Law* 4, no. 1 (2006), 138.

13 Marcus Mietzner views Indonesian democracy as the most stable in Southeast Asia because, after the fall of Soeharto, Indonesia successfully established a functioning electoral democracy, stabilized its economy, ended a series of communal conflicts, and even settled the decades-old separatist conflict in Aceh through negotiations. Marcus Mietzner, "Political Conflict Resolution and Democratic Consolidation in Indonesia: The Role of the Constitutional Court," *Journal of East Asian Studies* 10 (2010): 397.

14 Edward Aspinall, "Twenty Years of Indonesian Democracy – How Many More?" *New Mandala*, accessed 24 May 2018, http://www.newmandala.org/20-years-reformasi/.

15 This survey gives a score of 6.39 for the Indonesian democracy index in 2017, compared with the previous year's score of 6.97. This decline is the most significant decline in Indonesia's democracy index since this survey was introduced in 2006. See "The Economist Intelligence Unit's Democracy Index," The Economist. accessed 5 July 2018, https://infographics.economist.com/2018/DemocracyIndex/.

16 Democracy, as Tom Daly notes, is a contested concept. This is why some countries, like Hungary and Poland, refer respectively to "illiberal democracy" and "conservative democracy", but still lay claim to being a constitutional democracy. However, in this essay, I choose not to give democracy a narrow interpretation that only requires elections, but like Huq and Ginsburg, broadly understand it as requiring rights to speech and association, neutral legal institutions, and elections. Without the first two elements, competitive elections cannot be implemented. See Huq and Ginsburg, "How to Lose a," 8. See also Tom Gerald Daly, "Democratic Decay in 2016," in *Annual Review of Constitution-Building Processes,* ed. International IDEA(Stockholm: International IDEA, 2016), 10-11.

respond to the anti-democratic Islamic populist movement in Indonesia has indirectly compromised them. In particular, it is argued that, under the guise of protecting democracy from the threat of Islamic populism, Joko Widodo's government has used a repressive and coercive approach that has had exactly the opposite effect.[17]

After setting out this argument, the paper moves to examine the role of the Constitutional Court in protecting Indonesia's democracy from constitutional retrogression. The main reason why this paper gives the Constitutional Court a spotlight to play that role was that until now Widodo's government still fail to capture the Constitutional Court, apart from that, the experience of other countries also shown that constitutional courts may be able to play a role in this respect. In Colombia, the Constitutional Court famously stopped President Alvaro Uribe's attempt to amend the Constitution to allow him to run for a third term.[18] Such examples illustrate that strong constitutional courts may be able in certain circumstances to compensate for weaknesses in constitutional design.[19]

The other reason to focus on the Constitutional Court as the main defence against constitutional retrogression is that countries that recently transitioned from authoritarianism to democracy, like Indonesia, established their constitutional courts precisely for this purpose.[20] Indeed, in many of these countries, the Constitutional Court is considered more democratic than political institutions, such as the executive and legislature, which in theory have stronger claims to democratic legitimacy.[21]

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17 Marcus Mietzner, "Fighting Illiberalism with Illiberalism: Islamic Populist and Democratic Deconsolidation in Indonesia," *Pacific Affairs* 21, no. 2 (2018).

18 Landau, "Abusive Constitutionalism."

19 Much constitutional designs to protect democracy like electoral system, opposition rights, amendment mechanism, and also the constitutional court often fail against the attempt to harm democracy through the use of a constitutional mechanism like an example in the Hungary and Poland. Dieter Grimm, "How can a democratic constitution survive an autocratic majority?" *Verfassungblog*, accessed 14 December 2018, https://verfassungsblog.de/how-can-a-democratic-constitution-survive-an-autocratic-majority/.

20 Renata Uitz, "Constitutional Courts in Central and Eastern Europe: What Makes a Question too Political?" *Juridica International* XIII (2007): 50.

21 Kim Lane Scheppele, "Democracy by Judiciary. Or, why Courts Can be More Democratic than Parliaments," in *Rethinking the Rule of Law after Communism*, ed. Adam Czarnota, Martin Krygier and Wojciech Sadurski (Budapest: Central European University Press, 2005).

II. ANALYSIS

2.1. Explaining Constitutional Retrogression

Many terms have been used to describe the phenomenon where a ruler uses the constitution and laws to destroy democracy, including 'abusive constitutionalism', 'autocratic legalism', and 'constitutional retrogression'. This paper will use the term 'constitutional retrogression', as coined by Aziz Huq and Tom Ginsburg, for several reasons.

First, the term 'abusive constitutionalism', which was developed by David Landau, focuses attention on attempts to destroy democracy by using mechanisms of constitutional change, such as amendment or replacement, as exemplified in Venezuela and Colombia.[22] However, democracy may be destroyed without such mechanisms, as demonstrated in Poland.[23] In contrast, 'constitutional retrogression' focuses on actions to destroy democracy more broadly.

Second, while the 'constitutional retrogression' concept is not completely different from the idea of 'autocratic legalism' developed by Kim Lane Scheppele, constitutional retrogression establishes three definite benchmarks to assess whether a government action destroys democracy or not.[24] These benchmarks, according to Huq and Ginsburg, consist of elements that must exist in every democratic government, namely: (1) a democratic electoral system; (2) rights to speech and association; and (3) integrity of law and legal institutions, i.e., the rule of law. [25]

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[22] Landau, "Abusive Constitutionalism."

[23] In Poland, the ruling Law and Justice Party were unable to undermine democracy through the amendment mechanism as it did not possess the required two-thirds majority in Parliament. However, it was still able to undermine democracy by using laws whose substance weakened other institutions set up to check executive powers, such as the Constitutional Court and the Ombudsman. See Gabor Halmai, "Second Grade Constitutionalism? Hungary and Poland: How the EU Can and Should Cope with Illiberal Member States," in *Developments in Constitutional Law, Essay in Honour of Andras Sajo*, ed. Iulia Motoc, Paulo Pinto de Albuquerque, Krzystof Wojtyczek (Eleven International Publishing, 2018), 159-177.

[24] Scheppele's term "autocratic legalism" is similar to Huq and Ginsburg's term "constitutional retrogression". Both view the destruction of democracy through constitutional mechanisms broadly, not only focusing on the processes of formal constitutional change. Unfortunately, Scheppele does not set a definite benchmark when introducing her term but merely defines "autocratic legalism" as the situation where an "electoral mandate plus constitutional and legal change are used in the service of an illiberal agenda". Scheppele, "Autocratic Legalism," 548.

[25] Huq and Ginsburg, "How to Lose a Constitutional Democracy". 9.

Furthermore, it is important to understand what distinguishes this phenomenon from the traditional threat to democracy. According to Huq and Ginsburg, the traditional threat, authoritarian reversion, is characterized by the quick and complete destruction of the democratic order. This process usually occurs either through extra-constitutional actions, such as military coups against legitimate governments (as happened in Thailand, Mali, and Mauritania), or through the use of emergency power mechanisms (as happened in Weimar Germany and India under Prime Minister Indira Gandhi's leadership).[26]

In contrast to authoritarian reversion, constitutional retrogression involves the incremental destruction of democracy under the cloak of the rule of law and the constitution.[27] The democratic order does not directly collapse, but rather there is a gradual and continuous decline in the quality of the three main elements of democracy: the democratic electoral system, rights to speech and association, and the rule of law, which in combination over time has the same effect as authoritarian reversion.[28] It is also important to understand that "retrogression" only occurs when there is the systematic destruction of the three main elements of democracy rather than just one of them. It is only when the quality of all three elements decreases that democracy is endangered.[29]

Constitutional retrogression, according to Huq and Ginsburg, usually occurs in five steps: (1) a formal constitutional amendment that in substance marginalizes the opposition and removes presidential term limits[30] (examples of the use of this mechanism can be seen in some Central African countries, such as Cameroon, Chad, and Gabon);[31] (2) the elimination of institutional checks, as in Poland, when the Law and Justice Party won both the presidential and legislative elections in 2015, and enacted a new Law on the Constitutional Court, whose substance weakened the role of the Court in checking their power;[32] (3)

[26] *Ibid*, 13-14.
[27] *Ibid*, 15.
[28] *Ibid*, 16.
[29] *Ibid*, 17.
[30] *Ibid*, 41
[31] See Charles Manga Fombad, "Strengthening constitutional order and upholding the rule of law in Central Africa: Reversing the descent toward symbolic constitutionalism", *African Human Rights Law Journal* 14, (2014), 425-430.
[32] Huq and Ginsburg, "How to Lose a," 42-43.

centralizing and politicizing executive power, as exemplified by President Erdogan in Turkey, who reformed the court system to give him greater control over the appointment of judges and prosecutors;[33] (4) degrading the public sphere, usually through the enactment of a media law which allows the government to freely ban the press or by enacting a law on non-governmental organizations (NGOs), whose substance makes it easy for governments to dissolve an NGO or similar societal organizations;[34] and (5) the elimination of political competition, usually manifested by the actions of rulers in weakening the opposition (the best example of this is the Fidesz government in Hungary, which manipulates election laws to make it difficult for the opposition to compete).[35]

The more specific phenomenon of democratic destruction through the mechanism of law and the constitution, on the other hand, as described by Landau, is closely related to the rise of populism. This connection arises because, over the past 20 years, many populist leaders have used constitutional provisions to undermine democracy after coming to power.[36] The list includes President Alberto Fujimori in Peru (1995), Hugo Chavez in Venezuela (1999), Rafael Correa in Ecuador (2008), President Evo Morales in Bolivia (2009), Viktor Orban in Hungary (2011), and President Erdogan in Turkey.[37]

The reason why populist leaders tend to engage in constitutional retrogression is that their appeal depends on a dichotomy between "the people" whom they claim to represent and the "corrupt elite" that opposes them. Populist leaders thus generally claim to be outsiders of the political system who want to reform the economic and political structure by involving groups previously marginalized by corrupt elites.[38] They also claim that they are the only legitimate representatives of the people so that those who oppose them – the corrupt elite –have no right to compete with them in elections.[39]

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33 *Ibid*, 46.
34 *Ibid*, 46-51.
35 *Ibid*, 51-52.
36 David Landau, "Populist Constitutions," *The University of Chicago Law Review* (2018).
37 *Ibid*, 522.
38 *Ibid*, 524.
39 *Ibid*, 525.

The belief that they are the sole legitimate representative of the people makes populist leaders dangerous to democracy. Based on this belief, they often criticize the existing constitutional order, which they allege has been utilized by corrupt elites to maintain themselves in power. That is why changing the law and the constitution is central to their political programme.[40] When successful in changing the existing institutional order, for example through the constitutional amendment or constitutional replacement, populist rulers seek to monopolize the political process rather than seeking consensus with the opposition and elements of the old institutional order they perceive as corrupt.[41] For example, in Venezuela and Ecuador, Presidents Chavez and Correa, after successfully changing the constitution, undertook steps such as formulating election laws that favoured their positions, dismissed judges who disobeyed them and dissolved the current legislature to ensure that its successor was under their control. In Hungary, Fidesz, after successfully taking control of the parliament, adopted a new constitution without involving the opposition.[42]

Populist leaders also tend to consolidate their power after acquiring it. They do so by strengthening the authority of the executive branch and eliminating term limits.[43] They also often attack independent institutions that function to check their power, such as courts, media, tax authorities, and electoral commissions. Populist rulers fill these institutions with party loyalists so that they are no longer independent.[44] The main target of such populist rulers is usually the Constitutional Court, since it is this institution, especially in countries that have undergone a transition from authoritarianism to democracy, that has the primary function of safeguarding democracy by protecting its own independence and the independence of other state institutions, and upholding human rights.[45]

[40] *Ibid*, 526.
[41] *Ibid*, 527.
[42] *Ibid*, 527.
[43] *Ibid*, 532.
[44] Scheppele, "Autocratic Legalism," 550.
[45] Uitz, "Constitutional Courts in Central and Eastern Europe," 50.

2.2. Constitutional Retrogression in Indonesia: Worrying Indications

When President Joko Widodo came to power in 2014, he was a weak president. At the time, 60% of the People's Representative Council (*Dewan Perwakilan Rakyat* or DPR)[46] was controlled by Prabowo Subianto, the opponent he narrowly defeated in the 2014 presidential elections.[47] However, since then, Widodo has successfully consolidated his power. Currently, his coalition is supported by 67% of the DPR. He built this support by persuading the two main opposition parties to switch sides.[48]

Unfortunately, President Widodo's success in consolidating his power has been accompanied by worrying developments. One of the most prominent of these, according to human rights activists, involved his use of the Government Regulation in Lieu of Laws mechanism in the 1945 Constitution, which allows the President to enact a government regulation without requiring DPR approval in the face of "compelling exigencies".[49] In 2017, Widodo used this mechanism to issue Government Regulation in Lieu of Laws 2 of 2017 on the Amendment of Law 17 of 2013 on Societal Organizations (hereinafter 'Perpu 2/2017'). This Regulation was subsequently approved by the DPR to become Law 16 of 2017 on the Stipulation of Government Regulation in Lieu of Law 2 of 2017 on Amendment of Law 17 of 2013 on Societal Organizations.[50] The adoption of Perpu 2/2017 caused controversy because it threatened one of the fundamental elements of democracy, viz. rights to speech and association. In particular, the Perpu makes it easier for the government to dissolve an organization by eliminating the courts'

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[46] The DPR is the lower house of the Indonesian Parliament. It has joint power with the President to make laws, which is why its support is important for Presidents to implement their agenda. See Article 20(2) of the 1945 Constitution, which provides: "Every bill shall be discussed by the People's Representative Council and the President in order to acquire joint approval."

[47] Stefanus Hendrianto, "Indonesian Constitutional Conundrum: The Weak Presidency, the Strong Opposition and the Regional Election Law," *Int'l J. Const. L. Blog* (October 2014), http://www.iconnectblog.com/2014/09/indonesias-constitutional-conundrum-the-weak-presidency-the-strong-opposition-and-the-regional-elections-law/.

[48] Stefanus Hendrianto and Fritz Siregar, "Indonesia: Development in Indonesian Constitutional Law," in *2016 Global Review of Constitutional Law*, ed. Richard Albert, David Landau, Pietro Faraguna and Simon Drugda, (Boston: ICONnect-Clough Center, 2017), 93.

[49] See Art. 22(1) of the 1945 Constitution: "In the event of compelling exigency, the President is entitled to stipulate government regulations in lieu of laws."

[50] Usman Hamid and Liam Gammon, "Jokowi Forges a Tool of Repression", *New Mandala*, 13 July 2017, http://www.newmandala.org/jokowi-forges-tool-repression/

oversight role.[51] The Perpu also broadens the grounds on which an organization may be dissolved to include:[52]

- "using names, emblems, flags, or organizational symbols that have similarities, essentially or in part, with the names, emblems, flags, or organizational symbols of separatist movements or prohibited organizations" (paragraph 4a);
- "engaging in separatist activities that threaten the sovereignty of the Unitary State of the Republic of Indonesia" (paragraph 4b); and
- "following, spreading, and teaching doctrines or concepts which are contrary to Pancasila" (paragraph 4c).

The political context in which Joko Widodo's government enacted a Perpu that threatened rights to speech and association in this way was as follows. At the end of 2016 and the beginning of 2017, Widodo's government faced serious challenges in the form of the rise of political Islamist groups, who succeeded in overthrowing one of his key allies during the election of the DKI Jakarta governor, Basuki Tjahaja Purnama (popularly known as 'Ahok'). Faced with these challenges, and in order to minimize the threats posed by Islamist groups, the Widodo government dissolve Hizbut Tahrir Indonesia (HTI), one of the hardline Islamic organizations involved in the political Islamist movement, that have competing views with Indonesian national ideology of Pancasila.[53] However, the aim to create this Perpu to dissolve HTI is unreasonable, because the mechanism for dissolving societal organization already exists in Law 17 of 2013 on Societal Organizations, even the mechanism in this law seems more democratic than in the Perpu, because it gives the court a chance to check first the government proposal to dissolve societal organizations.[54]

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[51] Article 71 of Law 17 of 2013 on Societal Organisation, which was amended by Perpu 2/2017, determines if the government's request to dissolve mass organizations must be decided first by the court.

[52] Article 59 paragraph 4a,b,c Government Regulation in Lieu of Law 2 of 2017 Amending Law 17 of 2013 on Societal Organisations.

[53] Giri Ahmad Taufik, "Proportionality Test in the 1945 Constitution: Limiting Hizbut Tahrir Freedom of Assembly," *Constitutional Review* 4, no. 1 (2018): 61.

[54] *Ibid*, 68.

Apart from issuing Perpu 2/2017, Widodo's government has also used another strategy to deal with the threat posed by the Islamist movement. This strategy takes the form of the criminal prosecution of Islamist movement leaders, mostly not in cases directly related to their activity in Islamist organizations or political demonstrations.[55] The goal of this strategy is to limit their rights to speech and association. For example, one of the most prominent Islamist movement leaders, Rizieq Shihab, was investigated by the police for making an insulting remark about the official state ideology, Pancasila; for allegedly helping to spread pornographic images and texts; and on several other grounds.[56] This strategy proved successful and Rizieq fled to Saudi Arabia.[57] The problem with both Perpu 2/2017 and this strategy, however, is that, while countering the Islamist movement's populist and religious agenda, which undoubtedly threatens Indonesia's democracy, these responses themselves have undermined core political rights on which democracy depends.

Another action taken by Widodo's government that threatens rights to speech and association was Law 2 of 2018 on the Second Amendment of Law 17 of 2014 on the People's Consultative Assembly, People's Representative Assembly, Regional Representative Assembly and Regional People's Representative Assembly ('MD3 Law 2018'). This law threatens rights to speech, especially in Article 122, which authorizes the House Ethics Committee to take legal action against persons or groups that tarnish the dignity of the DPR.[58] The existence of this article very likely suppresses freedom of speech and criticism of the DPR, especially given the use of the vague term 'tarnish'.

The incorporation of this article in the MD3 Law may appear to relate more to the interests of the DPR than Joko Widodo's government. Widodo himself, in fact refused to sign the law after its adoption. Nevertheless, the original process of formulating the law required the joint agreement of the President and the

[55] Mietzner, "Fighting Illiberalism with Illiberalism," 275.
[56] *Ibid*.
[57] *Ibid*, 276.
[58] Article 122 l of Law 2 of 2018 on the Second Amendment of Law 17 of 2014 on People's Consultative Assembly, People's Representative Council, Regional Representative Council, and Regional People's Representative Council, which stated that one of the tasks of the House Ethics Committee is "to take legal or other steps against individuals, groups or legal entities that tarnish the dignity of the DPR or its members."

DPR.[59] In addition, in instances where the President does not sign a law, the Constitution provides that the draft law will become law within 30 days, based on the President's approval in the formulation process.[60] Moreover, the majority of the parties that voted to adopt the MD3 Law support the government, including the Indonesian Democratic Party of Struggle (PDIP), President Widodo's own party.[61] Fortunately, as explained below, the sections of the MD3 Law that give the House Ethics Committee the power to bring actions against people or groups deemed to be tarnishing the dignity of the DPR were recently declared unconstitutional by the Constitutional Court.[62]

More recent evidence of the Widodo's government threat to rights to freedom of speech and association comes in the form of its attempt to repress a grassroots political opposition movement, the #2019GantiPresiden (2019ChangePresident), by using police institutions backed by pro-government protesters.[63] This move clearly violates rights to speech and association since the #2019GantiPresiden movement is simply campaigning to change the Widodo administration in the 2019 elections rather than opposing democracy in the manner of HTI. The legitimacy of this movement has also been confirmed by the General Electoral Commission (*Komisi Pemilihan Umum* or KPU), the Electoral Oversight Agency (*Badan Pengawas Pemilihan Umum* or Bawaslu), and by NGOs committed to democratic pluralism.[64]

In addition to issuing regulations and acting in ways that threaten rights to speech and association, Joko Widodo's government has also engaged in activities that threaten another fundamental element of democracy, namely the need for

[59] Stephen Sherlock, "Jokowi shares the blame for MD3 debacle," *New Mandala*, 19 March 2018, http://www.newmandala.org/jokowi-shares-blame-md3-debacle/.

[60] See Article 20(5) of the 1945 Constitution: "In the event a bill having been jointly approved as such has failed validation by the President within a period of thirty days as of such bill has been approved, the bill as such shall lawfully become a law and shall be promulgated."

[61] See Robertus Robet, "Beyond the bounds of democracy: DPR consolidates its power," *Indonesia at Melbourne*, February 23, 2018, http://indonesiaatmelbourne.unimelb.edu.au/beyond-the-bounds-of-democracy-dpr-seeks-to-consolidate-its-power/.

[62] Constitutional Court Decision Number 16/PUU-XVI/2018 on Judicial Review Law Number 2 Year 2018 on Second Amendment of Law Number 17 Year 2014 on People's Consultative Assembly, People's Representative Assembly, Regional Representative Assembly, and Regional People's Representative Assembly

[63] Tom Power, "Jokowi's authoritarian turn," *New Mandala*, accessed 15 October 2018, http://www.newmandala.org/jokowis-authoritarian-turn/.

[64] *Ibid*.

a democratic electoral system. In many countries experiencing constitutional retrogression, it is common for rulers to maintain elections as an outward sign of support for democracy, but in reality to manipulate elections in a way that means that they are not truly democratic.[65] In Indonesia, Widodo's government, with the support of a majority of the DPR, enacted Law 7 of 2017 on General Elections that requires candidates for President and Vice President to be proposed by political parties or coalitions of political parties that command at least 20% of the seats in the DPR or which received a minimum of 25% of the votes in the general elections ('presidential thresholds').[66] In defence of this measure, Widodo's government argued that the presidential threshold mechanism was needed to reduce the number of parties, so that Indonesia's presidential system would become more stable.[67]

The presidential threshold mechanism, however, limits the opposition's ability to compete in the presidential elections considering that almost 67% of the seats in the DPR are controlled by Widodo's government. In addition, when viewed from the perspective of the electoral system, this policy is an anomaly because Indonesia will hold simultaneous presidential and parliamentary elections in 2019 for the first time. This means that the 2019 results cannot be used to determine the 20% presidential threshold for nominating the President.[68] Rather, the only way this mechanism can be implemented is to use the results of the previous legislative elections in 2014. Since the constellation of DPR members will definitely change after the 2019 election, this effectively undermines democracy by limiting the field of presidential candidates to persons who enjoyed the support of established political parties in the last electoral cycle.

Another key element of a democratic state, the rule of law, has also not been free from threat by Widodo's government. The threat on this occasion consists of the weakening of law enforcement institutions. For example, the DPR has ordered

[65] Kim Lane Scheppele, "Autocratic Legalism," 565-566.
[66] See Article 222 Law Number 7 Year 2017 on General Election.
[67] "Tjahjo: Presidential Treshold 20 Persen Bukan untuk Jegal Calon," *Tempo.co*, accessed 17 July 2018, https://nasional.tempo.co/read/892072/tjahjo-presidential-threshold-20-persen-bukan-untuk-jegal-calon.
[68] "Peneliti Perludem: UU Pemilu bisa Menyulitkan Jokowi Sendiri," *Tirto*, accessed 15 July 2018, https://tirto.id/peneliti-perludem-uu-pemilu-bisa-menyulitkan-jokowi-sendiri-cs89.

an inquiry into the Corruption Eradication Commission (*Komisi Pemberantasan Korupsi* or KPK), the key institution created to achieve the *reformasi* objective of eradicating corruption.[69] The pretext for the inquiry was the need to supervise the implementation of the KPK's mandate in enforcing the law, with the DPR arguing that there were indications that the KPK had not compelled with relevant statutory provisions.[70] On closer examination, however, it emerged that several DPR members are facing so-called 'e-KTP' cases before the KPK. Many activists and legal experts thus consider that the inquiry is intended to disrupt the KPK's focus on handling these cases.[71] Since the majority of parties in the DPR that supported the launching of the inquiry were supporters of Widodo's government, Widodo may be considered responsible for it.[72]

Other law enforcement institutions in Indonesia have also been affected. One of these institutions was the Constitutional Court, an institution which, as noted, is often the main target of populist leaders seeking to undermine liberal democracy.[73] Since its establishment, the Constitutional Court has played a crucial role in maintaining democracy and building a culture of constitutionalism among lawmakers.[74] The Court is thus certainly now one of the main barriers in the way of any Indonesian government that wants to consolidate its power.

The Widodo government's assault on the Court was admittedly less severe than in Poland, where a new law was enacted to allow for packing of the courts.[75] In Indonesia's case, the attack took the form of the DPR's re-appointment of Justice Arief Hidayat to a second term. Hidayat's re-appointment was controversial

[69] "Agar Reformasi Pemberantasan Korupsi Tidak Sebatas Ekspektasi," Transparency International Indonesia, accessed 16 July 2018, http://ti.or.id/refleksi-gerakan-antikorupsi-menjawab-tantangan-20-tahun-reformasi/.

[70] "DPR Setuju Gunakan Hak Angket terhadap KPK," *Tirto*, accessed 16 July 2018, https://tirto.id/dpr-setuju-gunakan-hak-angket-terhadap-kpk-cnBr.

[71] "KPK: Hak Angket Tak Akan Hentikan Pengusutan Kasus e-KTP," *Tirto*, accessed 16 July 2018, https://tirto.id/kpk-hak-angket-tak-akan-hentikan-pengusutan-kasus-e-ktp-cnDY.

[72] Ihsanuddin, "Pansus KPK Diisi Fraksi Pendukung Pemerintah, Jokowi Diminta Bersikap," *Kompas.com*, accessed 16 July 2018, https://nasional.kompas.com/read/2017/07/25/12451401/pansus-kpk-diisi-fraksi-pendukung-pemerintah-jokowi-diminta-bersikap.

[73] Scheppele, "Autocratic Legalism," 550-553.

[74] Simon Butt, "Indonesia's Constitutional Court: Conservative activist or strategic operator?" in *The Judicialization of Politics in Asia*, ed. Bjoern Dressel, (London and New York: Routledge, 2012), 111.

[75] The weakening of the Constitutional Court in Poland was affected by the governing Law and Justice Party with amending the Constitutional Court Law, which allowed the addition of three new sympathetic judges. See Tom Gerald Daly, "Democratic Decay", 14.

because before undergoing the required fit and proper test, he was suspected of meeting several members of the DPR's Commission III (the commission that focuses on law, human rights, and security issues), and particularly with members of the DPR who support the government. This meeting led to Hidayat's being investigated by the Constitutional Court's Ethics Council, which resulted in an ethical sanction in the form of a warning in mid-January 2018.[76] Unfortunately, despite being proven to have met with members of the DPR and then accepting the ethical sanction, Hidayat was re-appointed as a Constitutional Court Justice by the DPR on March 27, 2018. The re-appointment was heavily criticized by the opposition and constitutional law scholars, who doubted its independence.[77]

Based on these examples, it can be said that Indonesia's democracy has undergone constitutional retrogression as defined. Widodo's government has systematically targeted all three fundamental elements which according to Huq and Ginsburg must exist in a democratic state, i.e. a democratic electoral system, rights to speech and association, and the rule of law.[78] To be sure, when these attacks began, they were more ad hoc in nature, such as the criminalization of radical Islamic leaders and the use of Perpu 2/2017 to block the Islamist populist movement in the Jakarta Gubernatorial election.[79] However, as time has progressed, the Widodo government has seen the advantages of these ad hoc measures, and deliberately expanded them to combat regular democratic opposition, as seen in the repression of the #2019GantiPresiden movement.

The severity of the harm done by Widodo's government to democratic institutions has not been equivalent across all three elements. Rights to speech and association have thus experienced the most severe threats, especially after the DPR's approval of Perpu 2/2017 in the form of Law 16 of 2017.[80] The

[76] Fabian Januarius, "Terlibat Kasus-Kasus Etik, Arief Hidayat Diminta Mundur dari Ketua MK," *Kompas.com*, accessed 16 July 2018, https://nasional.kompas.com/read/2018/01/25/20110941/terlibat-kasus-kasus-etik-arief-hidayat-diminta-mundur-dari-ketua-mk.

[77] "Pelantikan Arief Hidayat Wujud Penurunan Kualitas Hakim MK," *Tirto*, accessed 16 July 2018, https://tirto.id/pelantikan-arief-hidayat-wujud-penurunan-kualitas-hakim-mk-cGQo.

[78] Huq and Ginsburg, "How to Lose a," 9.

[79] Tom Power, "Jokowi's authoritarian turn".

[80] Some Indonesian constitutional law scholars criticized the issuing of this Perpu, arguing that the regulation was issued through a Perpu mechanism which did not involve the DPR, so it had an element of dictatorship. "Perpu Ormas Dinilai Batasi Hak Berserikat", *Republika.co.id*, accessed 17 July 2018, https://www.republika.co.id/berita/nasional/politik/17/07/15/ot3mgy368-perppu-ormas-dinilai-batasi-hak-berserikat

government's action in prosecuting certain opposition leaders and repressing grassroots opposition movements has also shown that rights to speech and association are in quite a precarious position. On the other hand, the electoral system and the rule of law, despite facing threats, have not yet been truly undermined, as evidenced by the existence of a vigorous opposition that will challenge Widodo's bid for a second term in the 2019 presidential elections. While the opposition's challenge has been complicated by the 20% presidential threshold requirement,[81] this barrier is not insurmountable. There are also still indications that the Constitutional Court has been able to act independently, for example through its decision to overturn those parts of the MD3 Law that threaten rights to speech, and through its Ethics Council's decision to sanction Hidayat for meeting with the DPR. As things stand, only one of the Constitutional Court judges is considered not to be independent.

Apart from that, there are doubts about whether Widodo is himself a populist leader as understood in the literature on constitutional retrogression or whether he is a pragmatic politician who is trying to contain populist elements in the country. Marcus Mietzner, for his part, has argued that Widodo is a new or 'technocratic' populist ruler.[82] According to this view, Widodo is different from traditional populist rulers, such as his arch-enemy, Prabowo Subianto. He acts inclusively rather than trying to exclude his political opponents; he is a nationalist like traditional populist leaders but does not use anti-foreign rhetoric in the same way they do; and, again like traditional populists, he criticizes the existing political elite, but wants to improve rather than replace them.[83] In making these distinctions, Mietzner portrays Widodo's new form of populism as something positive for democracy.[84]

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[81] The existence of an opposition party that will challenge Joko Widodo is shown, for example, through the statement of Prabowo Subianto (Jokowi's opponent in the 2014 presidential election) of his readiness to confront Joko Widodo again in the 2019 presidential election at the Gerindra Rakornas (National Coordination Meeting). See Liam Gammon, "Prabowo didn't just announce a presidential run," *New Mandala*, accessed 18 July 2018, http://www.newmandala.org/prabowo-didnt-just-announce-presidential-run/.

[82] Marcus Mietzner, *Reinventing Asian Populism: Jokowi's Rise, Democracy, and Political Contestation in Indonesia* (Honolulu: East-West Center, 2015), 2-3.

[83] *Ibid*. According to Howse, the good populist is not wanted for popular hegemony, in fact, the demand is to solve underinclusiveness and underrepresentation. See Rob Howse, "Populism and Its Enemies" (Workshop on Public Law and the New Populism, Jean Monnet Center, NYU Law School, 15-16 September 2017).

[84] *Ibid*.

Against this, however, it is clear that some elements of this new populism have undoubtedly threatened democracy. For example, when enacting Perpu 2/2017 and using it to dissolve HTI organizations that are opposed to democracy,[85] Widodo justified his actions as necessary to safeguard the unity of the people in accordance with the inclusive Indonesian ideology of Pancasila.[86] In substance, however, the Perpu is not really inclusive because it targets not only the enemies of democracy like HTI, but other groups, too, which are considered as having views that conflict with Pancasila principles, including atheists and Marxists.[87]

The Widodo government's use of *Pancasila* also reflects one of the characteristics that according to Luigi Corrias are commonly found in populist rulers, namely the habit of using constitutional identity as a shield for legitimizing their government.[88] *Pancasila* in this case, can be regarded as the embodiment of Indonesia's constitutional identity.[89] During his administration, Widodo has used Pancasila extensively, not only in Perpu 2/2017, but also in other legitimizing actions, for example by issuing slogans such as "*saya Indonesia, saya Pancasila*" ("I am Indonesia, I am *Pancasila*") and by forming a special body whose duty is to develop and foster *Pancasila* ideology in every element of society. This move represents the most extensive mobilization of the ideology of *Pancasila* by the Indonesian government since the fall of Soeharto.[90]

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[85] Giri, "Proportionality Test", 58-59.

[86] "Jokowi: Perpu Ormas dibuat untuk menjaga Pancasila dan NKRI,", *Tempo.co*, accessed 19 July 2018, https://nasional.tempo.co/read/1028012/jokowi-perpu-ormas-dibuat-untuk-menjaga-pancasila-dan-nkri.

[87] The substance of Perpu 2/2017 which excludes many groups can be seen in the official elucidation of Article 1(4c) Government Regulation in Lieu of Law 2 of 2017 Amending Law 17 of 2013 on Societal Organisations.

[88] According to Corrias, populist ideas usually contain three implicit constitutional theories, that is the constituent power, popular sovereignty, and constitutional identity. See Luigi Corrias, "Populism in a Constitutional Key: Constituent Power, Popular Sovereignty and Constitutional Identity," *European Constitutional Law Review* 12, no. 1 (2016).

[89] *Pancasila* is viewed by many Indonesians as an Indonesian ideology and identity, and many scholars from Indonesia and foreigners believe *Pancasila* contains values which are compatible with democracy like 'inclusivism' and 'pluralism'. However, a study by Pranoto Iskandar challenges this claim. His study shows that *Pancasila* contains the traditional communitarian spirit, which is not only biased towards a limited number of religions but could also potentially jeopardize democracy. See Pranoto Iskandar, "The Pancasila Delusion," *Journal of Contemporary Asia* 46, no. 4 (2016): 723-735; Populists, according to Corrias, often see constitutional identity as something fixed once and for all, pre-determined before the enactment of a legal order and stored away, untouchable by the ravages of time. *Ibid,* 22.

[90] Soeharto used *Pancasila* propaganda (knowing as 'P4') in every element of the state to legitimize his authoritarian rule See Tim Lindsey, "Indonesia Devaluing Asian Values, Rewriting Rule of Law", in *Asian Discourses of Rule of Law Theories and Implementation of Rule of Law in Twelve Asian Countries, France and the U.S*, ed. Randall Peerenboom (London and New York: Routledge, 2004), 290.

The Widodo government's tendency to exclude minority groups is also revealed by the draft of the New Penal Code (*Rancangan Kitab Undang-Undang Hukum Pidana* or RKUHP), which it has pushed hard to enact as soon as possible. The draft contains a controversial provision criminalizing homosexual activities.[91] Not only that, but Widodo's government has, as noted, also tried to insulate itself from the electoral competition by creating the presidential threshold mechanism, which is democratically questionable given the move to simultaneous presidential and parliamentary elections. These developments tend to support Tom Daly's caution against distinguishing 'good' and 'bad' forms of populism,[92] as proposed by Rob Howse.[93] Based on the Indonesian experience, it is clear that 'good' populists, whom Howse argues are less dangerous because of their pluralist and inclusivist character, can threaten democracy to the same degree as 'bad' populists.

In summary, while Widodo may not be a populist leader in the classical mould, his government's actions have weakened all three of the main support structures for democracy in Indonesia. The question accordingly arises whether there is anything that can be done to prevent and reverse this constitutional retrogression process, and in particular whether the Constitutional Court may play a role.

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[91] Article 454 RKUHP, which regulates sexual abuse by same-sex persons. This article has been criticized by many human rights organization because the new penal code already contains a provision on sexual abuse. So the existence of a specific article about sexual abuse by same-sex persons is suspected of discriminating against the lesbian, gay, bisexual, and transgender (LGBT) community. See Anggara (et. al), *Catatan dan Rekomendasi ICJR terhadap beberapa ketentuan dalam RKUHP* (Jakarta: Institute for Criminal Justice Reform, 2018). Many statements by officials of Joko Widodo's government reveal that the government clearly rejects the LGBT community. For example, the Minister of Religion, Lukman Hakim Saifuddin, called on all Indonesians "to embrace [LGBT people] so they will be conscious that they live in a religious society which can't accept homosexuality." See Phelim Kine, "Indonesian Religion Minister's Contradictory LGBT 'Embrace'," *Human Rights Watch*, accessed 8 October 2018, https://www.hrw.org/news/2017/12/19/indonesian-religion-ministers-contradictory-lgbt-embrace.

[92] Tom Gerald Daly, "Populism, Elitism and Democratic Decay in Brazil" (Paper presented at International Society of Public Law Conference, Hong Kong, 26 June, 2018), 4.

[93] Rob Howse divides populists into two types. The first is the good populist who rails against elites. However, such claims are pluralist since they do not take the form of a demand for popular hegemony but are rather a critique of the underrepresentation of people in the political system that is dominated by elites. The second is the bad populist. This type of populist takes aim at minority rights. They will engage in actions such as arbitrary seizure or nationalization of the property of elites, punitive taxes, deportation of foreign workers, and many more. See Rob Howse, "Populism and Its Enemies", 3.

2.3. Can the Constitutional Court arrest the slide?

A country's constitutional court is often the main target of populist rulers intent on orchestrating constitutional retrogression. The obvious reason for this is that democratic states, especially those that have just emerged from a long period of authoritarianism, such as Indonesia, establish constitutional courts with the specific purpose of safeguarding democracy from attack.[94]

In the Indonesian case, one of the positive aspects of the constitutional retrogression process that has occurred is that the Constitutional Court has thus far not been captured. As we have seen, the Widodo government and its supporting parties succeeded in extending Justice Arief Hidayat's term of office. However, this success was a turning point for the Constitutional Court. After Hidayat's controversial re-appointment, a public petition was signed questioning his neutrality.[95] While Hidayat refused to resign, the petition played a role in ensuring that he was not re-elected by his fellow justices to the position of Chief Justice.

Hidayat's failure to resume the Chief Justiceship shows that the amended 1945 Constitution, which divides the appointment of Constitutional Court justices between three institutions (the President, the DPR and the Supreme Court (*Mahkamah Agung* or MA), has made it difficult for Widodo's government to pack the Constitutional Court.[96] Even though it succeeded in controlling one constitutional justice, there were still eight other constitutional justices with sufficient independence to resist the attack. At the same time, the success of the

[94] Hamdan Zoelva, "Negara Hukum dan Demokrasi: Peran Mahkamah Konstitusi Menegakkan Hukum dan Demokrasi," in *Negara Hukum yang Berkeadilan*, ed. Susi Dwi Harijanti et. al, (Bandung: Pusat Studi Kebijakan Negara Fakultas Hukum Universitas Padjadjaran, 2011), 625; See also Katherine Glenn Bass and Sujit Choudry, "Constitutional Review in New Democracies," *The Center for Constitutional Transitions at NYU Law Briefing Paper* 40, September 2013.

[95] See the Petition "Save the Constitutional Court, Arief Hidayat Must Resign", which was signed by around 16,000 people. This petition was drafted shortly after the inauguration of Arief Hidayat. https://www.change.org/p/selamatkan-mk

[96] Article 24C(1) of the 1945 Constitution: "The Constitutional Court shall have nine members to be designated by the President, respectively three people to be proposed by the Supreme Court, three people by the People's Representative Council, and three people by the President."

Hidayat petition shows the importance of public support to the Constitutional Court's ability to protect its independence.[97]

The Constitutional Court also demonstrated its independence in the MD3 Law case, which, as we have seen involved a challenge to provisions giving the DPR's House Ethics Committee the authority to take legal action against people or groups who tarnish its reputation.[98] In this case, the Constitutional Court, despite the presence on the Bench of a judge whose independence had been called into question, proved its neutrality by striking the impugned provisions down.

In other instances, the Constitutional Court has been less effective in resisting the Widodo government's efforts to weaken democracy by. For example, on two different cases in 2017 and 2018, the Court declined to annul the 20% presidential threshold mechanism in Law 7 of 2017 on General Elections,[99] even though the use of such a threshold in combination with simultaneous presidential and parliamentary elections is not common. Nevertheless, there are other opportunities for the Constitutional Court to intervene in defence of democracy, specifically in the case of Perpu 2/2017 which was approved by the DPR in Law 16 Year 2017, and is currently under review by the Court.

Whether the Constitutional Court will be able to stop the constitutional retrogression process in Indonesia from getting worse depends in part on the changing political context. As Stephen Gardbaum has argued, all other things being equal, it is the political context that determines whether a constitutional tribunal with the requisite formal powers to prevent government attempts to destroy democracy actually will intervene to do so.[100] By political context, Gardbaum means such things as the outcome of an election that influences the appointment of constitutional tribunal judges or shifts in public opinion

[97] The Indonesian Constitutional Court's tendency to annul laws correlates to the strength of public support in favour of annulment. See Dominic Nardi, "Indonesia's Constitutional Court and Public Opinion," *New Mandala*, accessed 23 July 2018, http://www.newmandala.org/indonesias-constitutional-court-public-opinion/parties.

[98] See Constitutional Court Decision Number 16/PUU-XVI/2018.

[99] See Constitutional Court Decision Number 53/PUU-XV/2017 on Judicial Review of Law Number 7 Year 2017 on General Election; See also Marguerita Afra Sapiie, "Constitutional Court maintains presidential threshold", *Jakarta Post*, accessed 05 December 2018, http://www.thejakartapost.com/news/2018/10/25/constitutional-court-maintains-presidential-threshold.html

[100] Stephen Gardbaum, "What Makes for More or Less Powerful Constitutional Courts?" *UCLA School of Law, Public Law & Legal Theory Research Paper*, no. 17-37 (2017).

that affects the extent of public support for a democracy-protecting outcome.[101] In Indonesia's case, the amended 1945 Constitution undoubtedly gives the Constitutional Court sufficiently strong authority to protect democracy. The judicial appointment process has thus far also not been too severely compromised. Thus, if Gardbaum is right, much will depend on public support.

The events surrounding Hidayat's failed attempt to reoccupy the position of Chief Justice already provide some evidence that public opinion indeed plays an important role for the Constitutional Court. This point has further been acknowledged by one of the former justices of the Court, Maruarar Siahaan. According to Siahaan, public opinion and NGO's (Non-Governmental Organizations) are important sources of support for the Court. His exact words were: "Public opinion has been very kind to the Court".[102] Similarly, the media, in Siahaan's view, are vital to the effort to defend the Court's independence. While the Court has sometimes allowed public pressure to influence its decisions, the media and public opinion are effective weapons to protect the Court from intervention by political elites.[103] In addition to this anecdotal evidence, Dominic Nardi's statistical study shows that the more NGOs and public opinion support the annulment of a law, the greater the chances of the Court's annulling it.[104]

There is also comparative support for this view. In 2002, Colombia was led by President Alvaro Uribe, a right-wing populist.[105] The Colombian Constitution stipulated that the President could only serve for one term (four years in office), and afterward could not be re-elected. However, after completing his first term of office, Uribe succeeded in passing a constitutional amendment permitting the President to serve for two terms. The Colombian Constitutional Court reviewed this amendment, both in terms of substance and procedure, but refused to annul it. However, after the end of his second term of office approached, Uribe

[101] *Ibid*, 17-18.
[102] See Marcus Mietzner, "Political Conflict Resolution", 414.
[103] *Ibid*.
[104] Nardi, "Indonesia's Constitutional Court".
[105] Jennifer Cyr and Carlos Melendez, "Colombia's right-wing populist movement defeated the peace deal. Here's what we know", *The Washington Post*, accessed 26 July 2018, https://www.washingtonpost.com/news/monkey-cage/wp/2016/10/04/colombias-right-wing-populist-movement-defeated-the-peace-deal-heres-how-we-know/?utm_term=.0b0442b7f46e.

submitted another amendment to allow the President to serve for three terms. This time the Court declared the amendment unconstitutional,[106] holding that Presidents who serve too long pose a danger to democracy because of their ability to appoint loyal officials to institutions that are meant to act as a check and balance on their authority.[107]

The Colombian example shows how a constitutional court can play an important role in preventing constitutional retrogression from getting worse. However, it should be noted that the success of the Colombian Constitutional Court in slowing the pace of democratic decay did not emerge from nothing. Rather, its success was based on a long history of strong public support.[108] The Court in fact, took active steps to build its support during President Uribe's government, realizing that this would be necessary to allow it to play a democracy-protecting role. This support in the end, proved crucial in persuading President Uribe to think twice about disobeying the Court's decision, even though it was controversial in the sense that it overturned a duly enacted constitutional amendment.[109]

In Indonesia's case, the Constitutional Court has even greater prospects of preventing constitutional retrogression from getting worse because the attempts to undermine democracy in Indonesia are arguably not as bad as was the case in Colombia. In Indonesia, Joko Widodo's government's efforts to harm democracy are still being carried out through ordinary legislation, over which the Constitutional Court has supervisory authority. Unlike Colombia, where the Uribe government's attempts to undermine democracy were carried out through a constitutional amendment,[110] the Indonesian Constitutional Court thus does not have to push the limits of its authority in order to protect the democratic system. It can do so by exercising its regular power of constitutional review.

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[106] Rosalind Dixon and David Landau, "Transnational Constitutionalism and Limited Doctrine of Unconstitutional Constitutional Amendment," *International Journal of Constitutional Law* 13, no. 3 (2015): 616.

[107] *Ibid*, 617.

[108] *Ibid*.

[109] Jorge Gonzalez Jacome, "In Defense of Judicial Populism: Lessons from Colombia," *Verfassungblog*, accessed 27 July 2018, https://verfassungsblog.de/in-defense-of-judicial-populism-lessons-from-colombia/.

[110] See Carlos Bernal, "Unconstitutional Constitutional Amendment in the Case Study of Colombia: An Analysis of the Justification and Meaning of the Constitutional Replacement Doctrine," *International Journal of Constitutional Law* 11, no. 2 (2013).

However, the Indonesian Constitutional Court will not be able to defend democracy on its own against the Widodo's government's attempt to consolidate its power. As exemplified in Colombia, the Court will need broad public support. Constitutional law scholars and democratic activists can assist the Court in this respect by mobilizing public opinion in favour of the Court's efforts to stop the weakening of democracy.[111] When lawyers support the Court judgments, it becomes harder for the executive to disobey them.[112] The Indonesian Constitutional Court should also be able to attract public support by showing the public that the justices are independent and immune to bribery. The Court should also resume the strategies previously used under Chief Justices Jimly Asshiddiqie and Mahfud MD. Both Jimly and Mahfud MD frequently gave interviews and explained their decisions to the media with the intention of gaining public support while also forcing the institutions affected by their decisions to obey them. This strategy seems political, but as Stefanus Hendrianto's study shows, it proved to be a successful way of building the Constitutional Court's public support, so that the Court in the days of Jimly and Mahfud's leadership was able to assert its authority against political institutions such as the DPR and the President.[113]

III. CONCLUSION

This paper has revealed worrying signs that the phenomenon of constitutional retrogression has occurred in Indonesia. This is evident from the actions of Joko Widodo's government in harming the three fundamental elements of democracy, namely (1) democratic electoral system; (2) rights to speech and association; and (3) the integrity of law and legal institutions, i.e., the rule of law. While the weakening of democracy that has occurred does not justify labelling Joko Widodo's government an authoritarian regime, certain actions that the government has taken are clearly dangerous for democracy.

[111] Nardi, "Indonesia's Constitutional Court".
[112] See Rosalind Dixon, "Living to Fight Another Day: Judicial Deferral in Defense of Democracy," Wisconsin Law Review 683 (2016): 696.
[113] Stefanus Hendrianto, "The Rise and Fall of Heroic Chief Justices: Constitutional Politics and Judicial Leadership in Indonesia", *Washington International Law Journal* 25, no. 3 (June 2016).

The importance of this finding is that it contradicts the view in the literature that certain kinds of populist leader are not truly threatening to democracy. Some scholars have thus argued that Joko Widodo is a 'good' populist, who do not pose a real threat. On the contrary, this paper has shown, the four years of Widodo's government have seen a progressive weakening in democratic institutions similar to what has occurred when the 'bad' populist govern.

Finally, even though constitutional retrogression has occurred, this does not mean that there is no hope of saving democracy in Indonesia. The main reason for hope is that Widodo's government has not succeeded in taking control of the Constitutional Court. Currently, the Court is in the process of reviewing laws whose substance is related to the Widodo government's attempts to undermine one of the main elements of democracy, rights to speech and association. If the Court annuls these laws, it may help to slow down a democratic decline in Indonesia. The Court cannot save democracy on its own, however. It needs broad public support to protect its independence and to force the other branches of government, especially the President and the DPR, to obey his decisions.

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Harmonization of Regulation Based on *Pancasila* Values Through the Constitutional Court of Indonesia

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Abstract

The legal system which is adopted and applied in Indonesia was based on the formation from the founding fathers which is adjusted to the condition and the spirit of Indonesia as a nation known for its legal system as *Pancasila*. Ideally, *Pancasila* serves as the philosophy for the nation of Indonesia, as state's ideology and as the basis of the state. However, in reality, vertical conflicts (government and society) and horizontal conflict (inter-society) have created a variety of concerns, in which the sense of nationalism and diversity has diminished. The trigger is because *Pancasila* can only be understood as the ideology and the basis of the state, without saturating the meaning contained therein. The paradigm development of *Pancasila* based on legal state should demand the development of a democratic constitutional state, which juxtaposes the principles of a rule-of-law (nomocracy) with harmonious and complementary principles of the sovereignty of the people (democracy). This role can be solved by the Constitutional Court to harmonize the ideology of *Pancasila* in the Indonesia legal substance. When the legal development is integrated into meaning, the legal development which characterized by *Pancasila* can be realized to resolve the variety of community conflicts.

Keywords: Constitutional Court, Ideology of *Pancasila*, Legal Development, Legal Harmonization.

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I. INTRODUCTION

The independence of Indonesia which was declared on 17th August 1945 has created a new entry for Indonesian towards the goal of independence; thus, Soekarno as the President stated that independence is not the goal, but it is a tool or a bridge in achieving the purpose of the nation. In building the state's foundation, Soekarno proposed National Principles which contains five National Principles called as *Pancasila*. It comprises two old Javanese words originally derived from Sanskrit: "*pañca*" (five) and "*sīla*" ("principles"). Therefore, it is composed of five principles and contends that they are inseparable and interrelated:

1. Belief in One and Only God (*Ketuhanan Yang Maha Esa*),
2. Just and civilized humanity (*Kemanusiaan Yang Adil dan Beradab*),
3. The unity of Indonesia (*Persatuan Indonesia*),
4. A democratic life guided by wisdom in deliberation/representation (*Kerakyatan Yang Dipimpin oleh Hikmat Kebijaksanaan, Dalam Permusyawaratan Perwakilan*), and
5. Social justice for all the people of Indonesia (*Keadilan Sosial bagi seluruh Rakyat Indonesia*).

Practically, *Pancasila* can be simplified to three points named *Tri Sila*, which are: Nationalism, Democracy, and Divinity. By then, it is being simplified to *Eka Sila*, which are mutual assistance as the value of Indonesia for Indonesia.[1] In this chain, the formulation and determination of National Principles are directed to accommodate the heterogeneous that encompass tribe, race, religion, tradition and ethnic complexity in the frame of pluralism through state symbol which is Bhineka Tunggal Ika *(unity in diversity, diversity in unity).*[2]

The *Pancasila*, as an ideology and National Principles of Indonesia which is the result of contemplation from the founding fathers of Indonesia, is the National Principles of Indonesia which is suitable for Indonesian. *Pancasila* is

[1] Backy Krisnayuda, *Pancasila & Undang Undang (Relasi dan Transformasi Keduanya Dalam Sistem Ketatanegaraan Indonesia)* [*Pancasila* & Constitutions (Relation and Transformation in Indonesia Constitutional System)] (Jakarta: Prenadamedia Group, 2016), vi.

[2] Yudi Latif, *Negara Paripurna Pancasila* [A State of Pancasila] (Jakarta: Gramedia, 2011), 369.

the personality of the nation, and its values should be upheld by all Indonesian. However, the ideal condition is not always inline with the reality since there is a dynamic of legal issues, social and politics that created a horizontal and vertical conflict. It cannot be denied that the sense of nationalism has begun to wear off and become eroded by various factors that affect individual and group interests.

In the relation between law and politics, it is clear that the legal development, from the old order (*orde lama*) until the new order (*orde baru*), tends to have small progress and it is only for power interest. The subordinate of law under the control of the government, leads the corruption and authoritarian.[3] Legal conditions and law enforcement that happened in Reformation era were almost the same, as declared by Syamsul Bachrie. He said that the old way of development which has embedded in legal development that is still being adopted to legitimate the power or group interest and has been contagious to politics development, social and economic approach until now.[4]

So far, legal development[5] in Indonesia tends to move to artificial space with no directions. Along this way, the legal development in Indonesia tends to move to artificial space and no directions. The legal development after the Reformation era was always done with reactive, partial, and patchy ways. There is no fixed fundamental orientation of legal development that is becoming guidance that makes Indonesia legal development orientation and effective as tools to engineer and empower Indonesia that can lead to a fundamental purpose of the state which is the welfare of society (*bonnum publicum*) which is the ultimate goal of the State is to obtain the highest good for man and not merely good. That means the State should always seek and ensure the maximum

[3] Dayanto, "Rekonstruksi Paradigma Pembangunan Negara Hukum Indonesia Berbasis *Pancasila* [Reconstruction of the Development of Law Paradigm of Indonesia based on *Pancasila*]", *Jurnal Dinamika Hukum* 13, no. 3 (2017): 498-509, https://doi.org/ 10.20884/1.jdh.2013.13.3.253.

[4] Dayanto, "Reconstruction," 498-509

[5] Dhaniswara K, Harjono, "Konsep Pembangunan Hukum dan Perannya Terhadap Sistem Ekonomi Pasar [The Concept of Development of Law and Its Role toward the Market Economy System]," *Jurnal Hukum Ius Quia Iustum* 18, no. 4 (2011): 564-584 10.20885/iustum.vol18.iss4.art5 and Fence M. Wantu, "Mewujudkan Kepastian Hukum, Keadilan, dan Kemanfaatan Dalam Putusan Hakim di Peradilan Perdata [Realising Legal Certainty, Justice and Beneifts of Justice's Decosopm in Civil Courts]." *Jurnal Dinamika Hukum* 12 , no. 3 (2012): 479-489, https://doi.org/10.20884/1.jdh.2012.12.3.121.

good for the citizens both on the level of quality and quantity. In the state, the citizens should be able to enjoy a safe and peaceful life, both spiritual and physical. Thus, the appropriate legal means are needed to be a bridge for the values of *Pancasila* in the legal development of Indonesia.

Associated with the socio-political issues, the latest case that potentially erodes the value of *Pancasila* is the threat of disintegration of the nation after the Election of Regional Head (*Pemilihan Kepala Daerah* or *Pilkada*) in Jakarta on 19th April 2017. The elections of Jakarta's Regional Head in 2017 are assessed by many experts as a sign of change for social values that impact on potential loss of diversity essence. If this condition is still allowed, it will harm the sustainability of democracy, social and government system in Indonesia as well as the unity of Indonesia in the framework of *Pancasila*.

In line with those conditions, the researcher synchronized the claim from Try Soetrisno stated it is very painful when *Pancasila* became a *Scapegoat* for all problems and the unsuccessfulness of managing the life of a nation and the state. *Pancasila* was eventually blamed and accused of being the cause of the country's decline following the 1997 monetary crisis. Therefore, the political elite along with leading figures and leaders of this country are rushed to agree: P-4 must be dismissed, BP-7 must be dissolved, some even argue that *Pancasila* is no longer needed to be taught in educational institutions from elementary to university level. There are at least three mistakes made by the nation. The first mistake is, this nation does not understand and comprehend the essence and meaning of *Pancasila*, and how to implement *Pancasila* in real life. The second mistake is the existence of some leading figures and leaders of this nation who make *Pancasila* just as a tool for their interests. Meanwhile, the third mistake is the lack of ability and willingness of people of this nation to make *Pancasila* as the foundation, orientation, and the signs of social life as a nation and state in all its aspects, covering various dimensions and all real life practices. The nation is not doing introspection and self-correction on the attitude and actions that have not been by *Pancasila*, but immediately get rid of *Pancasila* and all things about *Pancasila*. As the result of non-appreciative

attitude and scapegoating of *Pancasila*, the state does not have a clear path, without clear direction, and without clear signs in facing globalization.[6]

Towards various problems, Joko Widodo as the President has taken a position to safeguard the value of *Pancasila* through the a speech in the anniversary of *Pancasila* in 2017 [7] which confirms that:

> We need to learn from the bad experiences of other countries that are haunted by radicalism, social conflict, terrorism, and civil war. With *Pancasila* and the 1945 Constitution in the frame of Republic of Indonesia and *Bhinneka Tunggal Ika*, we can avoid the problem. We can live together and work together to promote the country. With *Pancasila*, Indonesia is the hope and referral of the international community to build a world that is peaceful, just and prosperous amid plurality.
>
> Therefore, I invite the active role of ulama, ustadz, pastor, priest, monk, *pedanda*, public figure, educator, artist and culture, media player, bureaucracy, The Indonesian National Armed Forces (TNI) and Indonesian National Police (Polri) and all society component to maintain *Pancasila*. Understanding and practice *Pancasila* in the society, nation, and state must be continuously improved. Religious lectures, educational materials, the focus of news and debates on social media should be part of the deepening and practice of *Pancasila* values.
>
> The government's commitment to strengthen *Pancasila* is clear and very strong. We continue to do various efforts. It has been enacted in Presidential Regulation Number 54 of 2017 on Working Unit President of the Development Ideology in *Pancasila*. Together with all components of the nation, this new institution is tasked to strengthen the practice of *Pancasila* in everyday life, which is integrated with development programs. Poverty alleviation, welfare distribution, and other programs become an integral part of the practice of *Pancasila* values.
>
> There is no other choice unless we must work together to reach the ideals of the nation by *Pancasila*. There is no other choice, but the whole nation unites the heart, mind, and energy for unity and brotherhood. There is no other choice unless we have to return to our identity as a polite, soulless

[6] Try Soetrisno, "Penyikapan terhadap Pancasila dan Efektifitasnya sebagai Landasan, Orientasi, dan Rambu-rambu bagi Kehidupan Berbangsa dan Bernegara di Masa Lalu, kini, dan Masa Mendatang [Addressing Pancasila and Its Effectiveness as Platforms Orientations, and Signs for Nations in the Past, Present, and Future]" delivered at Simposium dan Sarasehan Hari Lahir Pancasila, which took place at Gadjah Mada University on 14th and 15th August 2006 : 20-21.

[7] Ahmad Romadoni, "Pidato Lengkap Jokowi di Upacara Hari Lahir *Pancasila* [A Complete Speech of Jokowi in the Commemoration of the Anniversary of Pancasila]," Liputan 6, June 1, 2017, http://news.liputan6.com/read/2973374/pidato-lengkap-jokowi-di-upacara-hari-lahir-Pancasila.

> and tolerant nation. There is no choice but to make Indonesia a just, prosperous and dignified nation in the eyes of the international community.
>
> However, we must also be wary of all forms of understanding and movement that are not in line with *Pancasila*. The government must act firmly to the people that are against *Pancasila*, the 1945 Constitution of the Republic of Indonesia. The government must act decisively if there are still understandings and communism movements that have clearly been banned in Indonesia.
>
> Again, keep the peace, keep the unity, and keep the brotherhood among us. Let us be polite, respectful, tolerant, and mutually helpful for the benefit of the nation. Let's work hand in hand, work together for the sake of Indonesia's development.
>
> We are Indonesia, We are *Pancasila*. All of you are Indonesian, all of you are *Pancasila*. I am Indonesian, I am *Pancasila*.

From the explanation above, the questions appeared are the function and the role of *Pancasila* in the life of the nation that are missed interpreted, and sometimes are misused for certain needs, and no longer achieve a fundamental goal for life in nation and state. *Pancasila* is not in empty space. However it lives in the history and the mind of Indonesian, that is being an object that rose pro and cons, but there is also dialectic process from the various perspective about *Pancasila*.

This paper will review a problem about the ideology of *Pancasila* position in the structure of Legislation, the means of *Pancasila* in Legislation in search of the relevancy of *Pancasila* values in the life of the nation and the role of Constitutional Court of Indonesia to harmonize the regulation based on Pancasila Values. All the points will lead to the answer of Ideology of *Pancasila* in recent concept, whether it is still relevant or should be changed.

II. METHOD

This paper used a doctrinal approach. This approach focused on legal synchronization either vertically or horizontally. To analyze the problems, the author used a statute approach, analytical approach and conceptual approach by emphasizing on the syllogistic process of thinking. For the analytical

method, the authors used content analysis through grammatical and systematic interpretation. The result will be harmonized with norms, theories and doctrines through the use of multiple interpretation models, both grammatically and systematically.

III. DISCUSSION

3.1. The Position of Pancasila Ideology in the Structure of Legislation

From the time the proclamation of independence was declared in August 17, 1945, the journey of constitutional life of the Republic of Indonesia as a sovereign state is considered relatively "young" i.e., 73 years, compared to 242 years of the United States of America, whose independence was declared on July 4th, 1776. Nevertheless, admittedly the idea and or concept of constitutional implementation has always accompanied the state administration, regardless implementation empirical level of this idea often experienced the ups and downs, it is therefore interesting to analyze the notion, as the turn of the era in a nation's history has often encompassed a completely different characteristic.

Awareness of the state's constitutionalism founders has grown and developed in line with the founder of the nation's activities to fight and prepare for the independence of Indonesia. This is documented in the series of the history of formation and discussion of Constitution as stated in meeting minutes of the Hansard of the Investigating Committee for Preparatory Work for Independence (*Badan Penyelidik Usaha-Usaha Persiapan Kemerdekaan Indonesia* or BPUPKI) and the Preparation Committee for Indonesian Independence (*Panitia Persiapan Kemerdekaan Indonesia* or PPKI) which may then be ratified on August 18, 1945. One of the main discussion was creating the ideology of Indonesia.

In general, ideology is a set of action-oriented ideas or thoughts that organized into a regular system. In ideology, it contains three elements, namely (1) the existence of an interpretation or understanding of reality; (2) accommodate a set of moral values or prescriptions; (3) held orientation of an

action, ideology is a guideline of activities to realize the values contained in it. Substantively, Pancasila is an ideology created by the people of Indonesia. It means, ideology declared a goal to be achieved as a point of pressure and included the values as the basic guidelines for the state and its life.

Pancasila as the ideology of the state has aimed that every field of government or any related to the life of the state must be based on the point of its implementation, limited in the motion of its implementation, and directed in achieving its goals with *Pancasila*. By declaring this aspiration to be achieved it is essentially the fifth principle, wishing to bring out social justice for all the people, who are imbued with another principle as unity.[8]

In its historical development, Ideology of Pancasila was set as a fundamental norm of the state. Notonagoro was the first to place *Pancasila* as a *staatsfundamentalnorm*.[9] Speech Anniversary Notonagoro in Airlangga University on 10 November 1955 suggests that *Pancasila* is a fundamental norm of the state or according to the principal use of the term fundamental principle of the state.[10] The origin of the term *staatsfundamentalnorm* first introduced by Hans Nawiasky in his book *Allgemeine Rechtslehre System als der rechtlichen Grundbegriffe* published in 1940. According to Nawiasky, in a state which is a unity of the legal system, there is a norm which is the highest (*der Oberste Norm*), which has a higher position of the constitution (*die verfassung*). Based on this supreme norm, the constitution of a state is formed. Nawiasky says that the highest norms in the unity of the state legal system is called *Grundnorm*.[11] However, both of the opinions above have the difference. *Grundnorm*, as stated by Hans Kelsen, is the highest norm and basically unchanged. But Hans Nawiasky see that the highest norms in a state always has the possibility of changing, either by events

[8] Bakry, *Pancasila: Yuridis Kenegaraan [Pancasila: Judicial State]* (Yogyakarta: Liberty, 1997), 67.

[9] Jimly Assihiddiqie, *Pengantar Ilmu Tata Negara [Introduction to Constitutiona Law]* (Jakarta: Secretary General and Secretariat of The Constitutional Court of Republic of Indonesia, 2006), 43.

[10] Notonagoro, *Dies Natalis* Speech, "*Pancasila sebagai Ideologi dalam berbagai bidang kehidupan bermasyarakat, berbangsa, dan bernegara* [Pancasila as Ideology in Various Fields in Society]" (Speech at Airlangga University in November 10th 1995).

[11] Kaelan, *Inkonsistensi Dan Inkoherensi Dalam Undang-Undang Dasar Negara Republik Indonesia Tahun 1945 Hasil Amandemen* [Inconsistency and Incoherence in the 1945 Constitution of the Republic of Indoensia from the Amendment] (Jakarta: Badan Pengkajian Majelis Permusyawaratan Rakyat Republik Indonesia, 2017), 38.

such as rebellion, *coup d'etat, putsch*, or *anschluss*. *Pancasila* is seen as a legal ideal (*rechtsidee)* which is the guide star. This position requires the formation of a positive law to achieve ideas in *Pancasila*, and can be used to test positive law.

It can be concluded from the political aspect that *Pancasila* can be viewed as a *modus vivendi* or a sublime agreement that unites all primordial ties into one nation and the whole of Indonesia which is vast and complex in principle of unity. Pancasila which was supposed to be a "middle path" neither liberal nor socialist, that charted a new course for philosophy and politics.[12] Nevertheless, *Pancasila*, as stated by Notonagoro, is not a political compensation, but the result of the profound meditations of the soul, the result of an orderly and thorough investigation of inventory on a broad base of knowledge and experience which was not reached easily by every human being.[13]

Based on philosophical perspective, *Pancasila* is the fundamental believe of a society aspired by the people and served as the fundamental of national enforcement obtained from the values of life of Indonesian anchestors. Meanwhile, according to the legal perspective, *Pancasila* is the legal ideal (*rechtside*) which should be the legal basis and purpose of every law in Indonesia. Therefore, every law formulated in Indonesia should be based on *Pancasila* and it can conclude all contents consistency from any hierarchy level. It can be concluded that *Pancasila* is an instrument to unite the heterogeneity of Indonesian people which consists of many races, religions, cultures and languages. In addition, it is also an awareness for the whole elements of Indonesian people from Sabang to Merauke by ignoring the differences and partitions so that they can unite in the Unitary State of Republic Indonesia.

[12] Pranoto Iskandar, "The Pancasila Delusion," *Journal of Contemporary Asia* 45, no. 3 (2016). 723-735, https://doi.org/10.1080/00472336.2016.1195430

[13] Soekarno, *Filsafat Pancasila Menurut Bung Karno* [The Philosophy of Pancasila based on Bung Karno] (Yogyakarta:Media Presindo, 2006), 2.

Pancasila is *filosofischegrondslag* and common platform or *kalimatunsawa*.[14] According to Bernard Arief Sidharta, legal ideal (*rechtidee*) is a regulation to rule the society behavior based on the ideas, feels, intentions, thoughts of the society. It is related to the law meaning perceptions which consist of three elements such as justice, benefit (*doelmatigheid*) and legal certainty. The legal idea is created in human thought and soul as the combination of the views of life, religious believe, and social reality appeared in the society behavior regulation process which realizes those three elements. The legal idea in the dynamics of social life will give impact as the building principle, critical norms, and motivational factors in the law enforcement (the legal formulation, finding and stipulation) and behaviour. In addition, the legal idea will simplify its description in many regulations, rules, behaviours, and keep the law enforcement in consistency. So, the rule of law should be a reflection of legal ideas inside any legal principle arranged in a system.[15]

According the explanation above, the spirit and the soul of every law/norm/regulation in Indonesia must be the implementation of the spirit and soul of *Pancasila*. Thus, both the national and regional governments have power to create and formulate law in form of regulation, government regulation, president regulation, regional regulation and governor/regent/mayor regulation that should set *Pancasila* as the legal idea and every regulations should not against the moral principles of *Pancasila*.

Therefore, the national legal development guided by *Pancasila* will be appropriate with:

a. The first principle which is the acknowledgment to be a country believing in the one and only God instructs to all legal products to ensoul the religious principles.

[14] Jimly Asshiddiqie, *Ideologi, Pancasila dan Konstitusi [Ideology, Pancasila, and Constitution]* (Jakarta: Constitutional Court of Republic of Indonesia, 2009), 10.

[15] Bernard Arief Sidharta, *Refleksi tentang Struktur Ilmu Hukum: Sebuah Penelitian tentang Fundasi Kefilsafatan dan Sifat Keilmuan Ilmu Hukum sebagai Landasan Pengembangan Ilmu Hukum Nasional* [Reflection of the Structure of Law: A Research on Philosophical Foundation and the Nature of Law as the Basic for Development of National Law] (Bandung: Mandar Maju, 1999), 181.

b. The second principle is every law should in line with humanity which means the law formulated cannot ignore the humanities and against human rights.
c. The third principle is the legal development should be unity, which means keeping the pluralities and the unity in diversity.
d. The fourth principle is the law has to be democratic; and
e. The fifth principle is the law should bring the social justice and prosperity.

Thus, the national legal development policy and its aspects must be rational and uphold the spiritual values, ethics and moral. It has to be created based on the honor principle upon human prestige and dignity by guaranteeing the human rights protection, protecting the whole Indonesian people and homeland, and serving the national interests. In addition, it has to be built upon the democracy principle which means people have a big room to contribute in every law formation and renewal to arrange and formulate the new law either by direct or indirect participation. Furthermore, the national law must be fair on the social justice so the equity can be reached.

The direction of national law is integrated with the direction of development in another field which needs adjustment. Even if the legal development starts from the ideas based on the 1945 Constitution of the Republic of Indonesia, adjustment is needed with the level of society growth that wishes to be realized in the future. According to common term used in Indonesia, the legal development is not identic with legal or regulation formulation. Legal formulating as many as possible does not mean creating the law. Legal state is not law state. Legal formulating only means creating legal norms. In fact, social order, economy, culture and politics are not solely a normative order. Thus, there should be certain spirit needed so that they can have capacity.[16]

[16] Dhea Yudhista, "Arah Pembangunan Hukum Nasional Menurut UUD NRI 1945 [The Development of National Law based on the 1945 Constitution]," February 29, 2016, https://fh.umj.ac.id/arahpembangunan-hukum-nasional-menurut-undang-undang-dasar-negara-republik-indonesia-tahun-1945/.

The consequence for the legal product which is not in line with the spirit and soul of *Pancasila*, based on hierarchy principle, is that it does not have legal power since there are three consequences for following the hierarchy principle. They are:

a. A lower regulation cannot exist against the higher regulation;
b. A lower regulation can only be alienated by the authority of the regulation with the same level or having the higer level;
c. If the material of the lower regulation is not in line with the higher regulation; therefore, it cannot be imposed.

Pancasila, which is the source of any national legal source in the Indonesian legal system which gives direction and soul, becomes the norms paradigm in substance of 1945 Constitution. The interpretation of legal norms in 1945 Constitution as the highest law will be based on the national core in *Pancasila* with the function as the legal idea which is going to be the basic and source of life vision or the life philosophy of the nation that is the guide in formulating law and other lower regulation. The legal idea, life philosophy and nation morality which are the source of any state legal source will be the standard to value of legal policy. Otherwise, it can be used as the fundamental paradigm for policy making in law and regulation field or social, economic and political field.[17]

3.2. Judicial Review as Legal Harmonization Tool based on the Value of *Pancasila*

The authority of judicial review is an examining right which belongs to the judiciary toward the regulation related to the matter whether it is in line or against the regulation with the higher level. In the United States, the authority of judicial review is considered as a natural authority of judiciary, even before it was adopted in the constitution of the United States. It is because the Constitution of United States, at the beginning, does not explicitly regulate the authority of judicial review of federal court.[18] Judicial

[17] Maruarar Siahaan, *Undang-undang Dasar 1945 Konstitusi yang Hidup* [A Living 1945 Constitution] (Jakarta: Secretary General and Secretariat of the Constitutional Court of the Republic of Indonesia, 2008), 59.
[18] William Michael Treanor, "Judicial Review Before Marbury," *Stanford Law Review* 58, no. 2 (2005): 455-562.

review refers to the authority of a court to review the constitutionality of legislative and executive actions. It means that a court can invalidate laws or decisions contrary to higher laws or regulations, particularly the Constitution. The term of judicial review is often used interchangeably with constitutional review. [19]

Through the authority of judicial review, the judiciary can contribute to preventing the misuse of power by using the regulation formulated by the government.[20] In some states, the authority of judicial review is conducted by the constitutional court. This kind of court can be found in Germany, Italia, Austria, Spain and Belgium. Based on the authority gained in revoking legal product formed by the legislatives, Hans Kelsen described the authority of constitutional court as negative legislators.[21] Even so, he distinguished how the parliament and constitutional court make law. The parlements, as the positive legislators, create law directly using their authority while constitutional court, as negative legislators, make law using the revocation.[22]

Discussing the position of *Pancasila*, the Constitutional Court stated that, according to Article II Additional Rule of the 1945 Constitution of the Republic of Indonesia, "*in line with the stipulation of Amendment of this Constitution, the 1945 Constitution of the Republic of Indonesia consists of the preamble and articles*". Meanwhile, the preamble of The 1945 Constitution of Republic of Indonesia, especially the fourth paragraph, substantively contains *Pancasila* as the national principle, therefore, the amendment of the 1945 Constitution of the Republic of Indonesia only affects to the articles not to the preamble. In this regard, *Pancasila* is inseparable to the preamble of the the 1945 Constitution of the Republic of Indonesia which automatically there is no chance to change *Pancasila* as the national principle.[23]

[19] Pan Mohamad Faiz, "Legal Problems of Dualism of Judicial Review System in Indonesia". *Jurnal Dinamika Hukum*. 16, no. 1 (2016): 87-195. https://doi.org/10.20884/ 1.jdh.2016.16.2.535.

[20] David S. Law, "A Theory of Judicial Power and Judicial Review," *Georgetown Law Journal*. 97. (2009): 723.

[21] J. Uzman, T. Barkhuysen and M.L. van Emmerik, "The Dutch Supreme Court: A Reluctant Positive Legislator?" *Electronic Journal of Comparative Law* 14, no.3 (2010): 1-35.

[22] Alec Stone Sweet, "The Politics of Constitutional Review in France and Europe." *International Journal of Constitutional Law* 5, no. 1 (2007): 69-92.

[23] "MK Tegaskan Kedudukan Pancasila dalam UUD 1945 [The Constitutional Court Affirmed the Position of Pancasila in the Constitution]." Constitutional Court of Republic of Indonesia, accesed August 1, 2017, http://www.mahkamahkonstitusi.go.id/index.php?page=web.Berita&id= 13296&menu=2#.WU n8P5KGPIU.

By the stipulation of *Pancasila* as *staatsfundamentalnorm,* the formulation, the application and the enforcement of law cannot be separated from the values of *Pancasila*. The problem is, by setting *Pancasila* as *staatsfundamentalnorm* means that *Pancasila* has the higher status than the the 1945 Constitution of the Republic of Indonesia. Thus, *Pancasila* is not considered as the meaning of constitution since it has higher position. This discussion can be conducted by looking back at basic norms and constitution concept according to Kelsen and the development by Hans Nawiasky, as well as the relation between *Pancasila* and the 1945 Constitution of the Republic of Indonesia. Until now, there is still polemic among law experts about which one is the source of any legal source, which can be *Pancasila*, the Preamble of the 1945 Constitution of Republic of the Indonesia or the proclamation of independence.

Since *Pancasila* is the highest norm in legal structure and its position is higher than the Constitution, *Pancasila* becomes the requirement for the application of the 1945 Constitution of the Republic of Indonesia. In other words, *Pancasila* has existed before the emergence of the 1945 Constitution of the Republic of Indonesia. Therefore, it places *Pancasila* as a tool to examine either constitution or legislation.

For that reason, the Constitutional Court should be able to use *Pancasila* as a testing tool in judicial review in the Constitutional Court. It is pivotal because almost all law examinations only use the 1945 Constitution of the Republic of Indonesia as the testing tool whereas *Pancasila* is the value that animates the 1945 Constitution of the Republic of Indonesia. By affirming *Pancasila* as the testing tool in judicial review in the Constitutional Court, it opens the way to internalize *Pancasila* concretely in the realm of legislation. Through this way, all laws that contradict with *Pancasila* can be repealed through judicial review mechanism. It is expected that there is no law either formally or materially that contradicts with *Pancasila*. Furthermore, this matter will implicate to the legislation process in parliament where the circumspection in regulating law in a good way and content that do

not contradict with *Pancasila* is more and more increasing. In the same time, the internalization process of *Pancasila* in every law will be more and more developed. Hence, *Pancasila* does not only become rhetorical-semantic sentences which are too high-sounding, but it can also incarnate in the life of nation and state as the basic principle and the guidance.

3.3 The Relevance of Pancasila in the Life of Nation in Indonesia

As the philosophy of life, the value of *Pancasila* is ideal as foundation of nation and state in Indonesia. The basic idea about the identity of nation and its role in giving the identity of state system and legal system was stated by Carl von Savigny (1779-1861) with his *volkgeist* theory that can be equalized with the heart of nation and national identity. Moreover, in France, there is *raison d' etat* theory or reason of state theory which determines the existence of a nation and state (the rise of sovereign, independent and national state).

Constitutionally, commitment of having nation and state of Indonesia has been firmly declared in the fourth paragraph of the Preamble of the 1945 Constitution of the Republic of Indonesia. That commitment is a crystallization of nationality spirit that historically cristalizes in the form of National Resurgence 1908 movement, Youth Pledge on October 28th, 1928 and Declaration of Indonesian Independence on August 17th, 1945 as the peak. All components of nation are restless because of the nowadays condition of nation and the prospect of nation in the future. Various discussions, seminars, workshops, symposiums, and others that are often conducted now in all regions of Indonesia are the strong indicators signifying that all components of nation have very strong nationality commitment. However, national policy which is comprehensive, coherent, and sustainable through integrated comprehension in the value of *Pancasila* is needed.

Pancasila as a foundation of the state, the ideology of the nation and the philosophy and the way of life of the nation are contains the basic values, instrumental values and values of praxis. In addition, Pancasila as

an open ideology has at least two dimensions of values, namely ideal values and actual values. However, these values are influenced by the values which brought by globalization, resulting in a shift in tapping, which also leads to changes in meaning and positioning of *Pancasila*. Concretely, *Pancasila* is adopted by the state or the government and the people of Indonesia as a whole, not as a tool or monopoly of a person or any particular group. It explained that *Pancasila* as a national Ideology is also a source of value for Indonesian law and create legal ideals for the people of Indonesia as a whole. *Pancasila* became the reference of political and state life in Indonesia.

In the life of the Indonesian nation, *Pancasila* is a philosophy of life which developed in the socio-culture of Indonesia. The value of *Pancasila* is regarded as the basic value of the nation's culture. This value believed as the soul and personality of the nation and fundamentally give a character (personality, identity) for Indonesia. As a philosophy, *Pancasila* reflects the values and create essential aspect of the people of Indonesia such as:

1. Believe in God;
2. Human conscience;
3. Truth; and
4. Justice

3.3.1 The implementation of Pancasila as the National Philosophy System are:

Sila 1 (First Principle) Belief in One and Only God

Implementation of the first principle of *Pancasila* from the perspective of the philosophical system is that belief in God Almighty is not a dogma or belief which can not be verified by reason, but a belief that stems from human consciousness as God's creature. From the perspective as the foundation of the state, Belief in God becomes the main source of life values of the Indonesian nation, animating and underlying and guiding the other principles of the second principles until the fifth principle. This closeness is in accordance with the statement

in the Preamble of the 1945 Constitution namely "The One Almighty God....". In national ideology this principles states that within the state of Indonesia there is no and there should be no ideology that negates or deny the existence of God Almighty (Atheism) and that there should be Belief in the Supreme (Monotheism) with tolerance to freedom to embrace religion in accordance with his confidence.

3.3.2. Sila 2 (Second Principle) Just and Civilized Humanity

In the aspect of the philosophical system of the second principles, it has the view that the Indonesian people claim human dignity as the creature of God Almighty. This means that man is equally recognized, equal to his fundamental rights and obligations, without distinction of race, heredity, religion, social standing and others. As the foundation of the state, this principle related with the values of Indonesia's human rights and obligations. Every citizen is guaranteed the right and freedom that governs the human relationship with God, with another person, with his society and the natural environment. In the paradigm of *Pancasila* as the ideology of the state, every Indonesian human being is part of the citizens of the world who believe in the principle of equality and dignity as a servant of God.

3.3.3 Sila 3 (Third Principle) Unity of Indonesia

The philosophy of *Pancasila* of the third principles contains the values of bureaucracy and ethical values which include the position and dignity of the Indonesian people to appreciate the balance between private and public interest. In the point of view, this principles emphasizes the importance of diversity in the fields of culture, religion, belief in God Almighty and ethnicity to raise awareness of "Single Unity". Pancasila as a national ideology is a manifestation of nationalism that provides a place for cultural and ethnic diversity. This principle will create togetherness and solidarity.

3.3.4 Sila 4 (Fourth Principle) Democratic Life Guided by Wisdom in Deliberation/Representation

The position of *Pancasila* as a system of philosophy in the fourth principles reflects the attitude and outlook of life regarding the value of truth and the high validity to prioritize the interests of the state and society. Manifestation of the sovereignty of the people and the value of "representation"' related to deliberation within the framework of Indonesian democracy. The context in this national ideology contains the notion of popular sovereignty which reflects the value of togetherness, kinship and mutual cooperation.

3.3.5 Sila 5 (Fifth Principle) Social Justice for All Indonesian People

In the nation's philosophical system, the fifth principle includes that social justice means justice prevailing in society in all spheres of life, both material and spiritual. *Pancasila* contains the value of the necessity of collectively achieving equitable progress and social justice. The value of *Pancasila* as a national ideology includes the concept of social justice to provide assurance and achieve a decent and respectable standard of living in accordance with its nature, and place the value of democracy in the economic and social sphere.

Based on the essence of the five principle of *Pancasila*, the life of nation in Indonesia will always be related with the identity of the nation based on its characteristics. Mochtar Kusumaatmadja argues that all developing societies are always characterized by legal functions to ensure changes occurs in an orderly condition.[24] Based on Mochtar's opinion, there are two important legal functions in the effort to carry out national development, Firstly, the legal basis, and Secondly, control over power. Those two legal function has relevancy with nation's character.

National Policy of Nation's Character Development indicates that the situation and the condition of nation's character that are apprehensive

[24] Romli Atmasasmita. *Teori Hukum Integratif* [Theory of Integrated Law] (Yogyakarta: Genta Publishing, 2012), 65.

lead the government to take the initiative in prioritizing the development of nation's character. The development of nation's character becomes the main stream of national development. It means that each development effort must be directed to give positive impact to the character development. Regarding that matter, constitutionally it has been reflected in the mission of national development that places character education as the first of eight missions in order to realize the vision of national development, as stated in Long-Term National Development Plan Year 2005 – 2025 (Law of the Republic of Indonesia Number 17 Year 2007), which is

> "...actualizing nation's characters that are strong, competitive, noble, and having high moral standards based on *Pancasila*. Those characters are characterized by Indonesian society's character and behavior which are various, believing in One God, virtuous, tolerant, cooperative, patriotic, dynamic, and science and technology-oriented."

That policy is very wide, since substantively and operationally, it is related to "...development all potential aspects of nation which are multidimensional because they cover the dimensions of nationality which are still in progress."

In this case, it is also mentioned that:[25]

(1) Character is a very essential thing in having nation and state, the lost of character will cause the lost of future generation of nation;
(2) Character has role as "rudder" and strength, so this nation is not oscillated;
(3) Character does not come by itself, but it must be developed and formed to be dignified nation. Furthermore, it is firmly declared that the development of nation's character must be focused on "... three big matters, which are:
    a. to grow and strengthen the identity of nation,
    b. to keep the integrity of the Republic of Indonesia, and (3) to create Indonesian society that is noble and dignified."

[25] Udin Saripudin Winataputra, "Implementasi Kebijakan Nasional Pembangunan Karakter Bangsa Melalui Pendidikan Karakter (Konsep, Kebijakan, dan Kerangka Programatik) [The Implementation of National Policy on the Development of the Character of the Nation through Character Education (Concept, Policy, and Pragmatic Framework)]" (Paper., 2010).

The development of nation's character is not only enough in the essence of physical development, but also stronger orientation which is the basic foundation of nation's character development where it is needed. Therefore, physical essence of development starts from the internalization of values to lead to the value development or vice versa, the development that is oriented to physical matter animated by the spirit of increasing socio-community and cultural values. In this case, Indonesia has *Pancasila* as the foundation to develop the nation's character. Danielle N. Lussier and M. Steven Fish stated that, if Indonesian people believe that they can make a difference, they are more likely to take part in political actions to defend their right.[26]

To realize the application of *Pancasila* in overcoming nationality problems in Indonesia, the application of *Pancasila* can be done in education sector:

1. Sharing knowledge, basic knowledge, scientific knowledge, and philosophical knowledge regarding *Pancasila.* These things are pivotal for the leaders and the scientists;
2. Raising the awareness, through being aware and knowing the growth of ourselves will help someone to apply the values of *Pancasila*;
3. Improving the obedience like always being ready in fulfilling the obligations physically and mentally, physical thing comes from outside for instance government meanwhile mental comes from ourselves;
4. Developing strong ability, the booster to behave based on the high values of *Pancasila*;
5. Introspection, by always assessing ourselves whether we already behave well or bad in applying *Pancasila*.[27]

Pancasila is a guidance in national law politics; thus, national law must be lead to: (1) keeping the integrity of nation either ideological aspect or territorial aspect; (2) based on the effort of developing democracy and nomocracy at once; (3) based on the effort of developing social justice for

[26] Danielle N. Lussier, and M. Steven Fish, "Indonesia: The Benefits of Civil Engagement," *Journal of Democracy* 23, no.1 (2012): 70-84, https://doi.org/10.1353/jod.2012.0017

[27] Kaelan, *Pancasila: Yuridis Kenegaraan [Pancasila: Judicial State]* (Yogyakarta:Liberty, 1993), 178.

all Indonesians; and based on the principle of religious tolerance which is civilized. *Pancasila* is the highest material source which determines content material in regulating law as well as philosophical parameter in examining constitutionality of legal norm.[28] Moreover, if we want to be honest and pure in hearing our own conscience, it is not *Pancasila* that is wrong, but rather the human who applies *Pancasila* that is wrong.

IV. CONCLUSION

1. *Pancasila* is a fundamental norm of the Republic of Indonesia which becomes source of legal source and it will be the standard in assessing legal policy or it can be used as the paradigm that becomes the foundation of policy making in the aspect of legislation, social, economic, and politic. It can also be stated that *Pancasila* is a unifying means for the heterogeneity of Indonesian nation which consists of various ethnic groups, religions, cultures and languages. *Pancasila* is also essentially a form of awareness of all elements of the nation, regardless to the differences and barriers among differences to unite within the Unitary State of the Republic of Indonesia.
2. Implementation of *Pancasila* in national legal development can be actualized by harmonizing *Pancasila* into regulation in a hierarchical manner. Therefore, the Constitutional Court is insisted to conduct judicial review toward the legal substance in order to make it consistent with the *Pancasila* ideology. The aims to harmonize the regulation based on *Pancasila* value is to create legal development in a hierarchical manner which correlates with the four goals of the state (1) to protect the entire nation and Indonesian homeland; (2) to improve the public welfare; (3) to educate the life of the nation; and (4) to participate in the implementation of world order based on independence, lasting peace, and social dignity. Normatively, Indonesian constitutional identity is incarnated in a consensus that maintains the upholding of Indonesian constitutionalism into the five basic principles of

[28] Backy Krisnayuda, "Pancasila & Undang Undang [Pancasila & Constitution],", 55

Pancasila served as an ideological-philosophical foundation in achieving and realizing the four goals of the state;

3. The recent problems are only the testing tool toward the existence of *Pancasila*. Thus, every state's policy that is made by state organizers including the effort of conducting national development should be accordance with the ideology of *Pancasila* through the developing nation's character, which are:
   a. Keeping the integration of nation and state, either ideologically or territorially.
   b. Actualizing democracy and nomocracy at once and as one unity that is never separated.
   c. Raising common prosperity and social justice for all Indonesians.

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AUTHOR GUIDELINE

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