Trajectories of Curial Power: The Rise, Fall and Partial Rehabilitation of the Indonesian Constitutional Court

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The Indonesian Constitutional Court's surprisingly early and forceful assertion of its veto role in national politics has attracted a fair amount of academic attention. Contributions to date have emphasised three main explanatory factors: the charismatic leadership provided by the Court's first Chief Justice, Jimly Asshiddiqie; Indonesia's fragmented political party system; and the judges' preparedness boldly to assert the Court's powers in a way that built its public support. But is the Court still as powerful in its second decade as it was in its first? Two incidents in particular suggest that the Court's strength may be declining: the attempted legislative curtailment of the Court's mandate in 2011, and the resignation in 2013 of its third Chief Justice, Ali Mochtar, following his arrest on charges of corruption. While neither of these events has as yet resulted in any permanent change to the Court's jurisdiction and powers, there is a sense that the Court is in trouble – that its heyday has passed and that it is less influential than it used to be. The purpose of this article is to evaluate this claim. It starts by developing a conceptual framework for assessing the performance of initially forceful constitutional courts. It then moves on to apply this framework to the Indonesian case. Assessed according to its capacity to support the consolidation of Indonesia's democracy, the article argues, the Court's power has indeed declined since its forceful start under Jimly. There are some signs, however, that the Court is on the rise again.

On 21 August 2014, the Indonesian Constitutional Court rejected a challenge by Prabowo Subianto, the losing candidate, to the outcome of the previous month's presidential elections.[1] This was the third time in ten years that the Court had been asked to settle this kind of case.[2] As before, its decision was accepted and enforced

(Warat, 2014). What makes the 2014 decision more significant than the other two, however, is that it followed two incidents in which the Court's role as a 'veto player' (Tsebelis, 2002) in Indonesian politics had been seriously threatened: a 2011 amendment to the Court's governing statute that sought to curtail its jurisdiction in several respects,[3] and the 2013 arrest on corruption charges of Akil Mochtar, the Court's third Chief Justice.[4] The latter incident, in particular, had left one commentator doubting the Court's capacity to play a forceful role in Indonesian politics for much longer. While the 2011 legislative amendments had been quickly struck down, it was argued, the second incident was symptomatic of a more insidious form of political attack: the nomination to the Court of judges more involved in, and thus more likely to have been compromised by, the highly competitive world of Indonesian electoral politics (Hendrianto, 2015).

There was some basis to this claim. Before his appointment, Mochtar had been a member of Golkar, the former ruling party under President Suharto. Several other judges had also had prior political involvements that were stronger than their legal-professional credentials.[5] If it was not possible to contain the Court by amending its jurisdiction, these appointments suggested, the same result could be achieved by appointing judges more attuned to political-branch imperatives. The Court's decisive rejection of the 2014 presidential complaint, however, now casts doubt on this analysis, or at least on the success of the alleged containment strategy. Upholding as it did the election of Joko Widodo – the first Indonesian President with no connection to the past authoritarian regime (Aspinall and Mietzner, 2014: 351) – the 21 August decision demonstrates the Court's continuing relevance to the consolidation of Indonesia's democracy.

Even before these events, the remarkable rise of the Indonesian Constitutional Court had attracted a fair amount of academic attention. Contributions to date have focused on two main issues: (1) the factors likely responsible for the forceful role the Court has played, and (2) the lessons that the Indonesian experience has to teach about the role of constitutional courts in democratising regimes. Stefanus Hendrianto's University of Washington PhD thesis, for example, stressed the role of the Court's first Chief Justice, Jimly Asshiddiqie. Through his charismatic intellectual leadership and sensitivity to the Court's public image, Hendrianto argued, Jimly succeeded in rapidly establishing the Court's institutional legitimacy (Hendrianto, 2008). Simon Butt's University of Melbourne PhD thesis

(Butt, 2006) and his subsequent monograph, co-authored with Tim Lindsey (Butt and Lindsey, 2012), took a more socio-legal approach. Through close analysis of the Court's case law, Butt and Lindsey showed how it exceeded its 'negative legislator' mandate to take on a broader role in Indonesia's constitutional system than had originally been envisaged. A final example is Marcus Mietzner's analysis of the political conditions that have supported the early assertion by the Court of its independence and the role that the Court has played in Indonesia's democratisation process (Mietzner, 2010).

Together, these and other contributions (Lindsey, 2002; Dressel and Mietzner, 2012) have done much to explain the Indonesian case and put it in comparative perspective. None of this work addresses the most recent events, however. There has thus been no detailed examination as yet of the triggers for the attempted amendment of the Court's jurisdiction in 2011 or of the seeming ease with which the Court was able to strike down the legislation in question.[6] Similarly, the events surrounding Mochtar's dismissal and the subsequent (also unsuccessful) attempt to use his dismissal as a reason to strengthen judicial accountability mechanisms on the Court have not as yet been analysed. While these two events are proof in one sense of the Court's ongoing forcefulness, its continued rejection of seemingly reasonable legislative attempts to improve the way judges are selected and held to account seems in another sense short-sighted. Given the undeniable judicial conduct problems the Court has faced, were the judges right to construe these attempts as an attack on the Court's independence? How in any event should we assess the performance of constitutional courts in such situations? Is any sign of curial strength to be welcomed, or is there a particular form of curial power that we value? If there is, can we use that normative understanding to devise a conceptual framework for evaluating the fluctuating power of initially forceful constitutional courts?

This article tries to provide a convincing answer to these questions. We start with a discussion of the conceptual issues raised by the Indonesian case. In comparative terms, we argue, Indonesia belongs to a group of countries whose constitutional courts made strong starts before facing political claw-backs. Understanding the causes and nature of the institutional-power trajectories followed by this group of courts can make a useful contribution to comparative understanding of the conditions for sustainable judicial review. To arrive at such an understanding, however, we first need to clarify what it is we are assessing. We argue that a

normatively inflected conception of curial power as a court's democracy-supporting capacity is the best way of defining the dependent variable in this context. We then go on to suggest a number of indicators by which curial power in this sense may be measured and constitutional courts' performance over time assessed.

The second section analyses the literature on the Indonesian Constitutional Court's early forcefulness and asks whether the Court indeed made the important contribution to Indonesia's democratisation process that has been claimed for it. Of the two main views in the literature, Mietzner's view that the Court's expansive interpretation of its mandate, far from violating the separation of powers, was in fact crucial to the stabilisation of Indonesia's democracy, seems to us the most persuasive, at least in respect of the Jimly Court. As the transition progressed, however, the Court's very success in helping to stabilise Indonesia's transition emboldened the democratic branches to assert their primary policy-making role. This led, the third section argues, to the first attempt to rein the Court in: Mohammad Mahfud's appointment as Chief Justice on the back of a promise that he would return the Court to its original jurisdiction. The trigger for the 2011 legislative amendments, in turn, was a combination of Mahfud MD's failure to make good on this promise and two incidents of alleged judicial corruption that fortified the call for improved accountability measures. The Court was wrong, the fourth section argues, to overturn the more reasonable aspects of the 2011 legislative package, and left itself vulnerable to the sort of damage to its reputation that the later, more serious Mochtar corruption incident caused. Its refusal thereafter to accept the proposed amendments to the composition of the Honour Council (the body responsible for hearing complaints of judicial misconduct) was even more unwise. By again rejecting reasonable accountability measures, the Court cast doubt on the credibility of its claim to being a sound judge of what is required to promote Indonesia's democracy.

Three other cases decided in 2014, however, suggest that all is not yet lost. The Court's nationally televised judgment in the presidential election case, in particular, showed that it still has a role to play in resolving high-level political conflict. In order to build on the momentum provided by this case, we conclude, the Court needs to return to the relatively more rigorous style of reasoning it had begun to develop under Jimly's chief justiceship. It also needs to accept that its success in helping to stabilise Indonesia's democracy requires it to avoid non-essential interventions in national politics.

Initially Forceful Constitutional Courts: Trajectories and Indicators of Curial Power

Of the constitutional courts established since the fall of the Berlin Wall in 1989, three stand out as having made particularly forceful starts: the Hungarian Constitutional Court under its first President, László Sólyom (Zifcak, 1996; Scheppele, 1999), the South African Constitutional Court under it first Chief Justice, Arthur Chaskalson (Klug, 2000; Roux, 2013), and the Colombian Constitutional Court after its establishment in 1991 (Cepeda-Espinosa, 2012). Of these three, the Hungarian and South African Constitutional Courts are today seemingly less powerful than they once were. In Hungary, the first sign of decline was the non-reappointment of Sólyom when his initial nine-year term came up for renewal in 1998. After a decade of less forceful but still meaningful review, the Court's jurisdiction was significantly curtailed by Fidesz, the centre-right political party that has controversially dominated Hungarian politics since 2010 (Bánkuti, Halmai and Scheppele, 2012; Scheppele, 2013). In South Africa, the Constitutional Court's decline has been less dramatic but still marked. Following an initial honeymoon period from 1995-1996 when it was given considerable space to oversee the transition, the Court has been increasingly constrained by South Africa's dominant-party democracy (Roux, 2013). While stopping short thus far of formal court-curbing measures, the ruling African National Congress has sought to control the Court through threatening public statements and sweetheart judicial appointments.[7]

Just why the Colombian Constitutional Court has not suffered a similar fate is unclear. According to David Landau, Colombia's dysfunctional party politics has been the main factor behind the Court's unusually broad and enduring policy-making role (Landau, 2010). The Court has also benefited from Colombia's well-developed legal tradition and the judges' ability to offer convincing reasons for the Court's more intrusive decisions.[8] But neither South Africa's nor Hungary's democratic system could exactly be described as healthy, and both these countries also had relatively well-developed legal traditions at the time of their transitions. There must accordingly be some other explanation for the different trajectories followed by these courts.

For scholars interested in the fate of the Indonesian Constitutional Court, understanding the causes and nature of these different trajectories would be very

helpful. As forceful starters, the Colombian, Hungarian and South African Constitutional Courts are forerunners in a sense of the Indonesian Constitutional Court. Their fates are thus instructive for determining how much of what is going on in Indonesia at present is just a normal process of power re-alignment and how much a genuine threat to the Court's authority. Should supporters of constitutional democracy in Indonesia, for example, hold up the Colombian experience of continued curial forcefulness as the model to be followed, or is some diminution in the Indonesian Constitutional Court's power in line with a better functioning democracy the better aspirational ideal? What, in the end, is a normal and healthy trajectory for an initially forceful constitutional court and what a more worrisome one that needs to be resisted?[9]

While a three-country survey is too small to say for certain, there are several reasons to think that the Hungarian and South African experience of declining curial power may be more typical than the Colombian experience of continued forcefulness. The first is that initially forceful constitutional courts may benefit from a honeymoon period during which they are seen to embody the transition from authoritarianism to democracy (Issacharoff, 2011). This period eventually comes to an end, however, and courts that have not by that stage developed an alternative source of legitimacy (public support for their decision-making record, say) inevitably face a diminution in their power. A second reason to suppose that declining power may be the more typical trajectory is that it takes time for political actors to work out the mechanisms through which they can contain a forceful constitutional court. Once again, this suggests that there may be a standard delay before a forceful court is reined in. Finally, declining power may be the more typical trajectory because forceful courts are in theory better able to secure the conditions for a well-functioning democracy. Not all forceful courts will use their power in this way, of course, but when they do it is reasonable to assume that their very success in doing so will enable the democratic branches to assert their primary policy-making role, inevitably at the expense of the court.[10]

Further research is required to support this conjecture. For the moment, all that can be said is that declining power may not be either a very unusual fate for an initially forceful constitutional court or something particularly to be regretted. On the contrary, for many constitutional theorists, the reduction of an initially forceful constitutional court's power would likely constitute a welcome sign of democratic

strengthening (Tushnet, 1999; Waldron, 2006). It is only when court-curbing measures take on a more sinister cast, as they undoubtedly have in Hungary (Scheppele, 2013), that the declining power of an initially forceful constitutional court may provide cause for concern. The problem, in other words, is not declining power *per se*, but how to tell the difference, particularly in the early stages of an apparent attack on the court, between legitimate assertions of the political branches primary policy-making role and illiberal attempts to rein the court in.[11]

This is a complicated question, but fortunately it is not necessary to answer every aspect of it for purposes of this article. In order to use the comparative experience just outlined to inform an assessment of the Indonesian situation, all that is required is greater clarity on three issues: (1) What exactly do we mean by curial power in this context? (2) Under what conditions is it desirable for courts to be powerful in the sense defined? And (3), in light of the answers to (1) and (2), what indicators should we use for assessing fluctuations in curial power and their normative implications?

As to the first issue, it is tempting simply to equate curial power with judicial independence. The latter concept, after all, is a very established in the literature and sophisticated indicators have already been devised for measuring it (Ríos-Figueroa and Staton, 2014). This temptation needs to avoided, however, since the two concepts are different. While judicial independence generally has to do with a court's freedom from partisan political control and other inappropriate influences,[12] curial power in this context refers to the ability some constitutional courts have shown quickly to assert their veto role in national politics and in so doing help to stabilise a transition from authoritarianism to democracy. While freedom from inappropriate influences is part of what has allowed these courts to play this role, it does not capture everything about them. In addition to this factor, initially forceful constitutional courts have been able actively to intervene in national politics to enforce the terms of the constitution – to trade up their independence, if you like, into a democracy-supporting role.[13]

Not every independent constitutional court possesses this kind of power, and not every powerful constitutional court is powerful in this way. The Egyptian Supreme Constitutional Court, for example, was by most measures relatively independent from 1979 to 1997. Its independence, however, was premised on its strategic decision not to review the operation of the state security system, one of the major

stumbling blocks in the way of Egypt's progress to democracy at that time (Moustafa, 2007: 104-107). Conversely, the Thai Constitutional Court is a seemingly very powerful court, with the capacity to dissolve political parties and remove democratically elected leaders (Dressel, 2010). But its impact on the quality of Thailand's democracy is ambiguous, to say the least, and thus it is not powerful in the sense intended here. Rather, the particular capacity that we admire when talking about initially forceful constitutional courts like the Hungarian and the South African is their capacity to make a difference to the quality of democracy in their respective countries – to facilitate the transition from authoritarianism to democracy and make some contribution, however fragile and subject to developments beyond their control, to democratic stabilisation and strengthening.

In clarifying what we mean by curial power, this discussion also throws light on the second question— the conditions under which it is desirable for courts to be powerful in the sense defined. If the central concern is not independence, but democracy-supporting effectiveness, the kind of curial power we would like courts to possess is tied to the health of the democratic system. Where a democratic system is dysfunctional, our normative preference is for a constitutional court that is able forcefully to intervene in national politics to help the democratic system function better. Provided that this was the purpose and effect of the Court's intervention, we would tolerate a fair degree of intrusion into policy-making. Conversely, where a democratic system begins to function properly, our preference is for a court that is able to change tack – to promote democracy by respecting legitimately produced democratic outcomes. Initially forceful constitutional courts that made this kind of transition would experience a decline in power of sorts in as much as their direct policy-making role would decline, but this would not register as a decline in power of the normatively preferred type provided that: (1) their power to make policy was lost to the people's duly elected representatives acting in a way that respected the integrity of the democratic system; and (2) they retained some latent capacity to intervene should the democratic system again come under threat.

So much is relatively straightforward. The difficulty is that the type of power a court wields may morph over time, and thus the assessment of its performance must be sensitive both to the type of power that the court is exercising and to its changing extent. The Indian Supreme Court, for example, is today seen as one of the most powerful constitutional courts in the world (Mate, 2013). But the role it plays in India's

democracy is not as uncontroversial as it used to be. Thirty years ago, there would have been little debate that the power it wielded was normatively desirable, giving voice as it did to democratically marginalised groups. Today, however, the assessment is more complex. While the Court is arguably more powerful than ever, it is no longer clear that its power is being deployed to desirable ends. According to one influential commentator, at least, the Court's intrusive intervention in policy making is preventing the democratic system from correcting itself (Mehta, 2007). Similar concerns, as we have seen, may be raised about the Colombian Constitutional Court, whose ongoing policy influence appears to be premised on the perpetuation, whether by the Court or simply in spite of what it is doing, of various democratic pathologies. Both the Indian Supreme Court and the Colombian Constitutional Court would thus score well on one kind of curial power rating (policy influence), but lower if that rating were normatively targeted at assessing their actual contribution to improving the quality of democracy.

Understood in this way, the indicators for assessing the fluctuating curial power of constitutional courts are: (1) the significance of decisions promoting the proper functioning of the democratic system; (2) the extent to which such decisions are obeyed and indeed have a positive impact on the health of the democratic system; (3) any evidence that the judges are exercising their powers to promote a well-functioning democratic system as opposed to their own ideological or political preferences; and (4) the changing quality of democracy in the country concerned and any evidence of a mature capacity on the part of the judges to adjust their policy-making role in line with improvements to the functioning of the democratic system.

The first three of these indicators are more or less self-explanatory. Indicator (1) is targeted at the significance of democracy-promoting decisions rather than their absolute number or proportion because neither of those last two measures on its own tells us anything about the court's democracy-promoting capacity. Indicator (2) is similarly designed to force consideration of the actual impact of decisions on the quality of democracy as opposed to their doctrinal niceties. As such, it is intended as a partial response to criticisms of the tendency of comparative constitutional lawyers to ignore the 'real-life impact of constitutional jurisprudence' (Hirschl, 2014: 153). The purpose behind indicator (3), for its part, is to provide a criterion by which the

normatively attractive kind of power that we are trying to measure may be distinguished from other forms of less desirable curial power.

Indicator (4) requires a little more explanation. It relates to the distinction between judicial independence and curial power introduced earlier and also to the need for a court to change tack as the democratic system begins to strengthen. If judges mistake judicial independence for curial power, and particularly if they conflate curial power with an absolutist conception of judicial independence, they may fail to adjust their decision-making behaviour to the changing strength of the democratic system. When that happens, their attempts to resist reasonable legislative measures designed to restrict their intrusion into policy-making may prove counter-productive. As Holmes, 2004: 9 has noted: 'A significant danger during transition … is *halfway reform*. Halfway reform occurs when the judiciary manages to free itself from authoritarianism without adapting to democracy.'

When assessing an initially forceful constitutional court's power trajectory what this means is that the assessment should be sensitive to the way in which judicial independence is defended, and in particular to whether the judges concerned are able to distinguish between legitimate moves to rein in their policy-making influence and illiberal attempts by anti-democratic actors to reduce their influence as a prelude to corrupting the system. That is precisely the judgment that was earlier said to be very hard to make in the abstract. Nevertheless, it is one that constitutional court judges perforce have to make in concrete cases if their decisions are to contribute to, rather than impede, the democratic consolidation process. In relation to formal court-curbing measures, in particular, what judges need to do is to steer a middle path between the twin dangers of submitting to formal changes that undermine their court's capacity to play a democracy-promoting role and defending their court's independence in a dogmatic way, irrespective of improvements in the quality of democracy.

How a court's performance registers in terms of these four indicators will obviously be open to interpretation: one person's democracy-promoting decision may be another's usurpation of legitimately exercised democratic power. Differences like this may affect the assessment of a particular court's performance while also confounding comparative research. The goal of this exercise, however, has not been to provide an objective measure of constitutional court performance. Rather, it has been to provide a conceptual framework against which the waxing and waning of an

initially forceful constitutional court's power may be measured and the desirability of such fluctuations assessed. Provided that the indicators help to clarify the nature of any interpretive disagreements over this issue, they will have served their purpose.

The rest of this article proceeds to use the conceptual framework developed in this section to assess the performance of the Indonesian Constitutional Court. We start by examining whether the claims made about the Court's early trajectory stand up to scrutiny. Was the Court under Jimly really as powerful as claimed and, if so, was it powerful in a way that the framework values? We then assess the Mahfud Court's performance to try to understand what some of the triggers for the 2011 amendments to the Constitutional Court Law might have been. Finally, we move on to examine the events of 2013 and whether the Court's power could be said to have declined in the sense defined. If there has been a discernible decline, is this because the Court has relinquished power to the people's duly elected representatives or because its power has been curtailed for less desirable reasons?

The Jimly Court's Forceful Start: Of the Right Type?

No one who has studied the issue doubts that the Indonesian Constitutional Court very quickly and forcefully asserted its veto role in national politics. Both under its first Chief Justice, Jimly Asshiddiqie (2003-2008), and then again under its second, Mohammad Mahfud ('Mahfud MD') (2008-2013), the Court handed down numerous politically 'consequential' decisions that thwarted legislative choices and disciplined executive conduct.[14] There is some debate, however, over whether the Court was forceful in the specific sense set out in the previous section – in a way that improved the quality of Indonesia's democracy.

On one side of this debate, Simon Butt and Tim Lindsey have questioned the legal correctness of the Court's expansive understanding of its mandate, and thus by extension its respect for the separation of powers (Butt and Lindsey, 2012). While sometimes creatively interpreting its mandate in ways that supported Indonesia's democracy, they argue, the Court at other times intruded too far into policy-making. As an example of the former, they cite an early series of decisions in which the Court brushed aside a legislative prohibition against judicial review of pre-1999 statutes (Butt and Lindsey, 2012: 109). Since the class of statutes in question all dated from

the authoritarian era, this series of decisions was 'important … to the broader development of a legal culture of human rights in Indonesia' (Butt and Lindsey, 2012: 110). Conversely, the Court's 'conditional constitutionality' jurisprudence, in which it upheld the constitutional validity of impugned statutes on condition that they were interpreted or implemented in a particular way, was more questionable. In this line of decisions, Butt and Lindsey argue, the Court seems to have 'breach[ed] its self-proclaimed limitation of acting only as a "negative' as opposed to a "positive legislator"' (Butt and Lindsey, 2012: 110). In so doing, the Court illegitimately usurped the function of the political branches, with knock-on effects (they imply) for the quality of Indonesia's democracy.

In his appreciation of the Court's early role, Marcus Mietzner takes a diametrically opposed view. For Mietzner, the very jurisdictional expansiveness that troubles Butt and Lindsey is the key to understanding the Court's contribution to the stabilisation of Indonesia's democracy. By boldly facing up to political power, Mietzner argues, the Court built its public support, which in turn allowed it to act as a 'respected referee in political conflicts' (Mietzner, 2010: 416). By way of example, Mietzner cites the Court's July 2009 *Electoral Roll* law decision,[15] in which it struck down a requirement that voters' names appear on an official list as a precondition for their being allowed to vote. Instead, the Court declared that possession of a regular identity document would suffice.[16] For Butt and Lindsey, this sort of decision is exactly what they mean by the Court's questionable usurpation of the legislature's role (Butt and Lindsey, 2012: 70, 140). For Mietzner, by contrast, the significant point is that the *Electoral Roll* decision was highly popular (Mietzner, 2010: 411).

The difference between these two assessments is partly a matter of disciplinary perspective. For Butt and Lindsey, writing in a socio-legal frame, the legal justifiability of the Court's decisions matters, not just as an internal doctrinal matter, but also because the rational coherence and consistency of its record is crucial to its ability to claim the neutral umpire role that Mietzner celebrates. For the political scientist Mietzner, the substantive impact of the Court's decisions on the quality of Indonesia's democracy is what really matters. Legally justifiable or not, the key question is whether the Court's expansive understanding of its jurisdiction had a positive influence on Indonesia's democratic consolidation process.[17]

On the approach adopted here, it is Mietzner's assessment that must carry more weight, at least in respect of the Court's early record under Jimly. According to

the framework developed in the previous section, what matters is not whether the Court's decisions, as a technical legal matter, breached the separation of powers, but the substantive impact of those decisions on the quality of Indonesia's democracy. Granted, the line between these two things may be hard to draw, especially since, for some constitutional theorists, the substantive impact of a decision should be considered in the overall assessment of its legal justifiability.[18] Legal justifiability is also relevant to the assessment of substantive impact in as much as it is hard for a court whose decisions are legally defective to play a sustainable role in improving the quality of a democratic system. At least during the time of Jimly's chief justiceship, however, the forcefulness of the Court's decisions appears to have outweighed any negative impact its failure sometimes to provide fully convincing reasons might have had. As Horowitz has shown, when the Court began its work in 2003, Indonesia's commitment to democracy was still extremely fragile, with many elements of the former authoritarian regime and a stubborn culture of corruption still in place (Horowitz, 2013). In this kind of dysfunctional environment, the Court's intrusion into policy-making was probably justified. In technical legal terms it may have breached the separation of powers, but in substantive political terms its intervention was required to safeguard the transition and signal that henceforward all political conduct would be subject to the discipline of the Constitution.

A further reason to favour Mietzner's assessment is that it is hard to make the conclusive judgments of legal justifiability on which Butt and Lindsey's argument depends, particularly since, during the period of Jimly's chief justiceship, the Court was still developing a tradition of reasoned justification of its decisions. When Butt and Lindsey argue, for example, that the Court exceeded its jurisdiction in its conditionally unconstitutional jurisprudence (Butt, 2008), how is that conclusion to be supported? According to the standards of legal justifiability that they as Australian legal academics bring to bear on the question, or according to the standards that the Court itself was still developing? On the approach adopted here, it is in any case not the legal justifiability of the Court's decisions *in the abstract* that matters, but whether the Court did enough to justify its decisions to its most important audiences: the political branches and the Indonesian public. While the Court under Jimly arguably fell short in the former respect, the popularity of its decisions ensured that it was able to continue enforcing the Constitution at a critical time in Indonesia's transition.

When it comes to mapping the early part of the Indonesian Constitutional Court's trajectory, then, the Jimly Court should be regarded as a court that demonstrated the democracy-promoting capacity that our framework values. Given the fragility of the transition, the residual role in Indonesia's democracy played by elements of the past authoritarian regime, and the need to entrench respect for the Constitution as the framework for legitimate political conduct, the Jimly Court's ability quickly to assert its veto role was crucial to the success of the transition. That assessment puts the Court firmly in the company of the group of initially forceful courts discussed in the previous section.

The Court's power was not guaranteed to last, however. As noted, a constitutional court's very success in stabilising a democratic transition requires it to reduce its policy-making role as the democratic system begins to function better. Initially forceful courts that fail to appreciate this point may run into trouble. This is particularly so where the existing tradition of judicial independence inclines judges to be suspicious of any kind of political-branch interference, including well-intentioned attempts to improve judicial accountability measures. In those circumstances, judges may miss vital opportunities to acknowledge improvements in the functioning of the democratic system – improvements to which they themselves may have contributed – and in this way undermine their court's ability to continue playing a democracy-supporting role.

Something like this appears to have happened during the term of the Indonesian Constitutional Court's second Chief Justice, Mohammad Mahfud ('Mahfud MD'). Although corruption and the continued influence of authoritarian elements remained worrisome factors, Indonesia's democracy had stabilised considerably by the time Mahfud MD took office in August 2008. The improved functioning of the democratic system required the Court to respond in the nuanced way suggested above. To the extent that interventions in support of the democratic system were still required, the Court needed to provide more convincing reasons than had hitherto been supplied for its expansive understanding of its mandate. To the extent that such interventions were no longer required, the Court needed to step back and allow the democratic system to function. Instead, as the next section explains, exactly the reverse appears to have happened. Nominated to the Court on promises of returning it to its original jurisdiction, Mahfud MD took the Court in an

even more expansive direction while paying less attention to the need to justify its decisions.

The Backdrop to 2011: The Court's Decline under Mahfud MD

In order to understand the impact that Mahfud MD's chief justiceship had on the Court's trajectory, we need to go back to the circumstances of his appointment in August 2008 and the legislative provisions that regulated it. As originally enacted, Art 22 of the Court's governing statute, the Constitutional Court Law of 2003, provided for once-renewable, five-year judicial terms, subject to a mandatory retirement age of 67.[19] For reasons that are unclear, Art 4(3) delinked the election of the Chief Justice from his or her appointment as an ordinary judge by providing for a three-year leadership term, subject to renewal by majority vote of the sitting judges.[20] In his capacity as an ordinary judge, then, Jimly's appointment ran from 2003 to 2008 with the possibility of renewal until 2013. In his capacity as Chief Justice, on the other hand, Jimly had to stand for re-election in 2006, which he did successfully, and then in theory again in 2009, one year after his re-election as an ordinary judge. Things did not turn out this way, however.

By the end of June 2008, three members of the original nine-member Court had retired on grounds of age.[21] Of the six remaining judges, only three, including Jimly, were re-appointed under Art 22.[22] At the beginning of August 2008, therefore, there were six new justices on the Court, two of whom (Mahfud MD and Akil Mochtar) had been members of the DPR before their appointment. Given this radically changed composition, a decision was taken to hold the election for the chief justiceship immediately, even though it was only legally due in 2009. In a dramatic turn of events, Mahfud MD defeated Jimly by five votes to four, precipitating the latter's resignation.

While the DPR and President had no official role under Art 4(3) in Mahfud MD's election, there are reasons to think that, behind the scenes, they did attempt to influence the process. First, Mahfud MD, in his fit-and-proper test when standing for nomination as an ordinary judge by the DPR, more or less electioneered on an anti-

Jimly ticket, giving a very pointed list of ten things that a Constitutional Court judge should not do.[23] By nominating Mahfud to the Court, therefore, the DPR ensured that there would be at least one apparently loyal judge capable of standing against Jimly for the chief justiceship when the time came. Secondly, there is evidence that just before the election for the chief justiceship was held in August 2008, the Ambassador to Russia and former Minister of Justice and Human Rights, Hamid Awaludin, tried to persuade one of the judges, Mukhti Fadjar, to vote for Mahfud MD (Fadjar, 2010).[24] Annoyed by the Court's expansive interpretation of its mandate, but prevented by the Court's popularity from moving too obviously against it, the DPR and national executive appear to have attempted to do the next best thing: influence the election of a Chief Justice who promised to return the Court to its original jurisdiction.

At this point, then, the Indonesian Constitutional Court's trajectory seems very similar to that of the Hungarian Constitutional Court. As in the Hungarian case, the Court's early forcefulness was associated with a visionary first Chief Justice and, as in that case, the political branches struck back by effectively blocking his reappointment. That is where the similarity between the two cases ends, however. Contrary to expectations and to his own professed judicial philosophy, Mahfud MD turned out to be just as much inclined as Jimly had been to flex the Court's muscles. Indeed, if anything, the Court's intrusiveness grew, with more conditionally unconstitutional decisions handed down and more of those decisions tending towards the 'positive legislator' end of the spectrum.[25] In several other cases, too, the Court directly contradicted the President's preferences.[26] The only area in which the Mahfud Court appeared to show greater deference was in civil and political rights cases.[27] But the outcome of those cases was as much an expression of the judges' own policy preferences as it was about giving the political branches what they wanted.

Measured purely in terms of policy impact, therefore, there was very little difference between the Mahfud and Jimly Courts. Both were powerful courts in the sense that their decisions were politically consequential. When the assessment is targeted at their respective democracy-promoting capacities, however, things look a little different. For one, the Jimly and Mahfud Courts had very different cultures and reasoning styles. Jimly, the former constitutional law professor,[28] had tried to create quite a scholarly, intellectually challenging atmosphere at the Court, with all the

judges required to write academic books and defend their draft judgments in open discussion.[29] Under Mahfud MD, this culture changed: judicial conferences became mere opportunities to indicate voting intention,[30] opinions got noticeably shorter,[31] the dissent rate reduced quite dramatically,[32] and argument before the Court became less technical.[33] Some of these changes may be attributable to a fortuitous correspondence of views among the judges. Mahfud MD also explicitly announced a shift in reasoning method to a 'substantive justice' (*keadilan substantif*) approach in terms of which the Court tried to do justice in the individual case rather than concern itself with the formal development of constitutional doctrine (Budiarti, 2010). This may explain why the Court's opinions were less legally elaborate. But the perception among members of the Indonesian legal profession interviewed during the course of this research is that the quality of decision-making declined under Mahfud MD.[34] Whereas the Jimly Court had at least attempted to build a tradition of reasoned justification of its decisions, the Mahfud Court reverted to a more perfunctory, civil-law style.

One likely trigger for the 2011 legislative amendments, this analysis suggests, was the widening gap between the extent of the Mahfud Court's intrusion into democratic politics and the quality of its justifying reasons. At just the point when the Court ought to have been developing a more nuanced understanding of its mandate – conceding some doctrinal ground here to the political branches' claim to primary policy-making power, while fortifying other doctrines there with stronger justifications – the Court appears to have embraced curial power for curial power's sake. This was both normatively undesirable for the reasons given earlier and also strategically unwise, in as much as it made the Court more vulnerable to overt political attack.

The other trigger for the 2011 legislative amendments was a series of incidents of alleged judicial misconduct that provided political ammunition for the Court's opponents. In the first of these, Refly Harun, a former clerk of the Court, claimed in a newspaper article in late 2010 that he had seen a large sum of money intended to bribe (the then ordinary) Judge Akil Mochtar to influence the outcome of a regional election dispute (Harun, 2010) discussed in Butt and Lindsey, 2012: 147). This allegation was later dismissed by an independent commission for lack of evidence, but the very fact that it had been made added weight to the argument that the judges needed to be more closely supervised. In the second incident, in early 2011, Judge Arsyad Sanusi was forced to resign after it came to light that his

daughter and brother-in-law had accepted bribes from an applicant in a Constitutional Court case in which he was sitting (Butt and Lindsey, 2012: 147-48). Even though the allegation concerned the judge's family members rather than the judge himself, this incident was in many ways more damaging to the Court because Judge Sanusi was ultimately forced to resign. One of the shields that had long protected the Court – the judges' reputation for incorruptibility – had started to disintegrate.

In mid-2011, then, two and a half years into Mahfud MD's chief justiceship, the Court had lost strength, but not in the way that might have been expected given the circumstances of his appointment. Instead of weakening the Court by making it more quiescent, Mahfud MD's appointment had reduced the Court's power in two more subtle ways: first, by undermining its capacity adequately to justify and therefore to sustain its democracy-supporting role; and secondly, by allowing managerial controls on the Court to slip to the point where two of its judges had to defend corruption allegations. While the Court was still powerful in policy-making terms, its capacity positively to contribute to the quality of Indonesia's democracy had declined.

The Court Overturns the 2011 Amendments: A False Impression of Strength

In June 2011, the DPR passed a series of amendments to the Constitutional Court Law.[35] Three of these amendments were obviously targeted at curtailing the Court's jurisdiction and powers in line with the role originally envisaged for it: (1) Article 45A, which sought to prohibit the Court from issuing 'ultra petita' decisions (i.e. decisions in which the Court went further than requested by the constitutional claimant in invalidating a statutory provision); (2) Article 50A, which provided that the Court, when reviewing a particular statute for constitutionality, should not use inconsistency with *another statute* as a basis for invalidation; and (3) Article 57(2a), which sought to prohibit the Court, when striking down legislation, from prescribing the form of words that would cure the constitutional defect identified. While these amendments have been described as amounting to an attack on the Court, none of them is

particularly sinister when compared to limitations imposed on, or assumed by, constitutional courts in other countries. The principle that a constitutional court should restrict itself to making orders in line with the issues actually raised by a claimant, for example, is routinely observed in many constitutional democracies. Likewise, while reading-down and reading-in remedies are fairly standard, many constitutional courts would be loath to prescribe (other than by simple deletion or addition) the precise words by which an invalidated statute should be restored to constitutional health.[36]

Aside from these changes to the Court's jurisdiction and powers, the 2011 amendments also sought to regulate the composition, powers and procedures of the Constitutional Court Honour Council mentioned in Art 23 of the Constitutional Court Law. As originally enacted, Art 23(3) simply referred in passing to the Council, leaving its 'formation, structure and work procedure' to be regulated by the Constitutional Court.[37] An obvious weakness of this original formulation was that the dismissal of a constitutional court judge could only occur on the recommendation of the Chief Justice,[38] with no provision made for the dismissal of the Chief Justice himself. In addition, although various grounds for dishonorable dismissal were set out in Art 23(2), no provision was made for the regulation of judicial misconduct falling short of a dismissible offence (Butt and Lindsey, 2012: 147 n 139). This left the Court to fashion its own Code of Ethics and Behaviour Guidelines, which it did in 2003.

The 2011 amendments attempted to change this highly autonomous model. By Art 27A, the Court was formally required to adopt a Code of Ethics and Guidelines. While this provision was technically speaking redundant (Butt and Lindsey, 2012: 147), Art 27A's evident purpose was to make it impossible for the Court to repeal the Code and Guidelines it had already adopted of its own accord. Article 27A further empowered the Honour Council to uphold the Code of Ethics and Guidelines. That provision, too, appears redundant until it is considered in combination with the prescribed change to the composition of the Council, which broadened its membership to include, in addition to a Constitutional Court judge, a member of the Judicial Commission, a member of the DPR with responsibility over legislative affairs, a member of the executive responsible for legal affairs, and a Supreme Court judge.[39] Read together, what the amendments sought to do was to wrest control of

the disciplining of Constitutional Court judges from the Court and place it in the hands of a more broadly representative Council.

Once again, these changes were not all that sinister in comparative terms. As enacted, the Constitutional Court Law was clearly deficient in failing to provide any procedure for the dismissal of the Chief Justice. In addition, most constitutional systems accept that, given the powers they wield, Constitutional Court judges ought to be accountable to a body that is representative of all major political groupings.[40]

Notwithstanding the apparent moderation of the 2011 amendments, the Constitutional Court's response was swift and decisive. In the *Constitutional Court Law Amendment Case No 1*,[41] which was decided just four months after the passing of the amending law, the Court invalidated both Articles 45A and 57(2a). On the same day, in *Constitutional Court Law Amendment Case No 2*,[42] the Court invalidated several other amendments, including Articles 50A and 27A(2). The doctrinal issues arising in these two cases have been analysed by Butt and Lindsey (2012: 149-57). Their assessment – that the Court's reasoning, except in relation to Art 27A(2), was unconvincing – is persuasive. No purpose would thus be served by repeating it. The as-yet-unanswered question is how it was that the Court was able to get away with overturning the amendments *notwithstanding the weakness of the legal arguments it offered*. It is also worth asking whether the Court was wise, from a democracy-supporting perspective, to overturn the amendment to the composition and functioning of the Honour Council.

As to the first question, the main reason why the Court was able to get away with striking down the amendments appears to be that the terms of its independence from political control had not substantially changed since 2003. As then, Indonesia's party politics in 2011 were highly fragmented.[43] While it was thus one thing for the DPR to pass the 2011 legislative amendments, it was quite another for it to countermand the Court's decisions striking down core aspects of the package. To be effective, any such response would have required the sponsoring parties in the DPR to build the broad coalition required to amend the Constitution.[44] Such an undertaking, however, was never really on the cards given the sensitivity of re-opening the staged political settlement that had been reached between 1999 and 2002.

This incident shows the ongoing importance of Indonesia's fragmented party political system in safeguarding the Court from political attack.[45] In so far as the

maintenance of its formal jurisdiction and powers is concerned, the Constitutional Court is protected by the difficulty of amending the Constitution. It continues to enjoy a relatively high degree of independence from political control in that sense. The stability of this situation, however, should not be confused with robust curial power as defined in section 2. As we have been at pains to argue, the assessment of that very different issue depends on whether the court is able or willing to trade up its independence into a democracy-supporting role. When the events of 2011 are viewed in those terms, what appears at first to have been a very powerful act – the as yet unpunished striking down of the 2011 amendments – looks more like a sign of curial weakness.

Why do we say this exactly? As noted earlier, most of the amendments proposed were fairly unremarkable. Given the sparseness of the Constitutional Court Law's treatment of the composition, procedures and powers of the Honour Council, these provisions clearly needed to be fleshed out. It was also not unreasonable to provide that the Honour Council should be composed of a broader cross-section of political actors and interest groups. If a case might originally have been made for the Court's ability to police itself, that case had collapsed in the wake of the two instances of alleged judicial misconduct in late 2010 and early 2011.[46] Likewise, the amendments to the Court's jurisdiction and powers were not all that sinister. In most respects, they were directed at limiting the Court in ways that are internationally acceptable. While that fairly amorphous standard may be manipulated by ingenious drafters, the 2011 amendments were not illiberal, 'Frankenstate' amendments of the kind introduced in Hungary (Scheppele, 2013). Rather, they were focused on returning the Court to a plausible understanding of the original terms of its mandate.

If all of that is accepted, the Court's seemingly bold decision in the two *Constitutional Law Amendment Cases* was not necessarily a sign of institutional strength. On the approach adopted here, curial power is good for one main thing, and that is to promote the proper functioning of the democratic system. Often that will require courageous defence of constitutional rights in the face of intense political opposition. At other times, however, it will require judges to distinguish between legitimate accountability measures and more sinister court-curbing measures. Where they get that assessment wrong, judges may lose credibility as the sound voice of reason on what the continued health of the democratic system requires. In so doing, they risk undermining their court's democracy-supporting role.

That, at least, is one understanding of the fate that has befallen the Indonesian Constitutional Court in the wake of the events of 2011. Certainly, the Court's decision in the two *Constitutional Law Amendment Cases* has not silenced calls for the current system for enforcing proper ethical conduct on the part of the judges to be improved.[47] For as long as that shadow hangs over the Court, and for as long as it fails to convince a broad section of the political class that its expanded powers are still required to stabilise Indonesia's transition, the Court's capacity to make a difference to the quality of Indonesia's democracy will be impaired.

The only doubt about this is that the 2014 presidential election showed how delicately balanced Indonesia's democratic transition still is (Aspinall and Mietzner, 2014). There is thus still an argument for saying that the Court is right to be jealous of its powers for a while longer. It is also true that Indonesia's judiciary, given past political interference with its autonomy (Pompe, 2005), generally favours a very strict conception of judicial independence.[48] But these arguments do not mean that the Mahfud Court should not have done more to accommodate the amendments the DPR sought to introduce in 2011 and to explain its decision better. A carefully reasoned opinion of that sort would have done more to build the Court's credibility over the long run than the defiant overturning of every amendment that remotely restricted the Court's powers. As we shall see in the next section, the issue of judicial corruption on the Court soon burst into the open again, and the Court would surely have been in a better position to weather that storm had it already signalled its intention to entertain reasonable judicial accountability measures.

Mochtar's Resignation: The Court at its Nadir

It was this weakened Court, then, that was hit by the further setback of Akil Mochtar's forced resignation in 2013. Mochtar had replaced Mahfud MD as Chief Justice in April 2013 after the latter had resigned on the expiry of his five-year term as an ordinary judge.[49] Just six months later, on 2 October 2013, Mochtar was arrested by the Corruption Eradication Commission (KPK) on charges of bribery. The allegations against him were different to those of which he had earlier been cleared. This time they related to a legal dispute over the election of the district head for

Gunung Mas in Central Kalimantan, which was before the Court for decision. In a dramatic press statement, the KPK announced that it had found $US260,000 in Mochtar's private residence, money it said had been accepted by him in exchange for agreeing to influence the result of the case. Two days later, President Susilo Bambang Yudhoyono announced his intention to dismiss the Chief Justice. As noted, however, the Constitutional Court Law only provides for the dismissal of ordinary constitutional judges. Mochtar was thus in the end simply pressured to resign.[50]

Unsurprisingly, this incident precipitated a renewal of the failed 2011 attempt to reform the procedures for regulating judicial conduct on the Court. Citing the extraordinary nature of the crisis, the President issued an emergency interim order (PERPU) amending the Constitutional Court Law.[51] As provided for in Art 22(2) of the Constitution, the PERPU was later approved by the DPR and enacted into law.[52] It provided: first, that a new institution to supervise constitutional judges' conduct should be created;[53] second, that the nomination of justices should be conducted by a special committee formed by the President and the Judicial Commission;[54] and third, that persons making themselves available for appointment to the Court should not have been a member of any political party for at least 7 years prior to their appointment.[55]

As before, none of these amendments seems, from a comparative perspective, particularly threatening to judicial independence. Given the absence of any procedure through which Mochtar's dismissal could be effected, the proposal that an independent institution should be created to supervise the conduct and dismissal of judges was entirely reasonable. The same is true of the proposal that a special committee be formed to supervise the judicial nomination process. As enacted, the Constitutional Court Law simply provides that the DPR, the President and the Supreme Court shall each devise their own nomination process, and that '[t]he election of constitutional judges shall be conducted in an objective and accountable manner'.[56] This provision has produced a wide range of different processes with no guaranteed public involvement.[57] It could thus clearly do with some refinement. The third proposed change – the requirement that judges should not have been members of a political party for at least seven years prior to their appointment – is, if anything, a remarkable admission on the part of the President and the DPR that the practice of nominating serving politicians to the Court has been unwise.

It is thus again hard to fathom why the Court, this time under Mochtar's successor as Chief Justice, Hamdan Zoelva, annulled these amendments in their entirety at the first opportunity.[58] As in its 2011 decisions, the Court's February 2014 decision adopted an essentially dogmatic position on the requirements of judicial independence, holding that any outside involvement in the regulation of judicial conduct constitutes an impermissible breach of this principle. While this kind of sweeping decision looks superficially forceful, it is questionable whether it is in the long-term interests of Indonesian democracy. In the absence of proper judicial accountability measures and an open and transparent system for judicial appointments, the Court has left the DPR and President with little choice but to seek to regulate it through more indirect means. Zoelva himself, for example, was somewhat ignominiously forced from office when he refused to be interviewed by a presidential selection committee established in November 2014 to consider whether his term should be renewed or a substitute found for him (Hendrianto, 2015). Until this sort of ad hoc procedure for judicial appointments is replaced by a properly regulated procedure, the judges will not enjoy the public confidence that is required to rebuild the Court's image.[59] That, in turn, can only be a bad thing for Indonesian democracy over the long run.

The 2014 Term: Signs of Resurgence?

Notwithstanding this somewhat gloomy analysis, the Court enjoyed a good year overall in 2014, with three decisions in particular demonstrating that it may be on the road to recovery. This section briefly discusses those decisions with a view to gauging the Court's future prospects.

In the first of these cases, as noted in the Introduction, the Court was approached by the losing candidate in the 2014 Presidential election, Prabowo Subianto. Prabowo had performed surprisingly well in the election, after narrowing what was initially a considerable lead, and won 62.5 million votes to Joko Widodo's 71 million. Prabowo's legal team alleged three irregularities: that the Election Commission had miscounted a substantial number of votes (significant enough to make a difference to the outcome), that local government election officials had

displayed partisan bias, and that a large number of unregistered voters had been allowed to vote using ordinary identity documents. The Court took three weeks to consider these claims before issuing a unanimous, 5837-page decision dismissing all three allegations.[60]

Before the Court's decision, there had been concerns that some of the judges might be influenced by their partisan loyalties. Before his appointment, Chief Justice Zoelva had been a leader of the Star and Crescent Party, to which one of Prabowo's expert witnesses (Yusril Ihza Mahendra) belonged. Another judge, Patrialis Akbar, had been a leader of the National Mandate Party (PAN), to which Prabowo's running mate, Hatta Rajasa, belonged. The fact that neither of these partisan loyalties translated into judicial votes for Prabowo was significant. In addition, each day of the Court hearings was broadcast live by three national television networks and various radio stations. On the day the Court rendered its decision, all seven of the national television stations broadcast it live. The intense public interest in the case, the speed and evident impartiality of the Court's decision, and its acceptance by all major players as legitimate and binding are all positive signs that the Court may be returning to something like its former status.

Earlier in the year, on 23 January 2014, the Court had decided a controversial challenge to Presidential Election Law 42 of 2008.[61] As it then stood, the Election Law provided that only parties or coalitions of parties with 25% support in the immediately preceding parliamentary elections or 20% of the seats in the DPR could nominate candidates, and that the presidential election had to take place more than three months after the legislative elections. The complainant, Effendi Ghazali, argued that that these provisions unconstitutionally weakened the presidency by making the President beholden to the coalition formed to secure his or her nomination. The Court upheld this argument, reasoning that the Presidential Election Law, by forcing presidential candidates to offer concessions to secure their nomination, indeed gave political parties too much leverage over the President.

The reasoning supporting the Court's decision was generally thought to be sound. The controversy surrounding this case rather involved the length of time the Court took to decide it (ten months) and the fact that the Court, in handing down its decision, suspended its order of invalidity until after the 2014 elections. Both those aspects of the case are capable of being read as strategic moves on the part of the Court to defuse the politics of the case at the expense of the claimant's right to an

immediate and effective remedy. In response, defenders of the Court have pointed out that the challenge was launched in March 2013, just one month before Mahfud MD's retirement as Chief Justice. Thereafter, the Court became bogged down in a wave of regional election disputes, all of which required to be settled in a short time. The Mochtar corruption incident (which, as we have seen, was not unrelated to the regional election disputes) followed in October 2013. The Court was therefore genuinely preoccupied with other things, plausibly explaining the ten-month decision period. Likewise, the Court's reasoning that a January 2014 decision to revise the way in which the presidential elections were held would have caused too much disruption, is just plausible enough to counter the accusations of strategic manoeuvring. In sum, the Court is either entirely innocent of the charge of compromising legal rights in favour of its own institutional interests, or it got the politics of this decision just right.

The third significant case of 2014 was the Court's May 19 decision holding that it did not have jurisdiction to decide regional election disputes concerning governors and heads of district. The constitutional claimants, a consortium of NGOs, had argued that the reference in Art 24C(1) of the Constitution to 'general elections' did not extend to regional elections of that type. In upholding this argument, the Court struck down aspects of the 2008 Regional Autonomy Law, which had extended its jurisdiction to those matters and which had been adopted after the Constitutional Court itself had promoted the idea in public debate and in its decisions.[62] The Zoelva Court's decision to deny jurisdiction in these matters therefore represents something of an about-face. But it may improve the Court's position over the long run. As Jimly himself acknowledged after his retirement (Asshiddiqie, 2009), the Court's assumption of jurisdiction over regional election disputes unleashed a flood of cases, which both reduced the Court's capacity to decide ordinary statutory review cases and exposed the Court to the sort of corrupt practices for which Mochtar was eventually charged. On balance, then, the decision looks like a prudent retreat from an institutionally damaging area of law.

On the basis of these three cases decided in 2014, the Zoelva Court could be said to have rehabilitated the Court's standing somewhat. The presidential election decision was a major triumph, and the strategic moves in the Presidential Election Law and regional election dispute decisions appear to have been aimed at shoring up the Court's role in Indonesia's democracy rather than caving in to political

pressure. Whether these decisions have done enough to restore public confidence in the Court after the Mochtar corruption scandal remains to be seen. The long-term impact of the Presidential Election Law decision on the Court's independence is also something that will be interesting to watch. As noted, one of the major reasons for the Court's ability to assert its role has been the fragmented nature of Indonesian party politics. One of the reasons for that, in turn, has been the presidential election system, which favours the formation of ad hoc, instrumental coalitions. With that system now abolished, it is possible that more durable, ideological coalitions between Indonesia's ten or so main political parties may begin to form. Should that happen, the Court might in the future face a more cohesive and determined opponent.[63]

Conclusion

This article started with a comparative survey of initially forceful constitutional courts and argued that, if we are to learn from this sub-group, we need to be more precise about what it is about them that we value. A normatively inflected understanding of curial power as a constitutional court's democracy-supporting capacity was chosen for this purpose, and various indicators of sound curial performance suggested.

Using that framework to assess the Indonesian Constitutional Court's record, the story that emerged was one of a court that started forcefully but faced significant political opposition as its expansive understanding of its mandate became clear. To this extent, the Indonesian case confirms the plausibility of the conjecture made at the beginning of this article about the likely fate of initially forceful constitutional courts. As noted then, such courts almost inevitably experience some kind of challenge to their power as their very success in stabilising the transition emboldens and, in democratic theory, *entitles* the political branches to contain them. In Indonesia's case, this took the form, first, of the DPR's and the President's attempt to change the Court's direction by engineering Mahfud MD's appointment, and then, when that failed to produce the desired result, of the 2011 and 2013 amendments to the Constitutional Court Law.

What is different and interesting about the Indonesian case is the Court's surprising capacity to resist these attempts to contain it. In the case of Mahfud MD's appointment, the explanation for the Court's continued forcefulness appears to be either that he never had any intention of returning the Court to its original jurisdiction or that, once appointed, the Court's expansive interpretation of its mandate proved harder to reverse than he had anticipated. When the DPR attempted to constrain the Court more directly in 2011, Indonesia's fragmented political system ensured that it was able to overturn the amendments without significant repercussions. The Court did the same thing in 2013, even after its reputation had been badly damaged by the Mochtar corruption incident.

All of this shows that the Indonesian Constitutional Court is still remarkably powerful in policy-making terms. There is some doubt, however, about the Court's democracy-supporting capacity – the particular form of curial power whose fluctuations this article has sought to track. The main reason for this is the way the Court went about overturning the 2011 and 2013 amendments. Instead of offering a nuanced account of its institutional role in the Indonesian political system, the Court adopted a dogmatic stance on the requirements of judicial independence. The inflexibility of the Court's approach in this respect means that it has deviated from the ideal trajectory sketched at the beginning of this article. As argued then, if an initially forceful constitutional court is to continue playing a role in democratic consolidation, it needs to adjust its decisions to the changing quality of the democratic system it is attempting to nurture. Where a court fails to do that, and holds on to a conception of judicial independence more appropriate to the authoritarian era the country is leaving behind, it runs the risk that it will no longer be seen as a credible judge of what the health of the democratic system requires. That, in turn, may open it up to attack, not just by friends of democracy, but also by populist leaders capable of exploiting the inflexibility of the court's stance to retrench liberal-constitutionalist gains.

This conclusion is fairly worrying because Indonesia's democracy still faces many challenges. As Prabowo Subianto's narrow miss in the 2014 presidential election showed, leaders with connections to the former New Order regime are still active in Indonesian politics. Joko Widodo's election, significant as it is, has not yet demonstrated that Indonesia is free of its authoritarian past. His is a constrained Presidency, and thus Indonesia's democratic consolidation process cannot be said to be complete. Until new-generation leaders like Joko can operate in an

environment free of the sort of populist authoritarianism Probowo represented, there will be a role for the Constitutional Court in ensuring the openness of Indonesia's democratic system. But the Court needs to tread carefully. It cannot simply assert its policy-making power under the cover of an inappropriate conception of judicial independence. Rather, it needs to return to the Jimly Court's relatively more rigorous style of reasoning to give properly considered explanations for its interventions in support of the democratic system. Only in this way will the Court be able to build public understanding of its role in Indonesian politics, and only in this way, in turn, will the Court be assured of the public support it needs to assert its role in supporting Indonesia's democracy over the long term.

Notes

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

[2] In 2004, the complainant was Wiranto, who had placed third in the first round. In 2009, Wiranto and Jusuf Kalla, who had finished last in the first round, and Megawati Sukarnoputri and Prabowo Subianto, were the complainants.

[3] See the amendments to the Constitutional Law of 2003 discussed below.

[4] A detailed account of these two incidents is given below.

[5] Before their respective appointments, Mahfud MD had been member of the National Awakening Party and Minister of Defence and of Justice and Human Rights under President Wahid; Hamdan Zoelva a member of the Star and Crescent Party; and Patrialis Akbar Minister of Justice and Human Rights.

[6] In their study, Butt and Lindsey, 2012 speculate that the 2011 legislative amendments were targeted at undoing the Court's expansive interpretation of its mandate, but they do not explain the full political backdrop to the amendments or how it was that the Court was able to get away with handing down what they argue was a poorly reasoned decision.

[7] In 2012, for example, President Jacob Zuma announced the launching of a sinisterly worded government review of the impact of the Court's decisions on socio-economic transformation. One year earlier, Zuma had appointed one of the Court's most junior and socially conservative judges to the position of Chief Justice, the first time that ideological affiliation to the values of the appointing President had been so clearly preferred over court seniority and fidelity to the Constitution.

[8] This aspect of the Court's assertiveness was most powerfully illustrated in its courageous and principled resistance to popular President Uribe's attempt to win a third term. The decision is discussed in Landau, 2013: 202-203.

[9] We are grateful to Mark Tushnet for suggesting this line of inquiry when commenting on an earlier draft of this paper.

[10] Landau makes something like this point in explaining why the Hungarian Constitutional Court has been curbed while the Colombian Constitutional Court has not (Landau, 2010: 365-69).

[11] President Franklin D. Roosevelt's famous court-packing plan provides a good illustration of this point.

[12] The freedom is a relative rather than absolute one. Too much independence from political control is not good for democracy nor, in the end, for courts. See Fiss, 1993. This point will become important later on in this article when discussing the Indonesian Constitutional Court's attempts to defend its independence.

[13] Cf. Gardbaum, 2015 (arguing that 'as far as courts are concerned, the most important and basic goal for new democracies … is not establishing the power to invalidate legislation but establishing and maintaining the independence of the judiciary'). This misses the point. The issue is not the preferability of strong-form versus weak-form judicial review, but the capacity of the court to make a difference to the quality of democracy. Sometimes that goal may be promoted by institutionalising weak-form judicial review so as to allow the court slowly to build its influence. Equally, however, a court with only weak-form powers may be unable to protect the democratic system when it really matters.

[14] See Kapiszewski, Silverstein and Kagan, 2013: 2 (using the term 'consequential' to mean politically significant role in the governance of a country but not distinguishing normatively desirable forms of consequential judicial behaviour).

[15] Constitutional Court Decision 102/PUU-VII/2009.

[16] Constitutional Court Decision 102/PUU-VII/2009.

[17] Note that Mietzner, 2010: 418 accepts that this question may be hard to answer. He nevertheless contends that the 'Court and democratic stabilization have mutually supported each other, with more steady political conditions allowing the judges to issue their rulings in an orderly fashion, and their verdicts subsequently further consolidating the polity.'

[18] See Posner, 2003. For the contrary view, see Dworkin, 1986.
[19] Article 23(1)(c). In 2011, this provision was amended to extend the retirement age to 70.
[20] Article 4(3) has since been amended to reduce the Chief Justice's term to two and a half years.
[21] Judges Roestandi, Marzuki and Soedarsono retired in March, May and June 2008 respectively.
[22] Judge Harjono, who had originally been nominated by the President in 2003 but not re-appointed, was later appointed by the DPR to the Mahfud Court after Jimly's resignation.
[23] HER, *Sepuluh Rambu Hakim Konstitusi ala Profesor Mahfud* (13 March 2008) Hukumonline.com <http://www.hukumonline.com/berita/baca/hol18749/sepuluh-rambu-hakim-konstitusi-ala-profesor-mahfud>.
[24] Note that Mukhti Fadjar did not, in the end, vote for Mahfud MD.
[25] Conditionally unconstitutional orders were issued in 34% (14 of 41) of the applications granted by the Jimly Court, compared to 55% (54 of 98) for the Mahfud Court.
[26] One such case concerned the nullification of the President's decision to appoint Attorney General Hendarman Supandji on procedural grounds (Constitutional Court Decision 49/PUU-VIII/2010), another a decision striking down a law regulating the appointment of deputy ministers (Constitutional Court Decision 79/PUU-IX/2011), and a third a decision disbanding the state oil and gas exploration agency (Constitutional Court Decision 36/PUU-X/2012).
[27] See the *Pornography Law* case (Constitutional Court Decision 10-17-23/PUU-VII/2009) and *Blasphemy Law* case (Constitutional Court Decision 140/PUU-VII/2009) discussed in Butt and Lindsey, 2012: 201-202, 234-40.
[28] Mahfud MD had also been a constitutional law professor but had an extensive political career before his appointment.
[29] Court official, interview conducted at Constitutional Court Building on 3 December 2013.
[30] Interview with Mustafa Fahri, Director of Constitutional Law Centre, University of Indonesia, 3 July 2014.
[31] By our count, the average length of the Jimly Court's decisions was 2 017 words against 1 450 for the Mahfud Court.
[32] By our count, the Jimly Court's dissent rate was 37.75% against for 13.7% for the Mahfud Court.
[33] Eryanto Nughroho, interview conducted at Indonesian Centre for Law & Policy Studies, 11 December 2013.
[34] Taufik Basari, interview conducted at National Democrat Party Office, 17 December 2013.
[35] Law 8 of 2011.
[36] In *Minister of Home Affairs v Fourie* 2006 (1) SA 524 (CC), for example, the South African Constitutional Court, rather than amending the constitutional violation it had found with the statute impugned in this case, provided guidelines for Parliament to follow in amending it within a specified timeframe, failing which certain words would be read into the statute to cure the defect identified. On reading down in Australia, see Williams, Brennan and Lynch, 2014: 473.
[37] Article 23(5).
[38] Article 23(4).
[39] Article 27A(2) as summarised in Butt and Lindsey, 2012: 147.
[40] This requirement is today typically met through the creation of a 'judicial service commission' to oversee the interviewing and nomination of candidates. Such commissions exist in Bangladesh, Botswana, Fiji, Kenya, the Maldives, Nepal, South Africa, Sri Lanka, Thailand, Uganda, and Zimbabwe.
[41] Constitutional Court Decision 48/PUU-IX/2011.
[42] Constitutional Court Decision 49/PUU-IX/2011.
[43] In 2011, there were nine separate political parties represented in the DPR.
[44] Article 37 of the Indonesian Constitution provides that the Constitution may be amended by majority vote of the People's Consultative Assembly (MPR).
[45] Cf. Butt, 2014: 561 (arguing that the 2011 legislative amendment 'appears to expose a limitation of the fragmentation theory', namely that 'a court might reach a point at which it becomes so powerful that hobbling it might become a shared imperative of an otherwise fragmented polity').
[46] In one of those instances, as we have seen, the Court was forced to establish an independent commission of inquiry.
[47] See the account in the next section of renewed legislative attempts in this regard.
[48] We are indebted to our UNSW Law colleague, Melissa Crouch, for suggesting this point.
[49] One of the 2011 amendments to the Constitutional Court Law of 2003 not overturned by the Constitutional Court had changed the term of office of the Chief Justice from 3 years to 2.5 years. In terms of the amended Art 4(2), Mahfud MD's term as Chief Justice expired in February 2014. But he resigned in April 2013 because that is when his term as an ordinary justice expired.
[50] He has since been convicted and sentenced to life in prison. See Warat (2014).
[51] PERPU 1 of 2013 on the Second Amendment of Law 24 of 2003 on the Constitutional Court.
[52] Law Number 4 Year 2014 on Enactment of Government in Lieu Number 1 Year 2013 on Second Amendment of Law Number 24 Year 2003 on the Constitutional Court.
[53] Article 27A.
[54] Article 18A.
[55] Article 15(2)(i).
[56] Article 20 of the 2003 Constitutional Court Law. Article 19 stipulates that 'nominations of constitutional court justices shall be conducted in a transparent and participatory manner' but does not specifically provide for public involvement.
[57] Of its own accord, the DPR opened the judicial nomination process to the public in 2003 and 2008. The President did something similar in 2008.

[58] Constitutional Court Decision 1-2/PUU-XII/2014.
[59] According to one poll, public confidence in the Court dropped from a comparatively high 65.5% to 28% in the wake of the Mochtar corruption incident. See Warat (2014). If the literature on the link between curial effectiveness and institutional legitimacy is to be believed (see, for example, Gibson, Caldeira and Baird, 1998) this drop in public trust must have led to some diminution in the Court's power.
[60] Constitutional Court Decision 1/PHPU.Pres-XII/2014.
[61] Constitutional Court Decision 14/PUU-XI/2013. This summary draws on the information provided in Hendrianto, 2014.
[62] *Selesaikan Sengketa Pilkada di MA Melanggar Konstitusi* (12 September 2013) Jawa Pos <http://news.loveindonesia.com/en/news/detail/72719/selesaikan-sengketa-pilkada-di-ma-melanggar-konstitusi>
[63] It is also possible, however, that the 'hollowing out' of Indonesia's electoral politics by the influence of patronage might counteract this trend. See Aspinall, 2014: 96.

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