

12-31-2018

BOOK REVIEW LAW AND POLITICS OF CONSTITUTIONAL COURTS

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Recommended Citation

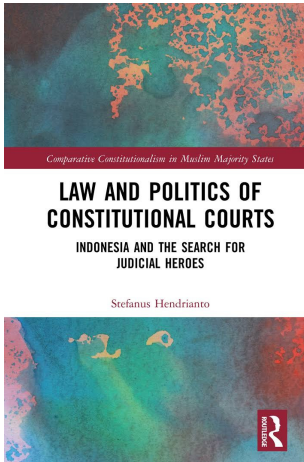
Simmons, Thomas E. (2018) "BOOK REVIEW LAW AND POLITICS OF CONSTITUTIONAL COURTS," *Indonesia Law Review*: Vol. 8 : No. 3 , Article 7.

Available at: <https://scholarhub.ui.ac.id/ilrev/vol8/iss3/7>

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BOOK REVIEW

LAW AND POLITICS OF CONSTITUTIONAL COURTS



Stefanus Hendrianto's "Law and Politics of Constitutional Courts" is part of Routledge's series titled "Comparative Constitutionalism in Muslim Majority States." The book combines several narratives and themes. It summarizes the late 20th century political history of Indonesia. It describes the birth of the Indonesian Constitutional Court. It advances the idea of judges as prudential-minimalist heroes. It considers Aristotle and the scholarship of Mark Tushnet. It presents weird analogies to the Iliad, the Odyssey, and the heroic tales contained the epic Mahabharata. But primarily it is an extended legal biography of the Constitutional Court's founding chief justice, Jimly Asshiddiqie. In a kind of extended epilogue, the book examines the impact of Justice Asshiddiqie's successor, Chief Justice Mohammad Mahfud, as well as the legacy of the third-generation court from 2013 to present day.

Hendrianto postulates that "a judicial hero achieves such status through courageous and ambitious interpretation of the constitution, which amounts to a judge participating in economic, social, and political governance." While Hendrianto clearly favors activist judges such as America's Earl Warren and bold judges such as Pakistan's Ifthikar Muhammed Chaudhry, he also acknowledges the heroism of judges who defer to elected legislators. Both conservative and liberal jurists can qualify as heroic, he acknowledges. As an antithesis of the "herculean judge" operating under an aggressive leadership model, Hendrianto introduces the idea of prudential-minimalist heroes – those, like Justice Asshiddiqie, who "are willing to take a go-slow, persevering, willing-to-strategically-retreat approach in achieving their ultimate goals." Hendrianto makes a strong case for the heroism inherent in this sort of quasi-weak-form judicial review.

Hendrianto links Justice Asshiddiqie's approach to decisions like *Marbury v. Madison* in which "passive virtues" are on display; a balancing act between judicial review and judicial restraint. This approach tempers provocative, controversial rulings against the fragility of judicial independence. It is politically sensitive. Several techniques which utilize this coupling of restraint with activism are identified. One is suspending a declaration of legislative invalidity. A particular statute may be held unconstitutional, but the court will grant the legislature a specified period in which to remedy the law before the court's determination of invalidity takes effect. Another approach is progressive realization. The court may coax the legislature to make incremental steps towards the full realization of constitutionality. Hendrianto explains: "Courts in newer democracies need a strategic chief justice who knows how to combine ambitious interpretations of the constitution with the willingness to recognize the merits of deferring to political judgments about the constitution." With this strategic approach, a constitutional court's authority can be carefully fortified.

Hendrianto explains how the Indonesian Constitutional Court took an expansive approach to standing, allowing litigants to proceed even where their injury was remote or indirect, thereby expanding the court's reach. At the same time, Justice Asshubbiquie and his fellow justices would oftentimes grant only prospective relief, denying a remedy to the successful litigant herself; ruling that the remedial outcome would apply only to future cases. One example of this tempering of judicial review with deference is the 2003 Communist Party case spearheaded by 35 political activists. The activists challenged the constitutionality of a provision of the General Election Law banning former members of the Indonesian Communist Party (Partai Komunis Indonesia, or PKI) from elections. Although the Constitutional Court held for the claimants, reasoning that "individual members of the Communist Party and its affiliates should be treated equally as citizens without discrimination," it also ordered that the decision would only become effective for the 2009 general elections.

What emerges from this book is a fascinating exploration of comparative constitutional law in its historical, cultural, and political context. The book's subtitle is "Indonesia and the Search for Judicial Heroes." Indeed, this is a book about heroism. The author's admiration for Justice Asshubbiquie's towering legal intellect and savvy tactical skills is infectious. With only one exception, Justice Asshubbiquie always sided with the majority and he successfully minimized the text of dissenting justices as part of his strategy to cultivate respect for the court's decisions. He frequently held press conferences to explain the court's rulings. He personally tried to persuade lawmakers into sharing his constitutional concerns. Yet in the end, he was outmaneuvered and resigned from the bench in 2008. Stefanus Hendrianto's book – the author's first – is highly recommended reading.

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| Title | : Law and Politics of Constitutional Courts |
| Language | : English |
| Publisher | : Routledge |
| Author | : Stefanus Hendrianto |
| Pages | : 291 + |
| Year | : 2018 |
| Reviewer | : Thomas E. Simmons (Associate Professor, University of South Dakota School of Law, U.S.) |