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Book Review: Yvonne Tew on Stefanus Hendrianto's "Law and Politics of Constitutional Courts: Indonesia and the Search for Judicial Heroes"

[Editor's Note: In this installment of I•CONnect's Book Review Series, Yvonne Tew reviews Stefanus Hendrianto's book [Law and Politics of Constitutional Courts: Indonesia and the Search for Judicial Heroes](https://www.routledge.com/Law-and-Politics-of-Constitutional-Courts-Indonesia-and-the-Search-for-Hendrianto/p/book/9781138296428) (<https://www.routledge.com/Law-and-Politics-of-Constitutional-Courts-Indonesia-and-the-Search-for-Hendrianto/p/book/9781138296428>). (Routledge 2018).]

—[Yvonne Tew](https://www.law.georgetown.edu/faculty/yvonne-tew/) (<https://www.law.georgetown.edu/faculty/yvonne-tew/>), Georgetown University Law Center

What shapes the role of constitutional courts in new democracies? What drives the rise of judicial power in emerging constitutional orders? Stefanus Hendrianto's new book, *Law and Politics of Constitutional Courts*, explores these questions through providing an account of the importance of judicial leadership in explaining judicial empowerment, illustrated by the impact of individual chief justices on the Indonesian Constitutional Court.

The book offers a fascinating insight into the creation and development of the Constitutional Court of Indonesia and the judicial personalities behind its leadership, with a particular focus on the role of the founding chief justice Jimly Asshiddiqie. By bringing a "global south" perspective from the Southeast Asian context of Indonesia,^[1] (#_ftn1) one of the world's largest democracies, Hendrianto's detailed exposition of the experience of Indonesia's Constitutional Court valuably expands our comparative horizons. Importantly, it also contributes to broader debates in comparative constitutional studies on the emergence of constitutional courts and the consolidation of judicial power in new democratic orders.^[2] (#_ftn2)

Judicial leadership, on Hendrianto's account, can take several forms. "Prudential-minimalist" judicial leaders enhance the court's authority by strategically taking a minimalist role in some policy areas to fortify the court against the executive and legislature. "Aggressive-bold" judicial heroes, in contrast, employ ambitious constitutional interpretation methods in taking a combative stance

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toward the elected branches. A third category describes a “soldier-type” chief justice—the anti-thesis of a “judicial hero”—who acts as a subordinate of the executive and legislature. Central to the book’s account is the claim that a cautious, prudential leadership approach is the most effective for developing judicial power, as exemplified by Chief Justice Jimly Asshidiqie’s leadership of the first-generation Indonesian Constitutional Court.

Under Asshiddiqie’s tenure as chief justice, the Court exercised what Hendrianto characterizes as “quasi-weak-form review,”^[3] (#_ftn3) based on Mark Tushnet’s typology of strong-form and weak-form judicial review.^[4] (#_ftn4) Examples of the “minimalist strategies” employed by the Court include “conditionally unconstitutional” rulings, “suspended declarations,” “progressive realizations,” and “prospective overrulings.”^[5] (#_ftn5) Hendrianto argues that Asshiddiqie’s strategy resembles that of United States Chief Justice John Marshall in *Marbury v. Madison*,^[6] (#_ftn6) exhibiting “a willingness to yield to the will of other branches of government, while at the same time creating a space for the Court to provide constitutional interpretation on the actions taken by other branches of government.”^[7] (#_ftn7)

The difficulty with framing the Asshiddiqie Court’s approach as “(un)heroic quasi-weak-form”^[8] (#_ftn8) review is that the Court’s strategy appears neither weak nor unheroic. As Rosalind Dixon and Samuel Issacharoff describe, deferral-based techniques used by courts can be explicit or implicit.^[9] (#_ftn9) Hendrianto explicitly relies on Rosalind Dixon and Samuel Issacharoff’s work on judicial deferral to ground his argument that Asshiddiqie led the first-generation Court to employ both explicit and implicit modes of deferral-based techniques.^[10] (#_ftn10) Explicit deferral, like the suspended declarations or progressive realization rulings, focuses on mitigating the practical costs of immediately effective remedial measures and provide government actors with the opportunity to respond to judicial decisions.^[11] (#_ftn11) Implicit judicial deferral, however, “is more strategic or *Marbury*-like in aspiration:” courts in these contexts assert themselves using *Marbury*-style reasoning while producing a legal outcome that avoids full confrontation with the political branches.^[12] (#_ftn12) Hendrianto makes a compelling case that Asshiddiqie often deliberately employed a *Marbury*-like “willing-to strategically-retreat approach” to “achieve his ultimate goals.”^[13] (#_ftn13)

Viewed in this light, the *Marbury* strategy employed by the first-generation Constitutional Court is not “weak-form” nor “quasi-weak-form” in its approach or aims. Unlike “weak-form” review, which is purportedly focused on promoting a democratic “dialogue” between courts and legislatures, the *Marbury*-style approach is strategically directed at empowering the courts vis-à-vis the political branches.^[14] (#_ftn14) Using the term “quasi-weak-form” review to describe the Constitutional Court’s approach obscures the ultimate aim of Asshiddiqie’s (self-avowed) *Marbury*-inspired strategy,^[15] (#_ftn15) which is to “strengthen[] the Court’s authority while simultaneously fortifying the Court against the Executive and Legislative branches of government.”^[16] (#_ftn16) Labelling all the Constitutional Court’s techniques as manifestations of “quasi-weak-form” review risks distorting some of the distinctive features of a *Marbury*-style “prudential-minimalist” approach, which, as Hendrianto acknowledges, is different from judicial self-restraint.^[17] (#_ftn17) Put simply, this approach is aimed at enhancing—not restraining—judicial power.

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"Heroism," too, is a term used frequently throughout the book. The portrait that ultimately emerges from Hendrianto's account is that of the "prudential-minimalist" judicial leader—in contrast to the "standard norm" of bold and aggressive heroic chief justices^[18] (#_ftn18)—as a powerful model of judicial heroism. Although Hendrianto at times refers to the actions of the first-generation Court as "seemingly unheroic"^[19] (#_ftn19) or "less heroic,"^[20] (#_ftn20) what seems clear is that he is advancing a deeply sympathetic picture of Chief Justice Asshiddiqie's tenure as a uniquely effective model of judicial leadership. Asshiddiqie is lauded as a heroic figure for his "intellectual vision and leadership:"^[21] (#_ftn21) the book gives great weight to his academic credentials and rise from academia to the judiciary, characterizing Asshiddiqie as a "towering intellectual figure"^[22] (#_ftn22) while his associate justices are described as "mediocre judges."^[23] (#_ftn23) Hendrianto's absorbing narrative of Asshiddiqie represents a welcome contribution to work on the judicial leadership of constitutional courts, which has tended to be dominated by work on United States Supreme Chief Justices.^[24] (#_ftn24) The painstaking focus on Asshiddiqie as a judicial hero, however, raises questions about whether the lionization of *individual* chief justices comes at the expense of the *institutional* power of the court. What happens to the institutional status and legitimacy of a constitutional court after the departure of a John Marshall, an Earl Warren, or a Jimly Asshiddiqie?

This is a big question with which the book grapples, even if it is one it cannot fully answer. In the case of the Indonesia, the story is still unfolding. Following the leadership of Asshiddiqie (2003-2008) and, in a different style of judicial heroism, Mohammad Mahfud (2008-2013), Indonesia's Constitutional Court has struggled to regain its legitimacy after then Chief Justice Akil Mochtar was arrested for bribery in 2013. As Hendrianto concludes, the Indonesian Constitutional Court is at a critical juncture in its history. ^[25] (#_ftn25) And its future direction remains unclear. Since the book's publication, Anwar Usman has taken over the Constitutional Court's leadership as its newest chief justice in April 2018.^[26] (#_ftn26) Hendrianto's careful account of the Constitutional Court's role in Indonesian constitutional law and politics provides us with a richly-layered account that helps contextualize the paths forward, while adding to broader understandings of the dynamics of judicial leadership and judicial power in constitutional democracies.

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[1] (#_ftnref1). See Ran Hirschl, *How Universal is Comparative Constitutional Law?*, in *Comparative Matters: The Renaissance of Comparative Constitutional Law* 192-223(2014).

[2] (#_ftnref2). See Ran Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (2004); Samuel Issacharoff, *Fragile Democracies: Contested Power in the Era of Constitutional Courts* (2015).

[3] (#_ftnref3). Stefanus Hendrianto, *Law and Politics of Constitutional Courts: Indonesia and the Search for Judicial Heroes* 5 (2018).

[4] (#_ftnref4) See Mark Tushnet, *New Forms of Judicial Review and the Persistence of Rights – And Democracy-Based Worries*, 38 Wake Forest L. Rev. 813, 814 (2003); Mark Tushnet, *Alternative Forms of Judicial Review*, 101 Mich. L. Rev. 2781(2003).

[5] (#_ftnref5) Hendrianto, *supra* note 3, at 5.

[6] (#_ftnref6) 5 U.S. 137 (1803).

[7] (#_ftnref7) Hendrianto, *supra* note 3, at 6.

[8] (#_ftnref8) *Id.* at 104.

[9] (#_ftnref9) Rosalind Dixon & Samuel Issacharoff, *Living to Fight Another Day: Judicial Deferral in Defense of Democracy*, 2016 Wis. L. Rev. 683, 685-86 (2016).

[10] (#_ftnref10) Hendrianto, *supra* note 3, at 26–27.

[11] (#_ftnref11) Dixon & Issacharoff, *supra* note 9, at 707.

[12] (#_ftnref12) *Id.* at 687.

[13] (#_ftnref13) Hendrianto, *supra* note 3, at 25.

[14] (#_ftnref14) Dixon & Issacharoff, *supra* note 9, at 687.

[15] (#_ftnref15) Hendrianto, *supra* note 3, at 254 (citing a personal interview with Chief Justice Asshiddiqie who “said that he drew inspiration from John Marshall”).

[16] (#_ftnref16) *Id.* at 6.

[17] (#_ftnref17) *Id.* at 254.

[18] (#_ftnref18) *Id.* at 15.

[19] (#_ftnref19) *Id.* at 4, 24, 104, 253.

[20] (#_ftnref20) *Id.* at 8, 104.

[21] (#_ftnref21) *Id.* at 74.

[22] (#_ftnref22) *Id.* at 95.

[23] (#_ftnref23) See, e.g., Hendrianto, *supra* note 3, at 94, 187, 221, 238.

[24] (#_ftnref24) See, e.g., Cass R. Sunstein, *Constitutional Personae: Heroes, Soldiers, Minimalists, and Mutes* (2015); *The Chief Justice: Appointment and Influence* (David J. Danelski & Artemus Ward eds., 2016).

[25] (#_ftnref25) Hendrianto, *supra* note 3, at 260.

[26] (#_ftnref26) Marguerite Afra Sapiie, *Anwar Usman elected as new Constitutional Court chief justice*, The Jakarta Post (April 2, 2018), <https://www.thejakartapost.com/news/2018/04/02/anwar-usman-elected-as-new-constitutional-court-chief-justice.html>.

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[June 16, 2019 at 4:08 am](#)

This book is timely for the current dispute of Indonesian presidential election April 2019. The loser is using MK (Constitutional Court) as a venue of Impeaching the winner incumbent with slander and hoax and post truth model campaign. On Friday June 14, 2019 the lawyer of Prabowo using political rhetoric and overdose of hoax materials to disqualify Jokowi. As ordinary voter I just ask whether it is right to "hijack" 85 million votes won by the incumbent and declare repeat votes while there is no actual evidence of the so called "fraud" election.

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