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Demand-Side Constitutionalism: How Indonesian NGOs Set the Constitutional Court's Agenda and Inform the Justices

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DEMAND-SIDE CONSTITUTIONALISM: HOW INDONESIAN NGOs SET THE CONSTITUTIONAL COURT'S AGENDA AND INFORM JUSTICES

ABSTRACT

Since its creation in August 2003, the Indonesian Constitutional Court's decisions have legalised the defunct PKI (Partai Komunis Indonesia, Indonesian Communist Party), mandated an open party-list election system, invalidated efforts to privatise the electricity and water sectors, and required the government to formally recognise indigenous faiths. This paper argues that non-government organisations (NGOs) have had a crucial and underappreciated impact in determining both which cases reach the justices, and the content of the Court's final decisions. It finds that NGOs are responsible for bringing the majority of socioeconomic claims, resulting in some of the Court's most controversial and far-reaching decisions. In addition, the justices are significantly more likely to quote petitions submitted by NGOs, meaning that the information NGOs include in their briefs is critical in shaping the justices' understanding of the legal and policy issues at stake. These findings have important implications for rule of law projects in Indonesia. In particular, they underline the importance of demand-side reforms. Donors should consider improving the capacity of NGOs to detect and inform the Constitutional Court about rights violations. They should also consider investing in the research capacities of NGOs as the justices rely heavily upon the information they provide.

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This article is adapted from his dissertation, *Embedded Judicial Autonomy: How NGOs and Public Opinion Influence Indonesia's Constitutional Court*. His dissertation research was funded in part by the US-Indonesia Society and by the University of Michigan.

DEMAND-SIDE CONSTITUTIONALISM: HOW INDONESIAN NGOs SET THE CONSTITUTIONAL COURT'S AGENDA AND INFORM THE JUSTICES

DR DOMINIC J NARDI, JR

One of the more frequent complaints from political scientists and activists about Indonesian politics is that, despite very real progress since *Reformasi* (Reformation, began in May 1998), elites still dominate the system. Concerns about corruption, collusion and nepotism at the highest levels of government are widely reported, as evidenced by the regular arrests of high-profile politicians. Conservative elites have attempted to undermine the independence of the KPU (Komisi Pemilihan Umum, the electoral commission) and the KPK (Komisi Pemberantasan Korupsi, the anti-corruption commission) (Mietzner, 2012). Meanwhile, the prevalence of oversized coalitions in the national legislature, the DPR (Dewan Perwakilan Rakyat, People's Representative Council), makes it difficult for voters to hold parties accountable at the ballot box (Slater, 2014). Despite the presence of democratic institutions, politics remains very much an elite game.

Somewhat surprisingly, political activists and non-government organisations (NGOs) have had more success influencing policy through the Constitutional Court than through the elected branches of government. In this paper, I provide evidence that NGOs have had an important impact both on which cases reach the Constitutional Court and on the content of the justices' final decisions. I use data derived from 524 court decisions issued between 13 August 2003 and 2 October 2013. I find that NGOs are responsible for bringing the majority of socioeconomic and rights claims, resulting in some of the Court's most controversial and far-reaching decisions. In addition, the justices are significantly more likely to quote petitions submitted by NGOs, meaning that the information NGOs include in their briefs proves critical in shaping the justices' understanding of the legal and policy issues at stake.

I begin by providing some background about the Constitutional Court and its relationship with civil society. Next, I discuss how NGOs set the Court's agenda by submitting petitions dealing with human rights and socioeconomic issues. I then focus on how NGOs influence the justices' decisions by shaping their understanding of the legal and policy issues at stake. Finally, I address the policy implications of my findings, particularly as they underline the importance of demand-side stakeholders in justice-sector reform and constitutional change.

THE MAHKAMAH KONSTITUSI

In November 2001, the Indonesian legislature, the MPR (Majelis Permusyawaratan Rakyat, the People's Consultative Assembly), passed the third package of amendments to the 1945 Constitution, which created the legal basis for the Constitutional Court (Mahkamah Konstitusi). According to art 24, the Court is independent of the other branches of government and has full control over its budget. It has nine justices, three each appointed by the president, the lower chamber of the legislature, the DPR and the Supreme Court (Mahkamah Agung). Justices serve for five-year terms with the possibility of one reappointment. The justices also elect a chief and deputy chief for 30-month terms.

According to art 24C of the Constitution, the Constitutional Court has jurisdiction over the following types of cases:

1. constitutional review of statutes, or *pengujian undang-undang* (PUU);
2. disputes over the authority of state institutions, or *sengketa kewenangan Lembaga Negara* (SKLN);
3. disputes over general election results, or *perselisihan hasil pemilihan umum* (PHPU);
4. the dissolution of political parties; and
5. DPR motions to impeach the president or vice-president.

Elections disputes account for the vast majority of the Court's docket, particularly during election years. These cases involve checking that the KPU counted votes correctly. SKLN cases involve disputes between Indonesian government institutions about the scope of their authority and powers. The MPR realised that *Reformasi* might lead to confusion and disputes between government agencies over jurisdiction boundaries. Meanwhile, the Court has not overseen any impeachment or dissolution of political party cases since its inception.

Petitions for constitutional review comprise the second largest item on the Constitutional Court's docket, with over a thousand cases since 2003 (see Table 1). The Constitutional Court serves as the court of first and last instance for constitutional interpretation. Its decisions are final and binding on other government actors. Notably, the Court only has jurisdiction over national statutes; challenges to administrative regulations or local laws, as well as judicial decisions, must be brought to the Supreme Court or to the

Table 1: Constitutional Review Cases in the Mahkamah Konstitusi

	Granted	Rejected	Not accepted	Withdrawn
2003	0	0	3	1
2004	11	8	12	4
2005	10	14	4	0
2006	8	8	11	2
2007	4	11	7	5
2008	10	12	7	5
2009	15	18	11	7
2010	18	22	16	5
2011	21	29	35	9
2012	30	31	28	5
2013	22	52	22	12
2014	29	41	37	17
2015	25	50	61	15
2016	19	34	30	9
2017	21	40	37	11
Total	243	370	321	107

Note: Includes all cases decided through November 28, 2017. Data available from MK website at <http://www.mahkamahkonstitusi.go.id/index.php?page=web.RekapPUU>.

Another important limitation on the Constitutional Court’s review powers is that its decisions only apply prospectively. In the 2004 Bali Bombing case, the Court held that the government could not prosecute terrorist suspects under a law that applied retroactively (*ex post facto*). However, in a press conference, Chief Justice Jimly Asshiddiqie announced that the decision did not overturn the petitioner’s conviction because Constitutional Court decisions did not apply retroactively (Butt and Hansell, 2004: 181). In other words, declaring a statute unconstitutional only prevents the government from enforcing it in the future; Constitutional Court decisions cannot overturn or remedy past constitutional harms.

1 While some scholars warned that the government could potentially use this loophole to reinstate laws that Constitutional Court had already declared unconstitutional through regulation (for example, Butt and Lindsey, 2008), Butt (2015: 6) concludes that this seldom occurs in practice.

Despite these constraints, the Constitutional Court has proven adept at expanding its jurisdiction beyond statutory constraints. Initially, art 50 of the 2003 Constitutional Court Law prevented the Constitutional Court from reviewing laws passed before 19 October 1999 (the date the constitutional reform process began). However, in a 2004 decision, the Court declared this provision unconstitutional because the Constitution itself contained no such limit on its jurisdiction. This exposed even more laws to constitutional challenge – likely against the wishes of the politicians who created the Court in the first place. Since then, the Court has heard challenges to dozens of pre-*Reformasi* laws, including to laws passed under Soeharto’s New Order regime on censorship² and marriage.³

THE COURT AND CIVIL SOCIETY

The MPR established the Constitutional Court because it was concerned about the fragmentation of political power in the aftermath of democratisation (Mietzner, 2010; Siregar, 2015). After the 1999 elections, no party held a majority in the MPR; the Indonesian Democratic Party of Struggle (Partai Demokrasi Indonesia – Perjuangan, PDI-P), the largest party, controlled less than a third of the seats. Moreover, the new government soon became embroiled in a constitutional crisis. On 1 February 2001, the MPR voted to impeach President Abdurrahman Wahid for gross corruption and incompetence. Wahid was ultimately forced to step down on 23 July.

Ironically, the MPR did not view the Constitutional Court primarily as a means for individuals to check government power. According to Hendrianto (2010: 165-66), ‘the issue of individual rights never featured during the debate on the formation of the Constitutional Court’ and ‘there was no extensive discussion on how those rights could be defended in the Constitutional Court.’ Despite this, NGOs and activists have frequently achieved major victories against the government through constitutional litigation. The Court’s decisions have, in fact, had major political and economic repercussions. For example, it has invalidated the privatisation of electricity utilities,⁴ legalised the (defunct) Indonesian Communist Party (PKI),⁵ and mandated an open party-list election system.⁶

To get a better sense of NGO participation in constitutional litigation, I hired Indonesian law students to code the identity of each petitioner in each petition (see Table 2). I used the 541 petitions submitted to the Constitutional Court between 13 August 2003 (the date the Constitutional Court opened for business) and 2 October 2013 (the day before

2 Constitutional Court Decision No 29/PUU-V/2007.

3 Constitutional Court Decision No 12/PUU-V/2007.

4 Constitutional Court Decision No 1-21-22/PUU-I/2003.

5 Constitutional Court Decision No 11-17/PUU-I/2003.

6 Constitutional Court Decision No 22-24/PUU-VI/2008.

Chief Justice Akil Mochtar was arrested for corruption).⁷ Overall, there were 3,002 individual petitioners, with an average of 5.36 petitioners per case. NGOs constituted around 21 per cent of the total and appeared in 144 cases. Despite the concerns of some Indonesian NGOs (Hukum Online, 2010) that the Court would favour traditional elites, NGOs were involved in far more cases than private businesses, political parties, or local governments (see Table 2).⁸

Table 2: Summary Statistics of Petitioners in Constitutional Review Cases (Aug. 2003 - Oct. 2013)

Petitioner Type	Number of Cases	Number of Petitioners	Example
Individual	312	1389	Reffy Harun
Political party	125	863	Gerindra
NGOs	144	497	Indonesian Farmer's
Private business	37	108	Union PT. Gudang
Local gov.	45	134	Garam Papua DPRD
National gov.	11	11	Election Commission

I also disaggregated the NGO category to obtain more information about the different types of NGOs involved in constitutional litigation (see Table 3). Human rights, good governance, and labour NGOs were amongst the most frequent (in 40, 30, and 33 cases, respectively). Indeed, the dominance of these NGOs suggests that the Constitutional Court is a more attractive venue to leftist/progressive groups. This makes sense, given the history of progressive NGOs in Indonesia, which have historically tended to distrust the state, especially after the 1965 crackdown on the PKI. During the New Order, anti-Soeharto, pro-poor NGOs preferred to stay out of party politics and pursue their policy agendas outside of the legislature (Lane, 2008). Even after *Reformasi*, many NGOs have refused to align with any of the major political parties, viewing the current system as hopelessly corrupt and captured by elite interests (Mietzner, 2013; Rosser and van Diermen, 2016).

7 On 2 October 2013, the KPK arrested Chief Justice Akil Mochtar for taking Rp. 60 billion in bribes during the adjudication of 15 regional elections disputes. In addition, investigators found narcotics in his office. He was sentenced to life imprisonment in June 2014. Butt, 2015: 46-48.

8 See Nardi (2018a: Section 4.2) for details about coding and methodology.

Table 3: Summary Statistics of Organised Interest Group Petitioners in Constitutional Review Cases (Aug. 2003 - Oct. 2013)

Type of NGO	# of Cases	# of NGOs	Example
Commercial	7	8	Chamber of Commerce and Industry
Consumer	3	3	Indonesia Insurance Consumers Foundation
Development	12	14	Urban Poor Community
Education	12	65	Teacher's Union of the Republic of Indonesia
Environment	11	20	Indonesian Center for Environmental Law Indonesian
Environment	17	44	Center for Environmental Law
Gender	12	19	Women's Solidarity Union
Governance	30	59	Indonesia Corruption Watch
Health	4	4	Indonesian Medical Association
Human rights	40	60	Commission for Disappeared and Victims of Violence
Indigenous	11	16	Indigenous Peoples Alliance of the Archipelago
Labor union	33	107	Indonesian Federation of Labor Unions
Lawyers	8	10	Congress of Indonesian Advocates
Legal aid Media/	19	26	Lembaga Bantuan Hukum
Journalism	7	15	Indonesian Television Journalists Association
Religion	10	24	Nahdlatul Ulama
Youth	3	6	Indonesian National Student Movement

The Constitutional Court provides an alternative means for these groups when they cannot advance their policy goals through the legislative or executive branches. This is also makes sense tactically, as progressive NGOs tend to be more comfortable framing their arguments in terms of legal rights than as political trade-offs (Bedner, 2014: 565). By contrast, conservative or traditionalist NGOs, such as religious foundations and chambers of commerce, do occasionally participate in constitutional litigation, but not in numbers commensurate with their influence on Indonesian politics.

The Constitutional Court, especially under Chief Justice Asshiddiqie, encouraged NGOs to challenge laws and took several steps to make it easier for them to do so (Hendrianto, 2016a: 518). First, the Court abolished filing fees to reduce the costs of litigation. Second, it lowered barriers to standing for NGOs engaged in public interest litigation (Hendrianto, 2015: 35). In theory, any party filing a petition before the Constitutional Court must prove that they suffered a specific or actual constitutional harm. In practice, the Court seldom denies standing to NGOs, even if the law being challenged does not directly harm the organisation itself. In one of its earliest decisions, the Court declared that generalised harm to the public welfare or good governance constituted a sufficient constitutional harm for the purpose of standing.⁹

⁹ Constitutional Court Decision No 1-21-22/PUU-I/2003, p. 327. See also Constitutional Court Decision No 22/PUU-XII/2014, p. 22.

SETTING THE AGENDA

Like most courts, the Constitutional Court cannot issue decisions *sua sponte*; the justices must wait for a petition to raise a constitutional issue before they can issue an interpretation of the constitution. As such, the Court's power to enforce the constitution is only as expansive or narrow as the cases it receives in its docket. NGOs can effectively expand the range of constitutional issues that the Court adjudicates by submitting petitions dealing with new or unique legal claims. In doing so, they help set the Court's agenda for each term. In *The Rights Revolution*, Epp (1998) argues that agenda-setting is one of the most powerful tools rights activists possess to influence courts. NGOs can inform judges not just about rights violations but also about any government attempts to evade the court's previous decisions.

NGOs play a particularly important role in Indonesian constitutional litigation because of the Court's prospectivity doctrine. In general, prospectivity reduces the incentives of average Indonesians to invest the resources necessary to challenge constitutional violations because they cannot receive compensation for past constitutional harms (see Butt, 2012: 107-08). Many individuals will be tempted to free-ride on the efforts of others. Fortunately, NGOs help overcome this problem. Many Indonesian NGOs were founded to pursue a set of policy goals, such as religious education or environmental protection. They have an interest in not just past harms but also preventing future constitutional violations.

Moreover, where litigation might be prohibitively expensive for the average Indonesian citizen, NGOs can pool the resources of their members and donors (Rosser and Curnow, 2014; Curnow, 2015; Rosser 2015b). Rosser (2015a: 187) goes so far as to claim that:

[I]t is difficult to imagine individuals successfully pursuing their rights in court without the financial, organisational and technical assistance provided by NGOs such as [the Legal Aid Institute of] Jakarta, PEKKA [Women Heads of Households] and Indonesia Corruption Watch... [S]uccessful citizen efforts to defend rights [...] in Indonesia have only occurred when citizens have had access to an effective SSLM [support structures for legal mobilisation] that has enabled them to mobilise the resources required to launch and sustain expensive and time-consuming court cases.

As such, NGOs have the incentive and the resources to challenge unconstitutional laws in court.

The education-budget decisions serve as an example of how NGO agenda-setting can shape the Court's jurisprudence. In 2002, the MPR amended art 31 of the Constitution to require the government to allocate at least 20 per cent of the state budget to education. In 2004, a coalition of NGOs submitted a petition challenging the 2005 budget because it only allocated 7 per cent to educational expenditures (Susanti, 2008:

258). The petitioners also challenged the elucidation to the National Education System Law, which permitted the government to reach the 20 per cent threshold ‘gradually.’ The Court agreed that the government needed to comply immediately, but declined to declare the budget null and void, citing practical concerns that doing so would throw government into chaos (Butt, 2009).¹⁰

A different group of NGOs, including the Indonesian Teacher’s Union, or Persatuan Guru Republik Indonesia (PGRI), challenged the 2006 and 2008 budgets on the same grounds. Government lawyers argued that the 20 per cent requirement included teacher’s salaries, whereas PGRI argued the budget should treat teacher salaries no differently than those of other civil servants. Again, the Court declared the budgets unconstitutional but not null and void.¹¹ However, because the president and DPR had been made aware of the Court’s earlier ruling, they could no longer argue that they had made a good faith effort to comply with the Constitution. In the 2008 case, the Court found the president and DPR had deliberately defied the Constitution and demanded that the 2009 budget fully meet their constitutional obligations. It also informed the government that if the next budget failed to pass constitutional muster, the Court would use its previous rulings as precedent to declare the budget null and void (Hendrianto, 2016b: 7). The DPR did, in fact, increase the spending on education in the 2009 national budget to 20 per cent, and spending has remained around that level ever since (See Figure 1).¹²

10 Constitutional Court Decision No 012/PUU-III/2005.

11 Constitutional Court Decision Nos 26/PUU-III/ 2005 and 13/PUU-VI/2008.

12 There is some controversy about these figures. The government includes training for civil servants in budgeting for education, so the amount of funds going directly to the public school system is less than it might initially appear.

Figure 1: Education as Percentage of Total Government Expenditure (%)



Data are from the World Bank World Development Indicators available at <http://data.worldbank.org/>. Note data are missing for the year 2006.

The decision of NGOs to pursue these cases had two important implications for the Constitutional Court. First, the justices received an opportunity to participate in the debate over the constitutionality of the education budget. Importantly, the majority stated unequivocally that art 31 was justiciable, even though some scholars thought this provision was merely aspirational (Ellis, 2002: 146). Second, the cases put pressure on the DPR to increase funding for education (Gauri and Brinks, 2015: 93-94). After the rulings, the media and DPR committees paid more attention to the state of the education system (Venning, 2008: 125). As noted above, this eventually yielded concrete results in the form of higher government spending on education.¹³ Without

13 It is difficult to establish a direct causal link between the Court's decision and the change in education expenditures. On the one hand, Butt (2015: 128-29) points out that a World Bank study of Indonesia's education spending did not even mention the decision. On the other hand, the decision likely contributed to the growing political pressure on the government, even if it was not the deciding factor.

NGOs taking the initiative, the Court might never have had the chance to issue these decisions, much less influence policy.

To evaluate the agenda-setting power of NGOs more broadly, I used a latent topic model in order to classify the legal issues raised in each petition.¹⁴ A latent topic model is a natural language processing tool that enables a computer to automatically detect topics in a corpus of documents (Grimmer, 2010; Grimmer and Stewart, 2013). The model uses information about the distribution of words within each document and across all documents in the corpus in order to determine which words tend to appear together most frequently. These clusters of words are the basis for the topics. For example, if the words ‘election’, ‘party’, ‘voter’, and ‘candidate’ tend to appear in the same document, they might form one topic cluster.

Latent topic models have several advantages over hand-coding. First, using an automated process reduces the risk of bias in coding the documents (Harvey and Woodruff, 2011). Second, the topic model can better account for documents that contain multiple types of topics. Typically, hand-coding will oversimplify and force each document into one or two categories but many legal disputes involve multiple types of legal claims (Shapiro, 2009). Finally, computer coding is simply more practical for a large corpus of documents; aside from learning a new program, it costs nothing and takes a few hours to analyse thousands of documents.

Before running the model, I had to convert all of the petitions into a machine-readable format. I also had a computer program stem all Indonesian words down to their roots (that is, remove prefixes or suffixes) to allow the topic model to recognise different forms of the same word.¹⁵ For example, *memilih* (to select), *pemilihan* (election), and *pemilih* (voter) are all variants of the root word *pilih* and can all relate to the same topic (elections). I also removed extremely rare and frequent terms because such terms are usually not related to unique topics. For example, words that appeared in almost every petition, like *permohonan* (petitioner) and *undang-undang dasar* (constitution), tend to describe constitutional litigation writ large, not any particular topic.

14 The version I use is a Structural Topic Model from Roberts, Stewart and Airoldi (2016).

15 I used the Nazief and Adriani (1996) stemming algorithm.

Table 4: Topics 1-22 from Structural Topic Model of Petitions

Topic 1 Environment	hutan (forest)	tambang (mining)	kawasan (area)	daerah (region)	tetap (remain)
Topic 2 Labor	kerja (work)	buruh (labor)	serikat (union)	usaha (business)	alamat (address)
Topic 3 Judicial	hakim (judge)	agung (supreme)	perkara (court case)	gugat (lawsuit)	kuasa (power)
Topic 4 Elections	presiden (president)	pilih (elect)	wakil (representative)	calon (candidate)	politik (political)
Topic 5 Education	didik (students)	selenggara (implement)	guru (teacher)	yayasan (foundation)	anggar (budget)
Topic 6 Agriculture	tanah (land)	tani (farm)	usaha (business)	rakyat (people)	ikan (fish)
Topic 7 Lawyers	advokat (lawyer)	profesi (profession)	organisasi (organization)	publik (public)	bentuk (form)
Topic 8 Regional	kabupaten (district)	daerah (region)	provinsi (province)	Papua (Papua)	bentuk (shape)
Topic 9 Finance	pailit (bankruptcy)	bayar (pay)	wajib (compulsory)	utang (debt)	tunda (postpone)
Topic 10 Tax	pajak (tax)	alat (tool)	kena (taxable)	bea (duty)	berat (weight)
Topic 11 Advertising	anak (child)	siar (broadcast)	rokok (television)	bukti (proof)	hidup (living)
Topic 12 Political Parties	partai (party)	pilih (elect)	politik (politics)	anggota (member)	pemilu (election)
Topic 13 Religion	agama (religion)	islam (islam)	umat (congregation)	kawin (married)	bangsa (nation)
Topic 14 Regional Elections	daerah (region)	kepala (chief)	pilih (elect)	calon (candidate)	KPU (KPU)
Topic 15 Addresses	alamat (address)	camat (district)	kabupaten (county)	desa (village)	Jawa (Java)
Topic 16 Human Rights	manusia (human)	asasi (right)	lindung (protect)	bebas (free)	bentuk (form)
Topic 17 Welfare	sehat (health)	jamin (guarantee)	sosial (social)	anggar (budget)	tembakau (tobacco)
Topic 18 Legislative	DPR (DPR)	rakyat (people)	dewan (chamber)	anggota (member)	wakil (vice)

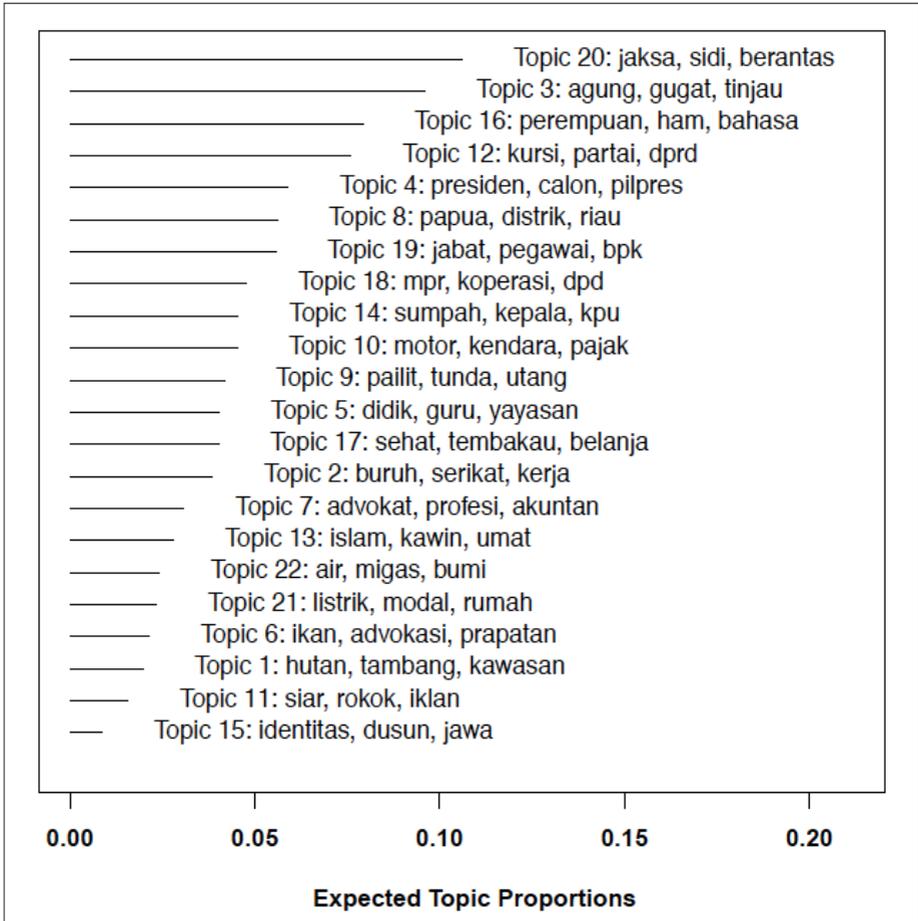
Topic 19 Government	jabat (officeholder)	uang (money)	masa (term)	badan (agency)	pegawai (employee)
Topic 20 Criminal	pidana (criminal)	tindak (act)	korupsi (corrupt)	jaksa (prosecute)	berantas (eradicate)
Topic 21 Economic	rumah (home)	usaha (business)	modal (capital)	ekonomi (economy)	listrik (electricity)
Topic 22 National Resources	air (water)	usaha (business)	sumber (resource)	daya (power)	guna (use)

The top five stemmed Indonesian words are listed in the first row of each topic, with translations below.

I present the 22 topics from the topic model in Table 4.¹⁶ The first five words are those with the highest probability of appearing in that topic cluster. Below each Indonesian term is an English-language translation. The topic dealing with criminal law was the largest topic, accounting for around 12 per cent of the text in all of the petitions (see Figure 2). The litigation and rights topics (Topics 3 and 16) were also prominent. This is not surprising, given that they cover language frequently used in litigation. The smallest topic was Topic 15, which includes language related to biographical information about the petitioners (all petitioners must list their name, address, and profession at the beginning of a petition). The three election-related topics – Topics 12, 4, 18, and 14 – cumulatively account for almost a quarter of the text in the petitions.

16 The number of topics has to be selected by the researcher (Blei, Ng and Jordan, 2003). The topic model does not automatically create labels for each topic cluster, so I assigned names to each topic based on the first five terms.

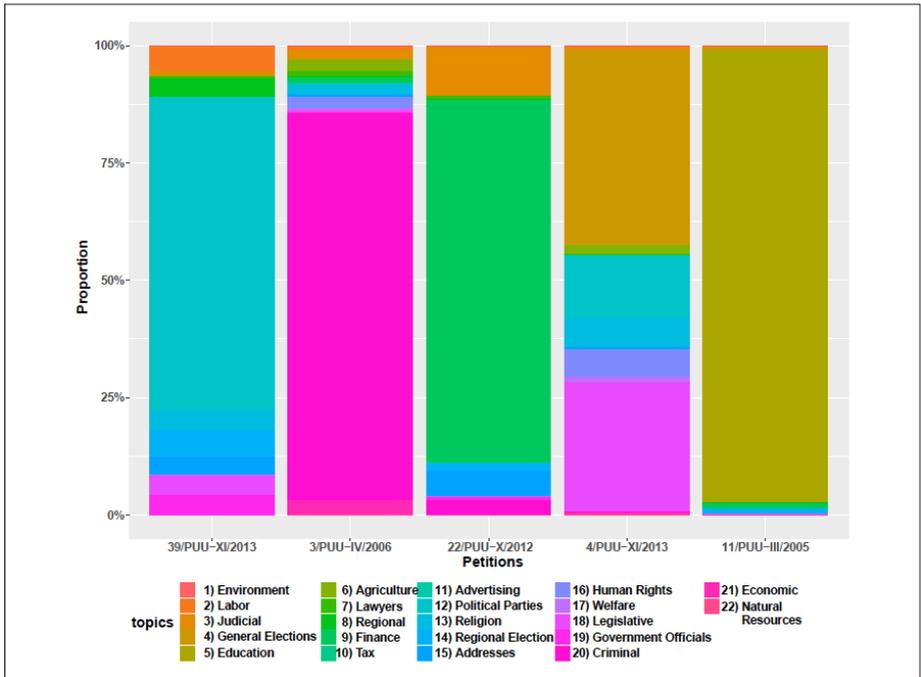
Figure 2: Expected Posterior Probability for Topics



To demonstrate how the topic model classifies documents, I selected five random petitions from the corpus and plotted the distribution of topics in each (see Figure 3). The bar graph shows the percentage of text in each petition assigned to each topic. For example, Petition No 39/PUU-XI/2013 challenged the 2008 Law on Political Parties, and so the largest topic is ‘political parties’ (Topic 12). The results for Petition No 4/PUU-XI/2013 show how the topic model handles multiple topics. That petition challenged the 2008 Law on Presidential and Vice Presidential Elections, so the largest percentage of text falls under the ‘executive elections’ topic (04). However, there is also a significant amount of text in the ‘legislative’ (18) and ‘political parties’ (12) topics,

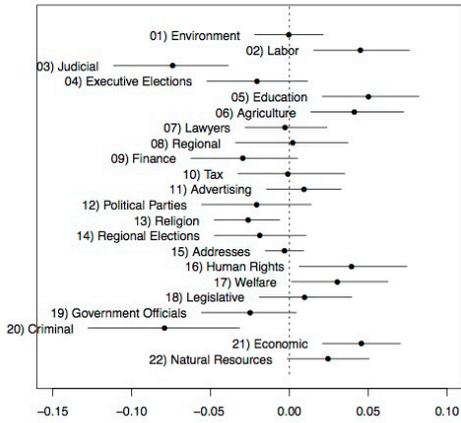
which are relevant to the nomination of presidential candidates in Indonesia.

Figure 3: Histogram of Topic Results for Constitutional Court Petitions

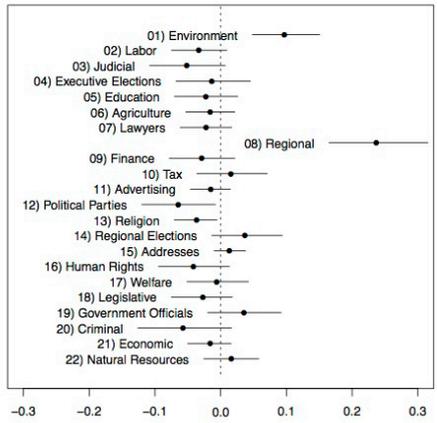


The laws challenged in each petition and largest topics are: Law No. 2 of 2008 on Political Parties (12); Law No. 31 of 1999 on the Eradication of the Crime of Corruption (20); Law No. 37 of 2004 on Bankruptcy and Debt Payment Suspension (09); Law No. 42 of 2008 on the Presidential and Vice Presidential Elections (04); and Law No. 20 of 2003 on the National Education System (05).

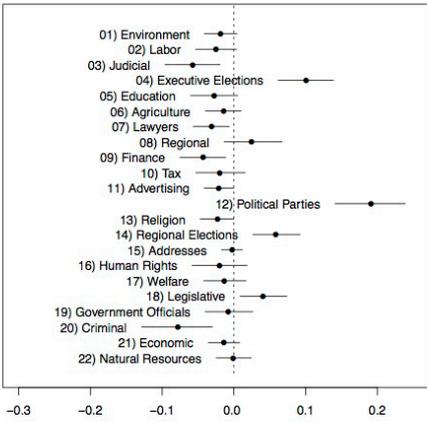
To understand how petitioners affect the Court’s agenda, I measured how the distribution of topics in a petition changed depending upon the types of petitioners involved in the case. I then took the difference between the average distribution of topics associated with each category of petitioner and the average topic distribution associated with all other petitioners. If the result was greater than zero, then that type of petitioner was responsible for an above-average proportion of text associated with that topic. For example, in Figure 4, the average petition submitted by a political party would contain approximately 20 per cent more text dealing with the ‘political party’ topic than would petitions submitted by other types of petitioners.



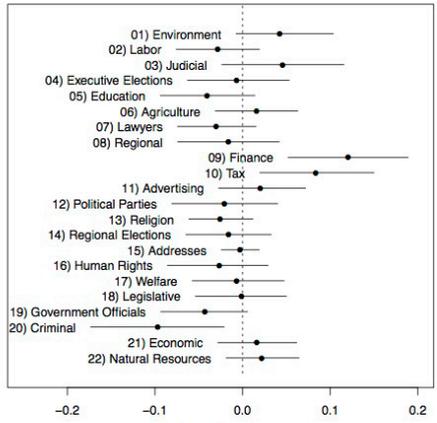
Nongovernmental Organizations



Local Government



Politicians & Parties

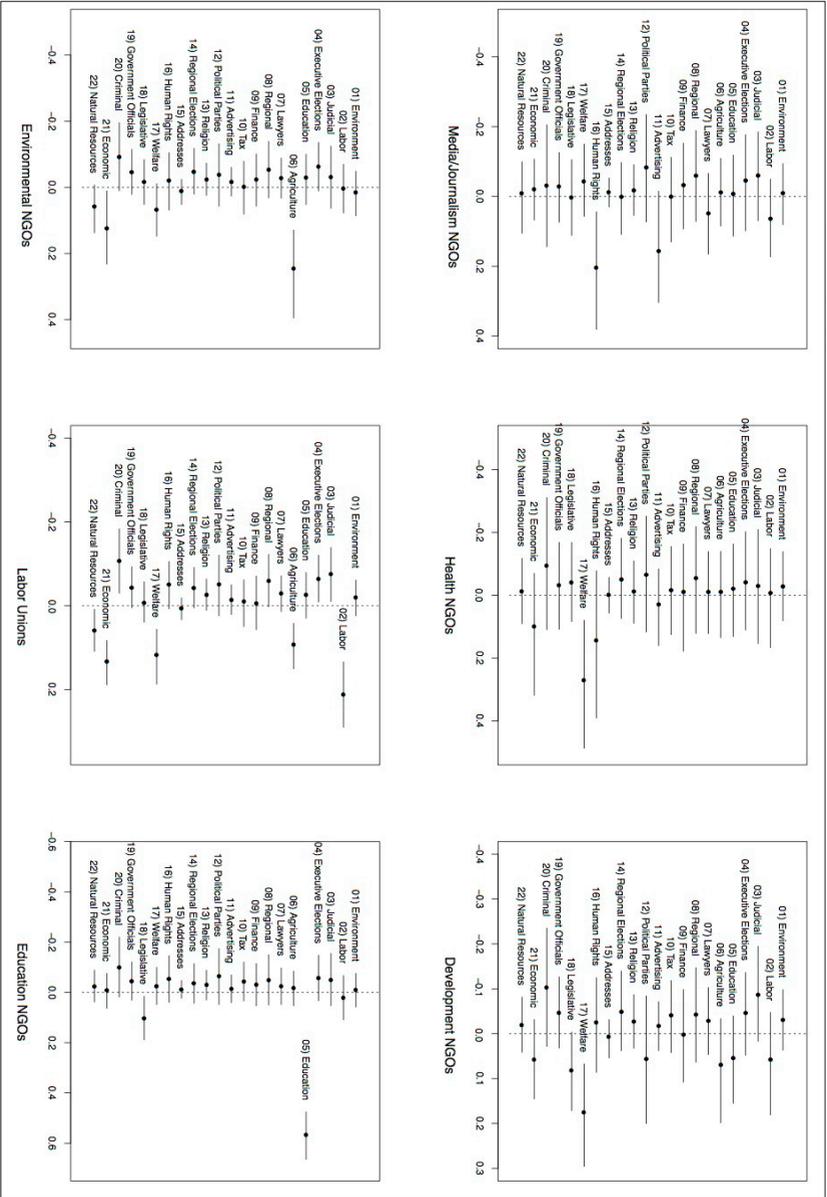


Private Businesses

The plot shows the expected difference in topic posterior probability for when the petitioner is of the type

The results indicate that NGOs are generally responsible for more of the content on the Constitutional Court's agenda related to socioeconomic and rights issues, particularly labour, education, agriculture, human rights, welfare, and economics. The agenda-setting effect becomes even more pronounced for specific types of NGOs (see Figure 5).¹⁷ NGOs focused on media or journalism are 20 per cent more likely to file petitions related to the human rights topic, which includes freedom of speech (for example, *informasi* or information). Petitions filed by health and development NGOs are approximately 20-25 per cent more likely to include text related to the welfare topic, which includes health (for example, *sehat*, or health, and *tembakau*, or tobacco) and social security (for example, *jamin* or guarantee, and *sosial*). For environmental NGOs, petitions are 20 per cent more likely to focus on agricultural topics. Labour unions tend to file petitions associated with labour, agricultural, welfare, and economic topics. Education NGOs seem to have the largest influence over a single topic; simply having an education NGO in a petition increases the proportion of text in the education topic by around 60 per cent.

17 Note that the figure only includes NGOs with significant or noteworthy results.



The plot shows the expected difference in topic posterior probability for when the specific type of NGO petitioner is of the type listed below versus all other NGO petitioners. The bars represent 95% confidence intervals.

These results have two important implications for the Constitutional Court. First, NGOs are more likely to focus on socioeconomic issues, such as those under art 33 of the Constitution, and, to a lesser extent, human rights. Second, the types of legal claims NGOs raise differ quantitatively and qualitatively from the claims submitted by other types of petitioners. They raise unique constitutional issues that might not have reached the Court in their absence. Taken together, these results show that NGOs play an important role in setting the Court's agenda. NGOs help decide which cases reach the Court, and thus which provisions of the Constitution the justices have the opportunity to interpret. In other words, the Court might have had fewer opportunities to influence Indonesian policy on socioeconomic issues had it not been for NGOs.¹⁸

INFORMING THE JUSTICES

NGO petitions not only set the agenda; they also provide the justices with information about the legal issues at stake. This is crucial because judges are limited in their sources of information. Unlike the legislative and executive branches, which have staff to conduct research on policy issues, the Constitutional Court lacks the capacity to conduct their own in-depth research into the facts or the policy implications of a case. This makes the justices very dependent upon the quality of the information contained in the briefs. One way they can assess the credibility a petition is through the identity of the petitioner. Justices are more likely to believe and cite briefs that come from individuals or organisations they trust (see Kearney and Merrill, 2000: 749-50; Lynch, 2004: 49-56).

There are several reasons why the justices might view NGOs as credible petitioners, especially during the Court's first few years. Some of the justices had close ties to civil society groups before joining the Constitutional Court. For example, Jimly Asshidiqie was a law professor at the University of Indonesia and, as chief justice, he recruited lawyers and activists from NGOs to work at the Constitutional Court as research assistants and staff. Former Chief Justice Mohammad Mahfud (2008-13) was a professor of law at the Islamic University of Indonesia and also had ties to Islamic student groups.

Compared to the average Indonesian individual, NGOs have greater capacity to conduct research and incorporate quality information into their petitions. Larger NGOs often have researchers and lawyers, as well as networks of experts and stakeholders

18 Scholars who study Indonesia claim that the Constitutional Court tends to favour socioeconomic rights over civil and criminal rights (Butt, 2012; Hendrianto, 2016b). My results suggest a possible explanation. NGOs dominate agenda-setting for labour, education, and welfare issues on the Court's docket. In engaging with the Court so consistently on these issues, these NGOs might have helped persuade the justices to agree with their policy preferences. By contrast, where NGOs do not play an agenda-setting role, they have less influence over the Court because the justices receive briefs from other types of petitioners who might advance different policy positions. While NGOs do play some role in setting the Court's agenda with respect to rights issues, the effect is much smaller.

they can call upon for assistance. NGOs that focus on a narrow set of policy issues can develop considerable expertise on that issue. Knowing this, justices might be more inclined to believe information contained in NGO briefs is more accurate and well researched. At the very least, the justices can expect most NGOs will not file frivolous, poorly researched claims with the Court.

NGOs also possess political or moral capital. Bryant (2008) argues that moral capital is particularly important for NGOs because a 'good reputation' can help them obtain donor funding, increase membership, and influence policy debates. When NGOs engage in constitutional litigation, they claim to do so to advance the public interest, unlike private business or politicians, which pursue litigation for profit or for political office. As such, the justices might view NGOs as having reputational incentives to provide the court with accurate and credible information. In other words, justices are more likely to view NGOs as honest brokers.

The information contained in briefs becomes especially important in cases dealing with complex economic issues that involve technical knowledge, such as the challenges to the 2001 Petroleum and Natural Gas Law. This statute was designed to increase private sector involvement in the fossil fuel sector. It also established an independent regulatory authority, BP Migas, to oversee licenses and concessions. However, economic nationalists saw the law as a challenge to the country's control over its natural resources. NGOs worried market reforms would let foreign companies exploit Indonesia's resources without generating benefits for local communities (Rosser and van Diermen, 2016: 344).

The Constitutional Court oversaw several challenges to this Law. In 2003, a group of NGOs, including a labour union representing Pertamina employees, and several professors asked the Constitutional Court to disband BP Migas for violating art 33 of the Constitution, which mandates that the country's natural resources 'shall be under the powers of the State' and exploited for public benefit. The Justices refused, noting that regulation, administration, management, and supervision of the oil and gas sector remained under government control.¹⁹ In 2007, a group of eight DPR members filed another constitutional challenge to the constitutional authority of BP Migas, but the Court rejected it as well.²⁰

In 2012, a coalition of ten Islamic organisations and 32 prominent individuals submitted another petition against the law. The group was led by Muhammadiyah, a modernist Islamic organisation well-known for its charitable work. In 2009, the organisation's leadership board decided to investigate laws that violated the Constitution, calling for a 'constitutional jihad' (Habir, 2013: 127). The petitioners claimed BP Migas violated art 33

19 Constitutional Court Decision No 2/PUU-I/2003.

20 Constitutional Court Decision No 20/PUU-V/2007.

in three ways. First, any production-sharing agreements BP Migas signed with private foreign companies legally bound the government in a way that reduced its control over the resources. Second, the arbitration clauses in the contracts exposed the government to binding rulings from private international arbitration panels. Finally, the law forced state-owned enterprises to compete with private companies.

In a surprising decision, the Constitutional Court granted the petition and disbanded BP Migas.²¹ As a matter of law, the Court found that allowing BP Migas to enter in to binding contracts unconstitutionally bound the government because it would lose the ability to later pass regulations or policies that contradicted those contracts. The Court spent much of its decision discussing the policy merits of 2001 law. It accepted the petitioners' evidence that the arrangement with BP Migas did not maximise public welfare. It also noted allegations against BP Migas for abuse of power and corruption (see Butt and Siregar, 2013). In short, this decision, along with the Court's other jurisprudence, strongly suggests that that Court believes privatisation is incompatible with the state's obligations under art 33 (see Butt and Lindsey, 2008; Venning, 2008).

The Court reversed its previous decisions for multiple reasons but one important factor was the identity of the petitioners in the 2012 case. As Davidson (2015: 123-24) notes, the petitioners in the 2007 case – the least successful of the three – were politicians whom the Court likely saw as motivated by political interest rather than the public good. Davidson also points out that the NGOs in the 2003 case, primarily labour organisations representing Pertamina employees, not only lacked the gravitas of more established NGOs but also had a financial stake in the case because competition from the private sector would threaten their jobs. Thus, they had little credibility as champions of the public interest. By contrast, Muhammadiyah is one of the most reputable organisations in Indonesia. It claims around 30 million members and runs thousands of non-profit schools, hospitals, and youth organisations across the country. Politicians who opposed the law encouraged Muhammadiyah to take the lead in the case because it has 'vastly more social and moral authority in the country than any political party' (Davidson, 2015: 126).

The justices quoted a significant proportion of Muhammadiyah's petition in their final decision. Some of that text contains charged rhetoric and bold claims about the political motivations behind the 2001 Petroleum and Natural Gas Law. For example, the Constitutional Court copied the following block of text almost exactly as it appeared in the petition:

Therefore, one of the factors driving the formation of Oil and Gas Law in 2001 was to accommodate foreign pressure and even foreign interests[...] The international interests that infiltrate every political consideration underlying the Oil and Natural Gas Law make the formation of Oil and Gas Law, even though

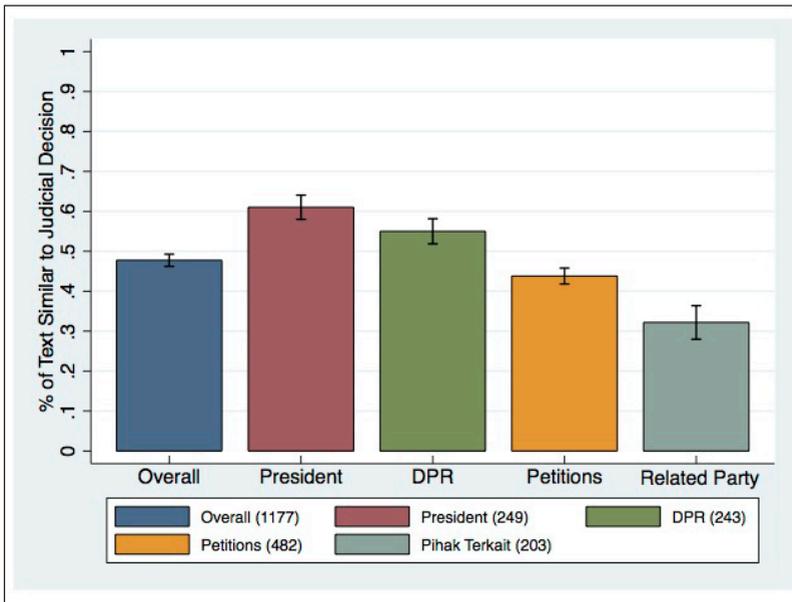
21 Constitutional Court Decision No 36/PUU-X/2012.

it was adopted through the formal legislative procedures, flawed because the intention behind the formation of Oil and Gas Law is injurious Article 33 of the 1945 Constitution. The branch of production which controls the livelihood of the people is merely a constitutional illusion[...]

The Court also accepted the petitioners' evidence about the economics of the natural gas industry and the law's impact on corruption.

To evaluate the ability of NGOs to influence the information the Constitutional Court receives more broadly, I measured the extent to which the justices quote a petition in their final written decision. The justices are more likely to cite briefs that they believe to be credible or informative. Although justices do sometimes quote a petition simply to summarise its arguments or information, they are still more likely to do so if they believe the petition to be well researched and accurate. That said, it is important to note that credibility does not necessarily guarantee a favourable outcome; the justices might accept a brief's factual allegations and take a petitioner's arguments seriously, but ultimately rule against them.

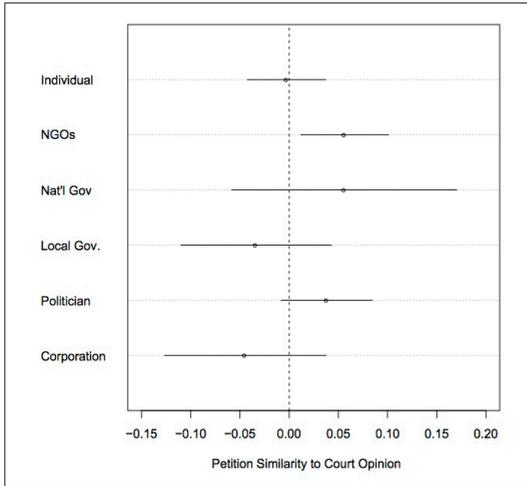
Figure 6: Similarity between Briefs and Constitutional Court Decisions



WCopyfind was used to calculate the similarity between each brief and the Constitutional Court's decision in that same case. If there were more than two briefs in the case, the average was used. The histogram shows the average percentage of text in each type of brief similar to the text in the Court's decision. Bars represent 95 per cent confidence intervals.

I used plagiarism-detection software WCopyfind to measure the amount of text the justices quoted from petitions in their final decisions.²² WCopyfind systematically searches through strings of text in pairs of documents to find matches. It then reports the total number of matching words, as well as the number of matched words as a percentage of the total number of words in the document. I set the program to report any matches at least 10 words long. I then calculated the percentage of words in the petition that was quoted in the Court’s decision. In other words, I measured how much of the petition the justices found useful or informative.²³

Figure 7: Similarity between Petitions and Judicial Opinions



WCopyfind was used to calculate the similarity between each petition and the Constitutional Court’s decision in that same case. The plot shows the difference in means for each type of petitioner. A positive number indicates greater similarity with judicial decisions, while a negative number indicates less similarity. Bars represent 95 per cent confidence intervals.

In general, the Constitutional Court quoted an average of 44 per cent of each petition (Figure 6); less than statements submitted by the president and DPR but more than

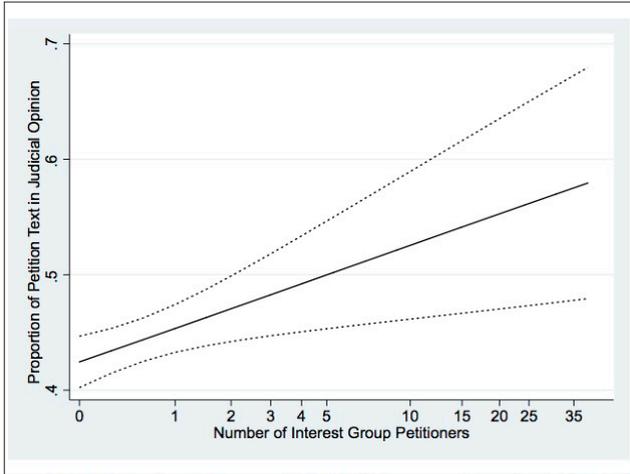
22 Other scholars have started to use plagiarism-detection software to study the effect of briefs on judicial decisions (see, Collins, Corley and Hamner, 2014).

23 More details on the methodology available in Nardi (2018a: Section 6.2).

related party (*pihak terkait*) briefs.²⁴ It is also more likely to quote text from petitions submitted by NGOs than by other types of petitioners (Figure 7).

I then used a statistical model in order to control for other variables that might affect the extent to which justices quote a petition, such as the length of the petition (in words), the outcome of the case, and the legal issues involved. I find that, all else being equal, the Court is still more likely to quote petitions submitted by NGOs. If a petition has the support of at least one NGO, the proportion of quoted text increases from around 42 per cent to 47.5 per cent. Moreover, the effect increases with more NGOs. The Court quotes on average around 50 per cent of text from a petition submitted by a coalition with 5 NGOs, compared to 44 per cent with a single NGO (Figure 8). Notably, the Court did not seem either more or less likely to quote petitions submitted by other types of individuals or organisations.

Figure 8: Similarity between NGO Petitions and Judicial Opinions



WCopyfind was used to calculate the similarity between each petition and the Constitutional Court's written opinion in that same case. Using the results from Model 3 in Table 6.5, the plot shows the marginal effect of the number of interest group petitioners associated with a petition on the amount of text associated with the Court's opinion. All other variables are held at their mean or modal values. Dashed lines represent 95 per cent confidence intervals.

Returning to the Petroleum and Natural Gas case, the effect of Muhammadiyah's credibility and moral authority is reflected in the Constitutional Court's treatment of its

24 Note that the number is high because Constitutional Court decisions include extensive summaries of each brief at the beginning of the decision, often copying portions of the brief verbatim.

petition. The Court quoted around 63 per cent of the text in the petition – nearly 20 per cent higher than the average petition – but only 51 per cent of the president’s statement. By contrast, in the 2007 Oil and Gas case, the Court quoted more text from the government’s statement than from the petition.

These results have several important implications for the Constitutional Court. First, they imply that the justices tend to view petitions submitted by NGOs as more credible and informative than those submitted by other types of litigants. Second, combined with the topic model from the previous section, they suggest that the Court views some NGOs as ‘policy experts’ on certain subjects. As discussed above, NGOs were significantly more likely to be associated with petitions dealing with socioeconomic and rights issues. As NGOs focus on these issues, they gain experience and knowledge. Indeed, the Court has come to view certain NGOs and their expert witnesses as credible voices on economic and natural resource policy.

POLICY IMPLICATIONS

The savvy leadership of its first two chief justices, Asshiddiqie and Mahfud (Hendrianto, 2016), the Court’s institutional independence, and even the fragmented nature of Indonesian politics post-*Reformasi* (Horowitz, 2013: 236-37), contributed to the Indonesian Constitutional Court’s success during the past 15 years. Yet, my findings highlight how NGOs also played a role by expanding the range of constitutional issues that reached the Court and by providing the justices with information. The Court’s dependence on litigants means that stakeholders interested in improving the rule of law in Indonesia would do well to invest in the capacity of NGOs and activists to file constitutional petitions and to conduct legal research.

While nearly 500 NGOs did bring constitutional violations to the Court’s attention between August 2003, and October 2013 (see Table 2), many others lacked the capacity or knowledge to do so. In fact, given the low standing threshold for constitutional litigation, the amount of petitions the Court receives seems relatively low. Although the rights situation in Indonesia has improved markedly since the end of the New Order, there are still important issues that have not yet reached the Constitutional Court, despite constitutional implications.²⁵

Moreover, the distribution of individuals and organisations submitting petitions to the Court is not fully representative of Indonesia. Over half of the petitions came from litigants who lived or worked in Jakarta, the national capital. Another 22 per cent included petitioners from Java outside Jakarta. Only 25 per cent of petitions included at least one individual or organisation from Sumatra, Kalimantan, Sulawesi, Papua, or any of the other parts of the country (and some of these also included petitioners from

25 For example, the DPR is currently considering a proposal to criminalise homosexual intercourse (de Haan, 2018).

Jakarta).

There are many reasons why more NGOs and activists have not filed constitutional challenges. It is possible that they do not believe the justices would agree with their claims. However, it also seems likely that many do not have the resources or the knowledge to engage in constitutional litigation. As noted above, relatively few Indonesians are even aware of the Court and fully understand its functions. Moreover, the geographic distribution of the petitioners suggests that the Court's location makes it less accessible to Indonesians who live outside Jakarta, either because of travel costs or lack of familiarity with the system.

International donors and Indonesian NGOs could help ameliorate these problems by promoting awareness of the Constitutional Court and constitutional remedies. Many NGOs already hold workshops to educate Indonesians about their rights, so they could easily incorporate constitutional issues into their programming, if they do not already do so. Donors could also fund workshops to train NGOs outside Java in understanding constitutional litigation and identifying constitutional violations.

As noted above, another challenge is that the justices depend upon petitioners, the government, and related parties to provide accurate and relevant information in their briefs. There is a real risk that factual errors will reach judges and influence their decisions (see Larsen, 2014). For example, a recent study of US Supreme Court decisions between 2011 and 2015 found that around 8 per cent of them contained material errors of fact, including several that might have affected the outcome of the case (Gabrielson, 2017). Scholars of the Indonesian Constitutional Court's jurisprudence have also expressed concern about the quality of the Court's decisions, especially its legal reasoning (Butt, 2016). In particular, several have criticised the Court's economic analysis in cases dealing with natural resources under art 33 (see Venning, 2009; Butt and Lindsey, 2009).

Policymakers and donors can take several steps to improve the reliability of the information contained in NGO briefs. While this problem is not unique to NGOs, it makes sense to prioritise them, given that the Court quotes NGO briefs at a higher rate. First, donors already managing capacity-building programs for Indonesian NGOs can provide training on legal and empirical research. Such training should provide advice on ensuring accuracy and checking against bias. For NGOs involved in socioeconomic issues, donors could also offer courses on basic economic and scientific literacy. Constitutional cases often involve disputed facts and it is impossible to completely eliminate uncertainty about the information justices receive. Nonetheless, improving the quality of information should at least reduce the risk of errors in Constitutional Court decisions.

Finally, donors and policymakers should consider funding additional research on the Indonesian Constitutional Court and its relationship with external stakeholders. As Australian legal scholars Simon Butt, Melissa Crouch, and Rosalind Dixon (2016: 2)

note in a recent review of the literature, ‘The Court’s role in constitutional politics also remains under-studied in a broader comparative context.’ In particular, we still know relatively little about the interplay between Constitutional Court and the Indonesian public at large. While I have found some evidence that public opinion can sway the justices (Nardi, 2018b), it is not clear how members of the public learn about the Court and form opinions about it. It would be useful to have more systematic data on public awareness and approval of the Court. Most publicly available surveys tend to ask about the judiciary or justice sector generally rather than specifically about the Constitutional Court.

CONCLUSIONS

This paper originated from my dissertation project about civil society and the Indonesian Constitutional Court. My original goal was to test academic theories on judicial voting behaviour. However, my findings go beyond the academic literature. By showing how much NGOs influence the Constitutional Court’s agenda and the information the justices receive, my research confirms the importance of demand-side stakeholders in Indonesia’s justice system. There is sometimes a tendency to think of judicial capacity as the sum of a court’s personnel, funding, and equipment, but I argue another important metric is the quality and extent of the institution’s relationship with external stakeholders.

Empowering NGOs will not only improve Indonesian civil society but will also help the Constitutional Court.

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