# BOOK REVIEW SYMPOSIUM: CONSTITUTIONAL DEMOCRACY IN INDONESIA EDITED BY MELISSA CROUCH

## Review Essay: Promoting Constitutional Democracy Through Judicial Transnational Engagement

Melissa Crouch (ed.), Constitutional Democracy in Indonesia, Oxford University Press, Oxford 2023, 336 pages, £ 87.00 (Hardcover), ISBN 9780192870681.

By *Maartje De Visser*[*]

Melissa Crouch's new edited collection *Constitutional Democracy In Indonesia* is a timely addition to the growing corpus of Global South literature in comparative constitutional law. It interrogates the experience of one of the world's largest jurisdictions, which has gone largely unnoticed in the discourse to date, thereby enriching our collective understanding of the operation of the constitutional democracy. The volume explores how Indonesia has grappled with constitutional evergreens, such as questions of institutional design and the relationship between different state actors, and usefully does so against the backdrop of the possible advent (again) of authoritarianism in the country. As this is, alas, a contemporary challenge that is not peculiar to Indonesia, the collection accordingly holds out the potential of contributing to furthering our collective thinking in a manner that could benefit the accuracy with which we examine and critique democracy-related developments in both Global South and Global North jurisdictions. In this regard, and as a more general point, there is a clear need for more works like *Constitutional Democracy In Indonesia* that offer "thick" descriptions and analyses of countries that are under-represented in the literature to enlarge the pool of empirical data that comparative constitutional scholars can draw on when it comes to concept-formation and theory-testing. In a related vein, praise is due for the choice to feature the voices of scholars from Indonesia, several of whom have so far not been regular participants in the English-language comparative constitutional discourse. Not only are such scholars particularly well-positioned to bring knowledge about their jurisdiction to the fore that is duly and deeply contextualized; their involvement is also a question of epistemic justice.

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In what follows, I wish to explore the behavior of one of the central actors featured in the volume, that is to say, the Constitutional Court (or *Mahkamah Konstitusi, MK*). This Court and its case law are the subject of the second half of the book, which considers how it interacts with a range of domestic interlocutors. My observations aim to complement this perspective by adding an external one, focusing on its approach vis-à-vis other highest courts in the region mainly through its involvement in the Association of Asian Constitutional Courts and Equivalent Institutions (AACC).[1] The MK has a long history of engagement with the AACC, as the ensuing historical overview will illustrate. In 2007, it was one of the signatories of the Memorandum of Understanding that set up a preparatory committee to study the establishment of an AACC. The intention was to formalize existing informal dialogues among several Asian highest courts, notably those taking place as an annual Conference of Asian Constitutional Court Judges. In 2010, the MK was the host of the 7th such conference, which was attended by delegates from 26 courts from across the world and devoted to the theme of electoral law. What is more, this event marked the official launch of the AACC, through the adoption of the so-called Jakarta Charter, with the MK as one of seven founding members – the others were South Korea, Mongolia, the Philippines, Thailand and Uzbekistan. According to the Jakarta Declaration, the aim of the AACC is to provide "an independent and non-political forum for members of constitutional courts and equivalent institutions to exchange experiences and information on shared concern on constitutional cases and jurisprudence for the promotion of the rule of law, democracy and human rights."[2] It seeks to deliver on these objectives through the organization of bi-annual congresses, international symposia and research seminars as well as a summer school. The AACC has a rotating chairmanship, which was held by the MK from 2015 to 2017 – one year longer than usual – and in that capacity it hosted the 3rd congress on issues related to the promotion of human rights, including the range of available mechanisms for protection, challenges, and future directions. There is reason to believe that it had a formative influence on the adoption of the resultant Bali Declaration, which matters for two reasons. On the one hand, the participating courts for the first time expressly declared their support for the maintenance of constitutional democracy as the desired form of government. As the Declaration stated, "We uphold the principle that constitutional courts and equivalent institutions as one of the guardians of constitutional democracy should be free from interference by other branches of the state powers. Furthermore, we deplore any unconstitutional and undemocratic attempts aiming to abolish the rule of law and democracy in any country."[3] On the other hand, and in the face of its growing membership, the AACC decided to upgrade its institutional infrastructure

1 For an early account of the operation of this Association, see *Maartje De Visser*, We all stand together: The role of the Association of Asian Constitutional Courts and Equivalent Institutions in promoting constitutionalism Asian Journal of Law and Society 105 (2016).

2 Jakarta Declaration on the Establishment of the AACC, point 2 (12 July 2010).

3 Bali Declaration on the Promotion and Protection of Citizens' Constitutional Rights, point 3.3. (12 August 2016).

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by establishing three joint permanent secretariats. One of these is located at the MK and deals with the planning and coordination of AACC activities. More precisely, its functions include: engaging with the liaison officers of the member courts, supporting members of the AACC secretariats, coordinating activities for personnel development such as through exchanges and internships, and organizing short courses on pertinent constitutional topics for substitute registrars, rapporteur judges, researchers and legal staff of AACC members that are delivered by (former) judges of the MK. By way of example, the 2022 course was devoted to ways to maintain public trust in the constitutional court, while participants in the 2023 session explored democracy, digital transformation, and judicial independence. In addition, the Planning and Coordination Secretariat – and hence the MK – also acts as the AACC interface with the rest of the world by "encouraging and giving support to the Association in the conduct of relations with international organizations and forums, and other external parties", including prospective members. In this capacity, it took the lead in preparing the signing of a Memorandum of Understanding between the AACC and the Conference of Constitutional Jurisdictions of Africa to foster collaboration and the exchange of experiences in upholding the holy trinity of constitutional principles, i.e. the rule of law, democracy and fundamental rights that has so far already led to a joint conference between both associations, with another gathering on the cards for 2025.

It should be clear that the MK has been instrumental in helping the AACC flourish and has managed to occupy a position as spider in the web within this Association by offering itself as the home for the secretariat that is arguably the most practically relevant, not least because it has the potential to shape relationships with members and third parties (the other two deal with comparative research on constitutional questions and human resource development respectively). Furthermore, the MK is an active participant in the World Conference on Constitutional Justice, a truly global network that unites close to 120 courts and judicial associations.[4] It held the position of elected representative for Asia and Oceania on the Bureau of this Conference between 2017 and 2022. Taken together, this helps to reveals the MK's judicial epistemic politics and emphasizes that it very much considers similar institutions in other jurisdictions as relevant interlocutors alongside local political elites and other Indonesian stakeholders. As a general point, also in single-country volumes like *Constitutional Democracy In Indonesia*, it would accordingly be sensible to systematically consider the international activities of constitutional courts alongside those discharged on the domestic plane to arrive at a better understanding of the self-perception and identity of those courts.

In turn, this all begs the question why the MK has been keen to invest in ties with courts in other jurisdictions and cultivate quite a pervasive transnational presence for itself. Various answers can be suggested. Doing so may be part of what David Law has called – in the context of references in the case law to decisions by foreign courts – 'judicial

4 See Venice Commission, World Conference on Constitutional Justice, https://www.venice.coe.int/WebForms/pages/?p=02_WCCJ (last accessed on 20 March 2024).

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diplomacy',[5] and could be linked to the strategic desire of the MK to establish itself as a leading court in Asia that others look toward for inspiration or even guidance. Here it is worth recalling that this region does not (yet?) have a transnational court that could otherwise have claimed the mantle of primus inter pares, along the lines of the European Court of Human Rights or the Inter-American Court of Human Rights. In this regard, it should be noted that the MK has quite a well-developed English website, complete with several translated (excerpts of) decisions that are obviously intended for foreign consumption.

In addition, there could be a desire to improve the content or mode for delivery of domestic constitutional adjudication through exposure to the experiences of fellow courts and a concomitant process of peer-learning. This too appears to be a motivating factor for the MK, as can be deduced from the observations its president made on the occasion of hosting the fifth gathering of the World Conference on Constitutional Justice in 2022: "[T]his Congress is one of the MKRI's efforts to improve the quality of its decisions."[6]

Finally, there could be a link to the endurance of constitutional democracy at the domestic level and the role of constitutional courts as custodian thereof. The knowledge of being part of a wider, like-minded community may help empower courts in continuing to faithfully discharge the judicial mandate and resist the temptation of caving in to political or public pressure. This refers to the socializing and psychological effects attendant on having a shared sense of purpose, in this case: the promotion and protection of democratic constitutional values, principles and rules. The MK also appears to be inspired by this line of thinking. Its president has argued that the hosting of international judicial meetings provides "an opportunity to further strengthen Indonesia's position as a constitutional democracy based on the ideology of the five precepts of Pancasila."[7] This is undoubtedly commendable in principle. The proof of the pudding is in the eating, however. Much depends on whether a constitutional court, and that of its individual judges, are (and can be) steadfast in the implementation of pro-democratic constitutional principles and values. In this respect, commentators have noted that the current position of the MK can be considered precarious in light of meddling by the political branches as well as incidents involving judicial integrity that have damaged its social legitimacy.[8] There may thus be an interesting paradox of sorts, with the MK presenting itself as a strong champion of constitutional democracy on the international plane, while it does not – at least for the moment – seem as effective a custodian thereof within Indonesia. One would hope that the

5 *David S. Law*, Judicial Comparativism and Judicial Diplomacy, University of Pennsylvania Law Review 163 (2015).

6 MK, President Joko Widodo Inaugurates 5th Congress of WCCJ, https://en.mkri.id/news/details/2022-10-05/President_Joko_Widodo_Inaugurates_5th_Congress_of_WCCJ (last accessed on 20 March 2024).

7 Ibid.

8 See, for example, *Azeem Amedi*, Restoring Public Trust in the Indonesian Constitutional Court, https://blog-iacl-aidc.org/2023-posts/2023/6/29/gd121xoz08wl4apf6v0h8blj9le8he (last accessed on 21 March 2024).

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MK will find ways to minimize this dissonance and again become a powerful force for, and emblem of, constitutional democracy within Indonesia.[9] In doing so, it should consider leveraging the moral support and transnational solidarity that can be provided through the transnational judicial organizations that it is keen to associate itself with.[10]

While this contribution has focused on the MK, we should remember that preserving and ideally strengthening constitutional democracy requires the enduring commitment of all State institutions, political and other elites as well as the population at large. This can by no means be taken for granted, be it in Indonesia or elsewhere, as there increasingly seem to be powerful countervailing forces and interests that seek to pull countries towards (quasi-)authoritarianism. This reality warrants keen scholarly attention, including to ensure that earlier experiences with constitutional democracy are properly chronicled and dissected, as these are fundamental to informing our understanding of the present and possible future trajectory thereof. This is exactly what *Constitutional Democracy In Indonesia* offers, and it accordingly deserves to be studied carefully by all those interested in the fate of constitutional democracy, both in the Global South and beyond.

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9 For an account of its initial operation, see *Simon Butt*, The Constitutional Court and Democracy in Indonesia, Leiden 2015.

10 The World Conference on Constitutional Justice has for instance indicated that its Bureau "is ready to offer its good offices to courts under pressure, including through statements of support" in its Bali Communiqué (6 October 2022), see https://www.venice.coe.int/files/2022_10_06_WCCJ5_Bali_Communique-E.PDF (last accessed on 21 March 2024).

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