Review Essay: The Precarious Position of Courts and Fundamental Rights in Indonesia's Constitutional Democracy

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Though it is the world's fourth largest country by population, Indonesia rarely features in comparative constitutional studies.[1] Those of us engaged in comparative research on Asia have had access to high-quality work on Indonesian public law by country specialists, mostly based in Australia.[2] What has been more difficult to locate is academic work by Indonesian scholars (in English) as well as scholarship that situates Indonesia within global academic debates.[3]

Constitutional Democracy in Indonesia fills both these gaps admirably. Its editor, Melissa Crouch, is ideally situated to shepherd this wide-ranging work, as she combines country expertise on Indonesia with broad knowledge of the comparative constitutional landscape. Crouch has assembled a mix of Indonesian and international authors to deepen our understanding of the country's public institutions. The chapters span not just the usual topics of constitutional scholarship – such as the role of the legislatures and courts – but the role of the military, criminal justice officials, and the electoral regime as well.

The volume also brings Indonesia into the global conversation on populist leadership and democratic erosion. Scholarship in this area initially focused on Europe, especially on Hungary and Poland.[4] After Trump's election in 2016, American scholars joined the chorus.[5] In Asia, the populist mantle was initially seized by Philippine President Rodrigo

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1 Notable exceptions include Dian A.H. Shah, Constitutions, Religion and Politics in Asia: Indonesia, Malaysia and Sri Lanka, Cambridge 2017.

2 See, for example, *Simon Butt / Tim Lindsey*, The Constitution of Indonesia: A Contextual Analysis, Oxford 2012.

3 Thankfully, this is starting to change. See, for example, *Ignatius Yordan Nugraha*, Constitutional Identity, Expressivism, and Constitutional Change Through Judicial Interpretation: The Indonesian LGBT Case as a Case Study, International Journal of Constitutional Law 20 (2023); *Abdurrachman Satrio*, Restoring Indonesia's (Un)Constitutional Constitution: Soepomo's Authoritarian Constitution, German Law Journal 24 (2023).

4 *András L. Pap,* Democratic Decline in Hungary: Law and Society in an Illiberal Democracy, Oxford 2017; Wojciech Sadurki, Poland's Constitutional Breakdown, Oxford 2019.

5 *Steven Levitsky / Daniel Ziblatt*, How Democracies Die, New York 2018.

Duterte, whose brash style and egregious human rights violations, drew parallels to Trump.[6] In 2019, Prime Minister Narendra Modi won a second term as Prime Minister of India. Thereafter, his government advanced its Hindu nationalist project in more brazen and troublesome ways, making it another bête noire of liberal constitutionalists.[7]

Crouch describes Indonesia as having a "transformational authoritarian constitution."[8] In short, while maintaining much of its original form, the Constitution evolved towards democratic rule from 1998 until the mid-2010s. Like Modi, President Joko Widodo was elected to a second term in 2019, which Crouch identifies as a major turning point towards illiberalism.[9] Indeed, Indonesia's new President-elect, Prabawo Subianto, is poised to move Indonesia even further in that direction. A former army general who served from 2019-24 as Minister of Defense, Prabawo is a right-wing nationalist who committed grave human rights abuses towards the end of Suharto's regime. Yet, Indonesia's illiberal turn has gone relatively unnoticed in both popular and academic discourse. What distinguishes Indonesia from India and the Philippines (as well as Hungary, Poland, and the United States) – and makes it an especially interesting case study for comparative scholars – is that the latest stage of constitutionalism (2019 - present) is marked by calls to revert to authoritarian aspects of the original 1945 Constitution.[10]

If Indonesia, in general, has been neglected in comparative constitutional studies, its judiciary, led by the Constitutional Court, has been especially overlooked. Part 2 of the volume begins to remedy that oversight with detailed analyses of the Constitutional Court and the enforcement of fundamental rights. While I cannot do justice to all the rich and varied chapters therein, I will draw on Andrew Rosser's chapter on social rights (Chapter 9) and Abdurrachman Satrio's chapter on LGBT rights (Chapter 13) to discuss the potential and limitations of court-led liberal constitutionalism as Indonesia enters a more illiberal era. Three themes emerge from these chapters.

The first theme is strategic judicial decision-making. Indonesia was under authoritarian role for most of its post-colonial history – first under President Sukarno (1959-67) and then under the New Order regime of President Suharto (1967-98).[11] The country transitioned towards democracy after the fall of Suharto's regime. Four amendments enacted between 1998 and 2001 created new democratic institutions, including the Constitutional Court in

6 *Mark R. Thompson*, Bloodied Democracy: Duterte and the Death of Liberal Reformism in the Philippines, Journal of Current Southeast Asian Affairs 35 (2016).

7 *Maya Tudor*, Why India's Democracy is Dying, Journal of Democracy 34 (2023).

8 *Melissa Crouch*, The Limits of Transformation Authoritarian Constitutions: The Indonesian Experience, in: Melissa Crouch (ed.), Constitutional Democracy in Indonesia, Oxford 2023, p. 2; Tom Ginsburg, Transformational Authoritarian Constitutions: The Case of Chile, in: Tom Ginsburg / Aziz Z. Huq (eds.), From Parchment to Practice: Implementing New Constitutions, Cambridge 2020.

9 Ibid., p. 15.

10 Ibid., p. 15.

11 Ibid., pp. 7-11.

2003.[12] As Tom Ginsburg has written in the context of other new democracies in Asia, political elites are more likely to empower courts with judicial review authority when there is no dominant party and electoral outcomes are uncertain.[13] Judicial review serves as "political insurance" for the losing parties: it provides them an institutional mechanism to challenge the ruling government.[14]

After Suharto's departure in 1998, there was no dominant party or coalition in Indonesia. It is no surprise, then, that the Constitutional Court was endowed with judicial review powers, albeit in limited form. While the Court may review the constitutionality of legislation passed by the Indonesian House of Representatives (DPR), it cannot review government actions or laws enacted by the People's Consultative Assembly (a joint sitting of the DPR and upper legislative house).[15] The Court in its early years developed a reputation for independence, ruling against the government in high-stakes constitutional disputes. It also relaxed standing rules to allow applications from civil society organizations, indigenous groups, and other non-government entities.[16]

In its second decade of operation, however, the Constitutional Court was rocked by corruption scandals, including a 2014 bribery conviction of its third Chief Justice.[17] The ensuing damage to its popular legitimacy, combined with Indonesia's illiberal turn since 2019, have left the Court on shaky political foundations. Satrio's chapter illustrates the careful path the Court now treads and the limitations therein. He focuses on the 2017 LGBTQ case,[18] which has an unusual procedural posture. Most constitutional cases on same-sex relations in Asia arise from petitions filed by progressive groups asking courts to read down or strike out regressive provisions from the criminal code.[19] This is most apparent in former British colonies, where the Section 377 of the Indian Penal Code – replicated in Malaysia and Singapore – criminalizes "carnal intercourse against the order of nature."[20] In Indonesia, the Criminal Code did not criminalize same-sex relations. The application in this case was filed by the Love Family Alliance (a group of conservative

12 *Simon Butt / Tim Lindsey*, Indonesian Law, Oxford 2018, p. 100.

13 *Tom Ginsburg*, Judicial Review in New Democracies: Constitutional Courts in Asian Cases, Cambridge 2003, pp. 22-25.

14 Ibid., p. 25.

15 *Butt / Lindsey,* note 12, pp. 103-04.

16 Ibid., p. 104.

17 Ibid., p. 101.

18 Constitutional Court Decision No.46/PUU-XVI/2016 ("LGBTQ Case").

19 See, for example, Navtej Johar v. Union of India, (2018) 7 SCC 192; Leung v. Secretary for Justice, [2006] 4 HKLRD 211.

20 Malaysia Penal Code, Sections 377A, 377B.

Muslim organizations), which asked the Constitutional Court to read a ban on same-sex relations into a provision that criminalized obscene acts against children.[21]

The Constitutional Court, in a 5-4 decision, rejected the petition on the grounds that it lacked power to create legal norms, especially with respect to criminal provisions.[22] It advised the petitioners to approach the legislature (DPR) instead.[23] By invoking judicial restraint and deference to the legislature, Satrio argues that the Court was able to avoid political blowback, while implicitly protecting the rights of the LGBTQ community.[24] He cites Mark Tushnet in describing the Court's approach as a type of "weak-form" judicial review since the Court left the ultimate solution to the political branches.[25]

While the Constitutional Court's decision has elements of weak-form review, I think it is better characterized as an incidence of judicial avoidance. Erin Delaney has detailed the ways courts strategically avoid deciding contentious issues that threaten their institutional viability.[26] Such avoidance, she argues, can be beneficial if be beneficial if it creates a productive dialogue with the political branches. Delaney identifies two factors that affect the dialogue: (1) the court's timing and (2) its candour in acknowledging its choice.[27] In this case, the timing appears to have been wise. Given the salience and divisiveness of this issue, the Court would probably have faced intense backlash had it ruled more squarely in favour of LGBTQ rights.[28] In terms of candour, the Court defaulted to the bromides of judicial restraint and deference to the legislature.[29] Whether it could have explained its avoidance with greater candour is a contextual question – and one that I will leave to scholars of Indonesian constitutionalism.

What is clear, however, is that the Court's strategic avoidance had beneficial short-term political effects. As Satrio points out, the judgment weakened the political momentum of conservative political forces and appears to have galvanized their progressive opponents.[30] Indeed, conservative groups followed the Court's advice and drafted a new criminal code for legislative approval. But in the prolonged legislative process that followed, progressive

21 *Aburrachman Satrio*, LGBT Rights and the Constitutional Court: Protecting Rights Without Recognizing Them?, in: Melissa Crouch (ed.), Constitutional Democracy in Indonesia, Oxford 2023, p. 261.

22 LGBTQ Case, note 18, pp. 429-52.

23 Ibid., pp. 447-52.

24 *Satrio*, note 21, p. 262.

25 *Mark Tushnet*, Weak Courts, Strong Rights, Princeton 2008, pp. 24-33.

26 *Erin Delaney*, Analyzing Avoidance: Judicial Strategy in Comparative Perspective, Duke Law Journal 66 (2016), p. 4.

27 Ibid., p. 5.

28 *Satrio*, note 21, p. 270.

29 LGBTQ Case, note 18, p. 441-42.

30 *Satrio*, note 21, p. 270.

groups were able to prevent the criminalization of same-sex relations by lobbying the government behind closed doors and turning public attention to other issues.[31]

Satrio's detailed analysis of competing conservative and progressive groups on LGBTQ rights raises a second theme: the importance of social movements. In contrast to top-down accounts that seek to explain how judges navigate and respond to political currents,[32] civil society-focused accounts of judicial decision-making take a bottom-up approach.[33] This approach is evident in Rosser's chapter on social rights. He explains how the NGO sector, on behalf of the poor, was able to effectively channel its activism and demands through the Constitutional Court.[34]

During Suharto's New Order regime, Rosser explains, the poor were not only politically marginalized but also subject to the predatory practices of economic elites.[35] Though Indonesia moved in a neoliberal policy direction following the Asian Financial Crisis (1997) and Suharto's fall (1998), it also implemented a range of social safety net schemes.[36] In the more liberal political environment of the early 2000s, the NGO sector emerged alongside new institutions like the Constitutional Court. And litigation became an important mechanism to advance socioeconomic justice. Such litigation has succeeded in halting neoliberal policies that would have excluded the poor from key public services; in increasing budgets for public health and education; and in strengthening legal protections for vulnerable groups like migrant workers.[37]

Thus, social rights litigation in Indonesia has been collective and policy focused.[38] Rosser points to several factors to explain this orientation. Structural factors include the lack of individual rights claims mechanisms like the *Amparo* in Mexico or *tutela* in Colombia.[39] Political leaders in the post-Suharto democratic environment had an electoral incentive to align themselves with the poor, making them especially responsive to social rights litigation.[40] The NGO sector that had (understandably) focused on civil and political rights during the final years of the Suharto regime brought socioeconomic rights into their ambit in the democratic era. They also shifted towards judicial advocacy, hiring activist lawyers to litigate cases on the rights to health and education.[41]

31 Ibid.

32 See, for example, *Yvonne Tew*, Constitutional Statecraft in Asian Courts, Oxford 2020.

33 See, for example, *Michael McCann* (ed.), Law and Social Movements, Oxford 2006.

34 *Andrew Rosser*, Making Social Rights Real? The 1945 Constitution and Social Rights Litigation in Indonesia, in: Melissa Crouch (ed.), Constitutional Democracy in Indonesia, Oxford 2023, p. 175.

35 Ibid., p. 178.

36 Ibid., p. 178-79; *Surabhi Chopra*, Legislating Safety Nets: Comparing Recent Social Protection Laws in Asia, Indiana Journal of Global Legal Studies 22 (2015).

37 *Rosser*, note 34, p. 186.

38 Ibid., p. 180.

39 Ibid., p. 187.

40 Ibid., p. 188.

41 Ibid., p. 189.

Rosser highlights the vibrancy of Indonesian civil society and its strategic deployment of resources towards progressive judicial outcomes. But his chapter concludes on a cautionary note, which raises a third theme: the precarity of our current moment. Rosser notes that social rights litigation is less likely to be successful going forward. He points to the corruption scandals at the Constitutional Court, which alongside Indonesia's democratic decline, may make judges less receptive to rights claims.[42] Rosser also notes that NGO priorities may change, either back in the direction of civil and political rights or, in the short term, towards mitigating the fallout from the COVID-19 pandemic.[43]

A similar story emerges with respect to LGBTQ rights in Indonesia. A new Criminal Code came into effect in December 2022 – after Satrio wrote his chapter – that criminalizes all sexual relations conducted outside of marriage. Since same-sex marriage is not permitted, this law effectually criminalizes all same-sex relations. It also criminalizes sexual activity among indigenous groups and other minorities who do not have official marriage documents, and who may, therefore, be targeted by the government.[44] The Constitutional Court's strategic avoidance in the 2017 LGBTQ case, therefore, did not work out in the longer run. Like many of its counterparts around the world, the Court now confronts an authoritarian-leaning government poised to undermine its independence and override its (limited) liberal constitutional jurisprudence.[45]

Looking beyond Indonesia, the era of global constitutionalism – which began after World War II and peaked in the early 2000s – is in decline. This era was marked, among other things, by the rise of constitutional courts and judicial recognition of an increasingly wide array of rights.[46] Judge-led liberal constitutionalism had been kept alive primarily in the LGBTQ rights domain, but the new Indonesian Criminal Code and recent judgments from India and the United States, indicate that these rights, too, are under threat.[47]

If court-centric constitutionalism ends, what will replace it? One hopes to see in Indonesia (and around the world) a rejuvenation of the plural, bottom-up democracy that Rosser described in the social rights context. In this scenario, courts would no longer be the primary forum for constitutional decision-making. They would instead serve as guardrails

42 Ibid., p. 190.

43 Ibid., p. 190-91.

44 Human Rights Watch, Indonesia: New Criminal Code Disastrous for Rights, https://www.hrw.org/news/2022/12/08/indonesia-new-criminal-code-disastrous-rights (last accessed on 30 October 2023).

45 *Kahfi Adlan Hafiz*, Judicial Impartiality in Indonesia Under Attack, https://verfassungsblog.de/judicial-impartiality-in-indonesia-under-attack (last accessed on 30 October 2023).

46 *Tom Ginsburg*, The Global Spread of Constitutional Review, in: Keith E. Whittington, R. Daniel Keleman and Gregory A. Caldeira (eds.), The Oxford Handbook of Law and Politics, Oxford 2008; *Ran Hirschl*, Towards Juristocracy: The Origins and Consequences of the New Constitutionalism, Cambridge 2004.

47 Supriyo @ Supriya Chakraborty v. Union of India, 2023 INSC 920; 303 Creative LLC v. Elenis, 600 U.S. 570 (2023).

to ensure that a spirited political contestation over the recognition and entrenchment of rights remains within constitutional bounds.