The Rise and Decline of Constitutionalism in the Global South: The Case of Indonesia's Constitutional Court

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Abstract: Studies of constitutionalism in the Global South often chart the rise and achievements of liberal constitutionalism. In this contribution, I suggest that we also need to consider the decline of constitutional democracy as part of studies of constitutionalism in the Global South. Since the book *Constitutional Democracy in Indonesia* was published, the decline of constitutional democracy in Indonesia has worsened. In this contribution I question the association between the Constitutional Court and constitutional democracy. I examine Indonesia's limited place in comparative scholarship prior to 1998, and then demonstrate how the case of Indonesia in 21st century scholarship is more relevant to debates concerning the decline of democracy and the rise of authoritarianism, given the 2023 Constitutional Court crisis.

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A. Introduction

The book *Constitutional Democracy in Indonesia* needs a sequel – *The Decline of Constitutional Democracy in Indonesia*. As a step in this direction, I consider the rise and fall of constitutional democracy in Indonesia, and the implications for the scholarly study of constitutionalism in Indonesian. I begin with a reflection on the rise of the Constitutional Court, an exemplar of the institutional reforms that followed constitutional amendment and an illustration of the gains and difficulties with constitutional implementation. I look back at where Indonesia featured in comparative constitutional scholarship prior to 1998 and in the absence of constitutional review. I then turn to the present and discuss a recent instance of the decline of constitutional democracy, namely, the Constitutional Court's role in changing the rules for the presidential candidacy to allow President Joko Widodo (Jokowi's) son to run, and win, as vice-president. The Constitutional Court has abdicated its mantel as one of Indonesia's most respected state institutions and this bodes poorly for the future of constitutional democracy in Indonesia.

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B. The Constitutional Court: A Status Symbol of Constitutional Democracy

The Constitutional Court has for over two decades now often been taken as the heart and soul of constitutionalism in Indonesia. Several years ago, I visited the Indonesian Constitutional Court located in the middle of the sweltering, sinking, ten-million populated mega-city of Jakarta. The Court lies on a main thoroughfare opposite the National Monument, a marker of the historic struggle against Dutch colonial rule from the 1800s to 1940s. The stately court building has nine round pillars - representing the nine justices of the Court - that line the facade of the building, which connects to a much taller office tower. The establishment of the building, with its stature and grandeur, was an effort to convey the country's commitment to constitutional democracy.

When I arrived at the Court, I noticed a small group of protesters outside the front building outnumbered by police and security officers. Such protests at the Court are a regular occurrence, particularly on politically contested issues such as disputes over regional or national elections. The Constitutional Court has become a site for both legal contestation and physical protests over the meaning of the historic reforms introduced from 1999 to 2002 as amendments to the 1945 Constitution.

I walked around to the entrance at the side of the building, where I signed in as a guest. I made my way up to Level 2 and deposited my phone in a safe box as required before entering the courtroom. Upon passing through security and entering the court room, my eyes caught the glimmer of the enormous golden Garuda on the wall, sporting the national slogan Unity in Diversity (*Bhineka Tunggal Ika*). As the national bird emblem, the number and arrangement of the feathers of the mythical eagle symbolise Indonesia's declaration of independence from the Dutch: independence day, 17 August 1945. In addition, the Garuda's shield has five symbols, with the star as the prominent central symbol representing the Pancasila, the state religious ideology acknowledging belief in one God. The Garuda hints at the archipelago's past Hindu-Buddhist kingdoms and its present diversity, with Islam as the religion of the majority in addition to various religious minorities. Despite the country's Muslim-majority status, Islam is not constitutionally recognised as the religion of the state, nor does the Constitution explicitly provide for Islamic law.

The Garuda lends the courtroom an air of historic formalism and national solemnity. Dark wood panels surround the room and a dark patterned carpet lay under our feet. Two giant powerpoint screens on either side of the Garuda broadcast the proceedings. The room is steeped in modern-day forms of nationalism, with two large red and white flags placed on either side of the judges' bench at the front of the court room. While other Indonesian courts are known for their relatively lax behaviour, such as judges using their phones during proceedings, the Constitutional Court hearings are strictly regulated. A recording was broadcast over the eight loudspeakers in the room before the court hearing began to inform those present how to behave in the courtroom. No shouting. No clapping. No mobile phones. No demonstration signs or banners. No reading newspapers. Stand when the judges enter the room and show them respect. All witnesses or experts must answer questions from

the judge. Only select media and their cameras are allowed into the courtroom. On the instructions went. These guides are generally upheld in the Constitutional Court, even though other courts across Indonesia may not always adhere to such disciplined proceedings.[1] On occasion, even the Constitutional Court struggles to maintain order, such as in 2009-2010 in the first case concerning constitutional review of the Blasphemy Law, when Islamist groups who supported the law and opposed the case packed the courtroom and interrupted judicial proceedings. Heightened security measures and an increase in security forces have been necessary in such cases.

In the courtroom, there were six male security guards clothed in black. Two stood to the side of the judges' bench, in front of the flag. Two sat to the left and right, ready to take over from the guards standing every half an hour. Exactly on the half hour, the guard sitting down joined the one standing up, they turned and bowed to the judges, and then the guard who was standing sat to the side while the new guard took his place in front of the flag. Two more guards stood watch solemnly at the back of the courtroom. Their presence was partly security and partly to maintain decorum at hearings. Every now and then during the hearing, the guards quietly discipline the public in the gallery. 'Crossing the legs is not allowed', a guard tells one member of the public sitting near me. 'Consumption of mints is not allowed', I overhear a guard say to another. There were also eight journalists in the session this morning. The presence of the media at court hearings is one example of the high level of publicity court decisions receive, the openness of these sessions to the public, and the power of its judges.

At the centre of the proceedings are the judges, wearing striking red robes with black vests and a white cravat. Each judge sits in a throne-like chair at the front of the room and has a carved wooden nameplate in front of him or her. They face out to rows of chairs placed in a semi-circle, all numbered. The first three rows of chairs for the parties are intricately hand-carved wood with expensive leather upholstery. The two rows of chairs beyond that are for the public, cheap metal chairs covered in fabric; there is also an upper gallery for the public. The size, quality and layout of the chairs indicate the social hierarchy in the courtroom and, most crucially, the respect for and prestige of the role of the judge, sitting in the largest and most expensive chairs.

The court was still hearing the last of the electoral disputes from the regional elections.[2] At this hearing, there were four lawyers on the front bench, two for each side. The lawyers wore black robes with a white cravat. There is one stand-alone podium to the right, for experts and other testimony. When the lawyers introduced themselves to the judges, they spoke into microphones resting in front of every seat in the first two rows. The extra seats and microphones are for some cases that involve large numbers of lawyers and applicants. The justices commenced with the greeting 'Peace be upon you' (*assalam walaikum*). Those

1 In controversial cases, such as those involving inter-religious relations, local courtrooms have been mobbed by large crowds or even burnt down, although this is rare.

2 Regional elections are known as 'pilkada', or pemilihan kepala daerah.

in the public gallery responded with 'And peace be upon you too' (*walaikum salam*), even though technically no talking was allowed. A growing public religiosity has been another marker of post-1998 Indonesia.

Like many 21st century constitutional courts, the Constitutional Court website is as impressive as the courtroom with decisions generally uploaded promptly after being read in Court. The Court has embraced the technological age, building its public audience across various social media platforms, and mirroring the ubiquitous use of iphones and social media among Indonesia's relatively young population. A big part of the Court's role has been social education about the Constitution and awareness about the role the Court plays in upholding the Constitution. Both the physical and online presence of the Constitutional Court is central to its image in building and defending constitutional democracy, an image that is now under threat. The shift in the role and function of the Constitutional Court has yet to be fully reflected in comparative academic scholarship.

C. Indonesia in Comparative Constitutional Law: Looking Back

The field of comparative constitutional law has in recent decades developed a concern with constitutionalism in and from the Global South. Despite its size as the third largest democratic country in the world and the largest Muslim-majority country, Indonesia features little in such comparative constitutional law scholarship. There is of course a vibrant local scholarly scene and a growing number of scholars contributing to English language scholarship, many of whom feature or are cited in the volume *Constitutional Democracy in Indonesia*. The case of Indonesia has potential to inform our comparative knowledge on issues ranging from the relationship between religion and the constitution; constitution-making in democratising states; the role of new constitutional courts in building constitutional democracy; and the complicity of constitutional courts in democratic decline, among other debates.

To appreciate just how much the constitutional landscape has changed in Indonesia since 2002, it is useful to reflect on the place of Indonesia in English-language comparative constitutional law scholarship in earlier decades. In the mid to late 20th century, somewhat understandably given the focus of the field on judicial review, Indonesia featured little in global scholarship as the Constitutional Court had not yet been established. Indonesia is a civil law system, and so it did not feature in common law textbooks on comparative constitutional law and judicial review in Asia.[3] Indonesia was also under authoritarian rule for much of the second half of the 20th century, a concern that was yet to receive the serious attention of comparative constitutional scholars.

During this time, English-language scholarship on constitutionalism in Indonesia did not come from foreign constitutional law scholars, but rather from political scientists or area studies scholars, or jurists from Indonesia. For example, in the 1950-60s, foreign

3 See *Harry E Groves*, Comparative Constitutional Law: Cases and Materials, New York 1963.

scholars of political science were concerned with diagnosing the failure of constitutional democracy post-independence in Indonesia. For example, in 1957, Herb Feith published a classic book documenting Indonesia's experiment with, but ultimately abandonment of, a parliamentary system post-independence (1949-1957).[4] For political scientist Jamie Mackie, the failure of constitutional democracy came down to four key issues.[5] First, a lack of experience with, and the shortcomings of, the Indonesia administration. Second, the failure of political parties and cabinets. Third, the failure of colonial authorities to prepare the country for self-rule. Fourth, the difficulty of obtaining political consensus in such a diverse country. Mackie claimed that the 1945 Constitution was useful to President Soekarno only in so far as it enabled him to reject liberal democracy as well as federalism, in essence supporting centralised authoritarian rule.

By the late 1970s to 1990s, Indonesia began to emerge in English-language constitutional law scholarship that sought to trace and evaluate the influence of the American Constitution around the world. In 1970s, the Association for Asian Studies (AAS) formed a Committee on Asian Law that included many of the leading American scholars of Asian Law of their generation, such as John O'Haley (Japan), Marc Galanter (India) and Daniel S Lev (Indonesia). The AAS is the peak interdisciplinary association for the study of Asia in the US.[6] The Committee on Asian Law, chaired by Lawrence Beer,[7] commemorated the Bicentennial of the Declaration of Independence of the United States by organising for Asian jurists to visit America and contribute to a symposium published as *Constitutionalism in Asia: Asian Views of the American Influence*.[8] While the influence of the American Constitution on jurisdictions such as Japan, the Philippines and India was discussed at length, for many other jurisdictions including Indonesia the discussion was often framed in terms of contrasts. In fact, as I show in my chapter in *Constitutional Democracy in Indonesia*, Indonesia's constitutional experience was particularly opposed to the American idea of federalism because Dutch colonisers had been advocates for a federal constitutional model.[9] Further, the 1945 Constitution in its initial form does not incorporate concepts such

4 *Herb Feith,* The Decline of Constitutional Democracy in Indonesia, Ithaca 1957.

5 *Jamie Mackie,* Indonesian Constitutions 1945-60, in: R N Spann (ed.), Constitutionalism in Asia, Bombay 1963, pp 178-189; *Jamie Mackie*, Aspects of Political Power and the Demise of Parliamentary Democracy in Indonesia, in: R N Spann (ed.), Constitutionalism in Asia, Bombay 1963, pp. 190-214.

6 The equivalent in Australia is the Asian Studies Association of Australia: see *Edward Aspinall and Melissa Crouch*, Australia's Asia Education Imperative: Trends in the Study of Asia and Pathways for the Future. Canberra, Asian Studies Association of Australia 2022.

7 Lawrence W Beer is professor emeritus of civil rights at Lafayette College in Easton, Pennsylvania.

8 *Lawrence W Beer*, Constitutionalism in Asia: Asian Views of the American Influence*,* Berkeley 1979.

9 *Melissa Crouch*, The Limits of Transformational Authoritarian Constitutions: The Indonesian Experience, in: Melissa Crouch (ed.), Constitutional Democracy in Indonesia, Oxford 2023.

as the separation of powers, while article 33 offers a radically different approach to state control over the economy.

The late 1970s were the heights of Soeharto's authoritarian New Order regime and came in the wake of the bloody 1965 alleged attempted communist coup that saw an estimated one million people killed in a genocide orchestrated by the military.[10] The courts rapidly descended into dysfunction and corruption. The Committee on Asian Law invited the Chief Justice of the Supreme Court to contribute to the volume despite these circumstances. The entry on Indonesia was introduced by Daniel S Lev, the leading American-based scholar of his generation on Indonesian law and politics,[11] and Roger Paget. Their contribution included a short but pointed reflection on authoritarian constitutionalism: 'The paraphernalia of constitutional democracy are maintained and occasionally elaborated or simplified, but pressures of exigency – and protection of incumbency – at times expanded the militarisation of actual government functioning.' For them, the situation in Indonesia had deteriorated to such an extent that constitutional democracy was largely convenient 'paraphernalia' or, in other words, a facade.

The chapter on Indonesia was written by Chief Justice of the Supreme Court, Oemar Seno Adji (1974-81), who prior to his term as judge served as the Minister for Justice under Suharto (1966-74) and professor of law and Dean at the University of Indonesia. While initially considered a potential reformer, he later became known for facilitating the co-optation of the courts by the executive. His contribution recounts the postcolonial constitutional history of Indonesia, from 1945 when the Dutch still controlled much of the country despite the declaration of independence. The end of the war was conditional upon the introduction of a constitution approved by the Dutch - the Provisional Constitution of the United States of Indonesia 1949. The Provisional Constitution was federal in nature, but upon independence Indonesia swiftly replaced it with the Provisional Constitution of the Unitary State 1950, the latter introducing a unitary and parliamentary system. While the Chief Justice acknowledges that by 1959 the country had returned to the 1945 Constitution, he omits the context – President Soeharto unilaterally overrode the work of the Constituent Assembly that had been working towards a democratic constitution and he chose instead to reimpose the 1945 Constitution, as my chapter explains.

Similar to the techniques of some judges in authoritarian regimes, the Chief Justice attempted to legitimise his claims by using the opinions of scholars of liberal democracies. The 1945 Constitution is notoriously briefly, and on this point the Chief Justice concurred

10 The literature is large but for recent research on 1965, see, for example, *Kate McGregor / Jess Melvin / Annie Pohlman*, The Indonesian Genocide of 1965: Causes, Dynamics and Legacies, London 2018; *Jess Melvin*, The Army and the Indonesian Genocide: Mechanics of Mass Murder, New York 2018.

11 See *Melissa Crouch* (ed.), The Politics of Court Reform: Judicial Change and Legal Culture in Indonesia, Cambridge 2021; *Dan S Lev / Roger K Paget*, Indonesia: Editorial Note (concerning reflection by Chief Justice Oemar Seno Adji), in: Lawrence W Beer (ed.), Constitutionalism in Asia: Asian Views of the American Influence, Berkeley 1979, pp. 99-101.

with the traditional views of the Oxford-based Australian scholar Kenneth Wheare that constitutions should be kept to a minimum. The Chief Justice acknowledged that the 1945 Constitution departed from the separation of powers as understood in the American constitutional model and instead recognised five institutions that were separate and distinct: the executive, legislative, and judiciary, the Supreme Advisory Council, and the Supreme Auditing Office. The judge went on to claim that some features of the Indonesian Constitution such as rights to freedom of expression and religion are similar to the US Constitution, although he acknowledges the absence of constitutional review for the enforcement of such rights, a key point of difference. Dan S Lev must have found this chapter difficult to edit, given his work charting the decline of judicial independence, the abuse of rights and growing impunity under Soeharto.[12]

As a sequel to the 1970s edition, in the 1990s Lawrence Beer organised a new and enlarged volume *Constitutional Systems in Late Twentieth Century Asia*.[13] He identified three issues across many jurisdictions in Asia:[14] the role of the military in governance, leadership succession issues and the challenges for the protection of human rights. The chapter on Indonesia was written by Padmo Wahjono, professor of the Faculty of Law, the University of Indonesia, and member of the National Law Development Centre of the Department of Justice.[15] Wahjono's chapter is centred around the idea of Pancasila democracy, or at heart what is known as integralism. As I explain in my chapter, integralism was the idea that the state was all citizens, and so the interests of the state and citizens were the same. It emphasised communitarian over individual interests, consultation and consensus rather than majoritarian democracy, and the idea that human rights must be defined in relation to others. Under Soeharto's regime, the military came to occupy a large number of seats in the People's Representative Assembly (MPR). While the regime referred to 'Pancasila democracy', the emphasis on integralism heavily qualified and affected any semblance of democracy or, as Lev put it, the Constitution was reduced to part of the 'paraphernalia of constitutional democracy'.

Overall, in more recent decades, comparative constitutional law as a field, and the study of jurisdictions other than America such as Indonesia, has come a long way from scholarly efforts to trace the influence of the American Constitution in the rest of the world. One area of significant growth has been studies of constitutionalism in the Global South, which is often understood to mean studies of liberal democracy in contexts such as South Africa and India. On another view, studies of constitutionalism in the Global South can and should include studies of authoritarian regimes, illiberal regimes and the varieties and diversity of

12 *Dan S Lev*, Legal Evolution and Political Authority in Indonesia: Selected Essays, Dordrecht 2000.

13 *Lawrence W Beer* (ed.), Constitutional Systems in Late Twentieth Century Asia, Seattle 1992.

14 The book included China, Taiwan, Japan, South Korea, North Korea, Vietnam, Brunei, India, Indonesia Malaysia, the Philippines, Singapore and Thailand.

15 *Padmo Wahjono*, Republic of Indonesia: Democracy in Indonesia, Pancasila Democracy [transl by Joseph H Saunders], in: Lawrence W Beer (ed.), Constitutional Systems in Late Twentieth Century Asia, Seattle 1980.

constitutionalism in the Global South.[16] Studies of Indonesia have much to contribute to our knowledge of both the rise and decline of constitutional democracy in the Global South, as my reflection of a contemporary constitutional review case shows next.

D. The Decline of the Constitutional Court as a Guardian of Constitutional Democracy

Studies of constitutionalism in the Global South often focus on the apex constitutional court and judicial review. While many of the chapters in the volume, *Constitutional Democracy in Indonesia*, go beyond the Constitutional Court, the institution nevertheless remains significant. The Constitutional Court has in recent years suffered its share of scandals and political interference, from the conviction of judges for gross corruption while in office, to instances of political interference with the Court via legislation reforms, appointments and removals. One such controversy in 2023 was the legislature's decision to remove Justice Aswanto from the bench, even though the legislature had no powers or legal reason to do so.[17]

In 2023, the Constitutional Court was implicated in another big scandal, a sign of the decline of its role in defending and upholding constitutional democracy. The scandal concerned a debate in the final years of Jokowi's second term over whether he would seek a third term as president. Constitutionally, he could not do this as there is a two-term limit, however public debate focused on the various ways that he might seek to change or circumvent this rule such as postponing elections or amending the Constitution. At the time the volume *Constitutional Democracy in Indonesia* was written, the debate focused on whether the president would pursue constitutional amendment, which was the subject of both my chapter and that of Marcus Mietzner.[18]

After this debate ended without amendment to the Constitution, a new option was pushed: the possibility of challenging the electoral law so that Jokowi's eldest son could run as vice-president. In 2023, several petitions were filed in the Constitutional Court asking it to remove or amend the minimum age requirement for the candidate for president. It was widely understood that if granted, such a decision would allow Jokowi's oldest son Gibran Rakabuming Raka (known as Gibran) to run for vice-president. The intention was for Gibran to run as vice-president together with former general Prabowo Subianto who ran as president. In the lead up to the 2024 presidential election, Prabowo was the Minister for

16 *Melissa Crouch*, What Counts as Constitutionalism in the Global South? An Anthropological Reflection, Comparative Constitutional Studies (forthcoming 2024).

17 *Jimly Asshiddiqie*, Can a Constitutional Court judgment be changed? Newly installed judge faces Ethics Council, https://indonesiaatmelbourne.unimelb.edu.au/can-a-constitutional-court-judgment-be-changed-newly-installed-judge-faces-ethics-council/ (last accessed on 20 March 2024).

18 *Marcus Mietzner*, Defending the Constitution, But Which One? The Indonesian Military, Constitutional Change, and Political Contestation, 1945-2020, Oxford 2023; *Melissa Crouch*, The Limits of Transformational Authoritarian Constitutions: The Indonesian Experience, in: Melissa Crouch (ed.), Constitutional Democracy in Indonesia, Oxford 2023.

Defence. Prabowo is also a former military general who was dimissed from the army, and while in office he is alleged to have committed a series of human rights abuses in the late 1990s. He has run for president in the past, but up until 2024 had been unsuccessful.

Initially, in the first three cases Chief Justice Usman either missed the meetings or recused himself (opinions differ as to which it was and whether or how it matters) and the Court rejected the cases. However, in the fourth case, unlike the others, the Chief Justice sat on the bench and with his vote the Court reversed course.[19]

The issue in the case was that the general election law required the candidates for president and vice-president to meet the minimum age required of 40 years old. Gibran, however, was ineligible under this rule as he was only 36 years old. Yet, since 2020, Gibran had served in politics as the mayor of the city of Surakarta (commonly known as Solo) in Central Java, located on the most populous island in Indonesia. His father, Jokowi, also previously held this post from 2005 to 2012. Both Gibran and Jokowi are affiliated with the political party PDI-P. The applicants argued that to deny someone who was not yet 40 years old but who held a regional elected political post from running for president was contrary to the constitutional provision on equality before the law, equal treatment and legal certainty, and the right to equal opportunity in government.[20]

The Court declared that a person who either held or previously occupied elected office was not bound by the minimum age limit to contest the presidential elections. Its decision meant that Gibran's post as mayor allowed him to circumvent the age criteria and run as vice-president.

The story becomes more complicated because, even prior to this case being heard by the Constitutional Court, there were serious reasons to doubt the Court's independence from the president. In 2022, the Constitutional Court Chief Justice, Anwar Usman, married the sister of the president. Chief Justice Usman is therefore Gibran's uncle. Further, although the petition regarding the eligibility criteria for vice president was filed in August 2023 and would usually take many months to be heard, the Constitutional Court handed down its decision in October 2023, unusually fast. The Court's timing was even more suspicious because it was issued by the Court just days before the official deadline of the National Election Commission for the registration of candidates for the presidential election. In short, the Court was perceived to have quickly decided the case in order to allow Gibran to register for the 2024 presidential race before the deadline closed, supporting the president's efforts to secure his ongoing legacy in politics via his son. The Court decision was made 5-4, so Chief Justice Usman in effect had the deciding vote.

19 Constitutional Court Decision Number 90/PUU-XXI/2023 (in Bahasa Indonesia).

20 Articles 27(1), 28D(1) and 28D(3) of the Indonesian Constitution respectively. For wider issues with the concept and application of legal certainty, see *Mark Cammack*, Legal Certainty in the Indonesian Constitutional Court: A Critique and Friendly Suggestion, in: Melissa Crouch (ed.), Constitutional Democracy in Indonesia, Oxford 2023.

Subsequent to the decision in 2023, the Ethics Council[21] initiated an inquiry into the case and into the actions of Chief Justice Anwar Usman. The Ethics panel was led by the well-respected and inaugural former chief justice Jimly Asshiddiqie. The Ethics Council held that the chief justice should have recused himself from the case. The Ethics Council found that Chief Justice Anwar Usman had breached the ethics code and as a result he was removed from his position as chief justice and barred from sitting on any cases concerning the elections, though he remains on the Court.[22] But its decision did not change the outcome of the case nor its consequences: Prabowo and Gibran ran a successful presidential campaign in the February 2024 elections.

Anwar Usman did not accept the decision of the Ethics Council. In fact, in early 2024, he brought a case to the Jakarta State Administrative Court challenging the Constitutional Court's deicsion to appoint a new chief justice to replace him.[23] Controversially, in August 2024, the State Administrative Court declared the Constitutional Court's decision invalid, although it did not go so far as to grant Usman's request to restore him to this position. The decision has been questioned and the independence of the State Administrative Court has come under scrutiny, as Usman was once a Supreme Court judge and the State Administrative Courts have a close connection to the Supreme Court. This also raised a challenge for the Constitutional Court in terms of how it should respond to this dilemma and the Ethics Council heard two further complaints that Anwar violated the code of ethics, with one resulting in a written warning.[24]

Further, the Anwar matter was not the only serious ethics violation that the Ethics Council heard in 2023. Earlier in the year, public confidence in the Constitutional Court was shaken when it emerged that Justice Guntur Hamzah had amended a court decision prior to it being read out at trial. The judge was subsequently found in breach of the code of ethics by the Ethics Council, although he only received a written warning. The Constitutional Court has not been the only site of the decline of constitutional democracy. For example, the national legislature debated a bill to amend the process for the appointment of the government of the city of Jakarta to remove elections and instead allow the president to make the appointment. Such a change would have allowed president Jokowi, who holds office until September, to install his second son Kaesang Pangarep as governor, a position highly sought after and often seen as a precursor to holding the post of president. The current law also requires candidates to be at least 30 years old, while Kaesang is only 29

21 The Ethics Council is known as the *Majelis Kehormatan Mahkamah Konstitusi*, or MK-MK.

22 *MKRI*, Ethics Council Removes Anwar Usman from Chief Justice Position, https://en.mkri.id/news/details/20231107/Ethics_Council_Removes_Anwar_Usman_from_Chief_Justice_Position (last accessed on 21 March 2024).

23 Jakarta State Administrative Court case number 604/G/2023/PTUN.JKT

24 Kompas, 'Kali ini, Anwar Usman lolos dari hukuman etik', 4 July 2024, https://www.kompas.id/baca/english/2024/07/04/en-kali-ini-anwar-usman-lolos-dari-hukuman-etik.

years old. In April 2024, the legislature retracted its proposal and direct elections were retained.[25]

In other developments, echoing the concerns mentioned in chapters by myself and Marcus Mietzner,[26] the legislature amended the Civil Servant Law to make it easier for military officers to be moved into civilian posts. This has raised concerns that the military's former 'dwi-fungsi' role, that is, its dual role as a military force and in civilian politics, is experiencing a come-back. This development validates concerns that the military remains an ongoing influence in Indonesian governance. These trends also reflect the increasingly active role for the military in constitutional politics around the world.[27]

E. The Paraphernalia of Constitutional Democracy in Indonesia

For more than twenty years, the Indonesian Constitutional Court has built a reputation in the region as a leading constitutional court and indeed it continues to market itself in that way. Its physical presence in Jakarta, as explored at the beginning of this essay, seeks to project and maintain that imagine as a visible bastion and defender of constitutional democracy. I suggest that the image of the Constitutional Court now needs significant revision and we need to look behind the paraphernalia of constitutionalism.

At the very least, we cannot presume that the Constitutional Court will be consistent in promoting and defending constitutional democracy. Nevertheless, in the second half of 2024, two Constitutional Court decisions uphold the integrity of regional elections, and specifically rejected the attempt to change the age requirement for gubernatorial elections ending the attempt by Jokowi's youngest son, Kaesang Pangarep, to run for office.[28] Yet the threat to constitutional democracy this time came from the legislature, which effectively proposed to overturn the Constitutional Court decision by amending the law. In August 2024, after students took to the streets in large numbers, the legislature appears to have withdrawn its plans. Talks of a constitutional crisis remained live at the time of publication.

While constitutional jurisprudence has been taken seriously by scholars, advocates and observers over the past few decades, political influence and interference on the Court means that constitutional jurisprudence should no longer automatically be regarded with respect. Due to the actions of both the Constitutional Court and the national legislature, Indonesia can no longer be considered as a strong model of constitutional democracy for the region and, if it is, it is only because of the dire state of constitutional politics in the rest of Southeast Asia – such as military rule in Myanmar, Hun Sen's Cambodia

25 Law No 2/2024 on the Special Region of Jakarta.

26 *Marcus Mietzner*, Defending the Constitution, But Which One? The Indonesian Military, Constitutional Change, and Political Contestation, 1945– 2020, in: Melissa Crouch (ed.), Constitutional Democracy in Indonesia, Oxford 2023, p. 49.

27 *Melissa Crouch,* The Military Turn in Comparative Constitutional Law, Annual Review of Law & Social Science (forthcoming 2024).

28 Constitutional Court decision 60/PUU-XXII/2024; 70/ PUU-XXII/2024.

and military-controlled politics in Thailand. The case of Indonesia provides comparative insights into the decline of democracy, the rise of populism, and the intensification, return or persistence of authoritarianism and military involvement in politics. We need new ways of studying the 'paraphernalia of constitutional democracy', as Dan S Lev called it, and Indonesia offers a key site for such exploration. The book, *Constitutional Democracy in Indonesia*, initiated discussion in this direction but also constitutes a call to advance this agenda.