Review Essay: The Paradox of Democratic Constitutional Change in Indonesia

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

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A. Introduction

Twenty-five years after *Reformasi* and the fall of Soeharto's authoritarian regime in May 1998, constitutional democracy in Indonesia is arguably in its most precarious state. Over the past decade, Indonesia has experienced what many analysts characterize as democratic regression[1] or democratic setbacks[2] – more concretely this is reflected, among other things, in the sustained challenges against key accountability institutions, the instrumentalization of laws (be they in the form of legislation or government and presidential regulations) to secure political gains, and the growing suppression of civil and political rights, particularly the freedoms of speech and the press. This picture is further complicated by the strengthening of oligarchic politics in the corridors of state power[3] – an issue that will most certainly be significant in the lead up to the upcoming presidential elections in February 2024. As these issues continue to dominate discussions on the state of Indonesia's constitutional democracy, it is perhaps easy to forget the great strides that were made in building and consolidating democracy. The post-Soeharto constitution-making process from 1999 to 2002 introduced significant (though by no means perfect)[4] renovations to the legal and political system, and these were later bolstered by a series of legal reforms to strengthen rights protection and checks and balances against government abuses of power. Along with

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1 See, for example, *Eve Warburton / Edward Aspinall*, Explaining Indonesia's Democratic Regression: Structure, Agency and Popular Opinion, Contemporary Southeast Asia: A Journal of International and Strategic Affairs 41 (2019), pp. 255-285.

2 See *Vedi R. Hadiz*, Indonesia's Year of Democratic Setbacks: Towards a New Phase of Deepening Illiberalism?, Bulletin of Indonesian Economic Studies 53 (2017), pp. 261-278.

3 See, for example, *Herlambang P Wiratraman*, Constitutional Struggles and the Court in Indonesia's Turn to Authoritarian Politics, Federal Law Review 50 (2022), pp. 314-330.

4 *Tim Lindsey,* Indonesian Constitutional Reform: Muddling towards Democracy, Singapore Journal of International and Comparative Law 6 (2002), pp. 244-301; *Donald L Horowitz,* Constitutional Change and Democracy in Indonesia, Cambridge 2013.

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a vigorous Constitutional Court, these structures have generated and supported substantial appetite for, and culture of, constitutional democracy.[5]

This paradox between the promise and practice of constitutional democracy in Indonesia is brilliantly captured in the volume on *Constitutional Democracy in Indonesia*. While there has been a clear and worrying pattern of threats to Indonesia's constitutional commitments to democracy – indeed as Crouch notes, the "actual decline in constitutional democracy is tangible"[6] – the 1945 Constitution has remained intact since the 1999-2002 amendment process and the democratic framework has been nominally preserved. In addition, the media and civil society has remained robust and this, perhaps, has helped slow down what could otherwise be a rapid free fall into authoritarian reversion. In this regard, as the Volume demonstrates, it is also worth noting that the threats to, and decline of, Indonesia's constitutional democracy did not emerge in a matter of months or years. In fact, the signs and attempts at unraveling democratic commitments have been apparent since 2010 under the administration of President Susilo Bambang Yudhoyono, then accelerating, rather ironically, under a figure who was elected into office with reformist and pro-democracy promises and expectations. The various contributions in the Volume implicitly make the point that despite institutional renovations and evolving culture of constitutional democracy, the strength and survival of Indonesia's democracy remain hamstrung by remnants of its authoritarian past. These include corruption, entrenched norms implicating accountability and the balance of power, and the dominant networks of political power organization.

Building on these points, in this contribution, I highlight three crucial facets of the paradox in Indonesia's experience with constitutional democracy. In doing so, I hope to present a more tempered view of the prospects and direction of building and sustaining constitutional democracy, especially in light of similar experiences in South and Southeast Asia. This assessment cautions us about the persistence and endurance of anti-democratic proclivities, which ought to encourage future analyses not just on the symptoms of democratic decline, but also its pathologies.

B. The Culture of Constitutional Democracy (and Its Antithesis)

Following four years of constitutional amendment, Indonesia emerged in 2002 with a radically transformed constitution. The process of constitutional change has been described as ad hoc, uneven, and messy,[7] but the outcome was impressive, especially considering the prevailing conditions – a country that was still reeling from decades of dictatorship, gross human rights abuses, and mass violence; a hastily drafted independence constitution that created and legitimized authoritarian governance; and a fractured society deeply divided

5 *Melissa Crouch,* The Limits of Transformational Authoritarian Constitutions: The Indonesian Experience, in: Melissa Crouch (ed.), Constitutional Democracy in Indonesia, Oxford 2022, p. 1.

6 Ibid.

7 *Lindsey,* note 4, pp. 245-46.

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across ethnic, religious, and regional lines. As Crouch notes, the four amendments resulted in 166 new provisions that altered the fundamental nature of the Indonesian state.[8] Contributions in the Volume further highlight, among other features, a comprehensive bill of rights that mirrored provisions in international human rights instruments, limitations on the authority and powers of the president, particularly with regard to law-making, the ending of the military's *dwi-fungsi* ideology, and established judicial independence. The core element that binds these features (and more others) is constraints on executive power, which is fundamental to the rule of law and a well-functioning constitutional democracy. Yet, the question that continues to animate discussions on Indonesia is whether the essence and norms underpinning these formal constitutional changes have trickled down to those who govern and the governed. Thus, one key to understanding the durability or fragility of constitutional democracy lies in whether and how the culture of constitutional democracy develops.

While many observers – and indeed the contributors in the Volume – acknowledge that *some* progress has been made in strengthening the rule of law In Indonesia, that progress is at best slow, or at worst stagnating. For example, the Constitutional Court, the Electoral Commission, and the Election Supervision Body have distinguished themselves as independent and robust institutions in protecting constitutional rights and electoral integrity.[9] At the same time, citizens, civil society, and the media are not just keeping tabs on rights violations and excesses of power; they are also actively campaigning, lobbying, and participating in legal and political processes to uphold democratic commitments enshrined in the Constitution. By contrast, rule-of-law norms have not seemed to permeate the function and practices of the criminal justice agencies as constitutional rights pertaining to arrest and detention are routinely violated.

All this underscores the importance of the process of socialization and legitimization for constitutions (and the reforms underpinning them), in order to a "culture of constitutional democracy".[10] I would go further to suggest that this process is even more pressing in countries that have experienced or are experiencing significant political change (that is, a transition and transformation to democracy). This Volume, with its rich analyses of various aspects of Indonesian constitutional practice and politics, offers fertile ground to unpack what the "culture of constitutional democracy" embodies. From a comparative perspective, we may find similarities across different jurisdictions as to how this culture evolves, as well as its exact elements, features, and drivers. But the specifics may also vary depending on the contexts of each country. In Indonesia's case for example, identity politics, the fluidity of political coalitions, as well as the role of the two largest Muslim organizations, Nahdlatul Ulama and Muhammadiyah, are likely to be key determinants in defining the culture of constitutional democracy.

8 *Crouch,* note 5, p. 11.

9 See Chapters 8, 9, and 10 of the Volume.

10 *Crouch,* note 5, p. 1.

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Finally, it is also pertinent to think about the "other culture" that exists and persists as the culture of constitutional democracy develops. It is beyond the scope of this contribution to elaborate on this point, but we can discern at least two interrelated aspects from the chapters in the Volume.[11] First, there is an authoritarian pathology that can be located in the tendency to arrogate power in the executive, regardless of the specific constitutional dispensations on the parameters of executive authority. This is bolstered by the endurance of the integralism ideology, as well as the *musyawarah mufakat* concept that is part of the *Pancasila*. Both these ideas drove Soekarno and Soeharto's authoritarian regimes by legitimizing a powerful executive, an undemocratic legislature, and subservient state institutions. Second, as Crouch astutely points out, the persistence of corruption is a challenge for constitutional democracy in Indonesia.[12] The growing incidence of corruption in elections and efforts to intimidate and debilitate the Corruption Eradication Commission[13] speak volumes about the monumental challenge in eradicating entrenched corrupt networks and practices, but these are just the tip of the iceberg. Extortion and bribery (often for relatively straightforward, mundane bureaucratic and regulatory compliance affecting ordinary citizens) remain prevalent in state institutions and agencies. If the masses are habituated to giving to avert onerous requirements, state officials will equally be habituated to demanding and receiving, and this cycle will obviate any incentive to root out such practices.

C. Unraveling Indonesia's Constitutional Democracy

The second aspect of the paradox I mentioned earlier revolves around the question of *how* Indonesia's constitutional democracy has unraveled. In this regard, the Volume makes it clear that the tangible threats to and assaults on constitutional democracy in Indonesia come in various shapes and sizes. There are three further points on this. The first concerns the specific *methods* in which the threats and assaults have been pursued. Crouch cautions us to the real "threat of formal reversal of Indonesia's democratic gains through constitutional amendment".[14] She highlights, in particular, the occasional proposals since 2002 to return to the initial 1945 Constitution.[15] For all intents and purposes, this really means a reversion to the authoritarian dispensations mandated by the initial 1945 Constitution, where the executive had untrammeled power and the MPR served as the highest lawmaking body that the president was only theoretically accountable to. In addition to this, a relatively recent proposal was to amend the Constitution to extend the presidential term of office to three terms, in order to allow the current president to contest in the 2024 presidential

11 For a brief exploration of the relationship between corruption and authoritarianism, see *Horowitz,* note 4, p. 223.

12 *Crouch,* note 6, p. 14.

13 Ibid.

14 *Crouch,* note 5, p. 1.

15 Ibid., p. 15.

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elections. Interestingly, these threats of unraveling Indonesia's democratic constitutional commitments through formal constitutional amendment have not materialized. Instead, as the chapters in the Volume illustrate, political elites have sought to weaken institutional checks and balances and dilute fundamental rights protection through other (perhaps more politically and practically expedient) means, including ordinary legislation passed by the DPR and regulations in lieu of law (*perppu)* issued by the president.[16] This indicates that the phenomenon of "abusive constitutionalism" has yet to reach Indonesian shores,[17] although – as I shall explain below – this is not necessarily a positive indictment of the state of affairs in the country.

Second, following the exploration of method, we ought to pay attention to the *sites* of assaults against Indonesia's constitutional democracy. As I have alluded to previously, the Volume exhibits an impressive array of examples that evince the symptoms of the decline of democracy, ranging from violations of constitutional rights, waning electoral integrity, and creeping "recentralization",[18] to balance of power issues implicating specific institutions such as the Constitutional Court, the DPR, the military, and the Electoral Commission. However, a deeper analysis on Indonesia's democratic decline could be pursued by synthesizing the constitutional arrangements that are *especially* susceptible to assaults by political elites. The corollary point I am making here is that authoritarians and anti-democrats may be more inclined to attack specific arrangements in the constitution in their quest to amass and centralize political power in the hands of the select few. Identifying such priorities and inclination may help us to better-read, anticipate, and understand the symptoms and pathologies of democratic decline. In this regard, Crouch's chapter, again, may be instructive – by exploring the five transformations encapsulated in the amended 1945 Constitution,[19] she provides a compelling framework to assess which commitments are vulnerable to attacks and which attacks define Indonesia's democratic decline. Notable ones include the powers of the president and the executive, the role and strength of the legislature (DPR) not just as a primary lawmaker but as a checks and balances institution vis-à-vis the executive, and judicial independence.

Finally, in thinking about the patterns regarding methods and sites, I suggest it is also worth enquiring into *why* some methods are more prevalent than others, and why some constitutional arrangements are more susceptible to attacks. With regard to the former, for

16 See Chapter 2 of this Volume, *Stephen Sherlock*, The Consequences of Halfway Constitutional Reform: Problems of Lawmaking in Indonesia's Parliament*,* in: Melissa Crouch (ed.), Constitutional Democracy in Indonesia, Oxford 2022, pp. 29-48.

17 "Abusive constitutionalism" is defined as the use of formal mechanisms of constitutional change to undermine democracy. See *David Landau,* Abusive Constitutionalism*,* UC Davis Law Review 47 (2013), p. 191.

18 See Chapter 5 of this Volume, *Rachel Diprose,* Striking the Right Balance: Winding Back Indonesia's 'Big Bang' Decentralization, in: Melissa Crouch (ed.), Constitutional Democracy in Indonesia, Oxford 2022, pp. 89-114.

19 *Crouch,* note 5 pp. 12-14.

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instance, through coalitional politics – no doubt driven by rules on presidential nomination threshold – an elected president has been able to secure more than a simple majority of support in the legislature. In President Jokowi's second term, the government coalition (*Koalisi Indonesia Maju*) holds over 80 percent of DPR seats spread over seven political parties.[20] Under such circumstances, the government has more than the necessary numbers not only to pass laws that reflect the President's agenda, but also to pursue constitutional amendments. In addition, in practice proposals for law reform or amendments have come primarily from the executive branch, and as Sherlock suggests, the President and his representatives are involved at every crucial stage of the legislative process.[21] So the fact that no formal (retrogressive) constitutional amendments have been seriously pursued thus far and that political elites have sought to gradually undermine the democratic gains through ordinary legislation or other types of regulations (such as *perppu*) is a phenomenon ripe for examination. What is perhaps clear for the moment is that there is a need to look beyond the conventional game of numbers and to reevaluate the significance of formal diffusion of political power among state institutions.

D. Protagonists and Antagonists

The preceding points provide some insights into the broad range of possible actors that are involved in the consolidation, decline, and survival of a constitutional democracy. In this regard, the Indonesian experience may also offer comparable lessons for countries that have or are undergoing political change elsewhere in South and Southeast Asia. Much of current literature on democratic decline in Asia has focused largely on executive actions that weaken institutional checks, violate constitutional rights, erode electoral competition, and incrementally accumulate power for its own benefit.[22]

The Indonesian case, as the chapter in the Volume demonstrates, paints a more complicated picture of the protagonists and antagonists of democratic decline. Sherlock's chapter on lawmaking, for instance, captures the nuances of how the balance of power between the executive and the legislature works in practice, which often results in the executive controlling the legislative agenda and their outcomes. This is made possible – as I mentioned above – by the cooptation of a large number of parties into the government coalition, under the pretext of securing the broader "national interest". However, the executive is rarely the

20 Jokowi was initially backed by six parties (with seats in the DPR), but following his victory the Gerindra party (whose presidential candidate opposed Jokowi in the elections) was coopted into the government coalition.

21 *Sherlock,* note 16, pp. 37-40.

22 See, for example,, *Tom Gerard Daly,* Democratic Decay: Conceptualising an Emerging Research Field, 11 (2019), pp. 9-36; *Tarun Khaitan*, Killing a Constitution with a Thousand Cuts: Executive Aggrandizement and Party-State Fusion in India, Law & Ethics of Human Rights 14 (2020), pp. 49-95; *Thomas P Power,* Jokowi's Authoritarian Turn and Indonesia's Democratic Decline, Bulletin of Indonesian Economic Studies 54 (2018), pp. 307-338.

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only actor that is interested in weakening mechanisms of accountability and checks and balances to protect their political and institutional interests. The parliament has proven to be a crucial actor too. Aside from working in concert with the government to secure the passage of various controversial laws, the DPR has also sought to undermine institutional checks. In 2018, for example, the DPR initiated and passed amendments to the "MD3 Law" (Law on Legislative Bodies), with provisions designed to shield lawmakers from public criticism and the KPK's investigative powers. More recently in September 2022, the DPR put itself in the spotlight again for removing a Constitutional Court judge from office, due to what it deemed as unsatisfactory performance and his role in invalidating laws passed by the DPR.[23]

E. Conclusion

The Indonesian experience of building and consolidating a democracy after over thirty years of authoritarian rule will remain in the history books as a success story of the post-third wave of democratization. In many ways, Indonesia progressed against all odds, but preserving its democratic gains is proving to be its biggest challenge thus far. This Volume offers valuable insights and lessons on the currents and counter-currents of democratic decline in the Indonesian context, many of which will continue to be significant in the years to come. It uncovers the breadths and depths of constitutional interpretation and practice, and urges readers to reflect on the implications of constitutional design. Crucially, in all these aspects, this study on Indonesia will hold immense relevance in ongoing and future comparative examination of democratic decline in Asia, especially as countries in the region grapple with both democratization demands and autocratic impulses.

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23 CNN Indonesia, Alasan DPR Copot Aswanto dari Jabatan Hakim, https://www.cnnindonesia.com/nasional/20221002092202-32-855230/alasan-dpr-copot-aswanto-dari-jabatan-hakim-konstitusi (last accessed on 10 October 2023).

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