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Debate

Donald L. Horowitz

Constitutional change and democracy in Indonesia. New York: Cambridge University Press, 2013, xviii+326 pp.

The reform of the 1945 Constitution has been one of the most important aspects of the transition to democracy in Indonesia. The amendments have changed the political game by establishing the democratic principles of the separation of powers and checks and balances, and by revising the constitutional framework for executive-legislative relations. Moreover, these amendments have fundamentally altered the rules by which the state relates to its citizens, the three branches of government deal with one another, civilians and the military interact, and the national, provincial, district, and village authorities relate to each other. Indonesia remains the only country in Southeast Asia to be rated 'Free' in Freedom House's annual survey of political rights and civil liberties. In the wider context of the Muslim world, certainly, this rare situation is significant in showing that this combination of Islam and constitutionalism can lead to the checks-and-balances mechanisms that are vital to democracy. Donald L. Horowitz's brilliant book *Constitutional change and democracy in Indonesia* evaluates and explains the process, the outcome, and the ongoing struggle of the Indonesian democracy. In his book, Horowitz demonstrates his knowledge on the intersection of law and politics.

The first issue I would like to raise is the relationship between religion and state in Indonesian democracy. Since Indonesia's 'middle position' (neither secular, nor Islamic) allows for law and religion to overlap, there is scope for legal religion and religious law. This causes difficulties as the legal expectation is not always in line with religious commands. Horowitz mentions the challenge to the validity of Law No. 1 of 1965, in which the law puts the government in a position to determine whether an interpretation, sect, or group is legitimate or not. However, in April 2010, the Mahkamah Konstitusi Republik Indonesia (Indonesia's Constitutional Court; hereafter Constitutional Court) rejected the legal challenge and, instead, upheld Law No. 1 of 1965. The majority of justices (8:1) found that the law is necessary to maintain public order, and is respectful of the principle of religious freedom in Indonesia.

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According to the court, the law itself is not contrary to the basic articles in the constitution, but it admitted that the law needs to be made clearer, and stated that it is up to the parliament to amend it. But what Horowitz did not evaluate is whether the court has gone too far from democracy and constitutionalism when it takes the view that one of the principal differences between the rule of law in Indonesia and the West is that 'the basis of Belief in God and (religious) teaching as well as religious values serve as a benchmark to determine whether or not a certain law is good, or even whether or not a certain law is constitutional'. In other words, the court claimed that the text of the constitution is not the only source that can be used to declare the validity of the legislation, but that religious teaching can also be used to determine its constitutional validity. This begs the question of how the court views the position of religion in the constitution.

The second issue regards the combination of the multiparty and presidential system that has resulted from the Indonesian constitutional amendments. While President Soeharto (1966–1998) allowed three political parties to contest the elections, the Indonesian reform era has struggled to reduce the number of political parties gradually. This struggle is due to the fact that the combination of a presidential system and a multiparty system is a bad choice. From just 3 political parties under Soeharto, Indonesia then had 49 parties in the 1999 elections, 24 in the 2004 elections, 38 in the 2009 elections, and 12 in the 2014 elections. A strong presidency requires a simpler political party system. No single political party in the reform era has been able to obtain a majority of seats in the parliament. President Yudhoyono's political party in the 2009 elections only won by 20.85 per cent, which forced him to create a large coalition and to deal with other political interests. Yudhoyono became a minority president trapped by different political parties' interests and ideologies. He effectively became a dealer, not a leader, as he had to negotiate, compromise, and calculate his policy and position. This 'bad combination' of multiparty and presidential system also means that the country spends too much money on election campaigns and that the various political voices have become too fragmented. However, Indonesia should certainly not use President Soeharto's dictatorial model to reduce the number of political parties. The last four elections (1999, 2004, 2009, and 2014) have been long and painful processes.

PDI-P won the 2014 legislative elections by gaining 19.95% of the vote and was forced to form a coalition with other parties to nominate Joko Widodo as president. In contrast, the Gerindra party, which nominated Prabowo as its presidential candidate, only won 11.81% of the vote. It remains to be seen if and how the president-elect Joko Widodo can avoid becoming trapped by the

different interests and ideologies among the coalition as Yudhoyono has been for the last ten years.

The final issue is the role of military and Islamic organizations if we want to consider how Indonesia's experience and experiment with democracy could travel (Horowitz's last topic in his book) to other Asian countries, or even to Arab Springs. The role of military and Islamic organizations in supporting democracy is important. The military's role in Indonesian politics has been reduced significantly. Active generals are no longer allowed to hold cabinet posts and other key positions in the government. The drop in the number of governors and mayors with a military background has revealed the new face of Indonesia's political game. The two most important religious organizations in the country, Muhammadiyah and Nahdlatul Ulama, rejected the insertion of Shari'a during the amendment process. Both Islamic organizations have supported democracy and have participated in preserving and consolidating the democratization process. Horowitz's book should have more appreciation of these important facts. In fact, the failure of democracy in Cairo and Syria, to name but a few places, as compared with Indonesian democracy, is due to the role of Islamic groups and the military. Once again, Indonesian constitutional reform might not be perfect, but it could become one of the role models in Asia and the Middle East.

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Horowitz's excellent *Constitutional change and democracy in Indonesia* provides a compelling account of Indonesia's transformation from an authoritarian regime to a constitutional democracy, detailing why particular models and institutions came to be chosen over various alternatives. His explanation for why the rule of law was not as successful as other reforms is also very convincing. Horowitz discusses this rule-of-law deficit in the penultimate chapter of the book, alongside what he calls 'other lower-quality democracy discontents', which include continuing corruption and the inadequate protection of minorities, particularly religious ones. These persistent problems, Horowitz claims, are partly attributable to the 'gradualism' that marked Indonesia's constitutional reform, under which the personnel and practices of the previous regime were not completely uprooted (p. 207).

I focus here on Horowitz's observations about the rule of law and Indonesia's Constitutional Court, which was established by constitutional amendment and

began operating in 2003. As Horowitz demonstrates throughout his book, this court has, for better or worse, shaped important features of Indonesia's new democracy, including its electoral systems. Horowitz describes the court variously as 'powerful', 'activist', and 'fearless', having 'solidified judicial independence' and exercised its judicial review powers with 'gusto'. Yet, as Horowitz convincingly shows, the court has been able to develop and exercise its authority to conduct judicial reviews independently and actively only because of Indonesia's political fragmentation or 'factional equilibrium' (p. 236). All parties involved in Indonesia's constitutional amendments saw the benefit of having an impartial umpire to settle disputes and have since been content to leave the court alone, even as it handed down decisions that adversely affected them.

Horowitz's work is impressively rigorous and comprehensive. Perhaps, though, he overstates the extent to which the Constitutional Court appears to be unconstrained by the political environment. Perhaps, also, he provides an oversimplified assessment of the court's judicial reasoning in some of the important cases he discusses. These two 'criticisms', to which I turn below, are narrow and are clearly of minor significance to Horowitz's primary theses. I do not intend, by raising them here, to obscure what is clearly exceptional scholarship.

As for the political environment in which the Constitutional Court has operated, Horowitz argues that the court was able to make unpopular decisions stick (p. 244) which '[n]o one considered disobeying' (p. 236).

Most significant and controversial have been decisions in which the court declares a statutory provision to be either 'conditionally constitutional' or 'conditionally unconstitutional'. In its earlier days under Asshiddiqie, the court declared many statutes to be conditionally constitutional in an apparent attempt to underline the questionable constitutionality of a statute, while also allowing it to stand. In these cases, the court merely urged that the statute should be interpreted in a way stipulated by the court so that it could remain constitutional. This allowed both the court and the legislature to 'save face': the legislature was not pushed to amend an unconstitutional statute, and the court did not face the prospect of having its decision formally overridden or avoided.

But as the court's reputation and confidence grew, particularly under its second chief justice, Mahfud MD, the court became more assertive and changed the way it cast these types of decisions, citing the general reluctance of the legislature to comply with the decisions in which the court had invalidated statutes. Rather than declaring statutes conditionally constitutional, the court began declaring them conditionally unconstitutional—that is, unconstitutional unless 'given the meaning' (*dimaknai*) specified by the court. These court decisions are self-enforcing—they do not require a legislative response. However,

as I read them, they are synonymous with the court amending legislation. By issuing them, the court moves away from its constitutional function—invalidating unconstitutional legislation—and towards law-making, thereby usurping a function of the legislature. This is a primary legal means by which the court has exhibited its activism, but I could find no reference to it in Horowitz's book.

Even if one accepts that the 'factional equilibrium' or 'fragmentation theory' explains the establishment of the Constitutional Court and its development into an independent, active, and expansionist institution able to issue decisions unfavourable to the government, it seems less capable of explaining amendments to the Constitutional Court Law, enacted in 2011. These amendments, which reportedly passed through parliament unanimously, sought largely to quell the court's activism, including its 'conditional unconstitutionality' decisions, and to tighten supervision of its judges (see Butt and Lindsey 2012:144–8). This amendment appears to expose a limitation of the fragmentation theory. A court might reach a point at which it becomes so powerful that hobbling it might become a shared imperative of an otherwise fragmented polity. A few months later the court had the opportunity to review the constitutionality of these amendments and, rather predictably, invalidated them. The national parliament, while able to combine to mount the initial attack, appeared then unable to join forces to challenge the court again. The court was, therefore, ultimately powerful enough to deflect these attacks.

I turn to my second point about Horowitz's assessment of the Constitutional Court, particularly his critiques of its reasoning and interpretative methods. I discuss only one of them here. Horowitz states that the Constitutional Court has 'not yet discovered methods of interpreting statutes narrowly to save the legislative purpose from complete annihilation through unconstitutionality' (p. 243). Yet the Constitutional Court turns down far more constitutional challenges than it upholds, often on grounds that the legislation in dispute falls within what it calls the 'corridor of constitutionality' or 'opened legal policy'. Both concepts refer to the scope legislators have to enact laws on particular topics, provided that they do not overstep the broad parameters outlined in the constitution. Another common ground is that the constitution itself allows the legislature to override the rights of some citizens in furtherance of other interests, such as 'public order'. The court did just this in the *Undang-undang tentang Pencegahan Penyalahgunaan dan/atau Penodaan Agama* (Blasphemy Law) case, discussed in Chapter 7 of Horowitz's book.

It is also possible that Horowitz has underestimated the extent to which the Constitutional Court, in its decision-making, is constrained by law. Of course, courts the world over can and do consider the ramifications of their decisions

before they make them—particularly, the political environment in which they are made—but to what extent is a court ‘required’ to come to a particular decision, because that is where applying the law leads it?

For example, Horowitz claims that the court ‘showed little respect for the nuances of electoral law’ when it invalidated aspects of Indonesia’s open-list system in a 2008 case.¹ (Prior to this decision, political parties could, for the most part, allocate seats they received in legislative elections to their own preferred candidates, ranked on their party candidate list. These preferred candidates had been able to obtain a seat even if they received a comparatively small number of votes. In this case the court decided that seats should be allocated to representatives who obtained the most votes, irrespective of where they sat on the candidate list.)

Yet was the court not simply applying Article 1(2) of the constitution—one of its most fundamental provisions—which places sovereignty in the hands of the people? In its decision, the court recognized the need for a balance to be struck between this principle and the role that the constitution gave to political parties as ‘participants in general elections’ (Article 22E(3)). For the court, at the voting stage of the electoral process, the choices of the people needed to be respected over those of political parties which, after all, had expressed their choices earlier in the process by recruiting candidates and determining which of their members would appear on candidate lists.

I do not intend to suggest that the court is not beyond reproach; far from it. But the main problems with the court’s reasoning and decision-making are perhaps different to, and more fundamental than, those to which Horowitz points. Particularly problematic are the court’s inexplicably inconsistent and poorly explained decisions, which have appeared more regularly since Asshiddiqie left the bench. Yet, the court’s overall standard of decision-making remains good, particularly if compared with any other Indonesian court. It is, therefore, somewhat of an exaggeration to describe the court as wielding ‘a large cleaver’ (p. 246) in any given case. To be sure, the court’s decisions do lack scalpel precision, but the truth probably lies somewhere in between.

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1 p. 286. Horowitz is referring to Constitutional Court Decision 22–24/PUU-VI/2008.

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In the latest issue of *BKI* Gerry van Klinken reviewed the book under debate and called it 'magisterial'. I fully agree, which unfortunately is not the best start for a debate. Horowitz's study of the post-1998 Indonesian constitution-making process, its outcomes, and its consequences has the depth of an area specialist's work, and yet the theoretical embedding of political science at its best. It serves as a case to critically look at and reconsider theories about constitutional engineering, and it presents novel insights into the factors and conditions determining the success of such an endeavour.

Many elements of the book merit attention, but I will focus on one particular topic: the sidelining of parliament and how this has come about. Horowitz shows how in parliament different religious groups are represented in different political parties, and how the same patterns can be discerned here as in the 1950s. However, as he rightly argues, there is now much more crossing of party lines than used to be the case. The term he coins for this, 'multipolar fluidity', is characteristic of present-day Indonesian politics.

When it comes to the limits of this fluidity and to the 'fundamental' issues on which no compromise can be reached, it is striking that the latter are typically of a religious nature. Major socio-economic conflicts, over the Land Acquisition Act (2/2012), the Mining Act (4/2009), and several labour laws, hardly lead to the degree of conflict religious topics cause. Likewise, different views about how to organize the economy and how to deal with socio-economic injustices seem to have played not much of a role during the constitutional debates. This, I would argue, could only happen because Indonesia's radical left was wiped out in 1965–1966. The discourse discrediting the communists and those associated with them has largely remained in place since—no doubt reinforced by the global neo-liberal ascendancy forged during the 1990s and 2000s.

It actually seems that the groups who were formerly represented by the Partai Komunis Indonesia (Indonesian Communist Party) and the Partai Sosialis Indonesia (Indonesian Socialist Party) never found a new home. The poor and disadvantaged are represented outside of parliament rather than inside of it.²

2 Gerry van Klinken pointed out to me that it seems Indonesia is a democracy for the elites rather than for the masses.

From the start the anti-New Order, pro-poor NGOs preferred to stay out of party politics and to pursue their reform agendas outside of parliament (Schulte Nordholt 2005).³

Horowitz argues that the fluidity of the multipolar political system and the practice of constituting cabinets which include almost all parties has made parliamentary opposition increasingly difficult. Several other factors have further reinforced this tendency. The first is the preference of President SBY to try to achieve certain policy goals while avoiding parliamentary procedures. Thus, in 2011 the Badan Perencanaan Pembangunan Nasional (BAPPENAS; National Development Planning Agency) adopted a 'National Strategy for Access to Justice', which set out an ambitious plan to realize a comprehensive set of progressive policy goals.

The opportunity for the president to avoid the parliament is further reinforced by the Indonesian legislative process, which is very formalistic in its agenda setting. The order in which draft laws are developed and discussed is determined in the Program Legislasi Nasional (PROLEGNAS; hereafter National Legislative Programme), which plans five years ahead and makes it hard for parliament to react swiftly to particular issues (even if MPs sometimes do present draft laws). Presidential decrees thus become an important tool for the president to regulate issues awaiting the moment the matter at hand is finally tabled on the basis of the National Legislative Programme.

At several points Horowitz mentions the absence of a formal veto power on the part of the president, but effectively the president has veto power. According to Article 20(2) of the constitution any draft law, including those proposed by parliament, needs joint approval by the legislative and the president. If either one disapproves, a new draft cannot be proposed again within the same budgetary year (see, for instance, Akbar 2014). Neither can parliament use its right to approve the budget as leverage in the way its American counterpart can, because in that case the budget of the previous fiscal year serves to validate the expenses by the government (Art. 23(3)).

The nature of acts of parliament also reduces parliamentary influence, as they are mostly so-called 'umbrella' acts, which only sketch the broad outlines of rules to be made by the government (Bedner 2008:176–7). Combined with the tendency of governments to enact government regulations that may even go against the relevant act of parliament, and the 'oversized' cabinets created by President SBY, it is clear that the tendency is for politics to move out of

3 However, they may also try to achieve their ends through connections with individual MPs; see Mietzner (2013a).

parliament towards an insider-dominated governmental process, with NGOs and outsiders trying to directly influence the government through lobbying and demonstrations rather than through political party programmes.

Alternatively, NGOs and other non-party political players have moved the opposition out of parliament to the rule-of-law institutions produced by the constitution and subsequent laws, such as the Komisi Nasional Hak Azasi Manusia (Komnas HAM; National Human Rights Commission), the Constitutional Court, the Ombudsman, the Komisi Yudisial (KY; Judicial Commission), and the Komisi Pemberantas Korupsi (KPK; hereafter Anti-Corruption Commission). NGOs have shown a strong preference for framing their arguments in human-rights terms, so that they can address the Constitutional Court to annul legislative provisions deemed unconstitutional or the Supreme Court for overturning lower legislation on the same basis.

It thus seems that not only is Indonesia a low-quality democracy, but that the combination of institutions adopted, combined with the particular political conditions in place, has led to the sidelining of parliament in a way not foreseen by the constitutional drafters. The personalistic elements emphasized by Horowitz (notably direct elections and the open-list system) have since been further reinforced by the changes in party financing by the state. In perhaps one of the politically most far-reaching measures in (post-)constitutional drafting, legislators decided to limit party financing by the state and thus made parties fully dependent on private funding (Mietzner 2013b). Hence parties have further lost control over programmes and candidates and the system has become even more executive-heavy.

The effects of this are not limited to the centre. Clark (2014) has recently demonstrated how district heads are forced to repay their clientele for the debts they incur during their campaigns and how this makes them vulnerable to charges of corruption. As a result, the political accountability process has moved out of the district parliament to become a process in which district heads have to sufficiently assuage their different constituencies to ward off an impeachment process following a trial for corruption. Thus the police and the public prosecutors become key institutions for determining political accountability,⁴ even if they do need to take account of NGOs, the central government, regional business, and—finally—the district parliament.

In short, I agree with Horowitz that the constitutional process in Indonesia was probably the best the country could get, and that its results have been bet-

4 The capacity of the Anti-Corruption Commission is far too limited to constitute a threat for most of the approximately 470 district heads in Indonesia.

ter than anyone expected. Yet, these results to me seem even further removed from a representative democracy than the end of his book seems to suggest.

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Response by Donald L. Horowitz

I am grateful to the *BKI* for organizing this debate on *Constitutional change and democracy in Indonesia*. In that book, I undertook to analyse the process by which Indonesia's politicians managed to create a democracy, the political institutions they chose, and the consequences of those choices. The process was unconventional, for it involved elections prior to constitutional change; change produced by insiders working through the legislative process, without the aid of a constitutional commission or constituent assembly; and amendment of the old constitution in stages extending over several years. The result was a thorough revamping of Indonesia's political institutions. A separation-of-powers regime was created, with a directly elected president, a new constitutional court, and considerable devolution to the regions. The result is a quite imperfect democracy, and I enumerated many of the imperfections.

The three distinguished critics who appear on these pages have deepened my analysis by pointing to judgements of mine that were questionable. Some of these criticisms are well founded, a few lie outside the scope of what the book sets out to do, and a small number are contestable. So let me lay out areas of agreement and disagreement.

Nadirsyah Hosen notes an omission in my treatment of the Constitutional Court's blasphemy decision. He is critical of the court's use of religious values in determining the constitutionality of the law. My own emphasis was on an extrajudicial pronouncement by the then-chief justice of that court to the effect that if the court had not upheld the Blasphemy Law, mobs might take vigilante action against religious dissenters. I pointed out that Indonesia was subject to vigilantism in spite of the court's decision and that, by declaring the law to be constitutional, the court may have entrenched intolerance (pp. 254–5). I agree that use of religious values in constitutional adjudication is highly questionable, but Article 29 of the constitution opens the door to such pronouncements. That article declares that 'the state is based on the belief in one supreme God'. This makes Indonesia something other than a fully secular state.

Dr Hosen also questions my endorsement of the mix of political institutions created by the constitution and electoral laws. He argues that a strong presidency is inhibited by Indonesia's multiparty system, because the president is obliged to cobble together a large coalition in order to govern. From this viewpoint, the president is 'a dealer, not a leader'. Yet I think there is an important tradeoff, about which there is room for a difference of opinion. My own view, expressed at many points in the book, is that a society as pluralistic as Indonesia benefits from having a party system that reflects that plurality, even if it makes government a bit more cumbersome. I would add that President Yudhoyono was unduly reticent about using the powers that he possessed, including the power to persuade—a power inherent in the presidential office. A more vigorous president might exercise greater initiative and be more successful.

A final point made by Dr Hosen is that I neglect two positive features of Indonesian politics, namely the support of the two major religious organizations (Muhammadiyah and Nahdlatul Ulama) for democracy as well as the declining political role of the armed forces. I do refer, albeit obliquely, to the democratic inclinations of both Muslim organizations, and I have a section of Chapter 7 and many references elsewhere concerning the way the military's political prerogatives were reversed during the reform period. But, of course, Dr Hosen is right to emphasize the importance of both developments to Indonesia's democratic trajectory, especially in contrast to cases such as Egypt.

Simon Butt's critique is mainly centred on the Constitutional Court. He agrees with my judgement that the court's power derives in large part from

what I call Indonesia's 'factional equilibrium', but he questions some of my judgements about that court. He points to some of the court's early decisions that found statutes to be neither absolutely constitutional nor absolutely unconstitutional but 'conditionally constitutional'. Under the second chief justice, the court sometimes declared statutes to be 'conditionally unconstitutional'. In both cases, what was meant was that the laws in question would be constitutional if they were given what is known in some other constitutional systems as a 'limiting construction'—that is, an interpretation that narrows the reach of a broadly drafted law to only those applications that are clearly within constitutional bounds. Some such interpretations may make the reach of a statute narrower than some legislators intended, but they make it possible for courts to avoid reaching sensitive constitutional questions and also give legislatures the chance to take a second look at the statutes concerned.

Dr Butt is right that I neglected to note these techniques, because in the section on the rule-of-law deficit (pp. 233–46) I was mainly calling attention to deficiencies. The book was not principally focused on the details of constitutional adjudication. Even so, I am not sure that I agree with Dr Butt that, by interpreting narrowly statutes that raise constitutional questions, the Constitutional Court is 'usurping a function of the legislature'. My own view of constitutional courts is that they should generally try to avoid constitutional confrontations, especially in new democracies. A limiting construction is one useful technique of avoidance, especially if a narrow interpretation can achieve the same result as a more explicit vindication of constitutional rights, which it often can.

Sometimes, as Dr Butt says, the narrow interpretation is too much at odds with legislative intent to be legitimate. But, as he rightly notes, constitutional courts that demonstrate too much power can produce hostile legislative reactions. The Indonesian legislature attempted to limit the court's power in 2011 by passing a restrictive statute, which the court then struck down. A certain judicial prudence might, therefore, be well warranted. Prudence may involve, on some occasions, giving full effect to legislative intent if it is manifested clearly enough and, on others, limiting the reach of a statute of doubtful constitutionality without an outright declaration that it is unconstitutional.

Dr Butt also takes me to task for a passage in which I criticized a decision of the Constitutional Court on the constitutionality of an electoral law. He defends the court's decision (22–24/PUU-VI/2008) striking down the 2008 provisions governing open-list elections. I do not agree.

In some list-system proportional-representation (list-PR) electoral systems, candidates are elected simply on the basis of their position on their party's list; no votes are cast for individual candidates. If there are, for example, 10 seats

to be filled in a constituency, a party may name 10 candidates in order of preference. If that party receives 20 percent of the vote in that constituency, only the top two candidates (20 percent) on its list will be deemed elected. (For simplicity, I leave out some refinements.) The system is based on the proportionality of seats to votes cast for the parties. This is closed-list PR. In some other list-PR systems, called open-list PR, voters are, in addition, accorded an opportunity to move individual candidates up on a list, and if a candidate achieves a substantial vote as an individual, that candidate may be elected even if he or she would not have been elected because of his or her position on the party's list. In Indonesia, the legislature chose the latter system for the 2009 election. To be elected on this basis, an individual would need a certain fraction of what is called the quota, failing which seats would simply be awarded on the basis of the position of candidates on their parties' lists, as is customary in partially open-list systems. (Again, I omit some refinements.)

The Constitutional Court noted that this provision allowed the election of some candidates based on their higher position on their party's list over others with more individual votes but a lower position on the list. This situation would occur if a candidate ranked too low on a party's list to win a list seat received more votes, but also not enough to win a seat on an individual-vote basis, than another candidate whose position on the party list was sufficient to win a list seat in spite of a lesser number of individual votes. This result the court found defective on the basis of Article 1(2) of the constitution, which places sovereignty 'in the hands of the people'.

Article 1(2) goes on to say, however, that sovereignty is 'implemented according to this Constitution', which accords law-making power, including the power to make electoral law, to the legislature. What the legislature did in the 2008 electoral law was to balance a number of competing considerations that are involved in electoral-law drafting. Among them are the desire for strong and relatively unified parties (fostered by party control of the order of names on lists), and the desire for accountability of representatives to constituents and an opportunity for voters to choose popular candidates (fostered by a chance for voters to move candidates higher up on a list). The legislature did this by creating partially open lists, by which particularly popular candidates could win election even if their position on a list would otherwise be too low to produce that result. To be elected on this basis, however, a candidate would need a substantial number of individual votes.

The court's decision upset this balance and had a number of consequences. It increased accountability to constituents. Candidates flocked to the constituencies in which they were running, in order to demonstrate the respon-

siveness that voters could expect if they voted for them as individuals. But the decision also fostered intra-party rivalries, as individual candidates sought to show that they were better choices than their party colleagues running on the same list. This weakens party cohesion.

There is little doubt that the court's decision, based on a constitutional clause that simultaneously affirmed the sovereignty of the people and the power of the legislature, was deeply in error. Many countries, including the Netherlands, have partially open lists of the sort that Indonesia adopted in 2008. The creation of an electoral system involves deciding among many values, not all of which can be satisfied at once. The Indonesian legislature had been struggling with these questions for a decade before the Constitutional Court intervened. That intervention was based on a profound misunderstanding of the foundations of electoral-system law and practices around the world.

Moreover, there was no injury to the sovereignty of the voter for the court to consider. By considering the relative number of votes cast for two individual candidates and expressing displeasure that one with fewer individual votes but a higher position on a party list could be elected over one with more individual votes but a lower list position, the court ignored the typically much greater number of votes cast for the party's list without any indication of individual candidate preferences. That larger number of voters might be willing to vote for the party list as it stood because they were expressing a straightforward party preference, or were insufficiently knowledgeable about individual candidates on the list, or were knowledgeable but thought the order of candidates on the list was just right. Partially-open list PR allows voters to make such choices, between whole lists and individual candidates, not merely the choice between two candidates on which the court focused.

The Constitutional Court in this case went further in diminishing the power of the legislature. It edged close to declaring that closed lists, although used in many countries, might be unconstitutional—and all this on the basis of only one half of a constitutional clause that might in other jurisdictions with provisions for constitutional review be regarded as not giving rise to justiciable claims at all.

Adriaan Bedner's comments focus to a considerable degree on the 'sidelining' of the Indonesian parliament and the president's ability to govern outside of parliament. In this respect, they contrast somewhat with Dr Hosen's view of Indonesia's rather weak presidency. Yet the two views may be reconcilable, because I think the balance between presidential and legislative power is likely to prove variable rather than constant.

Dr Bedner refers to my statements about President Yudhoyono's desire for a formal veto power, and he points to some provisions that already give the pres-

ident more control over legislation than might be apparent from the absence of an explicit veto. In this, Dr Bedner is undoubtedly correct.

The Bedner critique also notes that the legislature has often cast statutes in very general terms, leaving it to the executive to create binding rules. The deficiencies of the legislative process in Indonesia have been pointed out by other writers. I believe this particular defect is not inherent in the constitutional structure—although it may derive from some difficulties of achieving compromise in the legislature—but could be remedied by the legislature itself.

What does reduce legislative power is the multiparty structure of politics, which more or less guarantees that there will be no majority party. This in itself would not be a major problem if there were not such a strong tendency towards oversized cabinets, beholden to the president for various forms of largess—a tendency I discussed at length in the book. Hence the propensity that Dr Bedner cites for politics to move out of parliament and into the cabinet. But this tendency, too, has depended in part on the president's desire for a substantially oversized cabinet.

As I have pointed out in the book (p. 287), not all presidents will necessarily prefer such a broadly based cabinet. A real practice of government and opposition could emerge. For the moment, I am not completely convinced by Dr Bedner's point that parties have 'lost control over programmes [...] and the system has become even more executive-heavy'. The representation of the parties in the cabinet has given them a substantial voice in government.

Dr Bedner calls attention to the unfortunate effects of campaign expenses on political behaviour, both at the centre and in the devolved district governments. The need for funds to stand for election attracts parties to cabinets, where they can raid foundations attached to ministries, and creates incentives at the regional level, as Dr Bedner says, for corrupt bargains and subsequent deals enabling candidates to evade prosecution for those bargains. Politics in Indonesia would be more responsive and more responsible without the need for large sums for politicians to participate, although it is hard to imagine that public funding would operate without a good deal of corruption and favouritism.

I do not share Dr Bedner's view of the negative effects of Indonesia's rule-of-law institutions on the power of the legislature. On the whole, despite excesses such as those I mentioned concerning the Constitutional Court, those institutions are a useful complement to the political branches. Previously, Indonesia was, to put it mildly, not a rule-of-law state. It still has a long way to go to achieve that status—witness, for instance, the *ultra vires* activities of some regional governments, the inadequacies of the judiciary, and the shocking abuse of religious minorities, all of which continue to this day. Before we conclude that the effect

of these institutions is to move 'opposition out of parliament', especially before concluding that this is a wholly negative effect, we would need to confront the fact that parliament itself is not always inclined to respect human rights, observe constitutional limits, or root out corruption. It is not so much a matter of moving issues out of the legislature as it is moving them out of a legislature where, if the opposition were to take up those issues, they would still be inadequately dealt with. Indeed, members of parliament themselves move issues out of parliament when they protect interests with which they are connected from being summoned to the legislature for investigation or from being subject to legislation (see, for instance, p. 222).

Indonesia's constitution now makes it a separation-of-powers state. A very important part of such a regime consists of countervailing power to that of the legislature. Constitutional courts, commissions, and NGOs all perform useful roles in such a scheme. With rare exceptions, these institutions have not amassed so much power as to threaten the law-making power of parliament. The interesting question is the extent to which those institutions have a serious effect on legislators who are aware that some rule-of-law institution or NGO may be watching them. To what extent, in other words, do those institutions alter the behaviour of legislators and induce them to conform to the rule of law? My guess is that this is still a limited but benign effect. The fact that the legislature occasionally acts against the Constitutional Court or the Anti-Corruption Commission suggests that there could be some impact, but how much and under what circumstances? The subject is worthy of serious research.

The *Bijdragen* has done a splendid job of enlisting three fair, knowledgeable, and careful reviewers, who have forced me to think again about arguments I have made. I hope this debate enriches the experience of readers who manage to pick up a copy of *Constitutional change and democracy in Indonesia*.

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