



Has the Pandemic Exposed the Weakness of Indonesian Constitutional Democracy?

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The Corona pandemic not only reveals the fragility of the Indonesian health system, but also exposes the weakness of Indonesia's democracy. This particularly concerns the ability of political and judicial institutions to control government power.

Since the first Covid-19 cases were reported in Indonesia in March 2020, the number of cases continues to soar. In April 2021, it was recorded that more than 2,5 million people had been infected with Covid-19 in Indonesia, with the death toll reaching more than 70,000 people.¹ This number is expected to grow, especially after 12 April 2021, Indonesia achieved its daily record-breaking number, where for the first time in a year, the positive cases surpassed the 40,000 marks.²

With such a large number of cases, currently, the Indonesian health system is entering its 'nadir', where many hospitals especially in Java (Indonesia's most populated island) were full with Covid-19 patients, while their oxygen stocks were empty. This forced many Covid-19 patients to self-isolate in their own homes, and many died during this process.³

To overcome this crisis, since last year the Indonesian government under the presidency of Joko Widodo (Jokowi) declared a health emergency status based on Law No. 6 of 2018 on Health Quarantine. The activation of this status gives the government the authority to introduce a large-scale social restriction policy in several provinces, restricting social activities related to religion and education.⁴

Unfortunately, one year after it was implemented, this policy proved to be ineffective and failed to reduce the spread of Covid-19 because it still allowed people to travel outside their region. During the Eid celebration on 12 and 13 May 2021, millions of people travelled outside their hometown to perform the tradition of 'mudik' (visiting their relatives),⁵ which triggered a significant increase of Covid-19 cases.

Although this pandemic seems to have exposed the fragility of the Indonesian health system, it has also exposed the weakness of Indonesia's democratic system, especially regarding the performance of political and legal institutions to check the government's power.

Weakening of Check and Balances

After transitioning to democracy in 1998 (popularly known as 'reformasi'), which was followed by comprehensive amendments to democratize the Indonesian 1945 Constitution, Indonesia was once seen as the most successful story of democratic transition in Southeast Asia, especially from 2004 until 2014.⁶ This success cannot be separated from the role of political and legal institutions in Indonesia to check the government's performance, thus preventing the phenomenon that previously occurred in the pre-reformasi period where the executive became too powerful and unchecked.

1 See the Indonesian Government Official Website about Covid-19 Pandemic. <<https://covid19.go.id/>>

2 Hendro Situmorang and Heru Andriyanto, 'Indonesia Passes 40,000 Covid Cases Ten Days after Lockdown' (July 12, 2021) Jakarta Globe. <<https://jakartaglobe.id/news/indonesia-passes-40000-covid-cases-ten-days-after-lockdown/>>

3 Ibid.

4 Abdurrachman Satrio, 'Indonesia's Fight against COVID-19: A Battle Over the Meaning of Emergency?' (April 12, 2020) Verfassungsblog. <<https://verfassungsblog.de/indonesias-fight-against-covid-19-a-battle-over-the-meaning-of-emergency/>>

5 Tria Dianti and Arti Ekawati, 'COVID: Indonesian hospitals grapple with shortages as cases surge' (July 7, 2021) Deutsche Welle. <<https://www.dw.com/en/covid-indonesian-hospitals-grapple-with-shortages-as-cases-surge/a-58188012>>

6 Marcus Mietzner, 'Political Conflict Resolution and Democratic Consolidation in Indonesia: The Role of the Constitutional Court' (2010) Journal of East Asian Studies 397, 397-398.

However, in recent years there is a tendency that Indonesia has started to bring back its old authoritarian tradition, especially after President Jokowi came to power in 2014. Since coming to power, Jokowi often used various legal and constitutional mechanisms to weaken the power of other state institutions tasked with the duty to check his government.⁷ This tendency even seems to be getting stronger during this pandemic.

It cannot be denied that in almost all countries across the globe, this pandemic made the role of the executive increasingly more dominant, especially in terms of the decision-making process.⁸ But, for countries whose governments have been trying to make their power unconstrained since before the pandemic like Indonesia, this pandemic provides ample opportunity to further consolidate and expand their power.⁹

For example, at the beginning of the pandemic, the Jokowi government tried to use a civilian emergency status to handle this pandemic, based on the president's exclusive power to declare the state of emergency in the 1945 Constitution. The issuance of this status has the potential to weaken democracy because it not only allows the government to limit a person's freedom of movement and freedom of speech, but also weakens the power of other state institutions that should supervise his government.¹⁰ Luckily, his government decided to cancel this plan and chose to declare a health emergency status due to pressure from the public.

Although it failed to establish a civilian emergency status, the Jokowi government's attempts to concentrate state power in their hands did not stop there. Shortly after declaring the health emergency status, Jokowi promulgated Emergency Regulation No 1/2020 on State Economic Policy to Handle Coronavirus Pandemic. This regulation, which was made to deal with the economic crisis caused by the pandemic, states that the administrative court cannot challenge any government policy related to the pandemic. This regulation also prohibits the prosecution of any government official implementing this regulation in the Civil or Criminal Court.¹¹

In effect, this regulation makes the government almost immune from the Court's supervisory role. It was also formed without having any legal basis, because the activation of health emergency status does not provide the government with immunity from judicial oversight.¹² Besides that, there is no reason for the Jokowi government to eliminate the role of the court during the pandemic since the

judiciary – even though it has difficulty operating – is still able to hold trials through electronic or hybrid services.¹³ The role of the House of Representatives (DPR) as a legislative institution has also weakened during the pandemic alongside the role of the judiciary. Even before the pandemic, the Jokowi government had almost completely captured the legislature through their success in getting the support of the three-quarters of the DPR seats. But it was during this pandemic that the Jokowi government seems to have succeeded in making the DPR fully work as a rubber stamp to legitimize their action.

The government and the DPR issued various controversial laws through undemocratic processes such as the Omnibus Law on Job Creation, the Revision of the Indonesian Constitutional Court Law, and the Revisions to the Coal and Mineral Mining Law. These laws were formed through a hasty process and behind closed doors, without adequate involvement of the public.¹⁴ When the public protested against the enactment of these laws, the government cited the pandemic as a reason to not involve the public in the process to create these laws.¹⁵

Some of these laws were also enacted to weaken the performance of other state institutions tasked to check the government. An example of this is the Revision of the Indonesian Constitutional Court Law. Although this Law gives an impression that it was made to strengthen the independence of the Constitutional Court¹⁶ – since it allows the current benches of the Court to stay in office longer – actually this Law is closely related to the interests of the Jokowi government to weaken the Court. Before this Law was issued, the Jokowi government – with its supporters in the DPR – successfully appointed several Constitutional Court judges suspected of being loyal to his government, such as Enny Nurbaningsih and Arief Hidayat.¹⁷ Therefore, the enactment of this Law will secure the position of some of these loyalist judges, at least until the end of the Jokowi Presidential term.

Moreover, it was also during this pandemic, that the Jokowi government tried to weaken the Corruption Eradication Commission (KPK) – the most trusted law enforcement institution in Indonesia. The government dismissed some senior KPK staff and investigators under the pretext that they had failed to pass the 'civic test' which is part of the

7 Abdurrachman Satrio, 'Constitutional Retrogression in Indonesia Under President Joko Widodo's Government: What Can the Constitutional Court Do?' (2018) 4 Constitutional Review 272.

8 Joelle Grogan, 'Power, Law and the COVID-19 Pandemic – Part I: The Year of Pandemic' (May 15, 2021) *Verfassungsblog*. <<https://verfassungsblog.de/power-law-and-the-covid-19-pandemic-part-i-the-year-of-pandemic/>>

9 Tom Gerald Daly, 'Democracy and the Global Emergency – Shared Experiences, Starkly Uneven Impacts' (May 15, 2021) *Verfassungsblog*. <<https://verfassungsblog.de/democracy-and-the-global-emergency-shared-experiences-starkly-uneven-impacts/>>

10 Satrio (n 4).

11 Abdurrachman Satrio, 'Checking the Unchecked Power: The Role of the Indonesian Constitutional Court during the Pandemic' (May 26, 2020) *IACL-IADC Blog*. <<https://blog-iacl-aidc.org/2020-posts/2020/5/26/checking-the-unchecked-power-the-role-of-the-indonesian-constitutional-court-during-the-pandemic>>

12 Ibid.

13 Amalinda Savirani and Linda Yanti Sulistiawati, 'The Malady of Ignorance? Indonesian Parliament During the COVID-19 Pandemic' (April 06, 2021) *New Mandala*. <<https://www.newmandala.org/the-malady-of-ignorance-indonesian-parliament-during-the-covid-19-pandemic/>>

14 See Rafiq Qurrata Ayun and Abdil Mughis Mudhoffir, 'Omnibus law shows how democratic process has been corrupted' (October 12, 2020) *Indonesia at Melbourne*. <<https://indonesiaatmelbourne.unimelb.edu.au/omnibus-law-shows-how-democratic-process-has-been-corrupted/>>; See also Abdurrachman Satrio and Mohammad Ibrahim, 'One Year After the Pandemic in Indonesia: From Health Crisis to the Crisis of Constitutional Democracy' (March 15, 2021) *Verfassungsblog*. <<https://verfassungsblog.de/one-year-after-the-pandemic-in-indonesia-from-health-crisis-to-the-crisis-of-constitutional-democracy/>>

15 Ayun and Mudhoffir (n 14).

16 Simon Butt, 'The 2020 Constitutional Court Law amendments: a 'gift' to judges?' (September 03, 2020) *Indonesia at Melbourne*. <<https://indonesiaatmelbourne.unimelb.edu.au/the-2020-constitutional-court-law-amendments-a-gift-to-judges/>>

17 See M. Ahsan Ridhoi, 'Pelantikan Arief Hidayat Wujud Penurunan Kualitas Hakim MK' (March 28, 2018) *Tirto*. <<https://tirto.id/pelantikan-arief-hidayat-wujud-penurunan-kualitas-hakim-mk-cGQo>>

process to shift their status to a civil servant. This test itself is very controversial, given that its substance is unrelated to the performance of the KPK employees when conducting their job. Some of the questions in the test are related to the personal views of the KPK employees, including their stances on political and religious issues.¹⁸

The Fragility of Indonesian Constitutional Democracy

The explanation above shows how this pandemic is unveiling the fragility of constitutional democracy which has been adopted in Indonesia after the *reformasi*, especially from the efforts to weaken it by the government.

This vulnerability has become even more visible recently after the supporters of President Jokowi initiated a proposal to amend the 1945 Constitution regarding the provisions that limit the President's term of office to two terms, to allow him to become President for the third time. This idea emerged because Jokowi's supporters believe that the current crisis caused by this pandemic would be easier to overcome if the President could stay in office for a longer period.¹⁹

Regardless of its reason, this proposal certainly contradicts the main objective of *reformasi* and the democratic amendments from 1999 to 2002, made to prevent the centralization of power in the hands of the Presidents. The introduction of this proposal is also unreasonable, because even though Indonesia is currently experiencing a massive crisis, the presidential election itself will only be held in 2024, so there is enough time for the President to solve this crisis before the election.

What needs to be noticed from all of these current efforts to weaken democracy, is that the democratic reforms performed from 1998 until the early 2000s did not succeed in creating a robust constitutional democracy in Indonesia. Evidence for this assumption actually was visible when Indonesia was widely referred to as the most successful democratic country in Southeast Asia from 2004 to 2014. During that period, Indonesia succeeded in transitioning to democracy, and running smoothly mainly due to the role of non-elected institutions such as the KPK and the Constitutional Court, where both institutions – especially the KPK – successfully became the most trusted institutions by the public. Marcus Mietzner even argued that the consolidation of democracy occurred during this period because of the role of the Constitutional Court, which successfully resolved many political conflicts peacefully through constitutional means.²⁰

In an ideal democratic system, political institutions such as the President and the legislature should become the main actors in upholding democratic values, because they are the institutions that are directly elected by the people. Meanwhile, if the law enforcement institutions that are not

directly elected are more trusted by the public, it indirectly shows that there is an inherent problem in the Indonesian democratic system. Thus, this pandemic is not the main culprit that causes the declining quality of Indonesia's democracy, it is only a catalyst that exposes the problems that already existed in the Indonesian democratic system.

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19 See Stefanus Hendrianto, 'Term Limits and the Unconstitutional Constitutional Amendment Doctrine in Indonesia' (April 13, 2021) *Int'l J. Const. L. Blog*. <<http://www.iconnectblog.com/2021/04/term-limits-and-the-unconstitutional-constitutional-amendment-doctrine-in-indonesia/>>

20 Mietzner (n 6).