

Court Packing, Indonesia Style

Abdurrachman Satrio

2020-09-01T11:21:30

Once, Indonesia's democracy was hailed as the most stable in [Southeast Asia](#). In recent years, its quality is clearly deteriorating. And like other phenomena happening across the globe, this occurs precisely when democratically elected rulers make use of legal and constitutional mechanisms to [undermine](#) democratic values.

This is exactly what happened during the reign of President Joko Widodo (Jokowi). When he came to power in 2014 he was regarded as the [savior](#) of democracy. But in the six years of his government, he took numerous actions that have [weakened fundamental elements of constitutional democracy](#): he issued emergency regulations (Perppu 2/2017) to suppress his political opponents, used the Police Institution to [arrest activists who criticize his government](#), set a presidential threshold mechanism that limits the opposition's ability to compete in the 2019 presidential elections, and he weakened [The Corruption Eradication Commission](#) (KPK) – the most trusted law enforcement institution in Indonesia – by staffing it with loyalists.

Fortunately, even though its democratic values are openly weakened, until now, Indonesia has not yet reached the stage of [autocratic legalism](#) – as Poland or Hungary. The reason for this is that the Jokowi government has not fully captured the [Constitutional Court](#), which is one of the main factors that made Indonesia's transition to democracy successful.

However, it seems that the status of the Constitutional Court will change shortly: Recently, the Jokowi government and the House of Representatives which is controlled by his supporters proposed a Bill that shall revise the Constitutional Court Law.

Age and term limits

In this [Bill](#), the minimum age for the candidates for the Constitutional Court judges is increased from 47 to 60 years. Besides, this revision also eliminates the periodization of the judge's tenure. Previously, the Constitutional Court judges were appointed for a five-year term, after which they could be re-appointed for only one more term. Now in this revised draft, an appointed Constitutional Court judge will sit without a term limit until reaching the retirement age (70 years). So, this bill allows a Constitutional Court judge to serve for 10 years if he/she was appointed at the age of 60.

At first, this appears unproblematic. In fact, the elimination of judicial term limits seems to bring a positive effect since their existence in the current Constitutional Court Law often allows political institutions to influence the judges' reappointment decision. If they want a second term they need to register themselves in the fit-and-proper test

process held by the institution which appointed them – be it the President, the House of Representatives, or the Supreme Court.

Several judges [complained](#) about this process because they considered it unethical for a constitutional judge who is handling cases which often concern the interests of political institutions such as the President and the House of Representatives, to be subjected to a fit-and-proper test process by these very institutions. If they refuse to register for the fit-and-proper test, they most likely will not be re-elected as Constitutional Court judges – as it happened to the fourth Chief Justice Hamdan Zoelva.

However, even though this Bill seemingly intends to strengthen the independence of the Constitutional Court by eliminating the periodization of the judges' terms of office, some of its substance [raises public suspicion as to its true intentions](#). This is because of the change to the minimum age limit for a person to become a Constitutional Court judge.

Article 87 of the Bill emphasizes that if the current judges in the Constitutional Court pass the age of 60 and over, they will remain in office until the age of 70, even when their term of office determined by the current Law ends before.

Based on that provision, from all the judges currently sitting in the Constitutional Court, one judge will be dismissed from his position if this Bill is passed: [Saldi Isra](#), the youngest judge. His first term of office under the current Law ends in 2022 and at that point he will only be 54 years old.

This specific impact was the main reason for the public suspicion toward this Bill, because Isra, who has a background as a leading constitutional law scholar and anti-corruption activist, is the Judge who most often takes a position [against the government](#) on the current bench. In fact, when Isra was appointed as a Constitutional Court judge in 2017, he was seen by the public as an [independent figure](#) who would lead the Court in the next few years, thus his existence is a major obstacle for the Jokowi government to fully control the Court.

Public doubts toward this Bill were also reinforced by [the policy paper](#) (*naskah akademik*) issued by the House of Representatives when they initiated the idea to revise the Constitutional Court Law. The paper didn't contain enough reasons why the raise of the minimum age limit to become a Constitutional Court judge would be necessary.

This allegation was also strengthened by the [hasty process](#) of the creation of the Bill: the government and the House seem to take advantage of this pandemic situation by trying to enact the Bill as quickly as possible, and the process itself drew criticism for being held behind closed-doors without the public being involved.

A Court filled with loyalists

The allegation that this Bill was made to undermine the Constitutional Court can also not be separated from the ways in which the Jokowi administration in recent years

already tried to pack the Court with loyalists. The House of Representatives which is controlled by Jokowi's supporters extended for example the term of office of the fifth Chief Justice of the Constitutional Court [Arief Hidayat](#) to continue his second term in 2018, even though at that time Hidayat was being subjected to ethical sanctions by the Constitutional Court's Ethics Council for conducting political lobbying with a member of the House who supports the government.

Another effort to undermine the Constitutional Court was also performed through Jokowi's decision to appoint Judge Enny Nurbaningsih in 2018. As a former member of the Jokowi's administration, Nurbaningsih is one of the main figures [behind the draft of the new penal code \(RKUHP\)](#), which controversially wants to revive the provision that penalizes the act of defaming the president previously struck down by the Constitutional Court in 2007 (013-022/PUU-IV/2006). By placing Nurbaningsih in the Constitutional Court, Jokowi is trying to secure his policies so that later when his government promulgates the draft of the new penal code, it will not be overturned by the Court.

With such an unfavourable track record, suspicion from the public is understandable if the government and the House are trying to capture the Constitutional Court through the Bill that shall revise the Constitutional Court Law, especially with respect to Judge Saldi Isra. And it cannot be denied that their success in promulgating this bill will affect not only the Constitutional Court, but also the future of Indonesian democracy.

