

# Why Legitimacy Matters in Times of Uncertainty: A Critical Study of the Success Story of the Constitutional Court of Indonesia

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**Submission date:** 22-Apr-2019 01:57PM (UTC+0700)

**Submission ID:** 1116785193

**File name:** RB-5.pdf (612.38K)

**Word count:** 4084

**Character count:** 23218

RESEARCH BRIEF

## Why Legitimacy Matters in Times of Uncertainty: A Critical Study of the Success Story of the Constitutional Court of Indonesia

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Indonesia's abrupt democratizing process that started in 1998 has failed to produce any meaningful constitutional reform (Horowitz, 2013; Iskandar, 2016a, 2016b). For instance, even an optimist like Ellis (2002, p. 2) in his analysis of the constitutional amendment debate in the post-New Order era has posited that "[m]uch of th[e] debate has thus been confusing to participants and observers alike, in that the arguments over questions of substance have been paralleled by divisions over issues of symbols, language and perception." In fact, to some extent, progressive legal provisions, such as religious freedom, have been deliberately muted (Iskandar, 2016b; Shah, 2014). Essentially, "[i]n Indonesian constitutional matters, what is in the bottle does not always match what is on the label" (Ellis, 2002, p. 2). In other words, the trajectory of Indonesia's constitutional jurisprudence is drifting toward an ad hoc model that lacks systematic consideration.

In the midst of and perhaps as a result of these post-1998 legal uncertainties, the Constitutional Court (the "Court") has emerged as a new institution tasked specifically with deciding constitution-related questions. Arguably, the introduction of the Court is a gesture of public skepticism towards the notorious Supreme Court, which has been viewed as a threat

to legal certainty as well as the development of Indonesia's *rechstaat* or the Rule of Law (Pompe, 2005). It is unsurprising, therefore, that the Court has been viewed favorably by the public as a "force of good" (Putra, 2016). The Court has successfully secured others' "unconditional compliance" with its decisions despite the fact that it suffers from a lack of actual authority. It may be further argued that the persistent popularity of the Court is also linked to the exceedingly popular myth. Many among even the most educated population, based on the 12<sup>th</sup>-century prophecy of King Jabaya, believe in the inevitable coming of "the Just Prince" or "Ratu Adil," leading to prosperity. Such socio-psychological factors exemplify the unique nature of "legal legitimacy" at play within Indonesia.

This article is the first to critically discuss the importance of the moral dimension in the success of the Court as, first and foremost, a legal institution that resolves legal disputes among the main branches of government in Indonesia. Most available literature on the Court focuses on democracy-building and related matters (Butt, 2015; Meitzner, 2010; Stockmann, 2007). The Court has significantly added legal certainty to a widely disputed legal system, which has produced little more than confusion (Bell, 2001). Meaning,

this article argues that this achievement is ostensibly attributable to the legitimacy of the Court itself as a new institution, perceived as “clean and fiercely independent” (Butt & Lindsey, 2012, p. 104). Existing institutions do not share this favorable reputation. In other words, as a product of the political reform era (*reformasi*), the Court is popularly regarded as “[the major] provide[r] [for] serious debate on the application of the Constitution” (Butt & Lindsey, 2012, p. 104). The particularity of the Court’s “legitimacy” bolsters Indonesian legal scholarship, in particular, and the discourse of legitimacy and culture in social sciences and humanities in general. <sup>¶</sup>

I construct the argument as follows. In the following section, I discuss the peculiarities of legal uncertainty in the context of post-Suharto Indonesia. Meanwhile, the penultimate section argues that Indonesia’s conception of institutional legitimacy, or the absence of legal certainty, have arisen from institutional failure and ideological flaws rather than cultural differences. Before I conclude, the final section posits that Indonesia’s approach to institutional reforms is *sui generis*. To illustrate my case, I use the Constitutional Court where it has turned from a success story to an unassailable threat to the heart of the *reformasi* project itself, that is, the mechanization of checks and balances.

### Unwinding Legal (Un)Certainty in Indonesia

<sup>¶</sup> It has been widely noted that Indonesia’s judiciary has played a very limited role in the development of Indonesia’s post-colonial legal system (Lev, 2000; Pompe, 2005). Nevertheless, this does not mean that judiciary has been overlooked. It has been acknowledged that the need for instituting judiciary reform remains well-recognized in the post-colonial world. Interestingly enough, Lev (1973) argued that the motivating principle is a political ideology, especially national unification. As a consequence, the importance of regularity and legal certainty, historically the *raison d’être* of Western jurisprudence, has been sidelined. Notably, it might be argued that Indonesia’s post-colonial judicial practice has altogether disregarded pressure from “some Indonesian leaders . . . who opposed *adat* courts . . . and insisted that they be replaced by modern secular courts” (Lev, 1973, p. 4).

However, Javanese lawyers, who are more feudal in nature compared to their non-Javanese counterparts (Lev, 1973), insist, according to Iskandar (2016b), on a nation-wide implementation of *adat* law:

<sup>1</sup> ... [T]his law failed to meet the very definition of law in its modern sense: the rule of law. This means, *Adatrecht* [*Adat* law] is not written in a way that enables the population to easily understand it. For example, the sources for this kind of law were found in poetry, folklore and various other esoteric materials that can only be understood by the elite few in the village. (p. 728)

At a theoretical level, the Indonesian legal system is based on three different and oft-conflicting legal traditions, namely Western civil law, Islamic law, and *adat* law (Damian & Hornick, 1972; Iskandar, 2011; Lindsey, 1998). That said, it is common to see a sort of legal complexity which results from an irreconcilable difference between legal norms sourced from these three distinct legal traditions (Bowen, 2003). For instance, despite the 1974 Marriage Law considered as a laudable effort to part from the politics of (religious) identity, it fails not only as an effort “to develop an Indonesian national consciousness and civic identity aimed at overcoming the impediments posed to this by ethnic, religious or other attachment” but also “in essence incompatible with the Islamic concept of God as the sole agent of law-making” (Lukit <sup>¶</sup> 2013, p. 74). In public law, the confusion over the division of power between the central and regional governments has also created a state of perpetual confusion that is very unlikely to be resolved in the foreseeable future (Bell, 2001, 2003, 2011).

In addition to the grim socio-political reality of the corrupted judicial life that has undoubtedly eroded the public trust, the academic front has also failed to generate substantive proposals for legal reform (Iskandar, 2016a, 2016b). In particular, traditional Indonesian legal scholarship is accurately described as “highly theoretical, but at the same time superficial” (Bedner, 2013, p. 257). More troubling still, according to the Indonesian Association of Book Publishers, the academic publication of law books in Indonesia

reaches less than 20 per month (Iskandar, 2011, p. 177). It appears that there is no interest in developing a national legal repository in the foreseeable future (Taylor, 2008, p. 589). This should not come as a surprise given the fact that virtually all the law schools lack access to academic databases (Iskandar, 2011; Taylor, 2008). As a result, the prevailing discourse on constitutional law rarely invokes the latest findings on the subject. To make matters worse, this problem has been persisted since, at least, the 1970s without any apparent systematic effort to address it.

### Legal Certainty and Indonesia's Different Breed of Legitimacy

It should not be a surprise for those who have some familiarity with Indonesian studies that many scholarly propositions are based on some sort of exceptionalism. For instance, the ostensible founding text on Indonesian studies by Geertz (1976), which emphasized the particularity of culture through his "thick description," has provided an enduring legacy in contemporary Indonesian studies. Interestingly, these exceptionalism-based claims have also been impenetrable in the national political discourse, which inevitably stands in the way of further constitutional reform (Iskandar, 2016b). As Horowitz (2013, p. 41) aptly noted, "[t]he constitution was subjected to much criticism, but, in spite of its profound inadequacies, it was virtually sacred to important parts of the political spectrum because of its association with Indonesian independence." In fact, as constitutional freedoms of religion have worryingly gravitated toward the abuse of the rights of religious minorities (Iskandar, 2016b; Shah, 2014), the reality shows that, to some extent, it has produced a different kind of constitutionalism that cannot easily fit into any existing categorizations (Iskandar, 2016a, 2016b; Lindsey, 2002).

In terms of institutional reform, the *reformasi* has roiled legal certainty by introducing many specialized bodies that are growing unabated. Resulting turf wars between old and newly established institutions are commonplace. The frequent conflicts between the police and the Commission of the Eradication of Corruption (KPK) exemplify this inherently confrontational structure. Here, the public at large

views it through a binary lens where the police represent the evil of the status quo with the KPK as the white knight. As one might expect, the reality is much more nuanced; the conflict only corroborates the fact that Indonesia has no interest in addressing some fundamental flaws in a systematic manner (Susanti, 2015). Given the above situation of Indonesia's ambiguous commitment to serious institutional reform, it is fitting to claim that Indonesia's political system is still in a "transition" despite the fact that the *reformasi* era started in 1998.

To be sure, this failure to develop a systematic institutional response has decreased the level of legal certainty itself, especially in terms of legal enforcement. By extension, it might be argued that current domestic legal enforcement merely relies on the brute force, essentially resuscitating the pre-1998 authoritarian legal system and feeding a staggering rise in many sectarian gangs of thugs who take morality-inspired law into their own hands (Iskandar, 2016c). This means that the state's failure in enforcing their positive laws has undoubtedly incentivized these self-appointed guardians of morality to arbitrarily despoil the moral legitimacy of the law itself (Iskandar, 2016b).

The arbitrary and capricious imposition of the death penalty illustrates the dilatory effects of this paucity of legal certainty. As Pascoe (2015) noted, historical trends in use of the death penalty in Indonesia demonstrate that it has merely been a political instrument, rarely relying on legal considerations. Indonesia insists, however, on maintaining the death penalty for drug traffickers despite its socio-cultural claims of populism. For that, Novak (2014) rightfully argued that eventually, pragmatically informed decisions would seize the day in the case of countries such as Indonesia. In general, "[i]n Indonesia, institutions and ideology, not culture, are the context in which implementation of international human rights standards must be assessed" (Fitzpatrick, 2008, p. 511). Against this background, it should not be a surprise that "the possibility that the very tools that *ought* to protect [human] rights might also, in reality, militate against [human] rights" (Shah, 2014, p. 262).

Attempts to legitimize Indonesia's legal institutions may have the same ironic result. As Pompe (2005, pp. 43–44) observed in Indonesia, even in prominent

legal institutions such as the Supreme Court, institutional legitimacy has relied primarily on the personal charisma of its leader. Moreover, it should be realized that “[i]n the [Indonesian] politics of the legal system after 1965 . . . the motor of state ran on military fuel” (Lev, 2000, p. 314). To some extent, this situation has created many vulnerabilities where the judiciary is prone to outside influences, especially the executive. In fact, as Pompe (2005, p. 45) remarked, “[t]he judiciary was easily mobilized.” As a consequence, it is hardly surprising that the legal system produces nothing but uncertainties. For example, Taylor (2008, pp. 568–569) commented that “[despite] [f]ew attorneys who were openly critical of the formal legislation . . . there was strong, universal dissatisfaction with how contract law is manipulated, applied and enforced in the courts.”

Suffice it to say, Indonesia’s situation is similar to those derided as “authoritarian constitutionalism,” as it is still in “an intermediate point on a trajectory from authoritarianism to liberal democracy” (Tushnet, 2015, p. 395). More specifically, Indonesia’s normative commitment to constitutionalism is arbitrarily selective (Iskandar, 2016b). It is important to note that “Indonesia’s erratic pursuit of democracy has introduced many illiberal elements into its new legal structure, albeit in a democratic way” (Iskandar, 2016a, p. 1). As a result, as rightfully concluded by Iskandar (2016b, p. 723), the lack of a principled approach “has . . . prompted the process of *reformasi* drift from one ad hoc response to another.”

### The Other Side of Legitimacy: Indonesia’s Constitutional Court

In our effort to apprehend the concept of institutional legitimacy, discerning the bleak picture of Indonesia’s legal system where legitimacy has played a minimal role (or next to none in terms of legal enforcement) is arguably the most crucial dimension. Needless to say, Indonesia’s judiciary is reputed by the Asian Human Rights Commission as “discriminatory, unprofessional, unresponsive and discourteous” and therefore “the worst in Asia” (as cited in Horowitz, 2013, p. 233). In other words, the absence of legal certainty to the understanding of the efficacy of the Constitutional Court in Indonesia’s political system is critical. More

specifically, Indonesia’s failure to develop a principled approach in its post-New Order public life has not only contributed to the decline of the legitimacy of the legal system in general, but more importantly, it has helped the rising legitimacy of *reformasi*’s new product, the Court. Therefore, the Court may plausibly be able to settle many delicate and contentious political matters among national institutions.

Since its establishment, the Constitutional Court has been described as “at the forefront of [Indonesia’s] democratic development” that “started from scratch” (Butt, 2015, p. 2, 5) which is praised as “a reform over-achiever” (Butt, 2006). More importantly, “[The constitutional court] was established to take some of the politics out of any political disputes however it was also part of the sporadic Judiciary’s reform [sic]” (Horowitz, 2013, p. 241). What is most interesting about the Court is that in spite of suffering from the lack of enforcement power, the Court has managed to earn a “soft power” that may eventually lead to the enforcement of its rulings. Indeed, as Justice Maruarar Siahaan (2012) himself stated, the Court’s rulings are merely “declaratoir” (or declaratory) in nature. Therefore, for the Court’s decisions to be fully accepted and implemented effectively, the Court must convince not only the enforcement agencies but, more importantly, in the case of a dispute between two or more institutions, the affected parties. The parties must be in the state of “unconditional compliance.” It is tempting, therefore, to ask why one has not found any significant challenge to the Court’s decision.

To answer this, Dressel and Mietzner (2012), in the context of Indonesia, argued that it is the power diffusion that has helped shape the cooperative attitudes among the concerned political actors. More specifically, the actors’ “unconditional compliance” is related to the fact that the voluntary submission among the affected parties arises from their own selfish calculation in search of “a credible referee” which in turn fosters a fair electoral competition. While Dressel and Meitzner’s (2012) cynical explanation is quite compelling, I believe that it only offers a partial explanation as it presumably only applies to the cases where the Court deals with electoral disputes. Meanwhile, with respect to the

Court's competency to conduct a judicial review, there should be a different, or at least complementary, explanation to the above.

To this specific question, the motivation for other political institutions, such as the Executive (*Presiden*), the Legislative (*Dewan Perwakilan Rakyat, DPR*) and even the Supreme Court (*Mahkamah Agung, MA*), are in a state of "unconditional compliance." I strongly suspect that it is because the Constitutional Court is a product of the *reformasi* era that in the public's perception is the "satria piningit" (the hidden warrior), a Javanese resemblance of the Abrahamic religions' conception of the Messiah. As a result, the Court enjoys overwhelming popularity to the extent that it has become immune from any serious scrutiny. Arguably, the unintended mythification of the Court has helped diffuse any destructive controversies that might otherwise undermine its uncritical acceptance by the public. For instance, even the scandal of mega-corruption that placed Justice Akil Mochtar, then Chief Justice of the Court, in the eye of the storm has surprisingly failed to propel any serious reformative attempts in support of a more accountable or transparent Court.

The background in which the Court came to existence also informs this analysis:

Contrast the configuration in Indonesia since 1998. Party fortunes rose and fell at the polls from 1999 to 2009, but no party came close to dominating all of government. The result was a factional equilibrium, in which courts, especially the newly created Constitutional Court, had room to operate with independence, even thwarting government policy on constitutional grounds. No one considered disobeying inconvenient judicial judgments. There was no equivalent of Mahathir, who could single-handedly dismiss judges. If anyone had tried to use formal power for this purpose, others would have stepped up to prevent it, for such an action would have constituted an implicit threat against them, too. Factional balance was the key to creating this space for independent courts in Indonesia. Here, too, multipolarity was a benign condition. (Horowitz, 2013, pp. 236–237)

In this context, the desire to introduce the Court is little more than politicians' desperate need for some sort of insurance. Furthermore, it reveals that the situation is no different from the prevailing emergence of judicial review throughout Asia (Ginsburg, 2003).

More importantly, this has undoubtedly raised another serious concern in terms of institutional development in post-Suharto Indonesia. First, the Court has grown into a super-institution that has excluded itself from the conventional constitutional mechanism of checks and balances. The most conspicuous example is the Constitutional Court's infamous *Forum Kajian Hukum dan Konstitusi v. the Republic of Indonesia* in which the Court granted itself the competence to adjudicate any electoral disputes, which some suspected as related to its lucrateness. Simply put, the Court reasoned that the act of transferring the competence to the Supreme Court is unconstitutional. In a different case, the Constitutional Court's decision has also been identified as providing the Supreme Court "a shield to deflect many [Judicial] Commission proposals to examine particular judges for impropriety" (Butt & Lindsey, 2012, p. 97). This situation is certainly alarming as it proves that the Court is apparently unbounded. Unfortunately, until now, to the best of my knowledge, Indonesia has not been able to start a rigorous discussion on how to hold the Court accountable.

## Conclusion

Despite the years of institutional reform, Indonesia has been unable to systematically develop a fully rational climate of legal certainty. In an exceptional situation such as this, it is understandable that the popular perception can uncritically gravitate to something novel, such as the Constitutional Court. However, this kind of simplistic point of view has subsumed the very objective of the *reformasi* project. Specifically, *reformasi* aspires to create a true and genuine mechanism of checks and balance, with the ultimate objective of rigorous application of the same moral and legal standards to all institutions. Thus, it is reasonable to mark that the next important step in Indonesia's judicial reform agenda is to critically reexamine the status and role of the Constitutional

Court in the upcoming fifth Constitutional amendment that has been suspected moves toward a reversal course to the pre-reformasi (Iskandar, 2016c). This situation is perilous as it might kill off the existing robust political competition, a precondition for judicial independence and, in turn, legal certainty itself (Horowitz, 2013, p. 238).

### Conflict of interest

None.

### Ethical clearance

The study was approved by the institution.

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