

POLITICAL CHANGE AND THE DECLINE AND SURVIVAL OF CONSTITUTIONAL DEMOCRACY IN MALAYSIA AND INDONESIA

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ABSTRACT

In the past two decades, Indonesia and Malaysia have undergone significant political change that promised, and paved the way for, democratic reform. However, this process has been challenged and stunted by a series of events that have instead sought to undermine constitutional democracy. This article is provoked by recent events in the two countries, and it aims to shed light on two main questions: (1) What are the forms of challenges against constitutional democracy that have emerged in Malaysia and Indonesia? (2) How did different constitutional institutions, political actors, and citizens respond to those challenges? It highlights several issues, including the repression of anti-government voices in the lead up to the 2019 Indonesian presidential elections, and the role of the monarchy in Malaysia's democratic governance. By analysing the two questions, the article aims to shed light on whether there is a risk or pattern of constitutional decline or, conversely,

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whether constitutional democracy is sustained (or even reinvigorated) through the ability to withstand such challenges. The analysis will also consider how changing political imperatives and dynamics shape the operation, evolution, and survival of constitutional democracy in Malaysia and Indonesia.

KEYWORDS: *democratization, executive aggrandisement, political change, institutional reform, constitutional monarchy, democratic decay*

INTRODUCTION

Are constitutional democracies in Asia inherently unsustainable, or is their fragility or ability to survive dependent on changing constitutional, political, and social conditions? These questions frame the overarching inquiry in this article, and they are pertinent in Asian constitutional studies today, especially in light of the growing examples of what has been characterized as “constitutional decay” (Daly 2019; Machado 2013) and “constitutional retrogression” (Ginsburg and Huq 2018). My focus, however, is not on the more established, stable democracies of Asia (e.g., South Korea, Japan, India, and Taiwan). Rather, the interest is in a category of countries that have attempted to break away from their authoritarian or semi-authoritarian past and have undergone (or are undergoing) political change and democratization in the last two decades or so. Notable examples include Indonesia, Myanmar, Thailand, Sri Lanka, and more recently Malaysia, where changes in political leadership and regimes were accompanied by promises of democratic transition and consolidation. Yet, events over the last few years or so have shown otherwise.

In such countries, following political change, there is growing evidence of challenges or assaults against democratic constitutional commitments, which are triggered not only by elected governments but also by other key constitutional actors such as the judiciary and the monarchy. These commitments include electoral reforms to advance free and fair elections, strengthening the protection of fundamental rights, and improving institutional checks, and the threats against them are pursued through a variety of tools and strategies. For example, three years after the political change in Sri Lanka, President Sirisena engineered the disintegration of the ruling coalition, sacked Prime Minister Wickremesinghe, and replaced him with Mahinda Rajapaksa, the former president whom Sirisena had defeated in the 2015 elections. Sirisena’s political move—ostensibly driven by his seemingly irreparable friction with Wickremesinghe—threw the country into a constitutional crisis. When it transpired that Rajapaksa could not put together a parliamentary

majority to support him (which indicated that Sirisena had no constitutional basis to appoint Rajapaksa), Sirisena purported to dissolve Parliament and set parliamentary elections for January 2019. This decision defied the constitutional provision that empowers the president to dissolve Parliament only after four and a half years.

None of these maneuvers in Sri Lanka involved mechanisms of constitutional change or legislative action. Instead, they reflect executive manipulation or defiance of the constitution, though in part cloaked under the guise of constitutional legitimacy.² There are other case studies that exhibit this strategy, but there have also been instances where constitutional amendment and replacement were used to undermine institutional checks and aggrandize the executive branch. This threat of abusive constitutionalism (Landau 2013) looms in Indonesia, as President Jokowi's political allies are pushing for a constitutional amendment—the first since the post-Suharto constitutional amendment exercise in 1999 to 2002—to extend the presidential term limit to allow Jokowi to run for a third term.

Drawing on recent examples from Indonesia and Malaysia, I illustrate that the challenges that constitutions face following political change, and the ways in which countries respond to such challenges, take different forms and reflect a multitude of interacting forces. While in many ways, and in varying degrees, the phenomenon appears to fit the characteristics of constitutional decay or constitutional retrogression, this study adopts a wider lens. It considers the fragility of democratic constitutional commitments by analyzing, first, how political change generates democratic opportunities and progress and, conversely, how (and when) such change might chip away at the integrity of those commitments. By assessing the responses against those challenges, this contribution also sheds further light on a country's ability to withstand assaults against its democratic constitutional commitments.

Since the political change in Indonesia (1998) and Malaysia (2018), political polarization and demands for (as well as anxieties over) the preservation of elite interests have intensified. In Malaysia, for instance, the then-prime minister Muhyiddin Yassin sought to declare an emergency (ostensibly to manage a spike in COVID-19 cases) in October 2020 in order to halt political maneuverings that could see him ousted through a vote of no-confidence. In Indonesia, in the space of eleven months, the Jokowi government passed the Omnibus Law and other laws to curtail the powers of the Corruption Eradication Commission (KPK).

2. Under Art. 43(3) of the Constitution of the Democratic Republic of Sri Lanka, the president “shall appoint as Prime Minister the Member of Parliament who in his opinion is most likely to command the confidence of Parliament.” At the point of Rajapaksa's appointment, it was unclear what evidence Sirisena relied on to conclude that Rajapaksa had commanded such confidence.

The former has raised concerns about the protection of human rights and the future of Indonesia's decentralization.³ In this article, I show that these examples are not mere lapses in the journey of building and sustaining a constitutional democracy. They reflect, and are driven by, struggles to preserve (or even expand) the sphere of authority of different political institutions. In doing so, the anti-democrat's toolkit has expanded, and the result of these assaults—despite promises and hopes for democratization—is a weakened constitutional and democratic order.

This article proceeds in three parts. Part I examines the background to the political change in Indonesia and Malaysia and provides examples of key legal and constitutional reforms to bolster democratic practice. The reforms in Indonesia were far more extensive as compared to Malaysia, but in both countries governments and reformers seemed committed to strengthening institutional checks and enhancing the rule of law, with the hope that these would remedy the institutional decay from a long period of unaccountable executive power. Part II then explains the challenges against democratic constitutional commitments that have emerged in the two countries. It will be apparent that such challenges were triggered and driven by a range of political and constitutional actors as a means of preserving power and institutional self-interest. In some cases, these challenges have been justified pursuant to the constitutional text, even if the end result is to subvert the democratic order. Part III interrogates how changing political dynamics shape the evolution, decline, and survival of democratic constitutional commitments. Central to the political dynamics argument is not just the question of political survival but also the issues of identity politics and rampant corruption, both of which have magnified the vulnerability of such commitments in these countries.

I. POLITICAL CHANGE: AN IMPETUS FOR DEMOCRATIZATION?

A. Background Conditions and Contexts

Indonesia and Malaysia might strike many as unlikely candidates for a comparative study on constitutionalism and constitutional politics. Aside from differences in their constitutional and political histories, there are significant divergences in their current institutional structures and constitutional design. Indonesia is a unitary state that has devolved significant powers to the regions, along with special

3. The Omnibus Law on Job Creation was signed into law on 5 October 2020. The law amended thousands of existing regulations and laws in Indonesia, with the aim to improve and facilitate business, investment, and industrialization in the country. It covers eleven areas, including special economic zones, labor force, land procurement, and investment requirements.

autonomy arrangements for the provinces of Papua and Aceh, following the post-Suharto constitutional amendment exercise. Malaysia, meanwhile, has always been structured as a federal state, although the Federal Constitution of Malaysia was deliberately designed to create a strong central government with very limited autonomy for the states. The pan-religious principle of *Pancasila* binds Indonesia's complex multiethnic, multicultural, and multilingual society where more than 80 percent of its population are Muslim. In Malaysia, Muslims compose 70 percent of the population, but unlike Indonesia, religious identity (Islam) is closely intertwined with ethnic identity (Malay), and the Federal Constitution cements Islam as the "religion of the Federation."⁴ In addition, while Indonesia has a presidential form of government, Malaysia operates a Westminster parliamentary system, with the *Agong* (the King) as the constitutional head of state who exercises his functions under the Federal Constitution of Malaysia in accordance with the advice of the Cabinet.⁵

Despite these differences, at various points in their modern history, democratization (and the building of a constitutional democracy) seemed unlikely in both countries. In fact, in the past, Malaysia and Indonesia have struggled with the perilous concoction of systemic governance problems, economic crises, and social strife under powerful, autocratic regimes. From independence to the late 1990s, Indonesia never had a functioning constitutional democracy. Under President Suharto's rule for over three decades, Indonesia plunged deep into autocratic rule with rampant corruption, grave human rights abuses, and crippled legal and political institutions. The judiciary, for instance, had been captured and co-opted by a regime bent on ensuring that the role of courts was restricted as much as possible (Pompe 2018). These problems were compounded by the military's strong political role during the Suharto regime and the outbreak of ethnic, religious, and separatist violence, particularly in the year leading up to Suharto's resignation (Aspinall 2010).⁶ The military also controlled political resources, which meant that any significant institutional changes were unlikely following Suharto's departure (Liddle 1996).

Some of these conditions, too, plagued Malaysia's post-colonial history—under sixty years of dominant party rule, manipulation of electoral processes compromised free and fair elections; press freedom, free speech, and political opposition

4. Federal Constitution of Malaysia, Art. 3(1).

5. Federal Constitution of Malaysia, Art. 40(1).

6. Aspinall at p. 20 identified three conditions that were potentially threatening to Indonesia's new democracy after the fall of Suharto: (1) the military; (2) ethnic, religious, and separatist violence; and (3) Islamist political forces.

were suppressed; and executive interference with the judiciary weakened the rule of law. A series of draconian laws hurriedly passed in the lead up to the 2018 elections, and gradual state capture of independent institutions left Malaysia with little hope for a functioning constitutional democracy. One of the final nails in the coffin emerged as the attorney general decided in 2016 not to pursue the financial scandal involving the 1MDB government investment arm, even though the US Department of Justice and other entities had produced damning evidence implicating the then-prime minister, Najib Razak.

However, the sheer power of Suharto and the Barisan Nasional (BN) regime could not prevent democratic movements from springing a surprise. In May 1998, after a protracted period of ethnic violence and student-led protests in the streets of Jakarta, Suharto resigned, thereby ending a deadly political impasse. All things considered, the fall of Suharto was unexpected, owing to his sheer power and control over the police, the military, and virtually all state institutions. Centralized authority radiated from the corridors of power in Jakarta, through a bureaucracy dominated by Suharto's close associates, the Golkar Party, and the military. The resignation therefore marked the beginning of Indonesia's democratic reforms. A similar story unfolded in Malaysia twenty years later, when the opposition coalition, Pakatan Harapan (PH) defeated the ruling BN political coalition, once popular for being seen as a stable, reliable government that delivered economic progress. For the first time since independence in 1957, Malaysia experienced political change, and as in Indonesia, the defeat of the ruling coalition led by then-Prime Minister Najib Razak was unthinkable. Under Najib Razak, Malaysia turned into a kleptocracy (as did Indonesia during the Suharto regime), and the regime had become increasingly autocratic and personalistic. However, Malaysia had a more formidable political opposition and a relatively active civil society movement as compared to Indonesia's crippled student movement and virtually incapacitated opposition during the Suharto era.

In thinking about these conditions and contexts that preceded political change and the prospects for building a constitutional democracy, it is pertinent to understand the then-prevailing constitutional arrangements and structures. In general, the original 1945 Constitution of Indonesia and the Federal Constitution of Malaysia contained some trappings of a democracy. For example, both constitutions broadly diffused government powers among the three branches (the executive, the legislature, and the judiciary) and contained some guarantees of fundamental liberties. In Indonesia, however, such guarantees were extremely thin, while in Malaysia, fundamental liberties are encapsulated in only nine provisions. Even then, they were adopted with much resistance (the political leaders involved in the drafting of Malaysia's independence constitution were concerned that a poorly

drafted bill of rights would eventually hamper government expediency), and the provisions provide significant powers to the government to determine the boundaries of those rights. Both constitutions were not only parchment barriers against abuses of power; they contain provisions that could be invoked and interpreted to pursue authoritarian rule. For example, the 1945 Constitution accorded the president (the executive) with enormous powers but limited constitutional controls. In addition, the Constitution also appeared to have “constitutionalized”—in its general elucidation—a kind of political culture that emphasized the “political goodwill” of the government and political leaders and the (paternalistic) notion of an “integralistic state.” As I illustrate later, against these backdrop elements, one of the key challenges in Indonesia’s democratic transition following the fall of the Suharto regime was to dismantle these structures and norms of impunity.

B. Building a Constitutional Democracy, Step-by-Step

May 1998 and May 2018, therefore, heralded a new era for Indonesia and Malaysia, respectively. Given the issues they have faced, political change was accompanied by commitments to, and expectations for, democratization and constitution-building.

In the case of Indonesia, early and subsequent reformers pledged to strengthen human rights protection and improve government accountability. When President Jokowi campaigned for his first term in office in 2014, he portrayed himself as the “common man” untainted by the kinds of problems that surrounded the existing political elites. He pledged to eradicate corruption (an endemic problem in Indonesia’s politics and governance), support human rights, and ensure “clean” politics. Following Suharto’s resignation, elites engaged in and supported the transformation of existing institutions in form, substance, or both, even if it meant curtailing their own powers (Horowitz 2012). The government quickly embarked on electoral reforms, and after the first free and fair elections in Indonesia in 1999, the new legislature passed laws to advance human rights protection, improve political participation, devolve authority to the districts, and scale back the role of the military in politics and civilian life. Subsequently, four sets of constitutional amendments were adopted through consensus among the five hundred People’s Consultative Assembly (Majelis Permusyawaratan Rakyat, or MPR)⁷ members, thus endowing Indonesia with the fundamentals for its democratic transition.

7. The MPR is a super-legislative assembly. It comprises members of the DPR (Dewan Perwakilan Rakyat, or People’s Legislative Council) and the DPD (Dewan Perwakilan Daerah, or Regional Representative Council), both of which are elected houses. Before the constitutional amendments, the MPR comprised elected members, appointed members, and representatives from the military and the police.

Among many of the amendments, the adoption of a comprehensive bill of rights, an arrangement for decentralization, and restrictions on the president's law-making authority were particularly significant. In the original 1945 Constitution, the MPR possessed "sovereignty," while "government power" was granted to the president (Horowitz 2012, 92). The MPR had significant powers, including the appointment and impeachment of the president, judicial review of laws for constitutionality, and enactment of the Broad Outlines of State Policy (*Garis-garis Besar Haluan Negara*, or GBHN). In spite of the wave of democratization that swept Indonesia, the MPR continued to exert its authority by controversially removing President Abdurrahman Wahid from office in July 2001 (Lindsey 2002, 257–59). This incident served as a warning to reformers on what a powerful MPR could be capable of. In the end, the Third Amendment passed by the MPR in August 2001 reduced its own powers: it is now left only with powers to amend the Constitution and substantially reduced powers to remove the president or vice president, as a new process of impeachment required a referral to the Constitutional Court (Horowitz 2012, 115). In addition, the First Amendment in 1999 clipped the wings of the presidency by implementing a two-term limit and curtailing the power of the president to make legislation.⁸ The president now only has the "right to submit" bills to the legislature, and any bill must be discussed and agreed upon by the legislature (the *Dewan Perwakilan Rakyat*, or DPR) and the president. The legal, constitutional, and political renovation in Indonesia was therefore gradual and incremental, and the country emerged with a constitution that was fundamentally different from the original 1945 Constitution.

However, unlike Indonesia, Malaysia's political change was not accompanied by significant constitutional and legal reforms. Against the backdrop of corruption scandals and a weakening economy, the PH coalition led by former prime minister Mahathir Mohamad took power through its own "democratic tsunami" against the wave of democratic backsliding globally (Neo et al. 2018). The coalition had made several commitments in relation to democratization, but it opted to work with the existing Federal Constitution and pursue institutional reforms in a piecemeal fashion, instead of through constitutional replacement or a clear and systematic plan of amendments. Those commitments were embedded in the PH coalition's 150-page manifesto, and they included introducing a two-term limit on the prime ministerial office; introducing checks and balances in appointments to independent

8. This is important in Indonesia's political context because the MPR had always been dominated by the Golkar Party (Suharto's party), and this secured Suharto's position for over three decades. Golkar was virtually the only party that operated in Indonesia's political scene during Suharto's New Order regime.

commissions such as the Human Rights Commission and the Anti-Corruption Commission; enhancing free and fair elections by reforming the selection and membership of the Election Commission; strengthening judicial independence; “restoring” the East Malaysian states of Sabah and Sarawak as equal partners in the federation; and the lowering of voting age to eighteen. Most of these reforms would have required constitutional amendments. In addition, the PH also pledged to repeal oppressive laws that had previously been used to stifle political dissent, including the Sedition Act and the Anti-Fake News Act.

Although reform efforts began in earnest through the establishment of the Institutional Reform Committee, it soon became clear that they were difficult to realize. In addition to political infighting, which largely revolved around Mahathir’s relationship with the (promised) prime minister in-waiting, Anwar Ibrahim, the PH coalition lacked the requisite two-thirds’ majority to embark on constitutional change initiatives that were key to its overall reform agenda. Only the lowering of the voting age to eighteen was secured through a constitutional amendment in 2019. The government also managed to repeal the controversial Anti-Fake News Act that was bulldozed through Parliament under the preceding BN administration. The constitutional amendment addressing Sabah’s and Sarawak’s status as equal partners in the Federation of Malaysia (which implicated federal-state division of powers and long-standing abuses of power under the previous government with respect to the fiscal, social, and political decisions for these states) fell through. Fifty-nine MPs, who comprised opposition politicians as well as some representatives from Sarawak and Sabah, abstained from voting (Vanar 2019). It later transpired that various quarters from both states felt aggrieved by the lack of concrete, substantive changes with regard to the federal government’s obligations vis-a-vis the rights and interests of the two states.⁹ In some measure, the failure of the amendment was embarrassing for the PH government.

This account merely scratches the surfaces of the reforms in Indonesia and Malaysia. But what is clear is that there were varying degrees and forms of “forward-sliding” (as opposed to “backsliding”) following political change: laws, institutions, and constitutions were reformed to strengthen checks and balances, redistribute power among the political branches, and protect fundamental rights. What is also clear is that the different experiences—in terms of deliberations as well as outcomes—could be attributable to a host of considerations. In Indonesia’s case, the MPR agreed from the outset to proceed consensually, even on the most fractious

9. Hansard of the Parliament of Malaysia, 14th Parliament, 2nd Term, 1st Meeting (9 April 2019), pp. 55–70.

issues. Unlike Indonesia, bipartisan support involving consensus-driven politics has historically proved to be difficult, if not impossible, to achieve in Malaysia. Although the PH government attempted to enhance the credibility of independent institutions such as the Election Commission, the National Human Rights Commission, and the Anti-Corruption Commission by replacing their members and leadership, this merely reflected practices of the past where the executive had full authority in determining the composition of these bodies with virtually no checks on its power. Plans to amend the Federal Constitution to institute parliamentary oversight over such appointments eventually faded. In short, concrete institutional and structural reforms were, at best, minimal in Malaysia. Instead, “change” was secured in the form of a change of personnel in political offices and leadership, as well as in various independent commissions.

II. CHALLENGING COMMITMENTS TO CONSTITUTIONAL DEMOCRACY

In democratizing countries, where deep-rooted institutional and political practices have yet to evolve, reformed institutions and the democratization “project” may be vulnerable to assaults. In thinking about the operation and evolution of democratic institutions following political change, Martin Loughlin’s observations are particularly fitting: he argued that while institutions are important, a constitutional democracy must be “underpinned by certain social conditions,” and it requires a culture that accepts and respects restraints in exercises of power (Loughlin 2019, 439). To illustrate the force of Loughlin’s point, consider the case of Indonesia. The Constitutional Court was established in 2003 along with many other institutional innovations and renovations to facilitate democratization. Through its constitutional review and electoral dispute resolution functions, the Court has—especially in the first decade of its establishment—augmented democratic practice in Indonesia and even stymied impulses toward authoritarian reversion or democratic regression (Butt 2016, 2–3). It has earned considerable public trust and support, as well as a reputation for integrity and independence. However, the arrest and conviction of two of its justices in 2013 and 2017 for corruption sent a harsh reminder that Indonesia’s justice system continues to be vulnerable to the problems it faced in the past (Pompe 2018).

In addition, a series of amendments to the Constitutional Court Law since 2003 demonstrate that the judiciary’s authority and integrity are susceptible to direct or subtle assaults by other political branches. For example, in 2020, the DPR passed amendments to extend the term of office for the chief justice and deputy

chief justice, raise the minimum age of judges (thus constructing a significant barrier to entry to the bench), and stipulate that judges will now serve until they turn seventy (previously judges served a maximum of two five-year terms). Critics argue that these amendments are a “gift” from the government to existing judges on the bench, ostensibly with the hope that current controversial cases in the Court’s docket will be decided in the government’s favor (Butt 2020). Others, however, see the amendments as a boon for judicial independence (Butt 2020). The real consequences of the amendments remain to be seen, but some sympathy for the skeptics’ position may be understandable. After all, there have been instances in the past where the executive openly expressed unhappiness with the Court’s decisions. Perhaps, more insidiously, the legislature or executive has attempted to rein in the Court by appointing (or reappointing) to the bench political figures or personalities who are believed to be loyal to either of these appointing institutions by way of their political and social connections (Butt 2020). There appears to be some scholarly consensus that after the first decade of the Court’s operation, it has faced “political claw-backs” and has struggled to live up to the level of prestige, integrity, and credibility it demonstrated in its first decade (Roux and Siregar 2015, 3).

What this example demonstrates is that challenges or assaults against democratic commitments—be they in the form of “hard” provisions or “soft constitutional law” (Thio 2010)—may take different forms or methods. It is pertinent to recognize this because such assaults are not always overt (e.g., where “recalcitrant” judges are removed or where they exercise of powers in ways that are contrary to constitutional provisions). They could be carried out through subtler means, but in the end they prove to be damaging to a country’s constitutional integrity. And, sometimes, they could be initiated by elected political actors or those tasked to perform checks and balances or even those who pledged democratic reforms in the first place. These patterns have been noticeable in Malaysia’s and Indonesia’s experiences with democratization.

A. Aggrandizing the Executive

The “executive-heavy” nature of the original 1945 Constitution of Indonesia was seen as the root of Indonesia’s authoritarian regimes since independence (Indrayana 2008, 176). The president held the “power to make statutes in agreement with the DPR,” but because Suharto’s party, Golkar, was the dominant party in the legislature, he had effective control over the legislature and lawmaking. As explained in the preceding section, the post-Suharto constitutional amendment evinced the commitment to stronger checks and balances against executive power. However,

under the Jokowi administration, executive authority has been gradually consolidated while nominally maintaining Indonesia's democratic framework, processes, and institutions. To be sure, the seeds for this "authoritarian turn"¹⁰ had been sown since the Yudhoyono administration, where analysts highlighted signs of democratic regression (Power and Warburton 2020, 4). Under Jokowi, these have accelerated and coincided with the extensive and open utilization of identity politics at the national stage (Mietzner 2019, 1026).

The blasphemy saga involving the former Jakarta governor, Basuki Tjahaja Purnama (Ahok), provided one of the main driving forces for Jokowi's reactionary policies that undermined the Constitution. In 2016, Ahok—who had been Jokowi's deputy governor in Jakarta (2012–2014)—was investigated for blaspheming Islam due to remarks he made during a gubernatorial election campaign. This sparked mass demonstrations led by Jokowi's opponents in concert with hard-line and conservative Muslim organizations. The goal was not only to question Jokowi's Islamic credentials and commitment to "defend" Islam but also to pressure the government to prosecute and convict Ahok. Ahok eventually lost the elections, and this signaled to Jokowi that his presidential re-election prospects were in danger. Indeed, many analysts viewed the Jakarta election as an indicator of national political dynamics—in particular, a proxy contest between Jokowi and his opponent, Prabowo, in the upcoming 2019 presidential elections.

As Jokowi became increasingly conscious of political opposition and challenges to his authority, he sought to quell potential sources for dissent. This was reflected in the issuance of a "government regulation in lieu of law" (known as *Perppu*) on mass organizations (*Perppu 2/2017 tentang Organisasi Masyarakat*) that revised the Law on Mass Organizations. Among other things, the revision gave the government broad powers to dissolve or disband organizations identified to have held, promoted, or disseminated concepts or teachings that are against the national ideology, *Pancasila* (Warburton and Aspinall 2019, 261). Under the regulation, the affected organizations could not contest their dissolution in the court. Although the regulation did not identify or specify any particular organization, it was thought to target the Hizbut Tahrir Indonesia (HTI), a Muslim fundamentalist group that had played a key role in the anti-Ahok mobilization. This move is reminiscent of Suharto's New Order era where social movements and organizations were outlawed to protect Indonesia's "*Pancasila* Democracy." For the Jokowi government,

10. See, e.g., Thomas Power, "Jokowi's Authoritarian Turn and Indonesia's Democratic Decline," *Bulletin of Indonesian Economic Studies* 54, no. 30 (2018): 307–38; and Marcus Mietzner, "Authoritarian Innovations in Indonesia: Electoral Narrowing, Identity Politics and Executive Illiberalism," *Democratization* 27, no. 6 (2019): 1021–36.

this was a necessary measure to defend Indonesia's democracy from being hijacked by hardline Islamists who reject democratic systems of government.

The wider concern, however, is that the regulation could later be used against any groups deemed hostile to the government. Such concerns are not unfounded, especially in light of the persecution of government critics in the lead up to the presidential elections in 2019. In doing so, the government utilized a range of other laws (e.g., the Criminal Code and the Electronic Information and Transactions Law) to prosecute anti-Jokowi activists who were involved the “*Ganti Presiden*” (“Change the President”) campaign (Warburton and Aspinall 2019, 261). Vociferous supporters of Prabowo who were deemed to have defamed the president were threatened with charges of treason (*makar*). In universities, the suppression of academic freedom has magnified over the last few years, with reports of involvement by state security apparatus such as the military. In 2020, for example, constitutional law scholars from Universitas Gadjah Mada faced threats and intimidation over an online academic discussion on the issue of presidential impeachment (Satrio 2020).

In addition to this, there is currently an attempt to challenge term limits on the presidential office. The idea has been floating in political circles since November 2019, but in 2021 it appeared to be gaining considerable traction among political elites supportive of President Jokowi. Sources claim that there are ongoing efforts to draft a constitutional amendment to extend the presidential term limit to three terms and to restore the Broad Outlines of State Policy (known as “GBHN”), which was one of the central features of the Suharto administration (Argama 2021). If the amendment materializes, it could represent one of the biggest challenges against the integrity of Indonesia's democratic commitments. The GBHN would significantly constrain presidential authority in formulating national policies. This could effectively render the president subservient to the MPR (and by extension the political oligarchy that controls the MPR). Advocates of the amendments suggest that the proposals would strengthen democracy by lifting restrictions on the will of the people (with regard to the presidential term limits) and by ensuring stronger oversight over the presidential office. However, if the president successfully emulates the Suharto strategy of controlling and co-opting the MPR—a strategy that is now apparent under Jokowi—we could see an obvious pathway back toward the “executive-heavy” structures and practices that prevailed in Suharto's New Order era.

Signs of executive aggrandizement have similarly been observed in Malaysia, as political power battles and instability emerged after PH's electoral win in May 2018. The PH government fell in February 2020 through an internal coup within the PH coalition, leading to the rise of Muhyiddin Yassin (who was the minister of

home affairs under the PH government) to power. Muhyiddin managed to cobble a loose governing coalition comprising, among others, some politicians from the previous BN regime, but he held only a four-seat majority. In October 2020, Prime Minister Muhyiddin Yassin attempted to institute an emergency. Admittedly, the Federal Constitution provides that the King may proclaim an emergency where he is satisfied that “a grave emergency exists whereby the security, or the economic life, or public order in the Federation” is under threat.¹¹ Case law establishes that in being so satisfied, the King acts on the advice of the government (Harding 2020). However, the context in which Muhyiddin sought a proclamation of emergency was crucial: his survival as prime minister was rather precarious, amid plans for another overthrow of government (this time engineered by PH leader Anwar Ibrahim) and the potential of losing majority confidence in Parliament. The exponential rise in COVID-19 cases generated a perfect storm: Muhyiddin invoked the constitutional dispensation under Article 150(1) and justified his decision on the basis that the government needed political security to handle the COVID-19 pandemic.

In this instance, there was no attack against the constitution as such. However, one needs to pay attention to the implications of an emergency. The proclamation would have halted the democratic processes that could see the end of Muhyiddin’s government, as Parliament would be suspended and elections would be postponed. In addition, emergency declarations in Malaysia must be considered in light of how they have been historically invoked and utilized. A state of emergency would also allow the government to promulgate emergency ordinances that provide the government with a virtual *carte blanche* to pursue policies that impinge on fundamental liberties. Previously, such ordinances facilitated government abuses of power for decades. There is also a risk of a prolonged state of emergency: one might recall that in 1969, the government declared a state of emergency in response to racial riots in the country, and this was officially lifted only in 2011.

As it turned out, the King, having consulted the Malay Conference of Rulers,¹² declined Muhyiddin’s advice. This was the first time in Malaysia’s political history where the constitutional monarch officially rejected the advice of a prime minister. To be sure, this was a precarious precedent to be set in the context of Malaysia’s Westminster parliamentary democracy, which operates on the notion that in most matters of governance (including the proclamation of emergency), the head of state (monarch) is to act on advice of the Cabinet. This issue is magnified by the

11. Federal Constitution of Malaysia, Art. 150(1).

12. The Malay Conference of Rulers is a constitutional body comprising the traditional rulers (sultans) of the nine Malay states.

revived authority of the monarchy embracing, as Harding notes, Eastminster ideas rather than Westminster constitutional conventions in the past decade or so (Harding 2018). What this means is that the monarch's role and powers are interpreted and exercised in light of local social and political culture—more specifically, the monarch is perceived to possess the role of “checking” on the weaknesses and follies of politicians (Harding 2020, 260). Herein rests the paradox or the constitutional conundrum: what could arguably be deemed a monarchical overreach in the context of a Westminster democracy had also “saved” democracy from the hands of unscrupulous political actors who sought to protect their power and impair challenges from the political opposition (Bermeo 2016, 10).

B. Institutional Power Battles and Subverting Checks

Implicit in the preceding accounts on executive aggrandizement is the attempts to weaken checks on executive power through laws, decrees, and regulations. Strictly speaking, there has been nothing “illegal” about the ways in which such actions have been carried out in Malaysia and Indonesia. However, these ways gradually diminishes the prospects of building or sustaining a constitutional democracy. This pattern is deeply concerning, especially in light of other maneuvers that appear to subvert the idea of institutional checks and balances on executive power.

In Indonesia, there is an increasing tendency for the government and the legislature to act in concert to enforce repressive laws. Shortly after Jokowi issued the *Perppu* on mass organizations, it received DPR approval. Seven parties in the DPR (parties that compose the government coalition and backed Jokowi's presidential election in 2014) supported the ratification of the *Perppu*. Together, these parties made up a simple majority in the legislature that allowed the *Perppu* to be ratified. To be sure, the *Perppu* was challenged before the Constitutional Court in December 2017. However, this was rejected by the Court on technical grounds, as the regulation was already ratified by the DPR and had thus become part of the Law on Mass Organizations. Subsequently, an attempt to challenge the validity of the law, particularly in respect of the mechanisms and processes to ban an organization, was also rejected by the Court in May 2019. More recently, the passage of the Omnibus Law showcases how cooperation between the president and the legislature could lead to perverse outcomes. By law, regulations issued by the president could be made permanent with the DPR's approval. Indeed, within three months after Jokowi issued the Omnibus Regulation, the DPR signed it into law, thereby chipping further away at the mechanism of checks and balances between government branches and forging yet another tool for repression.

There was, however, another twist to this story on executive-legislative dynamics. In 2018, the DPR quietly passed legislation known as the “MD3 Law” (Law on Legislative Bodies), which was designed to shield lawmakers from criticism and render them immune from prosecution (Robet 2018). The MD3 Law also, to some extent, cripples the KPK’s investigative powers because it requires investigators to “consult” the House Ethics Council before interrogating a lawmaker. In addition, the House Ethics Council is now empowered to take legal action against individuals or groups who tarnish the reputation of the DPR. Although the law was supported by many parties in the legislature (including the president’s own party), it later transpired that the president had not been consulted on these controversial provisions. The passing of the MD3 Law did not reflect the president’s anti-corruption reform agenda at that time, but it also evinced significant dysfunctions and a political tug-of-war both within the executive and between the executive and the legislature. This is, of course, costly, for it not only blatantly defied Article 20 of the 1945 Constitution, which requires bills to be jointly approved by the president and the DPR before they could become law; it also allowed the legislature to consolidate its power against democratic principles.¹³ On the back of public disapproval, the president refused to sign the law, but as mandated by the 1945 Constitution, it came into operation anyway thirty days after its approval by the DPR.

In Malaysia, a different kind of institutional battle had emerged, one between the elected government and the constitutional monarchy. This is equally significant because in Malaysia’s context, any discussion of horizontal accountability must take into account the extent of the monarchy’s capacity to play a restraining role vis-à-vis the concentration of power within the executive-legislative branches, as well as restraints on monarchical authority. In addition, such power battles display tendencies to subvert Malaysia’s democratic order. Several examples have emerged over the last two years alone, but here I highlight three illustrative examples.

First, within days of the election of the PH government, a potential constitutional crisis emerged as the King reportedly offered the prime ministerial post to the leader of the most dominant party in the PH coalition, Wan Azizah Wan Ibrahim. This indicated royal disapproval of the candidate that PH had put forward—Mahathir Mohamad—and the delay in swearing in the prime minister fueled speculation of a stalemate between the monarchy and the elected government. This also has to be considered against the backdrop of Mahathir’s antagonistic

13. Ibid.

and complicated history with Malaysia's royal houses.¹⁴ In any case, this event raised questions about the King's role in appointing the head of government, as set out in Article 43(2) of the Federal Constitution. The provision states that the King shall appoint a prime minister who "in his judgment" is likely to command the confidence of the majority of the members of the House of Representatives. The debate thus revolved around the question of how the King ought to exercise "judgment," even though there are established constitutional conventions on the appointment of the prime minister. A serious constitutional crisis was averted when Mahathir was finally sworn in.

The second incident arose just months later. This time, the government suffered another setback involving the Cabinet's decision to ratify the Rome Statute and the International Convention on the Elimination of Racial Discrimination. Although foreign affairs are matters under the purview of the elected government (the executive), Malay nationalist factions mobilized massive demonstrations objecting to the ratification of these international instruments on the flawed and unsubstantiated perception that these would erode the position of Islam as the state religion and the power of the traditional Malay rulers. This appeared to be the rhetoric publicly shared by a few members of the royal households, and subsequently the Conference of Rulers allegedly rejected the ratification of the Rome Statute. Eventually, the government shelved the ratification on account of public confusion and to avoid the risk of a coup d'état by the "deep state" (Tan et al. 2019).

It is important to note that shortly before this saga, the monarchy had already shown signs of subtle intervention with the processes of democracy and democratic governance. In November 2020, for example, the King advised MPs to support the government's budget to ensure harmony and political stability. This was again unprecedented, but significant in light of the prevailing political context. The apparent "confidence vote" by the King, which propelled the monarchy into day-to-day politics, was important for government survival, as the government coalition held a razor-thin majority in Parliament and had been facing threats of a no-confidence vote. The King's advice was by no means legally binding, nor did it amount to a royal decree; but in the context of Malaysian and Malay politics, such public statements carried significant social and political weight. Put differently, in

14. In the 1990s, the Mahathir administration pursued constitutional amendments to limit the role of the monarchy in legislative matters and strip its long-held immunity from criminal prosecution. The latter was triggered by a series of criminal assault-and-battery cases involving members of a royal household. See, generally, Andrew Harding, *The Constitution of Malaysia: A Contextual Analysis* (Oxford: Hart, 2012), 117–19.

the current political climate, political actors would not want to be seen as defying royal advice. Indeed, these considerations about heeding royal advice also formed the backdrop to the PH government's decision to reverse its decision to ratify two international conventions.

III. POLITICAL DYNAMICS AND LESSONS ON DEMOCRATIZATION

Many countries undergoing political and democratic transitions will inevitably face teething issues. In Malaysia and Indonesia, political alliances have proved to be unstable, and entrenched institutional and political practices have not appeared to evolved along with structural reforms or democratic imperatives. Consider the Malaysian case again: there is reason to be wary of emergency declarations, as they have been used to suppress fundamental rights and political dissent, stifle political competition, and facilitate government abuses of power. The last emergency declared in Malaysia was in 1969 in response to the May 13 racial riots, and it was only in 2011 that the declaration was officially lifted. During this period, the government grew accustomed to operating with scant checks on its exercises of power. Similarly, in Indonesia, despite impressive constitutional and institutional reforms since the fall of Suharto, constitutional democracy has had to compete with engrained corruption, weak rule of law institutions, and the persistence of oligarchic politics. In 2014, President Jokowi was voted into power with promises of weeding out corruption, strengthening human rights, remedying past human rights abuses, and transforming Indonesian politics. What we have witnessed, instead, is a weak president who has since formed alliances with the “old guard” (i.e., the military, former military generals, and the political oligarchs) in order to secure and consolidate his power. Viewed in this context, Indonesia's “authoritarian turn” seems unsurprising (Power 2018b). It reflects the imperative of preserving interests and authority amid evolving political dynamics.

There are several ways of understanding why and how these elements operate to undermine democratic commitments and constitutional integrity. The first relates to the distribution of political power and the inter-branch competition for authority. Political change may generate broader distribution of political power and resources, and in the process of doing so, it may unravel established patronage networks that allow concentrated power to flourish. In addition, with institutional reforms accompanying such change, political elites who have been accustomed to few limits on their power or unfettered discretion soon realize that constraints result in the loss of political, economic, and social authority and interests. Conflicts

between political institutions could thus trigger (or even sustain) assaults against democratic constitutional commitments as political actors seek to assert their authority and recoup such losses.

In Malaysia, save for a few exceptions, the monarchy and the government have enjoyed a cordial and special relationship for decades. This relationship has its roots in the pre-independence period, when UMNO (the Malay nationalist party) elites and the monarchy mobilized to dismantle the British colonial government's unitary political framework, which was deemed a threat to ethnic Malay dominance (Singh 1995, 190). Under the BN administration, UMNO was the most dominant party, and it continued to draw support by positioning itself as the guardian of Islam and Malay interests, as well as allies and defenders of the Malay monarchy. This intertwining of race (Malay), religion (Islam), and royalty (the Malay sultans) and the patron-client relationship are central to UMNO's political philosophy, because sultans are seen as custodians of Malay social and political dominance. The Malays are also traditionally attached to their sultans, from whom they derive a sense of ethnic pride, prestige, and security (Shah 2022). This is not to say that the interests of UMNO and the Malay monarchy are always identical or aligned, but it is a mutually beneficial relationship: UMNO exploits feudal sentiments and the sultans for its electoral interests; the sultans, conversely, depend on UMNO as a source of patronage and for the upkeep of their status (Singh 1995, 192). In light of all this, the emergence of a new government (what's more, one that was led by Mahathir Mohamad, who had a fractious history with the monarchy after he led a series of constitutional amendments in the 1990s to cut back on royal immunities and privileges) was a threat to monarchical privilege as well as to UMNO's grip on resources. The new distribution of political power put a rewarding patron-client relationship at risk (Singh 1995, 192),¹⁵ and it magnified competition for authority and resources between these different political institutions.

Similar dynamics have played out (and are still playing out) between Indonesia's president and the MPR. Here, it is useful to recall that the tussle for power and authority between the presidential office and the MPR has been apparent in the early years of the post-Suharto political change. Political figures—particularly those from the Partai Demokrasi Indonesia-Perjuangan (PDI-P), the biggest party in the MPR—have been keen to rein in the president. Even though the current president is also from PDI-P, he has largely been viewed as an outsider who did not grow within the party ranks but was instead approved as a candidate only with

15. Singh at p.192 argues that for many decades, dating back to the 1960s, “most of the sultans willingly furthered UMNO's objectives at the expense of the opposition.”

the “blessings” of the party’s leader, Megawati. This relationship has become one of the consistently discussed facets of the Jokowi presidency—showing, as it does, the tension between a president wielding executive power and seeking to be his own person, versus the often-overbearing party leader who also seeks to assert her voice in decision-making. Given these dynamics, it is unsurprising that Jokowi has co-opted other parties into his grand coalition, as well as former military generals from Suharto’s New Order regime, including Megawati’s fiercest rivals. This way, the president is not completely beholden to his party and could draw on the charisma and strength of former New Order elites to support the presidential agenda. However, there are hefty costs on the integrity of Indonesia’s constitutional democracy: aside from impulses toward authoritarian policies, the military appears to have slowly found its way back into governance.

This Indonesian story is also linked to the second facet of the political dynamics and preservation of interest argument: political polarization and inter-party competition. In Indonesia and Malaysia, political change and democratization facilitated the opening up of political space and political competition, but subsequently the challenge has revolved around balancing competition, on the one hand, with preventing fragmentation, on the other (Mietzner 2019, 1023). In Indonesia’s DPR, for example, there are currently nine political parties, but during the last elections, there were at least twenty contesting political parties. With finite resources to be distributed among a growing number of political parties, the competition among parties to entrench their position (and thus secure access to political and economic resources) is inevitable. Furthermore, one has to consider the fact that political parties are used as primary vehicles for individuals with ambitions for the presidency (Lane 2021).

Several strategies have been utilized (or attempted) to bolster the influence and power of political parties, particularly those belonging or linked to Indonesia’s oligarchs. The first is an issue explored in the previous section—the move to engineer a constitutional amendment to empower the MPR. By restoring the GBHN under the amendment, the MPR, which is dominated by the political oligarchy comprising at least five of the biggest parties in Indonesia, will be able to exert greater control over the direction of state policy. The second implicates identity politics. This involves co-opting the religious discourse and movements in order to rally broad-based electoral support from the Muslim majority, which in turn ensures the continuing dominance of the political oligarchy and their interests (Hadiz 2019). In the 2014 and 2019 presidential elections, Prabowo (a former military general who was dishonorably discharged from the military for various transgressions) embraced hard-line Muslim organizations to form his support base and launched racially motivated campaigns

against Jokowi. The strategy involved tapping into grievances about socio-economic inequalities—in particular, the sense that Muslims, who are in the majority, have been marginalized in their own land as a result of the economic dominance of minorities. Third, through the legislature, dominant parties have engineered changes to electoral laws by tightening electoral participation rules in order to exclude new political parties. As Mietzner succinctly argues, “Indonesia’s electoral regime remain competitive within its limited elite arena—but this arena continues to shrink, systematically excluding anti-status quo actors” (Mietzner 2019, 1025).

CONCLUSION

The picture I have painted thus far offers a bleak outlook for Indonesia and Malaysia. However, I do not intend to suggest that democratic gains have been completely absent in Malaysia and Indonesia. In fact, there have been significant “surges”—for instance, through the strengthening of judicial institutions that has enhanced the judiciary’s role and power in curbing the power wielded by the executive and legislative branches. For example, recent decisions of the Malaysian courts have restored and reiterated judicial power, upheld the constitutional guarantee of equality, and enforced the constitution’s federal-state division of legislative powers.¹⁶ However, to understand the decline and survival of constitutional democracy in these two countries—in particular, how constitutional assaults may emerge and how institutions respond to those assaults—it is important to pay attention to prevailing (and changing) political dynamics and priorities. In any case, from building constitutional democracies to challenging (or enforcing, as the case may be) democratic constitutional commitments, political dynamics and preservation of interests have been a central and recurring theme. The Malaysian and Indonesian experiences illustrate that understanding political change and its relationship with the survival or decay of constitutions necessitates paying attention to political elites and the power dynamics involving them. Even though challenging such commitments are often justified by using constitutional tools and language, or even as a necessary means to save democracy, it is difficult to ignore the ways in which such actions harken back to the desire of political actors to entrench themselves in power.

16. See, e.g., *Indira Gandhi a/p Mutho v. Pengarah Jabatan Agama Islam Perak* [2018] 1 MLJ 545; *Iki Putra Mubarrak v. Kerajaan Negeri Selangor and Others* [2021] 1 LNS 47; *Suriani Kempe & Ors v. Kerajaan Malaysia & Ors* [2021] 8 CLJ 666; and *SIS Forum (Malaysia) v. Kerajaan Negeri Selangor; Majlis Agama Islam Selangor* [2022] 3 MLRA 193.

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