

Research Article

The Contradiction of Populism and Judicial Independence (Unraveling Alexander Bickel's Counter-Majoritarian Dilemma in the Context of the Indonesian Constitutional Court)

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The purpose of this writing is to analyze the contradiction between populism and the Counter-Majoritarian Dilemma, as well as their impact on the independence of the Indonesian Constitutional Court (ICC) and how the ICC maintains its independence while strengthening its legitimacy amidst populist rulings. The study utilizes normative legal writing with a philosophical and analytical approach, employing a descriptive-analytical method. The findings reveal a contradiction between populism and the independence of the ICC within the context of Indonesian politics. Populism prioritizes the interests of the people and opposes political elites, while the ICC's independence necessitates unbiased execution of its duties, unaffected by political interests. Despite the ICC's crucial role in upholding independence and justice within Indonesia's legal system, its autonomy is often threatened by political influence and populism during decision-making. Alexander Bickel's Counter-Majoritarian Dilemma theory provides insight into this challenge, emphasizing the importance of basing judicial decisions on objective constitutional principles. Populism can impact the ICC's independence as it must consider the people's interests, yet continued erosion of independence due to political influence jeopardizes both the ICC's autonomy and the fairness of the legal system. Hence, it is vital for the ICC to preserve its independence as a constitutional guardian, considering the people's interests, safeguarding constitutional rights, and carrying out its duties impartially, free from the influence of populism or political interests. By doing so, the ICC can establish itself as an independent and equitable institution, strengthening public trust in the legal system and democracy in Indonesia.

Introduction

The emergence of populist movements on the global stage has posed various deep challenges, one of which is a threat to the independence and effective functioning of the justice system¹ one of which is the Constitutional Court. Populist constitutionalism involves many different forms of manifestation, including constitutional amendments, changes to electoral laws, influence over state institutional organizations, abandonment of existing constitutional practices, and attempts to introduce new practices or interpretations contrary to their original aims.² In this regard, Andrew Arato said:³

"Populist movements often seek to undermine the integrity and functioning of the judiciary as a strategic move towards greater control over state institutions. They do this in various ways, such as overhauling the constitution, influencing the state organizational structure, and even ignoring existing constitutional practices."

These actions, referred to as populist constitutionalism, lead to the establishment of new practices or interpretations of the constitution that often conflict with their original aims. This shows how populist movements can threaten constitutional democracy by weakening the role and independence of the Constitutional Court. Thus, the threat to the independence of the judiciary by the populist movement is not just an attempt to control power but also a significant indication of the populist movement's intention to establish a dominant (authoritarian) regime. When populists interfere with the judiciary, they often claim to act in the name of the people. However, the relationship between the courts and the will of the people, even in liberal democratic conditions, is complex both theoretically and empirically. Understanding these complex dynamics can help us predict the long-term impact of populism on the judiciary.

A 2019 policy brief published by the Law, Justice, and Society Foundation at the University of Oxford highlights that courts often seek to defend their legitimacy by appealing to populist attention, which provides important insights for understanding the challenges facing courts. The report also explains how concern for legitimacy become an important mechanism and how populist movements can impact the judiciary.⁴

Considering this, it is important to refer to what Alexander Bickel⁵ calls the "contra-majority dilemma".⁶ The constitutional theory highlights two main reasons why courts should care so much

about their legitimacy, and the "counter-majority dilemma" outlines one of these reasons. According to this dilemma, judges, who are not elected, suffer from a democratic deficit; they have the power to overturn laws in democratically elected legislatures, and the courts often give certain groups unequal opportunities to influence the political process.⁷ All of this places the judiciary in a vulnerable position for attacks from populists.

However, this is the essence of the problems we are currently facing. First, courts suffer, or at least feel they suffer, from a democratic deficit, which is not without reason. This condition requires the courts to formulate alternative methods for strengthening their institutional legitimacy. The second reason prompting the courts to consider their legitimacy lies in their institutional weakness relative to the other two branches of government. As Judge Felix Frankfurter of the United States put it, the court "had neither the sword nor the purse".⁸ Therefore, they must rely on the goodwill of the other two branches of government and ultimately on voter support to guarantee compliance with the Constitutional Court's ruling.

Concerning these problems, the judiciary in Indonesia has the same challenges. In particular, the Indonesian Constitutional Court, which plays a vital role in protecting the rights of citizens as a democratic and lawful state, has strong constitutional democratic values that can withstand the negative effects of populism.⁹ However, the Constitutional Court can face the famous counter-majority dilemma, as described by Alexander Bickel. This dilemma stretches between the need to generate legal and ethical-based judgments and the pressure of populism, which encourages policies based on the will of the majority.

It should be noted that it is important to be aware of populist movements. As Tom Ginsburg points out, populists who gain control of the courts can take extra steps, such as extending terms of office and making changes to institutions. This can be seen in the example of the United States and its charismatic populists. Tom emphasized that populists generally do not like institutions, including the Constitutional Court as one of them. Based on his research, Tom mentions three steps that populists usually take if they don't like an institution. First, they will replace members or personnel in the institution. Second, they will change the authority of these state institutions. Finally, they will modify the legal procedures or procedural law of the courts to prevent cases related to them from going to court or even creating cases that they want to go to court.¹⁰ This creates a dilemma for the Indonesian Constitutional Court in maintaining its independence and carrying out a counter-majoritarian role, as explained in Alexander Bickel's thought.

On the other hand, Bivitri Susanti emphasized that any ideas about changing or evaluating the Constitution need to be considered in depth. He considered the 1945 Constitution to be at a crossroads with three different choices of direction. First, there is a desire to change the constitution for the sake of improvement. For example, the Regional Representatives Council has proposed the fifth amendment since 2008. Furthermore, the MPR chairman in 2021 expressed his desire to include the Principles of State Policy in the 1945 Constitution, although this idea was later changed to the "Convention on State Administration," as expressed in the speech by the MPR chairman on August 16, 2022.¹¹

Based on the description above, the formulation of this problem revolves around two important issues that are closely related to one another. First, how the contradictions of populism and the Counter-Majoritarian Dilemma, as outlined by Alexander Bickel, affect the independence of the Indonesian Constitutional Court. Second, how does the Indonesian Constitutional Court maintain its independence while strengthening its legitimacy amidst the characteristics of populist decisions and a Counter-Majoritarian dilemma. In this context, an in-depth understanding of Bickel's counter-majority dilemma is very important. In a situation where populism tends to push policies based on the will of the majority, the Indonesian Constitutional Court needs to ensure that the legal and ethical principles that form the basis for policy formation are not eroded. Understanding and overcoming this contradiction is the main challenge to maintaining the independence of this institution.

Furthermore, the second challenge is how the Indonesian Constitutional Court can strengthen its legitimacy amid the threat of populism. To achieve this, the counter-majoritarian role of this institution must be strengthened. As an institution that plays an important role in maintaining the balance of power and protecting citizens' constitutional rights, the Constitutional Court must be able to make decisions based on the law, even if this goes against the will of the majority. Building legitimacy through decisions that are based on law and constitutional principles will be an important step in dealing with this counter-majoritarian dilemma.

Overall, the contradiction between populism and the counter-majoritarian dilemma is of particular concern in the context of the Indonesian Constitutional Court. Developing an effective strategy to maintain independence and strengthen legitimacy is key to maintaining the functions and objectives of this institution during changing political and legal dynamics.

Research Questions/Questions

1. What is the contradiction of populism and the Counter-Majoritarian Dilemma according to Alexander Bickel and his influence on the independence of the Indonesian Constitutional Court?
2. How does Indonesia's Constitutional Court maintain its independence while strengthening its legitimacy amid populist ruling characteristics?

Methods

This research is categorized into the type of normative legal research based on the issues and/or themes raised as research topics. The research approach used is philosophical and analytical, namely research that focuses on rational views, critical analysis, and philosophy and ends with conclusions that aim to produce new findings as answers to the main problems that have been determined.¹² It will also be analyzed using descriptive-analytical methods, namely by describing the applicable laws and regulations related to legal theory and positive law enforcement practices related to the problem.¹³

This research will apply a philosophical and analytic approach to exploring the issue of populism and the counter-majoritarian dilemma faced by the Indonesian Constitutional Court. With a philosophical approach, this study will examine Alexander Bickel's thoughts on the counter-majoritarian dilemma and its relationship with populism. Through critical and rational analysis, this study will evaluate the extent to which the contradiction between these two phenomena influences the independence of the Constitutional Court.

Furthermore, this study will use descriptive analytic methods to describe and interpret the prevailing laws and positive law enforcement practices and how these are relevant to the issues under study. For example, an analysis will be made of cases of Constitutional Court decisions that show populist characteristics and how the Court maintains its independence in making such decisions. In this context, this research will take an analytical and critical approach to how the Constitutional Court maintains its independence and strengthens its legitimacy in facing the counter-majoritarian dilemma. Thus, this research will not only provide an in-depth understanding of how the contradiction between populism and the counter-majoritarian dilemma affects the independence of the Indonesian Constitutional Court but will also provide an overview of how the Indonesian Constitutional Court maintains its independence and strengthens its legitimacy amidst the characteristics of populist and arbitrary decisions. counter-majoritarian dilemma. Through this

research, valuable discoveries are expected to be generated as answers to the main problems that have been determined.

Result and Discussion

Alexander Bickel's Concept of Populism and the Counter-Majoritarian Dilemma

Populism

Populism is usually opposed by what it is against. The standard view is that populists are against elites, against constitutionalism, against democracy, and liberalism.¹⁴ While this view is sufficiently inclusive of examples of populism that have raised political and scientific alarm, there are three important ways in which it needs to be qualified.

First, populist rhetoric towards elites is often hypocritical or insincere. Many populist leaders are part of the elite itself.¹⁵ An example is Viktor Orbán, the current Prime Minister of Hungary and populist leader par excellence, who was educated at Oxford University (on a scholarship funded by George Soros). Donald Trump, former US President and populist icon, is an Ivy League-educated billionaire from New York who has inherited a large family fortune.¹⁶ These populist figures are not ordinary people.

Furthermore, although we have tended to focus on leaders who personify populist movements, many of the politicians and bureaucrats they bring to power are already part of the elite benefiting from pre-existing establishments, now characterized as 'corrupt', or rapidly becoming new elites through forms of crony capitalism often fostered by populist governments.¹⁷ For these reasons, it is not correct to claim, as a general matter, that populist movements produce or even sincerely aim to level social and political relations. Contrary to their anti-elite rhetoric, it seems that populist movements more often result in elite reshuffles in more or less pre-existing hierarchies. If so, then it is more accurate to claim that populists only oppose certain elites (presumably instrumentally) rather than oppose elites in principle.

The second qualification to the standard view of populism relates to the extent of populist anti-constitutionalism. Populists indeed oppose constitutionalism in the full sense of the term, referring not only to a written document called a 'constitution' but also to an effective body of legal and political

principles that substantially limit the powers of government and protect civil liberties (especially for minorities), principles embedded in a political culture committed to the rule of law.¹⁸

There are several ways courts can lean toward populism. First, they may begin to shun a liberal interpretation of the law in favor of one that caters to populist sentiments. Second, courts may adopt a certain instrumentalist approach to judicial review.¹⁹ However, populists are not necessarily opposed to narrowly defined constitutionalism, that is, government formally or technically according to the rules written in the constitution, including rules about what institutions exist, how they are formed, and how they are supposed to function.

In fact, in Venezuela, Turkey, Hungary, Poland, and elsewhere, populist regimes have not only retained constitutional courts but have also pursued most of their policy reforms through the vehicle of constitutional amendments.²⁰ Although these amendments are often intended to defeat constitutionalism in the fuller sense defined above, it seems that populists are content (or even motivated) to work within a formal constitutional framework rather than reject it outright.

From these two qualifications to the standard view follows a third, namely that populist movements appear to be pragmatic about the steps they use to implement their agenda. It is precisely because populism is based on what Cas Mudde, a Dutch political scientist, calls a "thin person-centered ideology," that it can embrace a wide range of actions capable of achieving its narrow set of substantive goals.²¹

This is part of what sets populism against liberalism and why Jan-Werner Müller, a German historian, rightfully claims that no democracy is illiberal. While liberalism is based on a commitment to certain just and democratic processes based on the idea that there are principal limits to how one can pursue the most desirable policies, populism²² is procedurally flexible and will support, as Müller claims, any that accelerates institutions, including the constitution and judges, towards their narrow substantive goals. This makes practical sense from a populist perspective. Courts and constitutions are politically and symbolically strong; populists should get courts to work with them than against them, and as long as courts work with them, they will have less incentive to interfere with them.

Based on that, the understanding of how populism can affect the judiciary, as illustrated in the examples of Venezuela, Turkey, Hungary, and Poland, is very relevant in the Indonesian context, especially for the Constitutional Court. Populist movements in Indonesia, as in other countries, also

have a pragmatic nature when achieving their goals. Therefore, it is important to understand that the Constitutional Court must be careful in carrying out its role so as not to fall into judicial populism.

Judicial populism in Indonesia can take the form of legal interpretations that tend toward populist sentiments or the adoption of a certain instrumentalist approach in judicial review. The fact that populists tend to accept a formal constitutional framework and use constitutional amendments as their main tool of reform, as has happened in other countries, may influence how Indonesia's Constitutional Court works. However, this does not mean that populists will fully accept the concept of constitutionalism in a broader sense. Instead, they may use the formal framework for narrower purposes, which may not always be in line with constitutionalist principles.

In this context, the Indonesian Constitutional Court needs to maintain its independence and strengthen its legitimacy. The Constitutional Court must be alert to possible intervention by populist movements and strive to ensure that its decisions are based on law and ethics, not populist pressure. Furthermore, the Constitutional Court needs to strengthen its counter-majority approach in making decisions, bearing in mind the procedural flexibility of populism, which can lead to the abuse of the legal process to achieve narrow substantive goals.

Thus, this research hopes to provide deeper insight into how the Indonesian Constitutional Court can maintain its independence and strengthen its legitimacy while facing the threat of judicial populism. This will be an important part of efforts to ensure that the Indonesian Constitutional Court remains the primary guardian of the constitution and enforcer of citizens' rights, in line with democratic and legal principles.

The Counter-Majoritarian Dilemma

Scholars have long debated the credentials of courts in the context of democracy. The view approach is divided into two parts. Some see the judiciary as a positive force for democracy,²³ while others see it as an institution that undermines and interferes with genuine democratic government.²⁴ One of the issues often debated in the court context is the "counter-majority difficulty" expressed by Alexander Bickel (1962), which has since become known as the Counter-Majoritarian Dilemma (CMD). The question is: how can a group of unelected and politically irresponsible judges go against the will of the people and/or their elected representatives in a democracy?

The Constitutional Court has historically been characterized as a 'negative legislator' and a counter-Majoritarian Dilemma. These two concepts, although separate, are often seen as one phenomenon. As

a result, the Constitutional Court is often seen as a passive entity that only rejects legal norms enforced by majority institutions, such as the legislature.²⁵ This assumption is based on the idea that a law passed by an elected legislature has the character of a majority, while a judicial decision that annuls the law has the character of a Counter-Majoritarian Dilemma. As a consequence, the legitimacy of judicial oversight is largely based on the protection of minorities and the control of democratic excesses through structural boundaries.²⁶

Any deviation from this practice opens the courts to criticism for engaging in a Counter-Majoritarian Dilemma that can undermine a democratic system of government. However, this categorization is too narrow and incomplete. The Constitutional Court indeed faced a counter-Majoritarian Dilemma, especially in protecting rights and enforcing the limits of majority power. However, it is also true that the Constitutional Court can exercise a majority action when overturning a law passed by a democratically elected parliament. In other words, a 'negative legislator' can also be a 'majority legislator' in a constitutional context.

First, we need to reject the notion that all actions of a democratically elected parliament always represent the will of the majority in the purest, optimal, or ultimate way. When the Constitutional Court replaces the views of the democratically elected parliament with their own, they de facto act in a Counter-Majoritarian Dilemma.²⁷ Actions of this kind are contrary to a democratic system of government and should generally be rejected unless explicitly permitted by the constitution or required by the basic principles of constitutionalism. However, when the elected legislature replaces the constitutional will with their own, it is they who act in a Counter-Majoritarian Dilemma.²⁸ Thus, when the Constitutional Court overturns legislative acts to restore constitutional will, it is strengthening majority power. This contradicts the general assumption that judicial review and the Constitutional Court in particular are Counter-Majoritarian Dilemma institutions.

In the modern era, when the people adopt a constitution, including its substantive content on important policy issues, they are exercising democratic and direct government. In other words, the people govern themselves by establishing their preferences and policy views in the highest form of law, namely the constitution, not just by electing representatives who will make policies through ordinary laws. In this respect, direct enforcement of policies enshrined in the constitution becomes an important buttress against the potential failure and inadequacy of indirect representative democracy. Consequently, future law-making must comply with the preferences of the majority expressed by the ruler, i.e., the people, in the text of the constitution. It is very inappropriate if the elected legislature

rejects the will of the people embedded in the constitution. This would be an illegitimate anti-majority measure. Therefore, when the legislature, even if elected, enacts laws contrary to the dictates of the constitution, particularly on public policy issues that reflect the views of a strong social majority and are embedded in constitutional texts, the Constitutional Court has to reject the law and restore the expression of the majority contained in the constitution.

Based on that, in the Indonesian context, the Constitutional Court has played an important role in maintaining a balance between the legitimacy of the majority and the protection of minority rights, in line with the principles of the Counter-Majoritarian Dilemma. The Indonesian constitution, clearly stipulating the role of the Constitutional Court in upholding democratic principles and human rights, serves as insurance against potential abuse of power by the majority. Through its duties and functions, the Constitutional Court plays an active role in limiting the excesses of democracy through the annulment of laws or regulations that are contrary to the Constitution. In this case, the Constitutional Court acts as a 'negative legislator, ensuring that legal norms issued by majority institutions do not harm minority rights or violate constitutional boundaries.

On the other hand, the Constitutional Court also plays a role in ensuring that the aspirations and will of the people, as enshrined in the Constitution, are not ignored by the elected legislature. In this case, the Constitutional Court has the role of guardian of direct democratic values and enforcer of constitutional orders. In practice, of course, there are challenges and criticisms of the way the Constitutional Court works. However, it is important to understand that this dilemma between the majority and the minority is an integral part of democracy. Therefore, the role of the Constitutional Court in bridging these two aspects is very important. The challenge, then, is how to strengthen the function and performance of the Constitutional Court to carry out its duties and functions most effectively and fairly. This requires a deeper understanding of this phenomenon, including further study of the limits of representative democracy and ordinary politics as well as a critical consideration of the potential of direct democracy and constitutional politics. Thus, Indonesia can continue to develop its democratic government system, with the Constitutional Court as the guardian of constitutionalism and upholding justice.

The Contradiction of Populism and Alexander Bickel's Counter-Majoritarian Dilemma Affects the Independence of the Indonesian

Constitutional Court

Populism and the independence of the Indonesia Constitutional Court (ICC) are two interrelated topics in the Indonesian political context. Populism is a political approach that emphasizes the interests of the people and opposes political elites.²⁹ Meanwhile, the independence of the Constitutional Court is the ability of the Court to carry out its duties as guardian of the Constitution freely and not be influenced by political interests.³⁰ The Constitutional Court has a very important role in maintaining independence and justice in the Indonesian legal system.³¹ However, the independence of the Constitutional Court is often debated due to the influence of politics and populism in decision-making.

One theory that can be used to understand the contradictions of populism and the counter-majoritarian dilemma in ICC is Alexander Bickel's theory.³² In theory, Bickel argues that a judge's decision must be based on objective constitutional principles and not on political interests or the will of the majority.³³ However, in practice, the Constitutional Court is often caught in a dilemma between maintaining independence and considering political interests or the wishes of the majority.³⁴ Therefore, an understanding of the contradictions of populism and Alexander Bickel's counter-majoritarian dilemma is very important to understanding the challenges faced by the Constitutional Court in maintaining its independence. In this article, we will further discuss the contradictions of populism and Alexander Bickel's counter-majoritarian dilemma and their impact on the independence of the Constitutional Court.

Populism in Indonesia

Populism in Indonesia is a natural part of the dynamics of democracy in a country.³⁵ Populism is often used to describe different political, historical, and ideological movements.³⁶ Populism was born based on ordinary people's perceptions of elite betrayal or the contradictory attitudes of political elites who behave in a contradiction between political promises during campaigns and their realization during power.³⁷ This approach has three basic elements of populism: the people, the elite, and the will of the people who have been betrayed.³⁸

Populism in Indonesia has transformed the dynamics of political contestation ahead of the 2019 Election.³⁹ Populism in this context refers to political movements that emphasize the interests of the people and oppose political elites who are considered corrupt and do not care about the interests of the

people. In this context, populism can be an alternative for the people to express their disappointment with the political elite, who are deemed unable to meet the people's needs.⁴⁰

Populism in Indonesia can also be viewed from an ideological, political-economic, structural, agrarian, class, intellectual, and social movement perspective, and so on.⁴¹ Populism in this context refers to political movements that emphasize the interests of the people and oppose political elites who are deemed unable to meet their needs.⁴² Populism in this context can be an alternative for the people to express their disappointment with the political elite, who are deemed unable to meet the people's needs.⁴³

Populism in Indonesia can also be related to identity politics, where religious populism arises as a result of a narrow perspective on religion so that people feel they are right and cannot accept different opinions.⁴⁴ This religious populism can be a threat to the integrity of the state and society because it can trigger conflicts between religious groups and worsen the political atmosphere.⁴⁵

Populism in Indonesia can be an alternative for the people to express their disappointment with the political elite, who are considered unable to meet the people's needs. However, populism can also be a threat to the integrity of the state and society if it is not balanced with an awareness of the importance of maintaining national unity and integrity. Therefore, good awareness and understanding are needed from all elements of society to avoid conflicts and strengthen the integrity of the state and society.

The Contradiction of Populism and the Independence of the Constitutional Court

The contradiction between populism and the independence of the Constitutional Court (ICC) lies in the different focuses and demands of the two concepts. Populism emphasizes the interests of the people, while the independence of the Constitutional Court demands freedom and independence in carrying out its duties as guardians of the Constitution.

Populism can affect the independence of the Constitutional Court because it must carry out its duties without being influenced by political interests.⁴⁶ However, populism can also affect the decisions of the Constitutional Court because it must consider the interests of the people in carrying out its duties.⁴⁷ If the independence of constitutional judges continues to be undermined by the People's Representative Council (DPR), this could threaten the independence of the Constitutional Court and potentially harm the applicant who submits a judicial review to the Constitutional Court.⁴⁸

The petitioner, who submitted a judicial review to the Constitutional Court, also highlighted the importance of the independence of constitutional judges in maintaining justice and protecting constitutional rights.⁴⁹ Retno Mawarini Sukmariningsih thinks that if the independence of constitutional judges continues to be eroded, the decisions of the Constitutional Court can be influenced by political authorities, which can threaten the justice and independence of the Constitutional Court.⁵⁰ However, the debate around the independence of the Constitutional Court does not only occur in Indonesia. In various countries, including democratic countries, the issue of judicial independence is often a major concern.⁵¹ Political intervention in the judiciary can threaten the independence of the guardians of the constitution and show the dilapidation of the laws in a country.⁵²

Alexander Bickel's Counter-Majoritarian Dilemma

Alexander Bickel's Counter-Majoritarian Dilemma is a problem that arises in the legal review of laws made by the majority, or the people. This problem arises because judicial review by judges can invalidate, overturn, or limit laws that reflect the will of the majority. This dilemma is often discussed in the context of United States.⁵³

Constitutional law, especially when discussing the powers of the three branches of the federal government. In the context of United States constitutional law, the counter-majoritarian dilemma becomes a complex problem because the United States Constitution gives power to judges to review laws made by the majority.⁵⁴ However, this power can create a dilemma, as non-elected judges can overturn decisions made by elected representatives. This can raise questions about the legitimacy of trials under the law and the powers of judges.⁵⁵

In his book, Bickel advises that judicial review should be exercised with caution and only in critical situations. He also suggested that judges consider the will of the majority and limit legal trials to very important cases ⁵⁶. In the context of Indonesian constitutional law, the counter-majoritarian dilemma is also a complex problem. The Indonesian constitution gives the Constitutional Court powers to review laws made by the majority.⁵⁷ This can raise questions about the legitimacy of judicial review and the powers of the Constitutional Court?.

In the context of constitutional law, a counter-majoritarian dilemma can also occur in the relationship between judges and politicians.⁵⁸ Politicians can try to influence judges' decisions by

appointing judges who share the same political views. This can raise questions about the independence of judges and the fairness of legal trials.⁵⁹ In the context of constitutional law, a counter-majoritarian dilemma can also occur in the relationship between judges and society. The public can feel dissatisfied with the judge's decision to annul or not annul the law made by the majority.⁶⁰

The Effect of Populism on the Independence of the Constitutional Court

The Constitutional Court must ensure that government policies and actions are following established constitutional principles.⁶¹ However, the Constitutional Court must also consider the interests of the people in carrying out its duties as guardians of the Constitution.⁶² This can lead to a dilemma because the Constitutional Court's decisions must be based on constitutional principles and not on the will of the majority. In this case, the Constitutional Court must consider the interests of the people and constitutional principles in carrying out its duties.

Constitutional principles are a set of rules and values contained in a country's constitution. These principles must be respected and upheld by all state institutions, including the Constitutional Court. One important constitutional principle is the separation of powers between the executive, legislative, and judicial branches.⁶³ This principle guarantees that no single state institution has excessive power and that each state institution must supervise and control the others.⁶⁴

In carrying out its duties, the Constitutional Court must ensure that its decisions are based on constitutional principles and not on political interests or the will of the majority. An example of a relevant case is the case of *Marbury v. Madison* in the United States in 1803.⁶⁵ In this case, William Marbury filed suit to the Supreme Court because he did not receive the commission as justice of the peace that had been granted by President John Adams.⁶⁶ The Supreme Court presided over by Chief Justice John Marshall, ruled that the statute that gave the Supreme Court the power to review executive and legislative decisions that contravened the Constitution was lawful. This decision affirms that the Supreme Court has the power to review executive and legislative decisions and ensure that they comply with constitutional principles.⁶⁷

In other cases, the Constitutional Court must consider the interests of the people in carrying out its duties. An example of this is when the Constitutional Court has to decide whether a law made by the legislature is following the constitution or not. If the law is contrary to the Constitution, the

Constitutional Court must decide to annul it, even though the law may be considered important for the interests of the people.⁶⁸ For example, the ICC in Israel once overturned a law that gave the government the power to detain citizens without trial. Even though the law was considered important for fighting terrorism, the Constitutional Court decided that it was against constitutional principles and had to be annulled.⁶⁹

Several decisions were considered populist by the Constitutional Court, for example, Decision Number 47/PUU-XXI/2023⁷⁰, Constitutional Court Decision Number 112/PUU-XX/2022⁷¹, and Case Decision Number 91/PUU-XVIII/2020⁷². These three decisions were widely criticized because they have an implicit correlation with the interests of the government⁷³, are political⁷⁴ or are considered to be less assertive (taking the middle way).⁷⁵

The petitioner in the judicial review case at the Indonesian Constitutional Court (ICC) has highlighted the importance of the independence of constitutional judges in maintaining justice and protecting citizens' constitutional rights. As stated by Retno Mawarini Sukmariningsih, if the independence of constitutional judges is eroded, the decisions of the Constitutional Court can be influenced by political authorities. This, of course, can threaten the justice and independence of the Constitutional Court, the highest constitutional institution in this country.

The debate about the independence of the judiciary does not only occur in Indonesia. In various parts of the world, including countries with mature democratic systems, the issue of judicial independence is often the main topic. Political intervention in the judiciary can threaten the independence of the guardians of the constitution and become an indication of the decline of the rule of law in a country. Populism, or the tendency to support the aspirations and interests of the common people, is sometimes contradictory to the principle of independence in the judiciary, including in the Constitutional Court. Populism can bring political and public influence into the decision-making process, which ideally runs objectively and fairly.

Several ICC decisions, such as Decision Number 47/PUU-XXI/2023, Constitutional Court Decision Number 112/PUU-XX/2022, and Case Decision Number 91/PUU-XVIII/2020, have drawn criticism because they are considered to have a correlation with political interests or the government, or because they are considered less assertive and take the middle way.

These decisions show how populism can affect the independence of the Constitutional Court. If the Constitutional Court's decision is suspected of favoring certain political interests or taking steps that

are considered popular among the public, this can affect the image of the Court as an independent and fair institution. In this context, it is important for the Constitutional Court to maintain its independence as the guardian of the constitution. The Constitutional Court must adhere to the principles of independence and carry out its duties with justice, without being influenced by populism or political interests.⁷⁶ In carrying out its duties, the Constitutional Court must consider the interests of the people and protect constitutional rights while maintaining its independence as an institution guarding the constitution.

In carrying out its duties, the Constitutional Court must ensure that its decisions are based on constitutional principles and not on political interests or the will of the majority. The Constitutional Court must consider the interests of the people and constitutional principles in carrying out its duties.⁷⁷ The Constitutional Court must ensure that its decisions are consistent with constitutional principles and are not influenced by political pressure or the interests of certain groups.⁷⁸

An example of a case where populism threatens the independence of the Constitutional Court is the Constitutional Court's decision regarding the Election Law. In 2018, the Constitutional Court issued a ruling limiting the number of political parties that can nominate presidential and vice-presidential candidates.⁷⁹ This decision aims to strengthen the political party system and prevent money politics from occurring in the presidential election. However, this decision drew criticism from several parties who thought that it did not pay attention to the interests of the people. Apart from that, the Constitutional Court's decision regarding the Job Creation Law is considered controversial and a form of political influence on the Court.⁸⁰ Furthermore, the influence of populism can also be seen in the selection process for ICC judges. Several parties considered that the selection process for ICC judges was not transparent and open, so that it could allow for political influence in the selection.⁸¹ Finally, the influence of populism can also be seen in the actions taken by the ICC judges. Some ICC judges are considered too close to power and take actions that are inconsistent with the principle of judge independence.⁸²

In addition, several ICC decisions such as Decision Number 47/PUU-XXI/2023, Constitutional Court Decision Number 112/PUU-XX/2022, and case decision number: 91/PUU-XVIII/2020, have drawn criticism because they are considered to have a correlation with political or governmental interests, or considered to be less assertive and to take the middle way.

These decisions show how populism can affect the independence of the Constitutional Court. If the Constitutional Court's decision is suspected of favoring certain political interests or taking steps that are considered popular among the public, this can affect the image of the Constitutional Court as an independent and fair institution. In this context, it is important for the Constitutional Court to maintain its independence as the guardian of the constitution. The Constitutional Court must adhere to the principles of independence and carry out its duties with justice, without being influenced by populism or political interests.⁸³ In carrying out its duties, the Constitutional Court must consider the interests of the people and protect constitutional rights, while maintaining its independence as an institution guarding the constitution

The Effect of Alexander Bickel's Counter-Majoritarian Dilemma on ICC Independence

The influence of Alexander Bickel's counter-majoritarian dilemma on the independence of the Constitutional Court (ICC) is an interesting topic to discuss. In this context, the counter-majoritarian dilemma refers to the issue of the legitimacy of the judiciary in overturning legislative decisions or decisions taken by the majority. This dilemma was first introduced by Alexander Bickel, a law professor from Yale Law School, in his famous book entitled "The Least Dangerous Branch: The Supreme Court at the Bar of Politics".⁸⁴ Bickel argues that the judicial power to cancel legislative decisions or decisions taken by the majority can create a dilemma, because this can be considered as an anti-democratic action.⁸⁵

First, seen from the perspective of legitimacy. In this context, the judicial power to cancel legislative decisions or decisions taken by the majority can be considered as an anti-democratic action. However, the Constitutional Court has the authority to annul laws deemed inconsistent with the constitution, so the Constitutional Court must also consider the legitimacy aspect in exercising its power⁸⁶.

Second, seen from the perspective of independence. In this context, the independence of the Constitutional Court can be influenced by political power and pressure from interested parties.⁸⁷ Therefore, the Constitutional Court must maintain its independence in exercising its powers, so as to maintain the credibility and integrity of the institution.

Third, seen from the perspective of constitutional interpretation. In this context, the Constitutional Court has the authority to interpret the constitution, so that it can annul laws that are considered inconsistent with the constitution.⁸⁸ However, the interpretation of the constitution can also be influenced by political interests and pressure from interested parties. Therefore, the Constitutional

Court must ensure that the interpretation of the constitution that is carried out is not influenced by political interests and pressure from interested parties.

Fourth, seen from the perspective of the relationship between judicial power and political power, In this context, the Constitutional Court has the authority to annul laws that are considered inconsistent with the constitution, thereby affecting political power.⁸⁹ Therefore, the Constitutional Court must ensure that its judicial power does not conflict with political power.

Fifth, seen from the perspective of supervision In this context, the Constitutional Court has the authority to repeal laws that are considered inconsistent with the constitution, so they can play an important role in monitoring government policies.⁹⁰ Therefore, the Constitutional Court must ensure that the supervision it carries out is not influenced by political interests or pressure from interested parties.

Sixth, from the perspective of the role of the Constitutional Court in maintaining political stability In this context, the Constitutional Court has the authority to annul laws that are considered inconsistent with the constitution, thereby affecting political stability.⁹¹ Therefore, the Constitutional Court must ensure that the decisions it makes do not create conflicts that could threaten political stability.

Seventh, from the perspective of the role of the Constitutional Court in safeguarding human rights In this context, the Constitutional Court has the authority to annul laws deemed inconsistent with the constitution so that they can play an important role in protecting human rights.⁹² Therefore, the Constitutional Court must ensure that the decisions it makes do not harm human rights.

In conclusion, Alexander Bickel's counter-majoritarian dilemma can affect the independence of the Constitutional Court (ICC) in exercising its power. Therefore, the Constitutional Court must consider aspects of legitimacy, independence, interpretation of the constitution, the relationship between judicial power and political power, supervision, its role in maintaining political stability, and its role in protecting human rights when exercising power.

Conclusion

That populism and the independence of the Constitutional Court (ICC) contradict each other in the Indonesian political context Populism emphasizes the interests of the people and opposes political elites, while the independence of the Constitutional Court requires that the Court carry out its duties without being influenced by political interests. However, the independence of the Constitutional Court

is often threatened due to political influence and populism in decision-making. Alexander Bickel's theory of the counter-majoritarian dilemma can be used to understand this contradiction. The Constitutional Court must maintain its independence as guardian of the constitution by considering the interests of the people and constitutional principles. In carrying out its powers, the Constitutional Court must also pay attention to aspects of legitimacy, interpretation of the constitution, relations with political power, oversight, political stability, and protection of human rights.

Footnotes

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⁶ The Counter-Majoritarian Dilemma, a term coined by Yale Law School Professor Alexander Bickel in his famous work, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics*, has become one of the central issues in constitutional theory. While Bickel's original interpretation of this phrase is debatable, this concept has now acquired an established meaning. This dilemma highlights the issue of the legitimacy of judicial review institutions: when judges who are not elected by the people use

their powers to overturn decisions made by the elected executive or legislature, they have the potential to contradict the "will of the majority" represented by the electoral bodies. In this context, if one argues that a democratic majority is a fundamental political value, this feature of legal review can be controversial. Since Bickel identified this problem, this debate has dominated the debate in constitutional theory for the following decades. See Sultany and Nimer, 'The State of Progressive Constitutional Theory: The Paradox of Constitutional Democracy and the Project of Political Justification' (2012) 47 *Harvard Civil Rights and Civil Liberties Law Review (CR-CL)* 2, 383–384, Available at SSRN: <<https://ssrn.com/abstract=2132397>>

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⁷² Formal test of Law Number 11 of 2020 on Job Creation

⁷³ For example, in decision No. 47/PUU-XXI/2023, Zico Leonard Djagardo Simanjuntak noted that as a party carrying out state functions, the government often receives criticism and suggestions from citizens. However, in some cases, the submission of such criticism is not in accordance with ethics and leads to humiliation and defamation. Therefore, it is important for the Government to be protected from acts of insult and defamation. However, this does not mean that the Government must have a

special article that prohibits acts of insulting them. Zico highlighted the question of why anyone who commits an act of insulting the Government must be subject to a special article, even though the Criminal Code (KUHP) already has provisions regarding insult and defamation that apply to everyone, including the Government. The existence of a special regulation regarding contempt of the Government actually violates the constitution and the principle of Equality Before the Law as contained in Article 28D paragraph (1) of the 1945 Constitution of the Republic of Indonesia. Apart from that, Zico also stressed that special arrangements related to insulting the Government indirectly violate Human Rights as stipulated in Law Number 39 of 1999 concerning Human Rights (UU HAM). Therefore, the applicants request that the Constitutional Court declare that Article 218 paragraph (1), Article 219, Article 240 paragraph (1), and Article 241 paragraph (1) of the Criminal Code are contrary to the 1945 Constitution and do not have binding legal force. See the Constitutional Court of the Republic of Indonesia. (2023). Questioning the Article on Contempt of the Government. Available at: <https://www.mkri.id/index.php?page=web.Berita&id=18849>.

⁷⁴ The Constitutional Court of the Republic of Indonesia has been asked to reinterpret its decision, number 112/PUU-XX/2022, which extended the term of office for the leaders of the Corruption Eradication Commission (KPK) from four to five years. In this petition, the Constitutional Court is asked to apply the new norms resulting from the decision for the upcoming KPK leadership period (2023–2028). The request was submitted by the Indonesian Anti-Corruption Society (MAKI), represented by its coordinator, Mr. Boyamin Saiman, and a lawyer from Bali, Mr. Christophorus Harno. They filed for a judicial review of Article 34 of Law Number 30 of 2022, which has been amended by Constitutional Court decision Number 112/PUU-XX/2022, namely the norm regarding the tenure of KPK leaders for five years and the fact that they can be re-elected only for one term. According to Mr. Boyamin, who was confirmed on Sunday, June 18, 2023, they hope that the Constitutional Court decision No. 112/2022 will be implemented for the next KPK leadership period (2023–2028). This argument is based on the principle that the law cannot be applied retrospectively as well as the hope that the independence of the KPK can be achieved given the unique nature of the term of office of the KPK leadership, which is different from positions in the executive and legislative branches. At the same time, an advocate named Marion has also submitted a request for judicial review of Article 21 of Law Number 31 of 1999 concerning the Eradication of Corruption Crimes and Article 16 in conjunction with Article 31 of Law Number 18 of 2003 concerning advocates. This request is related to legal norms concerning obstacles to investigations of corruption suspects or defendants,

which are subject to a minimum prison sentence of three years and a maximum of twelve years. According to the applicant, Article 21 of the Corruption Eradication Law is contrary to Article 16 of the Advocate Law, which grants immunity to advocates, so that they cannot be prosecuted, both civilly and criminally, when they carry out their professional duties in good faith in the context of client defense in court. See, Kumalasanti, S. R, MK Asked to Re-interpret the articles of the term of Office of KPK Leaders (Compass, 2023). Available at: <https://www.kompas.id/baca/polhuk/2023/06/18/mk-diminta-tafsir-ulang-pasal-masa-jabatan-pimpinan-kpk>.

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