

## Constitutional Court and Democracy Backsliding in The Post-Pandemic Era

Murti Ayu Hapsari<sup>1</sup>

*Universitas Janabadra Yogyakarta, Indonesia<sup>1</sup>*

**Abstract:** *Constitutional Court is a state entity that serves as the guardian of the constitution, one the duty is to act as the sole interpreter of constitution and protector of citizen civil rights. Constitutional Court also hold the key to incarnate healthy democratic state as well by striking down laws that violate the Constitution. The core element of constitutional democracy is "limiting the power of the sovereign" this element is to prevent an excessive authority that would lead to abuse of power. Therefore, an ideal and independent Constitutional Court should be able to prevent a state from corrosion of democracy as well as act as control and checks the executive power. When the COVID-19 epidemic strikes the, many researchers concern focuses on the loss and regression of democracy that gradually become more common. A "state of emergency" condition—a condition where executive has more power in case of emergency— tends to be used by authoritarian-leaning administrations to boost their control and influence within the state. This study aims to strengthening and determining the role and function of the constitutional court in guarding democracy both in pandemic and post-pandemic. Study conducted with doctrinal method--theoretical and history approach were used to analyze the relevant data. Based on these arguments, additional investigation is required to explore the role and duties of Constitutional Court in several countries in safeguarding democracy both during and after the pandemic. This study categorized as literature study. From the study can be concluded that courts have requested on procedural and lawful state of emergency declaration as well as engage in review of rights restriction to balance rights against matter of health concern.*

**Keywords:** *democracy, constitutional court, post-pandemic*

### Introduction

The Constitutional Court is a state institution that serves as a constitutional guardian and the final interpreter of the constitution. The function is complementary to the Constitutional Court's role as a guardian of democracy, the protector of citizens' constitutional rights and human rights in general. The fundamental concept of constitutional democracy is "limiting government power," in order to prevents excessive of power in a state (Sa'adah, 2019). The foundational idea behind the establishment of Indonesia's Constitutional Court is in support of a system of checks and balances as well as a constitutional democratic system. Further, Indonesian

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<sup>1</sup> E-mail: [murtiayu@janabadra.ac.id](mailto:murtiayu@janabadra.ac.id)

Constitutional Court has a solid reputation as a highly independent judicial institution (Eddyono, 2018)(Baidhowah, 2021)(Roberto Barroso, 2019).

Based on that idea, Gibler and Randazzo further argue that an independent Constitutional Court can prevent democratic backsliding (Baidhowah, 2021). Independency of this court can bring a beneficial effects on democracy, among other things, is the a possible cancellation of policies that contravene participatory democracy's principles and the strengthening of the safety net against democratic mechanisms, like fair elections (Baidhowah, 2021). On the other hand, a less independent Constitutional Court that interprets democracy as "unconstrained majority rule", tends to be close to an authoritarian government and eventually leads to the decline of democracy, examples as seen in Hungary, Romania, Brazil, and India (Steuer, 2021)(Hudson, 2021). Several cases in countries experiencing democracy backsliding are linked to the country's incapability to hold free and fair elections, some cases showcasing to go further as limiting the citizen political rights and civil rights. The democracy backsliding is essentially can be identified by the decline in overall democratic performance and emergence of authoritarian regime (Hudson, 2021)(Quraishi, 2021). As the world grapples with the 2019 COVID-19 pandemic, discourses and concerns about democracy's decline in many countries intensify (Lewkowicz et al., 2022). In fact, particular countries use a state of emergency to justify an authoritarian government's excessive power to rule over the country. Moreover, during pandemic emergency, control over the government is severely constrained; ranging from the suspension of parliamentary performance to the inability of citizens to stage public protests (Parry et al., 2020). The pandemic has further accelerated the decline of democracy in countries, particularly those that were already under democratic pressure (Quraishi, 2021)(Lewkowicz et al., 2022). This implies that the phenomenon of pandemic-caused democratic decline cannot be generalized; research conducted by Rapeli and Saikkonen in 2020 demonstrates that the pandemic has no effect on countries with well-established democracies values (Rapeli & Saikkonen, 2020). Nevertheless, the general narrative that circulates based on prior pandemic-related are; COVID-19 raises fundamental questions about what is the nature of democracy and how democracy works and being practiced in extraordinary conditions and emergencies (Parry et al., 2020). According to several studies, indication of democratic decline were noticeable in Indonesia long before the COVID-19 pandemic. Abhipraya argue that the decline of democracy in Indonesia can be traced back 10 years after the 1998 Reformation (Abhipraya et al., 2020). Several factors contribute to the threat to democracy in Indonesia, including politics of identities, a major shift in civil society, inadequate protection of human rights, particularly for the marginalized and minorities as well as rise of inequality oligarchy (Aspinall & Warburton, 2018). Political instability and economic uncertainty also trigger the decline of democracy in Indonesia. According t Freedom House survey in 2021, Indonesia considered as 'partly free' which means scores low in several indicators of democratic country. These are caused by several factors such as inconsistent implementation of the rule of law, partial practices of the judiciary as well as discrimination in constitutional rights fulfillment(House, 2021). Wiratraman further argues that Indonesia's COVID-19 emergency law violates the basic principles of the rule of law and human rights standards (Wiratraman, 2020).

In order to restore the balance, researchers argue that it is important for the judicial branch, in this case, a constitutional court, to oversee the government while gatekeeping and controlling democratic functioning in the context of overcoming the COVID-19 pandemic

(Patricia Popelier et al., 2021). One of them is Ginsburg and Versteeg research that concluded how Constitutional Courts in countries such as the Czech Republic, Brazil, and others exercised control through various actions and interventions (Ginsburg & Versteeg, 2020).

## **Literature Review**

### **1. On democracy and transparency**

Democracy is a method of state as a power organization that guarantees the significance of human rights. Further, democracy implementation must also be based on human rights; thus, understanding democracy comprehensively entails understanding human rights, and vice versa (Aswandi & Roisah, 2019). Democracy is a form of government in which citizens have the right, obligation, position, and power to participate decision-making, as well as the overseeing the course of sovereign, directly or indirectly. through the public sphere as well as through fairly elected representatives to run solely for the people's benefit and welfare. Lincoln describes democracy simply as government of the people, by the people and for the people (Fuady, 2010).

In this case, Robert A. Dahl proposed five democratic standards. According to Dahl, democracy will provide various opportunities for: 1) effective participation, 2) equal voting rights, 3) clear understanding, and 4) oversight of the government agenda. Dahl also claims that democracy can: 1) prevent authoritarian rule; 2) protect human rights; 3) general liberty; 4) self-determination; 5) moral autonomy; 6) human development; 7) protect the individual rights ; 8) bring peace; and 9) people's prosperity (Dahl, 1998). According to Dahl's concept, democracy may have an impact on people's freedom through transparency and accountability. It is stated that good governance is created, and one of the prerequisites for realizing true democracy can be achieved through mechanism of inclusivity principle. State Government is ought to be accountable to the people regarding how state administration is run (Retnowati, 2012). Responsible, legal, and democratic governance is built on the principles of freedom, transparency, and accountability. Democracy contains several key ideas, such as:

a) Civil society

Civil society is a fair society that does not tolerate on discrimination. In a civil society, all people are treated equally in terms of the allocation of rights and obligations. This idea ensures that all people have the same level of freedom and empowerment.

b) Political citizenship

This idea emphasizes the necessary conditions for the people as political agents. The people are guaranteed not only the protection of their rights but as well as fundamental right to engage in political activity. The moral obligation of citizens to preserve their human rights is implied by this idea.

c) Social citizenship

It is a new concept that has gained prominence in the evolution of the welfare state idea. According to this concept, citizens have a right to socioeconomic security, which serves as a guarantee for a prosperous life. Once this idea is realized, every citizen will come to understand themselves as liberal beings who live in a free environment to grow as individuals.

d) Good governance

The idea of good governance has gained traction in contemporary society. Good governance is the performance of a nation's government institutions, businesses, or community organizations that meets certain requirements. On the other hand, good governance could be seen as a tangible representation of democracy and demand civic culture of democracy's long-term viability. According to the World Bank, good governance is the application of sound and responsible development management in accordance with the values of democracy and a successful market (Sunarso, 2018).

Democracy not only pledges freedom but also expects its citizens to take responsibility for themselves. In this situation, the people are held accountable for all decisions made as well as the consequences because, in a sovereign democracy, the people are ultimately in charge. One of the founding fathers, Mohammad Hatta placed a strong emphasis on the need for a "administrative state"—a nation where the people are the sovereign (Palguna, 2019).

## 2. Constitutional court and the sovereign

The establishment of the Constitutional Court can be seen as being quite popular in a number of other nations, particularly in nations that have overseen a transition from an authoritarian regime to a more democratic one. In order to uphold justice and the law within the scope of its authority, the Constitutional Court was established. The incorporation of the Constitutional Court into the legal framework made a significant improvement for the growth of democracy in Indonesia. With all of the Constitutional Court's responsibilities and authority, it is believed that the doctrine of parliamentary supremacy has changed and replaced with guiding principle of constitutional supremacy (Faqih, 2010). The Constitutional Court was initially established with the goal of defending the law, one of which was to serve as constitutional interpreter as well as the gatekeeper of democracy. Since the 1945 Constitution recognized human rights, it has served the purpose of defending the constitution by defending people fundamental rights.

Indonesian Constitutional Court is one of these typical products born during the third wave of democratization is. Both the procedural sense of *rechtstaat* and the substantive sense of democracy were out of the reach of the Indonesian people prior to the establishment of the Constitutional Court after the 1998 Reformation and the constitution amendment (Rudy et al., 2021). This Constitutional Court has demonstrated a notable improvement in Indonesia's legal reform after a decade of its establishment.

### Methodology

This research is normative or doctrinal legal research. According to Soerjono Soekanto, normative research is research whose nature and scope of legal discipline includes analytical disciplines and prescriptive disciplines (Soekanto & Mamudji, 2011). This legal research is a legal research library, which means it uses library materials as primary data. This legal research utilized two approaches: a) an approach to legal principles and b) an approach to legal history. Relevant data was obtained and analyzed qualitatively before being presented descriptively. The state of the research object is first described in a descriptive presentation, and then it is further described to provide interpretation and explanation of discovered facts. Inductive reasoning will be used to draw and string the conclusions, started with minor to major premises.

## Findings & Discussion

Phenomenon of democratic backsliding is a global issue, despite the democracy's overall advancement and acceptance as the ideal political system. This situation is the result of numerous challenges to democracy, such as a decline in democratic quality in third-wave democracies as well as in more established nations (Abhipraya et al., 2020). Despite the hardships, democracy has proven to be sustaining. With a few exceptions, democracies have also demonstrated to provide better conditions for sustainable development (Abhipraya et al., 2020). Unfortunately for the past five years, Indonesia has democracy score has been declining, Freedom House based on latest data, demonstrates that the decline caused by uncontrollable systemic corruption, poor execution of judicial independence, as well as discrimination/violence against based on race and minority groups (House, 2022). Similar results also found based on the survey conducted by Indonesian Central Statistics Agency as well as Economist Intelligence Unit (Amalia, 2021) (Habibi, 2021). Törnquist in several research argues and pointed out that the neglect or severing of political ties between democratic institutions and the populace or constituents impacted on the stagnation of democracy as well as holding back the development of democracy under various labels. Törnquist further demonstrates that issues with bad representation or the failure to form a political bloc are preventing Indonesia from achieving true democracy (Habibi, 2021).

The novel coronavirus pandemic has devastated public health in most countries, but it has been extremely detrimental in ethnically and racially diverse major democratic countries such as United States, Brazil, as well as Indonesia. The pandemic has gotten harder to control because of the extreme social and economic disparities in these nations (Kurlantzick, 2022b). CFR further reports that inequalities impacted on how the health system works. When the virus spreads in those countries, health-care facilities are quickly overwhelmed because many of them have ineffective health-care systems for lower-income people, including many minorities (Kurlantzick, 2022a). Ironically, recent leaders of these large democratic states, like many of their peers in the COVID-19 era, have used the pandemic to expand their executive power. Illiberalism's nature and how they used the pandemic to further systematize power differ (Kurlantzick, 2022a).

Policy measures to the COVID-19 pandemic have complicated social life as well as the democratic systems (Kortum et al., 2020). These actions are seen as a significant risk to democracy because governments may endeavor to constrain democratic rules under the guise of pandemic countermeasure. Prior research exposed the fact that authorities in a state of emergency may use the unchecked countermeasure and frequently implement them against the interests of certain groups within society. Some researchers also warn against the abuse of emergency powers and emphasize the role of the rule of law in limiting sovereign' excessive sudden power (Lewkowicz et al., 2022). The phenomenon often called as *constitutional authoritarianism* in which authorities across several countries deliberately used the COVID-19 pandemic management countermeasure excuse to justify authoritarian regime, which unfortunately “constitutional” in literal way. Examples of these phenomenon as follows:

As for COVID-19 pandemic management handling, the Hungarian Parliament specifies laws that make it easier for the Prime Minister to issue a decree (rule by decree) without going through the proportional checks and balances process. This is known as rule by decree or government (based on) a decree for an indefinite period. After that, Prime Minister proceed to

issue a decree to limit parliament's powers. In this case, Prime Minister could easily control its unhealthy excessive authority and political interests by issuing a new decree (Thomson & Ip, 2020).

The Prime Minister of India issues a policy lockdown in a short period of time without the existence of legal instruments and adequate logistical needs, and pleas to the Supreme Court to issue a warrant for all mass media to obtain permission from the government to publish under the guise of eradicate misinformation. Clear as robbery in daylight, this act limiting public access to information (Ginsburg & Versteeg, 2020).

To manage the pandemic, the Chilean government amended its constitution by changing election provisions and postponing the referendum (which was a major political event in the country). The government's actions raise concerns for future democracy because the government has been using the constitution as a tool to maintain authoritarian power (Leonardo Cofre, 2020).

The UN finds numerous countries that have lied to the public by withholding critical information about the pandemic, further as detentions for particular journalistic activities and arresting individuals for “spreading false information” and “create unnecessary panic”(Rights, 2020).

It should be noted that the parties at risk or vulnerable in a pandemic have a broader definition compared to normal circumstances. Financial, sociocultural, and knowledge gap gradually becoming visible, adding to the complexity of dealing with the pandemic in general. Quoted from John Rawls' theory of justice, "the greatest benefit for the least advantaged," the government presumably ought to formulate fair and ethical policies to ensure least advantaged citizens during the pandemic. To close the gap, government has total control in transferring knowledge regarding COVID-19 information to be fully comprehended by people from various backgrounds (Vermonte et al., 2020).

Regarding the check in balances in pandemic, Tom Ginsburg and Mila Versteeg argues that judicial power ought to take a part in it, there are four ways that can be taken by the judicial power to balance the power of executive in emergency, as follows:

a) Making certain that procedures are followed

Courts can play a basic role in ensuring that procedural requirements are followed. Furthermore, courts can assess whether all constitutional requirements to the extend the use of emergency power, have been met. Courts can require legal authorization if the response is not based on constitutional.

b) Assessing substantive rights

Courts are responsible for striking this balance in a constitutional democracy. In this case, courts ought to balance the rights that are subject to constitutionally permitted with reasonable limitations. Further example would be certain courts that have used constitutional protections to prevent or lift unnecessary lockdown orders as for the burden gradually becomes greater for the people.

c) Call out for action

Courts may also order governments to take affirmative steps to combat the pandemic to fulfill their constitutional obligations. Some cases in Zimbabwe shows that courts can ordered to provide logistical needs for healthcare workers and massively increase the COVID-19 testing (Mavhunga, 202 C.E.).

d) Inaction cases

In a public health context, courts may be willing to insist on legislative oversight, protect rights, and challenge government omissions (Ginsburg & Versteeg, 2020).

The core element of constitutional democracy is "limiting the power of the sovereign" this element is to prevent an excessive authority that would lead to abuse of power. Therefore, an ideal and independent Constitutional Court should be able to prevent a state from corrosion of democracy as well as act as control and checks the executive power. Furthermore, the judiciary can conduct the review in the context of the rule of law. The mechanism accomplished by examining gaps in public trust in governance, transparency, and expert scientific opinions.

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**About the Author:**

<b>Chief Researcher</b>
<b>Murti Ayu Hapsari</b> <i>Janabrada University, Yogyakarta, Indonesia</i>
<b>Researcher Member</b>