Indonesian Constitutional Court's Moral Legitimacy: A Dworkinian Rights-Based Defense

Titon Slamet Kurnia*, Krishna D. Darumurti, Prisilia Kornelia Moonik*****

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Abstract

This study discusses the moral legitimacy of constitutional adjudication in general, with a particular focus on the Indonesian Constitutional Court. Moral legitimacy is crucial as it justifies the necessity of Constitutional Court—not merely because of its existence is stipulated by the 1945 Constitution. This issue is also discussed in response to the legislature's (the People's Representative Council) adverse reactions to the Constitutional Court, including efforts to weaken its authority. Additionally, moral legitimacy is also related to the well-known critique of constitutional adjudication: the counter-majoritarian difficulty. This study draws on Ronald Dworkin Rights-Based Theory, which defends constitutional adjudication as a means of safeguarding individual rights. Accordingly, the moral legitimacy of the Constitutional Court is framed as Dworkinian Rights-Based Judicial Review. From this perspective, constitutional adjudication serves as a shield for minorities against the dangers of majoritarian democracy and the tyranny of the majority. The Constitutional Court is therefore indispensable, as it upholds individual rights against legislative power, based on the principle of equal concern and respect.

Keywords: Indonesian constitutional court, moral legitimacy, rights-based.

A. Introduction

The year 2022 marked a troubling period for Indonesia's institution of constitutional adjudication. The Constitutional Court (*Mahkamah Konstitusi*), the specialized judicial body responsible for constitutional adjudication in Indonesia, faced a severe attack from the People's Representative Council (*Dewan Perwakilan Rakyat*), the legislative body. The People's Representative Council removed Judge Aswanto, a Constitutional Judge it had previously nominated, despite the fact that he was still serving his tenure. There is no clear judicial basis for this removal in Law Number 7 of 2020 on the Third Amendment to the Law Number 23 of 2003 on the Constitutional Court, apart from interpretations that defy common sense.[1]

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* Lecturer at Faculty of Law, Satya Wacana Christian University Jalan Diponegoro 52-60 Salatiga, S.H., M.H., Dr. (Satya Wacana Christian University), titonslamet@gmail.com.

** Lecturer at Faculty of Law, Satya Wacana Christian University Jalan Diponegoro 52-60 Salatiga, S.H., M.H., Dr. (Satya Wacana Christian University), krishna.djaya@uksw.edu.

*** Student at the Satya Wacana Christian University Master of Laws Program, Satya Wacana Christian University Jalan Diponegoro 52-60 Salatiga, S.H., M.H. (Satya Wacana Christian University), 322023031@student.uksw.edu.

[1] Titon Slamet Kurnia, "Recall Aswanto: Tertutupnya Ruang Disagreement antara Pembentuk Undang-Undang dan Mahkamah Konstitusi," *Refleksi Hukum: Jurnal Ilmu Hukum* 7, no. 2 (2023): 145-162, https://doi.org/10.24246/jrh.2023.v7.i2.p143%20-%20162%20.

This was not the first attack to the Constitutional Court.[2] However, the political event of 2022 was arguably the most reckless. The People's Representative Council, through a statement by the Chairperson of Commission III, justified the removal of Judge Aswanto by expressing dissatisfaction with his judicial performance, arguing that his rulings did not align with the interests of the legislative body that had nominated him. In principle, judicial performance falls within the domain protected by the principle of judicial independence, which ensures that judges are immune from external influence. Therefore, the replacement of Aswanto is difficult to justify.[3]

This case ultimately illustrates a fundamental tension between the People's Representative Council and the Constitutional Court, reflecting a classic issue in constitutional adjudication: The disappointment of the democratic institution whose products—laws—are overturned by the judiciary that does not have a democratic mandate. The issue was labelled as counter-majoritarian difficulty—a term coined by Alexander Bickel, the constitutional jurist of the United States.[4] This issue is interesting because it originally developed in the United States. However, considering what actually happened in the Aswanto case, the issue is also relevant to the Constitutional Court in Indonesia. This issue is still within the limits of the original concept according to Bickel, namely about the democratic legitimacy of judicial review of the constitutionality of laws, not the latest concept as discussed by Bassok, which shifts the focus to the alignment of judicial performance with the will of the majority.[5]

This study discusses the philosophical foundation of the Indonesian Constitutional Court, particularly in justifying its moral legitimacy. This issue is crucial due to misconceptions regarding the Court's position, which is often perceived as highly secure simply because it has legal legitimacy under Article 24C of the 1945 Constitution. The guarantee by the 1945 Constitution, as legal legitimacy, does not mean that its existence will be secured because there is no legal provision in the Constitution prohibiting the People's Consultative Assembly (*Majelis Permusyawaratan Rakyat*)—the constituent power—to take the opposite constitutional policy in the future: to abolish the Constitutional Court. The Constitutional Court also needs moral legitimacy—as well as sociological legitimacy—to strengthen its position. The significance of this issue is well captured

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2 Pan Mohamad Faiz, "The Role of the Constitutional Court in Securing Constitutional Government in Indonesia" (PhD Thesis, the University of Queensland, 2016), 120-123 & 164-165. Fritz E. Siregar, "Indonesian Constitutional Politics: 2003-2013" (SJD thesis, University of New South Wales, 2016), 179-203. Simon Butt, *The Constitutional Court and Democracy in Indonesia* (Leiden: Brill, 2015), 120-137. Stefanus Hendrianto, *Law and Politics of Constitutional Courts: Indonesia and the Search for Judicial Heroes* (New York: Routledge, 2018), 171-173.

3 Kurnia, "Recall Aswanto," 146-148.

4 Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (New Haven: Yale University Press, 1986) 16-17.

5 Or Bassok, "The Two Countermajoritarian Difficulties," *Saint Louis University Public Law Review* 31, no. 2 (2012): 333-382.

by Fallon, who states that "Judgments of legal, sociological, and moral legitimacy all reflects concerns with the necessary, sufficient, or morally justifiable conditions for the exercise of governmental authority."[6]

This issue focuses on why the Constitutional Court is a necessity, not just because of its status as a government body stipulated by the Constitution. In academic discourse, this issue remains understudied.[7] Legitimacy is a crucial issue because it is the answer to the fundamental question of moral entitlement to rule.[8] The issue of counter-majoritarian difficulties reminds us of the weakest point of the institution of constitutional adjudication. Constitutional adjudication institutions, such as the Constitutional Court, have been weak from the beginning because they must deal with the democratic mandate of the legislature, even though they are justified by their role in upholding constitutional supremacy. The institution of constitutional adjudication is not inherently necessary for maintaining constitutional supremacy. This premise has explicit precedents (e.g., the Netherlands).[9] The premise is also supported by the constitutional theory with the label popular constitutionalism, as advocated by scholars such as Mark Tushnet, Larry Kramer, Jeremy Waldron, and others.[10]

To justify the moral legitimacy of the Constitutional Court, this study employed Ronald Dworkin's Rights-Based Theory. The approach taken here is similar to that of Upendra Baxi, who applied Dworkin's ideas to the specific legal context of a particular country: India.[11] As a legal philosopher, Dworkin is widely known as a supporter of the constitutional adjudication institution—Dworkin metaphorically named it the Forum of Principle.[12] The reason for choosing Dworkin is that apart from providing positive support for constitutional adjudication, Dworkin also added the theory of constitutional interpretation as the most important instrument for the operation of constitutional adjudication. Substantively, Dworkin's most relevant argument for constitutional adjudication is that its function is to protect individual rights most effectively and to reject utilitarian considerations in overriding those individual rights.[13] However, Dworkin's thinking was not well systematized. Therefore, after successfully systematizing Dworkin's thought, Dworkinian Rights-

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6 Richard H. Fallon, Jr., "Legitimacy and the Constitution," *Harvard Law Review* 118, no. 6 (2005): 1791.

7 See Faiz, "The Role." Siregar, "Indonesian." Butt, *The Constitutional*. Hendrianto, *Law and Politics*.

8 Arthur Isak Applbaum, *Legitimacy: The Right to Rule in a Wanton World* (Cambridge-Massachusetts: Harvard University Press, 2019), 1-5.

9 Maurice Adams and Gerhard van der Schyff, "Constitutional Review by the Judiciary in the Netherlands: A Matter of Politics, Democracy or Compensating Strategy?," *Heidelberg Journal of International Law* 66 (2006): 399-413. Gerhard van der Schyff, "The Prohibition of Constitutional Review by the Judiciary in the Netherlands in Critical Perspective: The Case and Roadmap for Reform," *German Law Journal* 21, no. 5 (2020): 884-903, DOI: 10.1017/glj.2020.45.

10 Scott D. Gerber, "The Court, the Constitution and the History of Ideas," *Vanderbilt Law Review* 61, no. 4 (2008): 1068.

11 Upendra Baxi, "A Known but an Indifferent Judge": Situating Ronald Dworkin in Contemporary Indian Jurisprudence," *International Journal of Constitutional Law* 1, no. 4 (2003): 557-589, DOI: 10.1093/icon/1.4.557.

12 Ronald Dworkin, "The Forum of Principle," *New York University Law Review* 56, no. 3 (1981): 516. Ronald Dworkin, *A Matter of Principle* (Cambridge-Massachusetts: Harvard University Press, 2000), 69.

13 Hilaire McCoubrey and Nigel D. White, *Textbook on Jurisprudence* (London: Blackstone Press Ltd, 1996), 146.

Based Judicial Review,[14] this study employed these systematized principles to justify the moral legitimacy of the Constitutional Court and to demonstrate why its existence is essential.[15]

In essence, the moral virtue of Constitutional Court is to safeguard, or protect, the rights of all of us which are of the most vital interest to all human beings. Without a constitutional adjudication, these rights are meaningless. *A fortiori*, we can claim that the existence of Constitutional Court is indispensable. As its implication, efforts to weaken the institutional roles of the Constitutional Court and counter-majoritarian difficulty can be countered.[16] Thus, the contribution of this article is to support the sustainability of the Constitutional Court and strengthen disincentives so that the People's Consultative Assembly does not have sufficient reasons to, at the most extreme, abolish the Court.

B. Dworkinian Rights-Based Judicial Review

Moral legitimacy is one of the three layers of legitimacy, alongside legal and sociological legitimacy.[17] Fallon conceptualizes moral legitimacy as: "a function of moral justifiability or respect-worthiness".[18] The concept is synonymous with the normative legitimacy proposed by Harel and Shinar, which also refers to ethical or moral justifiability.[19]

According to Fallon, there are two types of moral legitimacy. The first is ideal theories, which focuses on "specify(ing) the necessary conditions for assertions of the state authority to be maximally justified or to deserve unanimous respect."[20] The second is minimal theories, which aims "to define a threshold above which legal regimes are sufficiently just to deserve the support of those who are subject to them in the absence of better, realistically attainable alternatives."[21] As explained above, the definition of moral legitimacy used is the minimal theory which will justify that constitutional adjudication institution in general—and the Constitutional Court in particular—as highly deserving of support because it embodies intrinsic moral value and because no superior alternative exists.[22]

Since this article employs Dworkin's ideas to defend the institution of constitutional adjudication, it is necessary first to explain his position as a legal philosopher. Next, the core of his legal philosophy must be outlined. Finally, by implication, his specific arguments in defense of constitutional adjudication institutions—what can be referred to as Dworkin's constitutional theory based on

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14 See section B.
15 See section C.
16 See section D.
17 Fallon, Jr., "Legitimacy," 1790.
18 Fallon, Jr., "Legitimacy," 1796.
19 Alon Harel and Adam Shinar, "Two Concepts of Constitutional Legitimacy," *Global Constitutionalism* 12, no. 1 (2002): 83, DOI: 10.1017/S2045381722000156. See also Randy E. Barnett, "Constitutional Legitimacy," *Columbia Law Review* 103, no. 1 (2003): 113-114, DOI: 10.2307/1123704.
20 Fallon, Jr., "Legitimacy," 1797.
21 Fallon, Jr., "Legitimacy," 1798.
22 Edward Rubin, "Judicial Review and the Right to Resist," *Georgetown Law Journal* 97, no. 1 (2008): 61-118.

his broader legal philosophy—should be examined.

In his general legal philosophy, Dworkin advances a theory of the state. It is the theory of the relationship between the state and the individuals, which is based on individual rights. His theoretical foundation is rooted in liberalism, which emphasizes the central importance of individual rights, and, in particular, the proposition that there should be equality between individuals.[23] Dworkin uses the concept of principle as a norm intended to express protection of individual rights. Dworkin's concept of principle illustrates the importance of the relationship between law and morality.[24] Contextually, this opinion is a critique of the concept of law put forward by H.L.A. Hart, where Dworkin's response is: "The law … comprises not only rules but also principles".[25] Hart's theory, which conceptualizes law as a system of rules, overlooks other standards, such as principles.[26]

Dworkin's primary concern is the necessity of incorporating both rules and principles into legal concepts—an approach that fundamentally distinguishes him from Hart.[27] According to Dworkin, principle is "a standard that is to be observed, not because it will advance or secure an economic, political, or social situation deemed desirable, but because it is a requirement of justice or fairness or some other dimension of morality."[28] At the level of application, Dworkin further elaborates on the argument of principle: "Arguments of principle justify a political decision by showing that the decision respects or secures some individual or group right."[29] For example: "The argument in favor of anti-discrimination statutes, that a minority has a right to equal respect and concern, is an argument of principle."[30]

Next, we turn to a discussion of Dworkin's thought as specifically related to the institutions of constitutional adjudication. Dworkin began his theorization with more general issue of the relationship between individuals and government in which democracy is the background and anti-utilitarian thinking as a result. Ideas related to the issue became parts of his theory of adjudication in general and the institution of constitutional adjudication in particular. McCoubrey and White explain this: "the majority should not be able to ride roughshod over the minority's legal rights. This theory of democracy is linked to his view of the judicial process by the notion that judges act as the protectors of individual rights against the state as well as between individuals."[31]

Dworkin 's starting point is the fundamental importance of individual rights. In this case, they are the rights against the government. This principle forms the foundation of his specific constitutional theory, namely the theory of the state (Dworkin usually calls it political theory) which answers the issue of the relationship

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23 Ian McLeod, *Legal Theory* (London: Palgrave, 2012), 113.
24 Suri Ratnapala, *Jurisprudence* (Cambridge: Cambridge University Press, 2009), 173.
25 Ratnapala, *Jurisprudence*, 175.
26 Ronald Dworkin, *Taking Rights Seriously* (London: Bloomsbury, 2013), 38.
27 Dworkin, *Taking*, 39-48, 79-85, 93-102.
28 Dworkin, *Taking*, 39.
29 Dworkin, *Taking*, 107.
30 Dworkin, *Taking*, 107.
31 Hilaire McCoubrey and Nigel D. White, *Textbook on Jurisprudence* (London: Blackstone Press Ltd, 1996), 146.

between the government and individuals where individual rights must be taken seriously as a form of protection for them from the government action by given the metaphor of taking rights seriously. The basis for individual rights that deserve respect from the government is twofold. First, human dignity. Second, political equality.[32] In advocating for the serious consideration of rights, Dworkin explains, "treating a man as less than a man, or as less worthy of concern than other men" constitutes a grave injustice.[33]

According to Dworkin, the relationship between government and individuals has direct implications for the government's obligations in treating individuals, which is called the principle of equal concern and respect. This principle has the following meanings:

> Government must treat those whom it governs with concern, that is, as human beings who are capable of suffering and frustration, and with respect, that is, as human beings who are capable of forming and acting on intelligent conceptions of how their lives should be lived. Government must not only treat people with concern and respect, but with equal concern and respect. It must not distribute goods or opportunities unequally on the ground that some citizens are entitled to more because they are worthy of more concern. It must not constrain liberty on the ground that one citizen's conception of the good life of one group is nobler or superior to another's.[34]

This explains the implications for the principle of equal concern and respect, which Dworkin defends are anti-utilitarian. Other considerations may not undermine rights. Dworkin refers to this concept as "rights as trumps over collective goals."[35]

The question, then, is how Dworkin's emphasis on the importance of individual rights can be translated into the moral legitimacy of constitutional adjudication institutions. To answer this, we must first and foremost rely on Dworkin's own explicitly stated views:

> If we want judicial review at all—if we do not want to repeal Marbury v. Madison—then we must accept that the Supreme Court must make important political decisions. The issue is rather what reasons are, in its hands, good reasons. My own view is that the Court should make decisions of principle rather than policy—decisions about what rights people have under our constitutional system rather than decisions about how the general welfare is best promoted—and that it should make these decisions by elaborating and applying the substantive theory of representation takes from the root principle that government must treat people as equals.[36]

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32 Dworkin, *Taking*, 239-240.
33 Dworkin, *Taking*, 240.
34 Dworkin, *Taking*, 326-327.
35 Dworkin, *Taking*, 10.
36 Dworkin, "The Forum," 516. Dworkin, *A Matter*, 69.

This is Dworkin's statement which in this article is treated as a statement about moral legitimacy of the constitutional adjudication institutions—in this case Dworkinian Rights-Based Judicial Review.

From the above opinion, several key ideas can be elaborated. First, as a starting point, is a theory of relationship between individual rights and the government. Here, the understanding that we can get from the metaphor of "taking rights seriously" is that the government should not "treat a man as less than a man, or as less worthy of concern than other men" because it must take rights seriously. Dworkin, through his theory of rights decisively succeeded in guaranteeing human being living under a government the most decent place because "a man, as a citizen, is valued for himself as a human being" equally because of the rights. These rights are so fundamental that the government must not override them using utilitarian calculations. Dworkin affirms:

> The institution of rights is therefore crucial, because it represents the majority's promise to the minorities that their dignity and equality will be respected … The institution requires an act of faith on the part of the minorities, because the scope of their rights will be controversial whenever they are important, and because the officers of the majority will act on their own notions of what these rights really are … If the Government does not take rights seriously, then it does not take law seriously either.[37]

Second, the implication is that Dworkin's understanding can be qualified as a specific opinion aimed at providing moral legitimacy to constitutional adjudication institutions, both direct statements such as the quote above, and inferentially. Starting from the concept of principle, Dworkin supports the involvement of the judiciary in making important political decisions to provide decisions about what rights people have—instead of providing decisions about how the general welfare is best promoted. Such judicial decisions are fundamentally rooted in the principle that the government must treat individuals as equals.

Constitutional adjudication institutions are a necessity because they are in line with Dworkin's thinking to take rights seriously namely the weaker members of a political community are entitled to the same concern and respect of their government as the more powerful members have secured for themselves. On this basis, inferentially, the government's obligation not to treat an individual as less than a person or as less worthy of concern than others can be channeled through constitutional adjudication institutions. This is what Dworkin calls the principle of equal concern and respect as a prescription for the issue of relationship between the government and individuals. Dworkin underlines this principle—as a basis for government legitimacy in general—with the statement: "No government is legitimate that does not show equal concern for the fate of all those citizens over whom it claims dominion and from whom it claims allegiance. Equal concern is the

[37] Dworkin, *Taking*, 246-247.

sovereign virtue of political community—without it, government is only tyranny."[38]

If rights are agreed upon as the best starting point for understanding the relationship between the government and individuals, then Dworkin has succeeded. The government has an obligation to provide equal concern and respect to individuals as part of its commitment to taking rights seriously. If this relationship is fundamentally based on rights, then this reasoning can be applied syllogistically to all aspects of government administration, including constitutional adjudication institutions.

Since law, as a product of democratic law making, is typically the decision of the majority, the moral legitimacy of constitutional adjudication is best grounded in Dworkin's Rights-Based Theory. This is because constitutional adjudication "represents the majority's promise to the minorities that their dignity and equality will be respected" within the framework of Dworkin's broader project of taking rights seriously. Dworkin affirms this by stating: "Judicial review improves overall legitimacy by making it more likely that the community will settle on and enforce some appropriate conception of negative liberty and of a fair distribution of resources and opportunities, as well as of the positive liberty."[39]

Constitutional interpretation is the core function of constitutional adjudication, as judicial rulings on the constitutionality of laws must be preceded by constitutional interpretation.[40] Furthermore, Rights-Based Judicial Review is supported by a theory of constitutional interpretation that Dworkin calls the moral reading.[41] According to Dworkin, "It is a theory about how certain clauses of some constitutions should be read–about what questions must be asked and answered in deciding what those clauses mean and require."[42]

Interpretation through moral reading involves invoking moral principles related to political decency and justice".[43] These moral principles must be identified in the process of interpreting the constitution, a process Dworkin refers to as the moral reading of the Constitution. However, to prevent judges from imposing their own moral convictions, Dworkin prescribes a limitation known as constitutional integrity.[44]

C. Dworkinian Rights-Based Judicial Review as the Moral Legitimacy of the Indonesian Constitutional Court

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38 Ronald Dworkin, *Sovereign Virtue: The Theory and Practice of Equality* (Cambridge-Massachusetts: Harvard University Press, 2000), 1.

39 Ronald Dworkin, *Justice for Hedgehogs* (Cambridge-Massachusetts: The Belknap Press of Harvard University Press 2011), 398.

40 Andrei Marmor, *Interpretation and Legal Theory* (Oxford: Hart Publishing, 2005), 141-144.

41 Ronald Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* (Oxford: Oxford University Press, 1996), 2-12.

42 Dworkin, *Freedom's*, 34.

43 Dworkin, *Freedom's*, 2.

44 Dworkin, *Freedom's*, 10-11. On integrity in adjudication see generally Ronald Dworkin, *Law's Empire* (Cambridge-Massachusetts: The Belknap Press of Harvard University Press, 1986). Ronald Dworkin, *Justice in Robes* (Cambridge-Massachusetts: The Belknap Press of Harvard University Press, 2006), 13-21.

This section seeks to justify Dworkinian Rights-Based Judicial Review as the moral foundation for the legitimacy of the Indonesian Constitutional Court. First, the discussion covers moral legitimacy as a critical issue for constitutional adjudication institutions in general and for the Constitutional Court in particular. The mere existence of a constitutional adjudication institution is insufficient if it is based solely on legal legitimacy, as such institutions remain controversial.

Legal legitimacy alone does not suffice because the 1945 Constitution does not impose specific limitations on the power of the People's Consultative Assembly, as the constituent authority, to prevent it from abolishing the Constitutional Court. This contrasts with the provision regarding the form of the state, which, under Article 37(5) of the 1945 Constitution, cannot be subject to amendment. Constitutional adjudication will always be contentious, as enforcing the constitution within the framework of constitutional supremacy is a necessity, whereas enforcement by the judiciary remains debatable. Dworkin highlights this controversy:

> Everyone agrees that the Constitution forbids certain forms of legislation to Congress and the state legislatures. But neither Supreme Court justices nor constitutional law experts nor ordinary citizens can agree about just what it does forbid, and the disagreement is most severe when the legislation in question is politically most controversial and divisive. It therefore appears that these justices exercise a veto over the politics of the nation, forbidding the people to reach decision which they, a tiny number of appointees for life, think wrong. How can this be reconciled with democracy?[45]

Next, we will examine why Dworkinian Rights-Based Judicial Review can serve as the moral foundation for the legitimacy of the Constitutional Court. The underlying premise of this article is that the justification for constitutional adjudication institutions—both in general and for the Constitutional Court in particular—is insufficient if based solely on the principle of constitutional supremacy.

The principle of constitutional supremacy implies that laws must conform to the constitution and cannot contradict it. While this principle establishes the constitution's authority over laws, ensuring that laws comply with the constitution is a separate issue.[46] The question of moral legitimacy for constitutional adjudication institutions arises because these institutions inherently face what is commonly referred to as the counter-majoritarian difficulty.

The counter-majoritarian difficulty questions the legitimacy of judicial bodies in reviewing the constitutionality of laws, given that laws are products of democratic lawmaking. The core issue, as Bickel explains, is that "[the court] exercises control, not on behalf of the prevailing majority."[47] While the judiciary's power to review

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45 Dworkin, *A Matter*, 33.

46 Christina Lafont, "Philosophical Foundations of Judicial Review," in *Philosophical Foundations of Constitutional Law*, edited by David Dyzenhaus and Malcolm Thorburn (Oxford: Oxford University Press, 2016), 265.

47 Bickel, *The Least*, 17.

laws is based on the principle of constitutional supremacy is self-explanatory,[48] the real issue lies in Bickel's argument: courts are not democratic institutions like legislatures, making them less compatible with the principle of majority rule.[49] Therefore, even though the Constitutional Court has the exclusive authority to carry out constitutional adjudication based on the Constitution, this is only limited to legal legitimacy.

The limitations of legal legitimacy are inherent in its very definition: "When legitimacy functions as a legal concept, legitimacy and illegitimacy are gauged by legal norms."[50] The existence of the Constitutional Court is entirely a constitutional policy determined by the constituent power. If the constituent power can establish the Constitutional Court through the Constitution, then, logically, it can also abolish it. This is a harsh legal reality. The only deterrent is that the constituent power must have sufficient justification for such actions—at least to avoid public outrage.

On this basis, discussions on the moral legitimacy of the Constitutional Court serve a more specific and crucial purpose: ensuring its sustainability by reinforcing disincentives against its dissolution. If moral legitimacy is successfully established, it becomes more difficult for constitutional framers to justify eliminating the Constitutional Court through constitutional amendments.

The Constitutional Court is a newly established government body in Indonesia's constitutional system, created through the Third Amendment to the 1945 Constitution. Its juridical foundation is found in Article 24(2) of the 1945 Constitution, which states: "Judicial power is exercised by a Supreme Court ... and by a Constitutional Court," as well as in Article 24C(1), which defines its material jurisdiction.

Conceptually, the rationale behind institutionalizing the Constitutional Court in the 1945 Constitution was vague, as debates during the Third Amendment process focused more on its technical placement within the Constitution.[51] The discussions surrounding its establishment were unusual, as they did not follow the common approach in legal discourse, which typically requires legal, sociological, and philosophical justifications for major legal decisions.

The legal foundation for establishing the Constitutional Court is relatively uncontroversial, as it aligns with the principle of constitutional supremacy and

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48 Titon Slamet Kurnia, "'Peradilan Konstitusional' oleh Mahkamah Agung melalui Mekanisme Pengujian Konkret," *Jurnal Konstitusi* 16, no. 1 (2019): 68-73, DOI: 10.31078/jk1614. Titon Slamet Kurnia, "Mahkamah Agung dan Supremasi Konstitusi: Diskresi Yudisial dalam Penerapan Undang-Undang," *Mimbar Hukum* 34, no. 1 (2022): 95-104, DOI: 10.22146/mh.v34i1.2084.

49 Luc B. Tremblay, "General Legitimacy of Judicial Review and the Fundamental Basis of Constitutional Law," *Oxford Journal of Legal Studies* 23, no. 4 (2003): 525-527, DOI: 10.1093/ojls/23.4.525. Luc B. Tremblay, "The Legitimacy of Judicial Review: The Limits of Dialogue between Courts and Legislatures," *International Journal of Constitutional Law* 3, no. 4 (2005): 619-630, DOI: 10.1093/icon/moi042. Malcolm Langford, "Why Judicial Review?," *Oslo Law Review* 2, no. 1 (2015): 36-85, DOI: 10.5617/oslaw2351.

50 Fallon, Jr., "Legitimacy," 1790.

51 Tim Penyusun, *Naskah Komprehensif Perubahan Undang-Undang Dasar Negara Republik Indonesia Tahun 1945: Latar Belakang, Proses dan Hasil Pembahasan, Buku VI Kekuasaan Kehakiman* (Jakarta: Sekretariat Jenderal dan Kepaniteraan Mahkamah Konstitusi, 2010).

follows the constitutional policies of countries that adopt formal constitutions.[52] Therefore, the lack of debate on this aspect is not necessarily problematic. However, the sociological foundation (why the Constitutional Court is necessary) and the philosophical foundation (why it is valuable) are crucial to establish, as they provide both sociological and moral legitimacy. Unfortunately, the People's Consultative Assembly failed to address these aspects. This omission makes the issue significant, and Dworkin's support for constitutional adjudication is invoked to justify the moral legitimacy and value of the Constitutional Court.

The main discussion will justify the moral legitimacy of the Constitutional Court based on Dworkinian Rights-Based Judicial Review. This justification is normative rather than descriptive. The Constitutional Court was not established based on Dworkin's framework, as the discussions leading to its formation during the Third Amendment to the 1945 Constitution did not reference his ideas. Therefore, the justification used here follows a normative approach: "The most ideal moral legitimacy for the Constitutional Court should be Dworkinian Rights-Based Judicial Review," as previously discussed.

Dworkinian Rights-Based Judicial Review imperative is the moral legitimacy of the Constitutional Court. The key definition of Dworkinian Rights-Based Judicial Review is the principle of equal concern and respect. The institution of constitutional adjudication is a part of the government's commitment to treat individuals in accordance with the principles of equal concern and respect—in this case related to the laws it has enacted. Dworkin affirmed: "Judicial review insures that the most fundamental issues of political morality will finally be set out and debated as issues of principle and not political power alone, a transformation that cannot succeed, in any case not fully, within the legislature itself."[53] The choice of Dworkinian Rights-Based Judicial Review as the ideal moral legitimacy for the Constitutional Court aligns with the understanding that democratic lawmaking is itself an ideal process. Consequently, any defense of constitutional adjudication must remain coherent with this perspective.

As a constitutional adjudication institution, the role of the Constitutional Court in making checks to the results of the legislative process must certainly be in line with the principle that underlies the legislative process: Laws produced through the legislative process are the product of democratic decisions. If the legislative process follows democratic principles, then even if consensus is not fully achieved, the resulting laws should, at a minimum, satisfy the majority. Thus, the principle of majority rule inherently carries a utilitarian tendency. Moore illustrates this point very well: "Utilitarianism, in a word, seems democratic. It maximizes the preference

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[52] Jutta Limbach, "The Concept of the Supremacy of the Constitution," *Modern Law Review* 64, no. 1 (2001): 1-10, DOI: 10.1111/1468-2230.00306. Steven G. Calabresi, "The Tradition of the Written Constitution: Text, Precedent and Burke," *Alabama Law Review* 57, no. 3 (2006): 635-687, DOI: 10.2139/ssrn.700175. Andras Sajo and Renata Uitz, *The Constitution of Freedom: An Introduction to Legal Constitutionalism* (Oxford: Oxford University Press, 2017), 326-334.

[53] Dworkin, *A Matter*, 70.

of all people, each counting for one but only one."[54]

Dworkinian Rights-Based Judicial Review challenges the assumption that legislatures, as democratic institutions governed by majority rule, inevitably produce decisions with utilitarian tendencies. As Jeremy Bentham famously put it, utilitarianism seeks "the greatest happiness of the greatest number," often at the risk of marginalizing those outside the majority.[55] With the principle of equal concern and respect, Dworkin reminded: "rights as trumps over collective goals."[56] This gives hope that a legitimate majority decision can be legitimately rejected if there is a legitimate basis. With regard to the vital role of rights, the institution of constitutional adjudication is very important because its role is to voice what Dworkin calls argument of principle. Because of this role, Dworkin provides a metaphor for constitutional adjudication as the Forum of Principles.[57] Fallon further elaborates on this concept, describing constitutional adjudication as an activity of "very distinctive constitutional interpretation" in the following sense:

> Dworkin's theory begins with a widely shared and appealing claim about the fundamentality of rights. Under our Constitution, people have rights, which it is the obligation of courts to enforce. According to Dworkin, courts cannot evade their obligation to enforce rights on the ground that enforcement would be imprudent, inconvenient, or otherwise contrary to the public interest. To the idea of the fundamentality of rights, Dworkin conjoins the notion that ours is a Constitution of principle, the full meaning of which cannot be derived directly from the intent of the framers or even from a narrow parsing of the text … Dworkin argues for an understanding of constitutional rights as the reflections or entailments of constitutional principles. Principles, in the relevant sense, are general moral directives, the true meaning of which can be identified only by a process of interpretation and philosophical inquiry.[58]

Using the United States Constitution as a reference for Dworkin's argument poses no issue for Indonesia, as the 1945 Constitution also includes human rights provisions. This implies that constitutional adjudication serves a mechanism for enforcing these rights.

More broadly, the principle of equal concern and respect is a fundamental prescription for how a democratic government should treat individuals. This principle applies not only under the U.S. Constitution but also under Indonesia's

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54 Michael S. Moore, "Justifying the Natural Law Theory of Constitutional Interpretation," *Fordham Law Review* 69, no. 5 (2001): 2019.

55 The phrase is an expression of Bentham's teaching on utilitarianism as a moral theory aimed at the legislature in forming laws or legislation. Lord Lloyd of Hampstead and M.D.A. Freeman, *Lloyd's Introduction to Jurisprudence* (London: ELBS, 1985), 247-250.

56 Dworkin, *Taking*, 10.

57 Dworkin, *A Matter*, 71.

58 Richard H. Fallon, Jr., *Implementing the Constitution* (Cambridge-Massachusetts: Harvard University Press, 2001), 27.

1945 Constitution. While majority rule is inevitable in a democracy, individuals still have the right to equal concern and respect from their government, even when decisions are made by majority vote. Consequently, constitutional adjudication becomes both essential and morally legitimate under the Dworkinian Rights-Based Judicial Review. The key question, then, is: Are we prepared to accept Dworkinian Rights-Based Judicial Review as the moral foundation of the Constitutional Court? Given Indonesia's strong commitment to human rights, accepting Dworkin's argument should not be difficult.

However, from the perspective of the Founding Fathers, such an approach would have been unacceptable. Dworkin's theory is rooted in liberal political thought and individualism, which contrasts with Indonesia's communitarian culture.[59] This study is of the position to see that Indonesia's constitutional framework has changed significantly since the Second Amendment to the 1945 Constitution, particularly with the inclusion of Chapter XA. This shift necessitates a proper Constitutional Theory, including a theoretical foundation for the Constitutional Court's role in constitutional adjudication.

Accepting Dworkinian Rights-Based Judicial Review requires agreement on several key premises. First, the government must uphold the principle of equal concern and respect, ensuring that no individual is treated as less worthy of concern than others. Second, constitutional adjudication must serve as an institution that realizes this principle by taking rights seriously. Third, the judiciary's mission in constitutional adjudication is to uphold rights as trumps over collective goals. Fourth, in conducting constitutional adjudication, the judiciary must present arguments based on principle.

This study asserts that the principle of equal concern and respect is difficult to reject, especially given Indonesia's constitutional commitment to human rights, as reflected in Chapter XA. The strongest opposition is likely to come from the government, particularly regarding the third premise, as it imposes juridical constraints that may complicate governance. However, the people stand to benefit the most from this approach, as it affirms that all individuals are equally valuable—and should be equally valued—by the government.

D. Implications of Dworkinian Rights-Based Judicial Review to the Indonesian Constitutional Court

With the moral legitimacy of the Indonesian Constitutional Court justified under the Dworkinian Rights-Based Judicial Review, the next issue concerns its implications—specifically, the benefits that arise from establishing the Constitutional Court. The first benefit is to counter efforts to weaken the Constitutional Court by the legislature (including the possibility that future constituent power has different constitutional policies regarding the existence of the Constitutional Court). The second one is to counter the difficulty of constitutional adjudication institutions in

[59] See in general Marsillam Simanjuntak, *Pandangan Negara Integralistik: Sumber, Unsur dan Riwayatnya dalam Persiapan UUD 1945* (Jakarta: Pustaka Utama Grafiti, 1997), 233-239.

general, and the Constitutional Court in particular, namely counter-majoritarian difficulty. The focus of this issue is Bickel's original counter-majoritarian difficulty concept, in this case the democratic legitimacy of the power of judicial review.[60] This issue is different from the counter-majoritarian difficulty issue put forward by Bassok, whose focus is on the compatibility of judicial performance with the will of the majority.[61]

In a normal system of limitation of power, every power must be limited and—most importantly—that limitation must be accompanied by institutional mechanisms for the limitation to be meaningful. Our main issue is the institutional mechanism for limiting the legislative power. Theoretically, the constitutional adjudication is an institution within the framework of such restrictions. As an institutional mechanism for limiting legislative power, constitutional adjudication, as described by the Dworkinian Rights-Based Judicial Review, is essential as a shield to protect individual rights from majority decisions of the legislature. On that basis, efforts aimed at weakening the Constitutional Court by the legislature (i.e. the People's Representative Council) who think that the Constitutional Court is their rival must be countered.

Our primary concern is the danger posed by limitations on legislative power that lack effective institutional enforcement. The first issue relates to the nature of constitutional adjudication itself. This institution is responsible for imposing limits on legislative authority, specifically by upholding the principle of constitutional supremacy, which dictates that the legislature must not enact laws that contradict the constitution.[62]

Ginsburg explains the importance of constitutional adjudication institutions in the connection with the issue of limiting legislative power: "Judicial review of legislation exists to prevent politicians from reneging on the founding bargain with citizens."[63] Ginsburg expressed a theory called insurance model of judicial review. The focus of limiting legislative power through the institution of constitutional adjudication based on the insurance model of judicial review is the protection of minorities from majority decisions—at least the losing party in the legislative process is not harmed by the resulting laws.[64] On that basis, Ginsburg's key point is his claim: "Judicial review may be counter-majoritarian but is not counter-democratic."[65] The claim has the following background: "Judicial review can ensure that minorities remain part of the system, bolster legitimacy, and save democracy from itself."[66]

The principle of *nemo judex in causa sua* reinforces the need for a capable and

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60 Bickel, *The Least*, 17.

61 Bassok, "The Two Countermajoritarian," 381.

62 Gerhard van der Schyff, *Judicial Review of Legislation: A Comparative Study of the United Kingdom, the Netherlands and South Africa* (Dordrecht: Springer, 2010), 5-6.

63 Tom Ginsburg, *Judicial Review in New Democracies: Constitutional Courts in Asian Cases* (Cambridge: Cambridge University Press, 2003), 23.

64 Ginsburg, *Judicial*, 33.

65 Ginsburg, *Judicial*, 31.

66 Ginsburg, *Judicial*, 22.

effective institutional mechanism to limit legislative power through constitutional adjudication, as the legislature cannot serve as a judge in its own case. In the tradition of formal constitution, which distinguishes between constituent power and legislative power, constitutional adjudication is essential to prevent the legislature from freely altering the constitution, a domain reserved for constituent power.[67] Lijphart underlined the issue: "if the constitution is rigid but not protected by judicial review, the parliamentary majority can interpret any constitutionally questionable law it wants to pass as simply not being in violation of the constitution."[68]

The existence of the Constitutional Court in Indonesia should not be weakened. This statement serves as a cautionary reminder, anticipating the possibility that, one day, politicians might entertain the extreme idea of abolishing the Constitutional Court simply because they disagree with its rulings. The failure of its products to satisfy all of us is no excuse. On that basis, with the moral legitimacy successfully obtained by the Constitutional Court, the implication is that we have sufficient substantive arguments to, on the one hand, defend the existence of the Constitutional Court, and, on the other hand, counter all efforts made to weaken the Constitutional Court (for example through laws) or even, most extremely, abolishing the Constitutional Court through amendment of the Constitution. As an institutional mechanism for limiting legislative power, constitutional adjudication institutions in general, and the Constitutional Court in particular, are increasingly relevant to the emergence of the phenomenon of autocratic legalism.[69]

The final issue to address is the deficit of legitimacy in the constitutional adjudication due to counter-majoritarian. While the Dworkinian Rights-Based Judicial Review provides moral legitimacy to constitutional adjudication, mitigating concerns about counter-majoritarian difficulty, vigilance is still necessary to prevent its abuse.[70] The legitimacy of constitutional adjudication depends on its outcomes, which may be correct or flawed. Although the Dworkinian framework resolves upstream concerns about counter-majoritarianism, downstream issues may still arise regarding the correctness of judicial decisions. The key challenge is ensuring that constitutional adjudication aligns with democratic principles and avoiding practices that undermine them. This concern falls within the domain of judicial strategy, which will not be elaborated on here but remains a crucial area for further research on how constitutional adjudication should be conducted.

The essence of Dworkinian Rights-Based Judicial Review is, as a restatement, government must treat people as equals.[71] Accordingly, Dworkin prescribes that "the Court should make decisions of principle rather than policy—decisions about what rights people have under our constitutional system rather than decisions about how

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67 Bruce Ackerman, *We the People I: Foundations* (Cambridge-Massachusetts: The Belknap Press of Harvard University Press, 1993), 6.

68 Arend Lijphart, *Patterns of Democracy: Government Forms and Performance in Thirty-Six Countries* (New Haven: Yale University Press, 1999), 228-229.

69 Kim Lane Scheppele, "Autocratic Legalism," *University of Chicago Law Review* 85, no. 2 (2018): 545-584.

70 David Landau and Rosalind Dixon, "Abusive Judicial Review: Courts Against Democracy," *UC Davis Law Review* 53, no. 3 (2020): 1313-1387.

71 Dworkin, *A Matter*, 69.

the general welfare is best promoted."[72] Emphasizing the distinctiveness of the court as an institution of constitutional adjudication, Dworkin uses metaphorical concepts of the Forum of Principle: "We have an institution that calls some issues from the battleground of power politics to the forum of principle. It holds out the promise that the deepest, most fundamental conflicts between individual and society will once, someplace, finally, become question of justice. I do not call that religion or prophecy. I call it law."[73] Dworkin recognizes the court's role as the Forum of Principle, where constitutional questions are ultimately matters of justice. As such, the judiciary must render decisions based on principle rather than political considerations.

The qualification of the court as the Forum of Principle to decide the issue of constitutionality of laws clearly ends the controversy generated by the issue of counter-majoritarian difficulty. As previously explained, the Dworkinian Rights-Based Judicial Review departs from the principle of equal concern and respect by giving "the majority's promise to the minorities that their dignity and equality will be respected" and aimed at "taking rights seriously". Thus, the issue of counter-majoritarian difficulty in constitutional adjudication institutions is clearly incoherent with "the majority's promise to the minorities that their dignity and equality will be respected".

Dworkin developed the theory of constitutional interpretation called "moral reading" which not only supports constitutional adjudication but also explicitly responds to counter-majoritarian concerns.[74] Democracy is often associated with a majoritarian premise, understood as "a thesis about the fair outcomes of a political process."[75] In the context of the legislative process Dworkin describes the majoritarian premise: "that the laws that the complex democratic process enacts and the policies that it pursues should be those, in the end, that the majority of citizens would approve."[76] Defending that constitutional adjudication institutions in general, and moral reading in particular, are not counter-majoritarian, Dworkin posited the constitutional conception of democracy: "If we reject the majoritarian premise, we need a different, better account of the value and point of democracy … that collective decisions be made by political institutions whose structure, composition, and practices treat all members of the community, as individuals, with equal concern and respect."[77]

People are certainly familiar with the theme of Dworkin's repeated claims. However, his most significant contribution lies in refining his theory, particularly his conception of democracy, which he terms the constitutional conception of democracy. He argues: "When majoritarian institutions provide and respect the

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72 Dworkin, *A Matter*, 69.
73 Dworkin, *A Matter*, 71.
74 See section B.
75 Dworkin, *Freedom's*, 15.
76 Dworkin, *Freedom's*, 31.
77 Dworkin, *Freedom's*, 17.

democratic conditions, then the verdicts of these institutions should be accepted by everyone for that reason. But when they do not, or when their provision or respect is defective, there can be no objection, in the name of democracy, to other procedures that protect and respect them better."[78] Illustrating his explanation, Dworkin stated:

> The democratic conditions plainly include, for example, a requirement that public offices must in principle be open to members of all races and groups on equal terms. If some law provided that only members of one race were eligible for public office, then there would be no moral cost—no matter for moral regret at all—if a court that enjoyed the power to do so under a valid constitution struck down that law as unconstitutional. That would presumably be an occasion on which the majoritarian premise was flouted, but though this is a matter of regret according to the majoritarian conception of democracy, it is not according to the constitutional conception.[79]

Positioning constitutional adjudication as the Forum of Principle, where the court is responsible for articulating arguments based on principle, is essential for ensuring the institutional protection of human rights. This implies that if we recognize human rights protection as indispensable, then concerns about counter-majoritarian difficulty should not be given undue weight, as priority must be placed on safeguarding rights.[80]

This claim is only valid for the purpose of this article which qualifies Dworkinian Rights-Based Judicial Review as a moral legitimacy of why the judiciary in general, and the Indonesian Constitutional Court in particular, should be given the authority to review the constitutionality of laws. This claim is not automatically applicable to judicial performance in reviewing the constitutionality of laws. Judicial performance can be otherwise—and it is a judicial error if Dworkinian Rights-Based Judicial Review is used as a standard for judicial performance, not just as an ideal for its moral legitimacy. For instance, a judicial decision that excessively restricts individual rights may undermine, rather than protect, those rights. In such cases, further research could explore institutional mechanisms for addressing judicial errors in constitutional adjudication.[81]

E. Conclusion

The moral legitimacy of the Indonesian Constitutional Court, based on the Dworkinian Rights-Based Judicial Review, is that "The Constitutional Court is responsible for protecting individual rights vis-à-vis the legislature based on the principle of equal concern and respect". From Dworkin's perspective, the

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78 Dworkin, *Freedom's*, 17.

79 Dworkin, *Freedom's*, 17-18. See also Ronald Dworkin, *Is Democracy Possible Here?* (New Jersey: Princeton University Press, 2006), 135-137.

80 Baxi, "Situating Ronald Dworkin," 565.

81 Compare with Tsvi Kahana, "The Partnership Model of the Canadian Notwithstanding Mechanism: Failure and Hope" (SJD Thesis, University of Toronto, 2000).

Constitutional Court serves as a Forum of Principle, advocating arguments grounded in fundamental principles. In the context of lawmaking—and, by implication, constitutional adjudication—Dworkin's theory is highly significant: if laws are the product of democratic lawmaking, they inherently tend to reflect majority rule. Constitutional adjudication, from the perspective of the Dworkinian Rights-Based Judicial Review, acts as a safeguard for minorities against the dangers of majoritarian democracy. As Dworkin reminds us, when democratic lawmaking mechanisms fail to function perfectly and their decisions are not universally accepted, a corrective procedure must be in place—in this case constitutional adjudication.

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