

INITIATING CONSTITUTIONAL MORALITY: POLITICAL INTERVENTION, ETHICAL REINFORCEMENT, AND CONSTITUTIONAL COURT DECISIONS IN INDONESIA

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Abstract

Constitutional morality is essential for the branches of power (Parliament and Government) to ensure impartiality, political insularity, and institutional stability for the judicial power, especially the Constitutional Court and constitutional morality as a guide and benchmark for constitutional judges to form ethics and decisions that reflect the Constitution. This article seeks to answer crucial questions about how forms of intervention and ethical problems in the Constitutional Court do not reflect constitutional morality and how the idea of limiting intervention and strengthening the ethics and decisions of the Constitutional Court through constitutional morality. The author uses normative legal research methods with statutory, conceptual, comparative, and case approaches. The results of this study are in line with the hypothesis of the argumentation that the author builds, showing that the lack of application

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of constitutional morality by Parliament, Government, and Constitutional Court Judges has threatened the independence of the Constitutional Court, has damaged the judicial dignity of the Constitutional Court, and making the Constitutional Court a means of political insurance. Several cases have shown that parliamentary and government intervention in the Constitutional Court is inevitable. Likewise, ethical violations and decisions of the Constitutional Court that do not reflect the Constitution add to the complexity of the current problems of the Constitutional Court. For this reason, the author recommends that the elaboration of the concept of limiting intervention and strengthening the ethics and decisions of the Constitutional Court can be accomplished in several ways, including statutory provisions regarding the prohibition of conflicts of interest and the ethics of state administrators, the construction of ethical institutions/courts as external institutions in enforcing and supervising ethics, reconstructing the process of selecting and dismissing constitutional judges fairly and transparently by involving public oversight, and guaranteeing and legitimizing the Constitutional Court in exercising administrative and financial autonomy independently.

Keywords: Constitutional Court Decisions; Constitutional Morality; Ethics; Independence; Political Intervention

I. INTRODUCTION

1.1. Background

History records the case of *Marbury vs Madison* in 1803 in the United States as the forerunner of reviewing the Constitutionality of laws against the Constitution. Although *Marbury* pleaded with the Writ of *Mandamus* to order *Madison* to issue a Letter of Appointment of *Marbury* as a judge, *Marshall* as a chief justice invalidated Article 13 of the Judiciary Act of 1789, which was the basis of *Marbury's* application because it was considered contrary to Article III Section 2 of the United States Constitution.¹ Section 13 of the Judiciary Act 1789 is an overly broad judicial power provided for in the United States Constitution. One of the valuable lessons to be remembered and even widely discussed among the public and academics is the spirit of constitutional morality practised by

¹ Zainal Arifin Mochtar, *Kekuasaan Kehakiman Mahkamah Konstitusi Diskursus Judicial Activism Vs Judicial Restraint [Judicial Power of the Constitutional Court: A Discourse on Judicial Activism vs. Judicial Restraint]* (Jakarta: PT Raja Grafindo, 2021), 28.

Marshall in deciding the case. Marshall considered that in exercising authority, he should not only look at the general law and turn a blind eye to the Constitution because he has been bound by the “oath” (morality) of duty, which is to carry out the Constitution, so according to him it is not justified for any law or political decision to contradict the Constitution.

Constitutional morality is not an abstract thing that is impossible to realize. However, basic principles must be inherent in each branch of power. Constitutional morality in this study is the attachment of state officials (HoR, Government, and judges) to the oath of duty to implement the Constitution in exercising authority. The oath of duty produces morality to carry out the Constitution consistently. Constitutional morality in the House of Representatives (HoR) affirms that every political policy formulation, especially those that impact judicial power, is constructed to protect impartial and independent judicial power. The over-power of HoR is a new symptom in the development of statehood in Indonesia, which has shown to dominate parliamentary dominance over all sectors of the branch of power, including the dominance of parliament to appoint and dismiss Constitutional judges. Constitutional morality in government positions limits executive power, which interferes too much with judicial power—especially the Constitutional Court—because the judicial atmosphere is impartial and independent. Executive interference with judicial power leads to a totalitarian² System of Government and can stop the pulse of a country’s democracy.³ While Constitutional morality of the prominent judge who tests the Constitutionality of laws against the Constitution has an essential role so that every decision always reflects the supremacy of the Constitution, not just ignoring and even changing the Constitution, Dixon and Landau (2019), in “Abusive Constitutional Borrowing: Legal Globalization and the Subversion of Liberal Democracy”, mention that sometimes in practice, judges deliberately change the Constitution through interpretation.⁴ It shows that the nature of the Constitution is no longer supreme.

² Jimly Asshiddiqie, *Oligarki, dan Totalitarianisme Baru [Oligarchy and the New Totalitarianism]* (Jakarta: LP3ES, 2022).

³ Steven Levitsky and Daniel Ziblatt, *How Democracies Die* (New York: Viking, 2018).

⁴ Rosalind Dixon and David Landau, *Abusive Constitutional Borrowing: Legal Globalization and the Subversion of Liberal Democracy* (Oxford: Oxford University Press, 2021).

McGuire (2004) stated that one indicator to measure a stable judicial institution is the application of the principle of differentiation, which is a clear limit to the judiciary's role.⁵ The limitation of this role is not limited to the distinction of absolute competence possessed by the judiciary but also needs to limit other branches of power to interfere with the unique role of the judiciary. It is in line with AV Dicey's notion of Constitutionalism⁶, C.F Strong⁷, and K.C Wheare⁸ each postulates that one element in the rule of law at least has a limitation on power. This footing reflects the independence of the Constitutional Court, which was determined mainly by constitutional morality by other branches of power in limiting themselves to interfering with judicial power.

On the other hand, constitutional judges must maintain morality in line with the Constitution (constitutional morality) to create the spirit of the Constitutional Court and rulings that reflect the spirit of the Constitution. Constitutional judges must avoid conflicts of interest in any decisions made. If there is a conflict between Constitutional morality and personal morality, Constitutional judges, in carrying out interpretations, must come out of the construction of subjectivity (personal) and enter into the objective construction (Constitutional) as written in the Constitution. Although in that context, it is undeniable that in the interpretation of texts—including Constitutional texts—one is often trapped in impersonal conditions, including cultural and historical backgrounds, beliefs, and psychological conditions of the interpreter⁹, but especially in the interpretation of Constitutional texts. According to the author, Constitutional judges must be equipped to overcome these traps.

Constitutional morality to maintain the independence of judicial power—in the context of the Constitutional Court in Indonesia—is carried out by branches

⁵ Kirill M. Bumin, et al., "Institutional Viability and High Courts: A Comparative Analysis of Post-Communist States," *Australian Journal of Political Science* 44, no. 1 (2009): 129, <https://doi.org/10.1080/10361140802657052>.

⁶ A.V. Dicey, *Pengantar Studi Hukum Konstitusi-Terjemahan [Introduction to Constitutional Law Studies]* (translated by [Translator's Name], Bandung: Nusa Media, 2015).

⁷ C.F. Strong, *Konstitusi-Konstitusi Politik Modern-Terjemahan [Modern Political Constitutions]* (translated by [Translator's Name], Bandung: Nusa Media, 2015).

⁸ K.C. Wheare, *Konstitusi-Konstitusi Modern-Terjemahan [Modern Constitutions]* (translated by [Translator's Name], Bandung: Nusa Media, 2018).

⁹ Hans Georg Gadamer, *Kebenaran Dan Metode [Truth and Method]* (translated by [Translator's Name], Yogyakarta: Pustaka Pelajar, 2010).

of power (HoR and the Government) under the mandate of the 1945 Constitution, namely Article 24 paragraph (1) “Judicial power is an independent power to administer justice to uphold law and justice”. The government and HoR must uphold these provisions to not interfere with the independent judicial power. The mandate is attached to the oath of HoR and the government when inaugurated to exercise its authority under the 1945 Constitution—including implementing Article 24 paragraph (1). Constitutional morality for Constitutional judges in determining decisions must be contained in upholding the supremacy of the 1945 Constitution. Constitutional judges are not allowed to make rulings that exceed the 1945 Constitution on grounds of interpretation.

Nevertheless, this ideal condition is inversely proportional to the problem of the intervening judicial power practice: first, the intervention of the HoR. The case of the issuance of Law Number 7 of 2020 concerning the Third Amendment to Law Number 24 of 2003 concerning the Constitutional Court. The change is considered an indirect intervention in the existence of the Constitutional Court as a form of legislative aggression. Similarly, in 2022, the recall of Constitutional Judge Aswanto was a blatant intervention made by the HoR against the Constitutional Court. Second, government intervention. The issuance of a Government regulation instead of Law Number 1 of 2013 concerning the Constitutional Court. However, it aims to save the institution of the Constitutional Court against corruption cases involving Constitutional Judge Akil Mochtar; in principle, the Government regulation instead of the Constitutional Court is not appropriate to be applied in the realm of deliberative democracy by Jurgen Habermas.¹⁰

Likewise, it was found that some Constitutional morality was not carried out by several Constitutional judges such as First, several cases of ethical violations committed by Constitutional judges, such as unilateral changes by Constitutional judges to Constitutional Court Decision Number 103/PUU-XX/2022 related to judicial review of the Constitutional Court Law. Likewise, there are many cases of ethical violations and even severe criminal violations committed by unscrupulous

¹⁰ F. Budi Hardiman, *Deliberative Democracy*, 3rd ed. (Yogyakarta: PT Kanisius, 2023).

Constitutional judges. Second, it is often found that the Constitutional Court's decisions indirectly exceed and change the meaning of the text in the 1945 Constitution, such as in the decisions: 1) Constitutional Court Decision Number 008/PUU-II/2004 regarding the Constitutionality of Law No. 23/2003 on the General Election of the President and Vice President. 2) Constitutional Court Decision Number 005/PUU-IV/2006 regarding the Constitutionality of Law No. 22 Year 2004 on the Judicial Commission. 3) Constitutional Court Decision Number 2-3/PUU-V/2007 regarding the Constitutionality of Article 80 paragraph (1), Article 80 paragraph (2) letter (a), Article 80 paragraph (3) letter (a), Article 81 paragraph (3) letter (a), Article 82 paragraph (10) letter (a), Article 82 paragraph (2) letter (a) and Article 82 paragraph (3) letter (a) of Law No. 22/1997 on Narcotics which regulates the Death Penalty. 4) Constitutional Court Decision Number 85/PUU-XX/2022 on the case of judicial review of Law Number 10/2016 on the Second Amendment to Law Number 1/2015 on the Stipulation of Government Regulation instead of Law Number 1/2014 on the Election of Governors, Regents, and Mayors into Law.¹¹ Based on this, this study is considered essential to discuss in depth the causes of the problems that have been described and initiate Constitutional morality concretely to maintain the independence and dignity of the Constitutional Court in the future.

1.2. Research Questions

Based on the background of these problems, the identification of problems in this study is formulated as follows:

- 1.2.1. What are the forms of intervention and ethical problems in the Constitutional Court that do not reflect Constitutional morality?
- 1.2.2. How is the idea of limiting intervention and strengthening the ethics and decisions of the Constitutional Court through Constitutional morality?

¹¹ S. Isra and F. Amsari, "Perubahan Konstitusi Melalui Tafsir Hakim [Constitutional Change Through Judicial Interpretation]," *Bphn. Go. Id* 12 (2019), accessed [Month Day, Year], http://bphn.go.id/data/documents/makalah_fgd.rtf. See F. Jurdi and A. Yani, "Legitimacy of Non-Formal Constitutional Reform and Restrictions on Constitutionalism," *Jurnal Konstitusi* 20, no. 2 (2023): 241, <https://doi.org/10.31078/jk2024>.

1.3. Research Method

This study uses normative legal research with systematic review techniques. The approaches used are statutory, conceptual, comparative, and case approaches.¹² The statutory approach relates to the 1945 Constitution of the Republic of Indonesia, Law Number 7 of 2020 concerning the Third Amendment to Law Number 24 of 2003 concerning the Constitutional Court and regulations relating to the selection of Constitutional judges. The conceptual approach relates to Constitutional morality, independence of judges, and political insurance. The comparative approach relates to comparisons in several countries implementing Constitutional morality in judicial power. The case approach relates to Constitutional Court decisions that do not reflect Constitutional morality, cases of Government or HoR intervention in the Constitutional Court, and cases of ethical violations of Constitutional judges. The data sources in this study are secondary data with primary legal materials (legislation and jurisprudence), secondary legal materials (journals, research results, and books), and tertiary legal materials (legal dictionaries and encyclopedias).¹³ All data sources are collected and identified systematically to be analyzed prescriptively to obtain solutions to the submitted problems.¹⁴

II. RESULTS AND DISCUSSION

2.1. Intervention and Ethical Problems of the Constitutional Court

2.1.1. Intervention from Political Actors (Parliament)

The issuance of Law Number 7 of 2020 on the Constitutional Court received so much attention that it resulted in 3 (three) case numbers at the Constitutional Court (excluding the inadmissibility verdict), namely Case Numbers 90/PUU-XVIII/2020, 96/PUU-XVIII/2020, and 100/PUU-XVIII/2020. However, one of the critical applications in this study is the decision in Case Number 100/PUU-

¹² Peter Mahmud Marzuki, *Penelitian Hukum [Legal Research]* (Jakarta: Prenada Media, 2005), 35.

¹³ Marzuki, 35.

¹⁴ Maria S.W. Sumardjono, *Bahan Kuliah Metodologi Penelitian Ilmu Hukum*, Edisi Revisi [*Course Material for Legal Research Methodology*, revised ed.] (Yogyakarta: Universitas Gadjah Mada, 2019), 23.

XVIII/2020, with the verdict rejecting the applicant's application. Formally, the "Koalisi Selamatkan Mahkamah Konstitusi" (starting now referred to as KSMK) as the petitioner in the case a quo at least based its argument on 6 (six) points, namely: First, the legislators committed legal smuggling under the pretext of following up on the Constitutional Court's decision. Second, the Constitutional Court Law revision needs to fulfil the carry-over requirement. Third, the legislators violated the principles of good legislation formation when discussing the revision of the Constitutional Court Law. Fourth, the Constitutional Court Law revision cannot be academically accounted for, and the academic paper is a mere formality. Fifth, the discussion process was conducted behind closed doors, did not involve the public, was hasty, and did not show a sense of crisis during the COVID-19 pandemic. Sixth, the revision of the Constitutional Court Law is based on invalid laws.

As argued, the revision of the Constitutional Court Law is not included in the 2020-2024 Medium-Term National Legislation Program. Hence, the revision of the Constitutional Court Law uses an open cumulative list of points due to the Constitutional Court's decision to be still able to revise the Constitutional Court Law. However, KSMK considers that several substances have never been mandated in any decision. KSMK considers that the revision of the Constitutional Court Law smuggles several substances based on political interests in the name of following up on the Constitutional Court's decision. The substances in question include [Vide: Constitutional Court Decision Number 100/PUU-XVIII/2020]:

1. The extension of the term of office of Constitutional judges is a maximum of 15 (fifteen years) until the retirement age of 70 (seventy) years and is intended for Constitutional judges who are incumbent;
2. Increasing the minimum age of Constitutional judges from 47 (forty-seven) years old to 55 (fifty-five) years old;
3. Elimination of periodization of judges' tenure;
4. Extension of the term of office of the chairman and vice chairman of the Constitutional Court from two years and six months to five years;

5. The addition of 1 (one) academic with a legal background as a member of the MK Honorary Council and
6. Candidates for constitutional judges proposed by the Supreme Court must come from within the Supreme Court and temporarily serve as high or supreme court judges.

The court considered that KSMK did not have legal standing in the material test of the Constitutional Court Law. It is because KSMK is considered unable to describe a causal relationship (*causal verband*) to the assumption of potential constitutional losses or factual losses against the articles requested in Law 7/2020. Indeed, the case above is a case that tests the existence of the Constitutional Court itself, which is very sensitive. However, the absence of legal considerations from Constitutional judges makes this case absurd because the material for the third amendment to the Constitutional Court Law has very clearly deviated from its path, namely the follow-up path to the Constitutional Court's decision.

To realize Constitutional morality in every decision and action issued by the Constitutional Court, the Constitutional Court needs to uphold the principle of judicial independence. The idea of judicial independence consists of two aspects, namely impartiality and political insularity. For Fiss (1993), impartiality is a condition where a dispute must be decided by a judge who has no relationship with the parties involved and has no interest in the outcome of the case. The second aspect of judicial independence is "political insularity", or the notion that actors outside the judiciary should not influence judges' decisions.¹⁵ It is crucial because, with some notable exceptions, judges tend to be appointed rather than elected, and there are often significant checks and balances involved in their appointments.

Other jurists have added one more aspect to test judicial independence, namely institutional stability, as Larkins (1996) proposed. Similarly, McGuire (2004) measured the underlying concept of judicial institutionalization using indicators that he categorized into three crucial qualities of a viable/stable

¹⁵ Shannon Ishiyama Smithey and John Ishiyama, "Judicious Choices: Designing Courts in Post-communist Politics," *Communist and Post-Communist Studies* 33, no. 2 (2000): 165, [https://doi.org/10.1016/S0967-067X\(00\)00002-7](https://doi.org/10.1016/S0967-067X(00)00002-7).

institution: differentiation, durability, and autonomy. According to McGuire, judicial differentiation from the political environment is a crucial indicator of institutionalized political organization. First, differentiation is the establishment of clear boundaries that mark and define the unique role of the judiciary. With a clear identity distinct from other political organizations, it is easier for citizens to see the judiciary as a viable and influential institution.¹⁶

The second is durability. Durability is the ability to survive and adapt to change. If the judiciary can maintain its role in the ebb and flow of democratization, this serves as a measure of its integration into the political system.¹⁷ Finally, standardized courts must be appropriately insulated from other branches of the national government. McGuire (2004) argues that autonomy is operationally demonstrated by “the existence of procedures protecting the institution’s independence vis-a`-vis other political actors and institutions.” Calibrating judicial capacity and institutional goals depends on the court’s ability to chart its policy course independently of the legislature or executive.¹⁸

If tested with the elements of independence mentioned above, this case leaves a question mark. Regarding impartiality, however, the Constitutional Court must still be responsible for the cases registered to it even though it is related to itself. The Indonesian Constitutional construction, at least, does not provide an alternative institution that can test cases about changes to laws directly related to the Constitutional Court.

Regarding political insularity, this case is closely related to the intervention of political actors (HoR) as an external judicial party that changes the substance of the Constitutional Court Law. So, there are better alternatives than the choice of the Constitutional Court to remain silent for this case rather than expanding the meaning of the Constitutional loss to accept the KSMK application as the applicant. Regarding institutional stability, through this case, the Constitutional Court does not stand autonomously but has a close relationship with political

¹⁶ Kirill M. Bumin, Randazzo, and Walker, "Institutional Viability and High Courts: A Comparative Analysis of Post-Communist States," *Australian Journal of Political Science* 44, no. 1 (2009): 129–30.

¹⁷ Bumin, Randazzo, and Walker, "Institutional Viability and High Courts."

¹⁸ Bumin, Randazzo, and Walker, "Institutional Viability and High Courts," 130

actors as lawmakers (HoR). It is because (HoR) provided a substance that, at that time, favoured the incumbent Constitutional judges and accelerated the entire process of changing the law by ignoring the sense of crisis and meaningful participation that should have been present in changing it at that time. The court's moves to accept the petition will be highly considered because if the court announces the product formed by the HoR, the relationship between the HoR and the court will become spanning.

Constitutional morality requires non-transactional loyalty to the Constitution. It requires patience with the possibility that what ultimately emerges differs from what citizens envisioned.¹⁹ A judge who believes in the doctrine of judicial activism will apply moral standards by expanding individual rights and personal freedoms. In contrast, one who believes in judicial restraint and the judiciary's limited role will interpret the Constitution narrowly.²⁰ In this case, the Constitutional Court is inclined to judicial restraint by narrowing the applicant's opportunities and rights to review the Constitutional Court law's third amendment. If associated with Constitutional morality, of course, this is odd because the Constitutional Court is the guardian of the Constitution.

2.1.2. Intervention from the Executive (Government)

Flashback to the bribery case that befell the former chairman of the Constitutional Court, Akil Mochtar, in 2013, who was proven to have practised bribery in buying and selling decisions on disputes over regional head election results (Pilkada) in Gunung Emas Regency, Central Kalimantan, and Lebak Regency, Banten. This case resulted in Akil being sentenced to life imprisonment by the Jakarta Corruption Court. If examined, this case is indeed a personal problem, not an institutional problem.

Not long after, then President Susilo Bambang Yudhoyono signed a government regulation instead of law (Perppu) Number 1 of 2013, which contained 3 (three) essential substances, namely first, to get good and trusted Constitutional judges,

¹⁹ Richa Dwivedi and Abhinav Shrivastava, "Constitutional Morality: A Tool for Judicial Governance?" *Think India Journal* 22, no. 4 (2019): 6080, <https://thinkindiaquarterly.org/index.php/think-india/article/view/10012>.

²⁰ Dwivedi and Shrivastava, "Constitutional Morality: A Tool," 6082.

the requirements for Constitutional judges, added the phrase ‘not being a political party for at least seven years before being proposed as a Constitutional judge’, second, clarifying the mechanism of the selection process and the submission of Constitutional judges, third, an improvement in the supervision system of Constitutional judges that is more effective.

If viewed, then this Perppu does contain a noble goal: to improve the institution of the Constitutional Court. However, by regulating it through Perppu, this step becomes a form of executive intervention against the Constitutional Court. The substance of judicial power is only suitable to be regulated in legal products except the law. This is because the judicial power must be independent of any direction and power. As is known, the issuance of Perppu is the president’s exclusive authority as granted through Article 22 of the 1945 Constitution. Furthermore, Perppu also needs to reflect public participation. As a result, the president can only regulate the institution of the Constitutional Court by providing space for the public to be actively involved.

The president’s power could be an executive intervention, and the parliament’s power to enact laws concerning constitutional court. Their powers can directly and significantly affect the Constitutional Court. Their decision can contribute to adding or reducing the Constitutional Court’s authorities, as stipulated in some laws. Tom Ginsburg has described this relationship between the judiciary and the executive as political insurance. Political insurance is the idea that political elites can use the Constitution and Constitutional law review, exceptionally, to provide insurance against the risk that they will lose office and influence in future democratic elections.²¹ As is known, political actors or the president, if no longer in office, will experience at least 3 (three) risks, namely first, the risk of reduced access to political power; second, the risk of reduced policy influence; and third, the risk of individual persecution or mistreatment.²² Insurance theory emerged as part of an effort to understand why political actors would tie their hands by empowering independent courts.

²¹ Rosalind Dixon and Tom Ginsburg, “The Forms and Limits of Constitutions as Political Insurance,” *International Journal of Constitutional Law* 15, no. 4 (2018): 989, <https://doi.org/10.1093/icon/moxo80>.

²² Dixon and Ginsburg, 989.

2.1.3. Ethics Violation Cases and Decisions Beyond the Constitution as a Reflection of the Immorality Constitution

The case of unilaterally changing the substance of the decision by Constitutional Judge Guntur Hamzah in Decision Number 103/PUU-XX/2022 related to the judicial review of the Constitutional Court Law, which discussed the removal of Constitutional Judge Aswanto is one of the events of immorality. This event resulted in imposing a written warning sanction from the Constitutional Court Honor Council (MKMK) through MKMK Decision Number 1/MKMK/T/02/2023. The incident of changing the phrasing of this decision is classified as a direct (personal) intervention from a Constitutional Judge. As is known, Constitutional Judge Guntur Hamzah changed the phrase “thus, the dismissal of Constitutional judges before the expiration of their term of office can only be carried out for reasons of resignation at their own request submitted to the chairman of the Constitutional Court, physical or spiritual illness continuously for 3 (three) months so that they cannot carry out their duties as evidenced by a doctor’s certificate, and dishonourable dismissal for reasons as stated in Article 23 paragraph 2 of the Constitutional Court Law. In the future, the dismissal of Constitutional judges before the expiration of their term of office can only be done for reasons of resignation....” which resulted in the decision experiencing a change in meaning. One of the sources of the problem of changing the phrase of this decision is the need for a standard operational procedure (SOP) for Judges to change the phrase of the decision while it is being read to the public.

If associated with the Constitution, of course, this event does not reflect the character of Constitutional judges as described in Article 24C paragraph (5) of the 1945 Constitution,²³ even if tested with the concept of Constitutional morality, this event seems far from the core concept of Constitutional morality itself, namely the moral obligation of every individual to uphold the values of the Constitution with uncompromising dignity and loyalty to it.²⁴ The principles

²³ Mahkamah Konstitusi RI, Naskah Komprehensif Perubahan UUD NRI Tahun 1945, Buku VI, Kekuasaan Kehakiman [*Comprehensive Manuscript of Constitutional Amendments of 1945, Book VI: Judicial Power*] (Jakarta: Mahkamah Konstitusi RI, 2010), 592.

²⁴ Soma Gupta, “Constitutional Morality: A Critical Study,” *Impact: International Journal of Research in Humanities, Arts and Literature* 10, no. 3 (2022): 1.

of non-discrimination, democracy, and equal protection before the law are the boundaries of constitutional morality, which becomes constitutional morality.²⁵ Meanwhile, changing the phrasing of this decision does not reflect democratic values. The community is no longer the holder of the government, but a handful of rulers drive the government to perpetuate power.

In addition to the ethical cases above, several Constitutional Court decisions reflect constitutional immorality. In a concurring judgment delivered in 2003, Justice S.B. Sinha held that although a measure of affirmative action may be lawful under Articles 15(4) and 16(4) of the Constitution, the action will violate “constitutional morality” if it violates the doctrine of equality.²⁶ Briefly, constitutional immorality occurs when state officials violate the doctrine contained in the Constitution.

These decisions exceed the Indonesian Constitution, including First, Constitutional Court Decision Number 008/PUU-II/2004 regarding the Constitutionality test of Law No. 23/2003 on the General Election of the President and Vice President against the 1945 Constitution of the Republic of Indonesia, there is an interpretation of the Constitutional Court that indirectly changes the text of the 1945 Constitution, especially Article 6 paragraph (1), namely the phrase “and able spiritually and physically” in Article 6 paragraph (1) of the 1945 Constitution of the Republic of Indonesia is defined by the Constitutional Court with the interpretation “that the candidates for President and Vice President must be spiritually and physically healthy in carrying out the duties and obligations of the state”.²⁷ This decision has changed the word “able” to “healthy,” even though the two words have many different meanings. The implications of this decision caused Abdurrahman Wahid (Gusdur) to lose his Constitutional right to run as a presidential candidate in 2004.

²⁵ Urvika Aggarwal, “Situating Dworkin in Indian Jurisprudence: An Analysis With Respect to Constitutional Morality,” *SSRN*, May 1, 2020, <https://ssrn.com/abstract=XXXXXXX>.

²⁶ Abhinav Chandrachud, “The Many Meanings of Constitutional Morality,” *SSRN*, January 18, 2022, <https://doi.org/10.2139/ssrn.3521665>.

²⁷ Isra and Amsari, “Perubahan Konstitusi Melalui Tafsir Hakim [Constitutional Change through Judicial Interpretation],” 12.

Second, the Constitutional Court Decision No. 005/PUU-IV/2006 regarding the Constitutionality test of Law No. 2004 on the Judicial Commission against the 1945 Constitution of the Republic of Indonesia, there is an interpretation of the Constitutional Court that indirectly changes the 1945 Constitution, especially the wording of Article 24B paragraph (1) to mean: “The Judicial Commission is independent with authority to propose the appointment of Supreme Court judges and has other powers to maintain and uphold the honour, dignity, and behaviour of judges, except for Constitutional Judges”.²⁸ The exclusion of “Constitutional Judges” narrows the meaning of “judge” and is contrary to the original intent of the establishment of Article 24B paragraph (1) of the 1945 Constitution, which never distinguishes between general judges and Constitutional judges.

Third, Constitutional Court Decision Number 2-3/PUU-V/2007 regarding the Constitutionality test of Article 80 paragraph (1), Article 80 paragraph (2) letter (a), Article 80 paragraph (3) letter (a), Article 81 paragraph (3) letter (a), Article 82 paragraph (10) letter (a), Article 82 paragraph (2) letter (a) and Article 82 paragraph (3) letter (a) of Law No. 22/1997 on Narcotics which regulates the Death Penalty. In this case, the Constitutional Court interpreted the text of Article 28A and Article 28I of the 1945 Constitution by providing a different understanding from the original intent of these articles. Against the ‘right to life’ which cannot be reduced under any circumstances, the Constitutional Court provides an interpretation based on the provisions of Article 28 J paragraph (2), so that the Constitutional Court believes that the death penalty is a restriction stipulated by Law No. 22/1997 to uphold public order. The Constitutional Court gives textual meaning to the provisions of Articles 28A and 28I based on the provisions of Article 28J of the 1945 Constitution.

Fourth, Constitutional Court Decision Number 85/PUU-XX/2022 on the case of judicial review of Law Number 10/2016 on the Second Amendment to Law Number 1/2015 on the Stipulation of Government Regulation instead of Law Number 1/2014 on the Election of Governors, Regents, and Mayors into Law. The decision states that Article 157 paragraph (1), paragraph (2), and the

²⁸ Isra and Amsari, “Perubahan Konstitusi Melalui Tafsir Hakim [Constitutional Change through Judicial Interpretation].”

phrase “until the establishment of a special judicial body” in paragraph (3) of the Pilkada Law must be stricken or declared to conflict with Article 1 paragraph (3), Article 22E, Article 24C paragraph (1), and Article 28D paragraph (1) of the 1945 Constitution. Thus, it should read, “The dispute over the determination of the final stage of the election results shall be examined and adjudicated by the Constitutional Court” [vide: Constitutional Court Decision Number 85/PUU-XX/2022]. The decision has indirectly changed Article 24C paragraph (1) of the 1945 Constitution of the Republic of Indonesia by adding to the authority of the Constitutional Court.

The above decision is no longer in principle in line with Constitutional morality. George Grote interpreted Constitutional morality as a culture of respect for the Constitution among the people, which would ensure peaceful governance.²⁹ Concerning its implementation, Chief Justice A.P. Shah of the Delhi High Court first used Constitutional morality rather than popular morality. Constitutional morality requires the court to disregard the people’s morals while examining the validity of government actions.³⁰ Chief Justice Misra in India, who had previously used Constitutional morality in a different context, found that courts should not be “guided remotely by majority views or popular perceptions” and should be “guided by a conception of Constitutional morality and not by the morality of society”.³¹ The law should always be guided by Constitutional morality rather than popular or public morality. In other words, public morality, even if accepted by the majority, should not outweigh the principles of Constitutional morality.³² The expression ‘morality’ has been used by the Supreme Court of India in many cases with issues like surrogacy, religious freedom, and sexual orientation.³³

Raz describes constitutional morality as the notion of thick Constitutionalism, normative culture, and normative rationality found in constitutional moral principles more than in the text of written constitutional documents.³⁴

²⁹ Chandrachud, “The Many Meanings,” 2.

³⁰ Chandrachud, “The Many Meanings.”

³¹ Chandrachud, “The Many Meanings,” 9.

³² Ajay Kumar, “Two Different but Same Perspectives on Constitutional Morality,” *ILI Law Review* (Winter 2022): 262.

³³ Kumar, Two Different but Same Perspectives, 259.

³⁴ J. Greenwood-Reeves, “The Democracy Dichotomy: Framing the Hong Kong 2019 Street Protests as Legitimacy Counterclaims against an Incoherent Constitutional Morality,” *Asia-Pacific Journal on Human Rights and the Law* 21, no. 1 (2019): 5, <https://doi.org/10.1163/15718158-02101003>.

Furthermore, according to Grote, Constitutional morality means obedience to the rule of law by recognizing the ideals outlined in the Constitution.³⁵ The transformative Constitutional doctrine states that the Constitution is a forward-looking text aiming to keep itself dynamic. As practised in India, Constitutional values consider the future of Indian democracy and adapt it in the manner necessary to reform itself.³⁶ According to Justice Indu Malhotra, Constitutional morality means Constitutional moral values, guaranteeing the freedom to hold and practice personal religious beliefs.³⁷

Constitutional morality requires state officials to defend and take action based on the Constitution's text and spirit.³⁸ In brief, Constitutional morality contains 2 (two) essential meanings: the opposite of public morality and the spirit and soul of the Constitution.³⁹ Meanwhile, as is well known, the limitation of power is a common feature of the Constitution. According to Carl J Friedrich, Constitutionalism is the idea that the government organized by and on behalf of the people is subject to some restrictions. These restrictions are expected to ensure that the power exercised is not abused by those who have to govern.⁴⁰ Kant expressed the premise that all morality is autonomous, as a form of freedom for intelligent beings.⁴¹ The development of moral theory, Kant also believes that a person becomes a cause that is considered accurate for the emergence of judgments about moral actions. For this reason, an action by a commission is morally said to be good and right, with justification for producing excellent and suitable consequences.⁴² To the extent that the resulting consequences are wrong and unrighteous is a form of harming constitutional morality.

³⁵ Gireesh Kumar and Arjun Philip George, "Constitutional Morality and Its Oracle," *PalArch's Journal of Archaeology of Egypt/Egyptology* 18, no. 08 (2021): 4311.

³⁶ Kumar and George, *Constitutional Morality*, 4313.

³⁷ Kumar and George, *Constitutional Morality*, 275.

³⁸ Jay Kumar Bhongale, "Dr. B. R. Ambedkar's Constitutional Morality," *SSRN*, January 4, 2023, Bharati Vidyapeeth Deemed to be University, New Law College, Pune, 5, <http://dx.doi.org/10.2139/ssrn.4312052>.

³⁹ Bhongale, *Dr. B. R. Ambedkar's Constitutional Morality*, 9.

⁴⁰ M. Laica Marzuki, "Konstitusi Dan Konstitusionalisme [Constitution and Constitutionalism]," *Jurnal Konstitusi* 7, no. 4 (2016): 4, <https://doi.org/10.31078/jk741>.

⁴¹ Tria Noviantika, "Gagasan Peradilan Etik: Penataan Kelembagaan Penegakan Kode Etik Penyelenggara Negara [*Ideas of Ethical Adjudication: Institutional Structuring of the Enforcement of the State Officials' Code of Ethics*]" (Tesis, unpublished, Universitas Gadjah Mada, 2024), 29.

⁴² Jimly Asshiddiqie, *Peradilan Etik dan Etika Konstitusi: Perspektif Baru Tentang Rule of Law and Rule of Ethics & Constitutional Law and Constitutional Ethics [Ethical Adjudication and Constitutional Ethics: A New Perspective on Rule of Law and Rule of Ethics & Constitutional Law and Constitutional Ethics]* (2014), 44.

2.2. The Idea of Limiting Interventions and Strengthening the Ethics of the Constitutional Court through Constitutional Morality

The complexity of constitutional issues is not only about legal norms, but there is a relationship with morality.⁴³ The Constitution is seen as not only fixated on what is written but is full of implicit meanings, including values and norms that grow and develop in society.⁴⁴ In line with this, Ronald Dworkin argues that the Bill of Rights should be understood as a form of establishing general morals; at the same time, judges interpret and apply general principles by asking and trying to answer more concrete ethical questions.⁴⁵

The existence of the Constitutional Court makes moral values and constitutional morality a benchmark in assessing conflicts of legal norms. The court examines laws from a philosophical, sociological, and juridical perspective and interprets them according to Constitutional morality.⁴⁶ The law cannot eradicate “moral decay”, but with the awareness of morality through the judiciary by the Constitutional Court embodied through the decisions and behaviour of the Constitutional Court, judges will be able to implement and realize the morality of the Constitution itself. The author wants to provide an argument by outlining the idea of Constitutional morality and potential challenges in its application as rules and limits in realizing the law expected by society, one of which is through the judicial institution of the Constitutional Court.

2.2.1. Limitation of Intervention against the Constitutional Court through Constitutional Morality

With morality and ethics, the state can be run authoritatively, as Hobbes stated in *Leviathan*.⁴⁷ Thus, the democratic space for citizens is closed. Without

⁴³ Salman Khurshid, *Judicial Review: Process, Powers, and Problems* (Cambridge: Cambridge University Press, 2020), Chapter 20, “Constitutional Morality and Judges of the Supreme Court,” 124.

⁴⁴ James E. Fleming, “Fidelity to Our Imperfect Constitution,” *Fordham Law Review* 65, no. 4 (1997): 1,335–1,355.

⁴⁵ Ronald Dworkin, *Freedom’s Law: The Moral Reading of the American Constitution* (Cambridge: Harvard University Press, 1996), 28. See also Ronald Dworkin, *Taking Rights Seriously* (1997).

⁴⁶ Tanto Lailam, “Building Constitutional Morality of Constitutional Judges in Indonesia,” *Jurnal Penelitian Hukum De Jure* 20, no. 4 (2020): 511–529.

⁴⁷ Jonathan Wolff, *Pengantar Filsafat Politik [Introduction to Political Philosophy* (translation)], Bandung: CV Nusa Media, 2013), 12.

ethics, rulers follow Machivelli's teachings in the II Principle.⁴⁸ By justifying various means for the sake of personal interests and making the law a legitimate instrument to maintain power (*status quo*) without regard to the teachings of morality.

One reflection of the apparent intervention into the Constitutional Court is seen in Decision 90/PUU-XXI/2023⁴⁹ It was related to reviewing the minimum age limit for presidential and vice presidential candidates in Article 169 letter q of Law Number 7 of 2017 concerning General Elections. The existence of a conflict of interest in the decision resulted in the imposition of serious ethical violations against all Constitutional Court judges.⁵⁰ Under such conditions, it is urgent to regulate constitutional provisions to prevent HoR and the Government from making laws that erode the independence of the judiciary. This is a concrete manifestation of preventing the intervention and political interests of groups or individuals.

In reality, there are interventions from political actors and the government through the law made by HoR and the Government, to limit the power of HoR and the Government in intervening in the power of the Constitutional Court so that it remains impartial and independent, at least some efforts are needed. First, there need to be legislative provisions that specifically regulate the prohibition of conflict of interest and the ethics of state administrators, one of which is the prohibition of intervening in judicial power. When the HoR and the government carry out intervention practices, the actions are justified as a violation of the ethics of state administrators, which can lead to ethical enforcement through internal and external ethics courts. In this position, the ethical indicators that need to be applied for state officials (HoR and Government) not intervening in the judicial power are based on Article 24, paragraph (1) of the 1945 Constitution,

⁴⁸ Franz Magnis-Suseno, "Machiavelli: Guru Benar Atau Guru Konyol? [Machiavelli: A True Teacher or a Foolish Teacher?]," in *Jika Rakyat Berkuasa Upaya Membangun Masyarakat Madani Dalam Kultur Feodal [If the People are in Power: Efforts to Build a Civil Society in Feudal Culture]*, ed. Tim MUALA (Bandung: Pustaka Hidayah, 1999), 47.

⁴⁹ Yance Arizona, et al., "Skandal Mahkamah Keluarga: Kaminasi Publik Putusan Mahkamah Konstitusi Nomor 90/PUU-XXI/2023 Mengenai Batas Usia Calon Presiden Dan Wakil Presiden [Family Court Scandal: Public Condemnation of Constitutional Court Decision No. 90/PUU-XXI/2023 Regarding the Age Limit for Presidential and Vice-Presidential Candidates]" (Yogyakarta: Department of State Law, Faculty of Law UGM, 2023), 14–15.

⁵⁰ Noviantika, "Gagasan Peradilan Etik [Ideas of Ethical Adjudication]," 50.

that the judicial power is independent and impartial, so the ethics of state administrators must guarantee the provisions in the report.

The existence of legitimacy to reduce and avoid external influences and interventions that can affect independence and impartiality with standards set through Constitutional morality can be done by expressly prohibiting and regulating interventions from the executive, legislative, and political interests of certain groups in the judicial process. It is crucial to ensure accountability, transparency, and integrity in the judiciary as core elements.⁵¹

Second, the construction of an ethical institution or court. This institution or court is needed as an external institution that can enforce the ethics of state administrators when there is behaviour contrary to the 1945 Constitution of the Republic of Indonesia. Through the institution or ethics court, a lawsuit can be filed if there is behaviour by both the HoR and the government that intervenes in the power of the Constitutional Court. However, it is still necessary to limit the competence of this ethics institution or court by only assessing and enforcing the ethics of state administrators in implementing the Constitution, including when there is a conflict of interest of state administrators that does not reflect the Constitution and precisely when there are violations of the ethics of state administrators that violate the limits of the independence of the judicial power Constitutional Court.

Third, the reconstruction of selecting and dismissing Constitutional Court judges can be carried out fairly, transparently, and following the qualifications that have been determined. Referring to the provisions of the 1945 Constitution in Article 24C paragraph (5) contains the value of morality by stating that: “The requirements for constitutional judges must have integrity and an irreproachable personality; statesmen who master the constitution and state administration; and do not concurrently serve as state officials” and Law Number 7 of 2020 concerning the Third Amendment to Law Number 24 of 2003 concerning the Constitutional Court.⁵²

⁵¹ International Commission of Jurists, *Judicial Accountability: A Practitioner's Guide No. 13* (Geneva: International Commission of Jurists, 2016), 9.

⁵² Constitutional Court of Indonesia, *Decision No. 005/PUU-IV/2006*. Set out in Article 15, paragraphs (1), (2), and (3).

The requirement that constitutional judges have integrity is an essential part of a reflection of attitudes that are outwardly reflected through wholeness and balance in personal relationships with the responsibilities that exist in themselves and cannot stand alone without independence and impartiality.⁵³ It is essential to do so, considering that Constitutional Court judges have other problems related to political independence to carry out their duties and authorities fairly and objectively, and this can be reflected through their actions and the results of their decisions. In this regard, AV Dicey stated that the morality of the court is much higher than that of politicians in parliament to establish a law with the justification that judges are considered to reflect the meaning of justice and truth. Likewise, concretely, the process of electing constitutional judges can be witnessed by the public and is open to the people in the context that the public can notice and oversee the process of election and dismissal.

Fourth, the Constitutional Court must have sufficient administrative and financial autonomy to carry out its duties without interference, pressure, and intervention from other branches of power, be it legislative, executive, or other political forces based on Constitutional morality. Effective and efficient budget management will have an impact in supporting the implementation of the duties and functions of the Constitutional Court judicial institution.⁵⁴ It is given that the state budget is a central instrument for implementing policies and usage based on applicable rules.⁵⁵ It is in line with the opinion of Jimly Asshidiqie, one of the conceptualizations of an independent judiciary is the guarantee of financial independence, which is independence in determining and managing its budget to ensure the freedom of the court.⁵⁶ Thus, to realize an independent and impartial Constitutional Court judiciary, it is necessary to regulate administrative autonomy standards regarding financial independence without intervention from other branches of power following Constitutional morality. It is essential

⁵³ Lailam, 516-520.

⁵⁴ Ismail Ramadan et al., "Budget Independence of The Supreme Court in The Implementation Of The Functions Of Judicial Power," *Jurnal Hukum Dan Peradilan* 10, no. 3 (2021), 421-29.

⁵⁵ Atep Adya Barata and Bambang Trihartanto, *State/Local Financial Management Power* (Jakarta: Elex Media Komputindo, 2004), 16-21.

⁵⁶ Muchsin, *Independent Judicial Power and Human Rights Policy* (Jakarta: STIH IBLAM, 2004), 32.

to underline that this upholds the supervisory function and the principle of checks and balances.

2.2.2. Ideas for Resolving Ethical Problems and Constitutional Court Decision

Constitutional morality is a paradigm that must exist in state officials, one of which is the Constitutional Court as the guardian of the Constitution and morality, the interpreter of the Constitution, and the protector in the sense that the Constitutional Court must position itself not only to guard legal norms but it is crucial to guard, interpret, and enforce Constitutional morality.⁵⁷ Moral judgment primarily concerns the fundamental structure of constitutional rights, not a secondary or derivative consequence of overly broad doctrines.⁵⁸ The potential for conflict arises when there are differences in the interpretation of moral values contained in the Constitution. It can occur due to different views or variations of constitutional judges on specific ethical issues, such as human rights, religious freedom, or individual rights.⁵⁹ In this context, it generally occurs as part of Dissenting Opinion; from the positive side, Dissenting Opinion can be used as a goal to build Constitutional morality and the living Constitution.⁶⁰ Referring to Simon Butt's opinion, the proper use of Dissenting Opinion can improve and realize the transparency and judicial accountability of the Constitutional Court.⁶¹ The evolution of the debate has led some authors to recognize that judges can play a crucial role in interpreting fundamental rights in a democracy.⁶²

⁵⁷ Muchsin, *Independent Judicial Power*, 518.

⁵⁸ Cristopher L. Eisgruber and Lawrence G. Sager, "Religious Liberty and The Moral Structure Of Constitutional Rights," *Cambridge University Press Legal Theory* 6 (2000), 253–68.

⁵⁹ Bhongale, "Dr. B. R. Ambedkar's Constitutional Morality," 5

⁶⁰ Lailam, 521.

⁶¹ Simon Butt, "The Function of Judicial Dissent in Indonesia's Constitutional Court," *Constitutional Review* 4, no. 1 (2018), 1.

⁶² Mariano C Melero, "Weak Constitutionalism and the Legal Dimension of the Constitution," *Global Constitutionalism* 11, no. 3 (November 2022), 494–517, <https://doi.org/10.1017/S2045381722000077>. which will be referred to as 'political constitutionalism' and 'strong popular sovereignty'. Despite their important differences, both share a sceptical approach to the dominant constitutional practice in liberal democracies, hence they are brought together here under the term 'weak constitutionalism'. They both highlight the political dimension of the constitution, arguing that democratic legitimacy requires institutional arrangements that give the people and/or their representatives the last word in settling fundamental issues of political morality. By contrast, this article underlines the legal dimension of the constitution as the repository of the moral principles that make possible a practice of public justification in constitutional states. It is from this second constitutional dimension that the critical arguments are developed, both against the desire to take the constitution away from the courts and the aspiration to recognize the constituent power as pre-legal constitutionmaking faculty.,"container-title":"Global Constitutionalism","DOI":"10.1017/S2045381722000077","ISSN":"2045-3817, 2045-3825","issue":"3","journalAbbreviation":"Global Con.,"language":"en","page":"494-517","source":"DOI.org (Crossref

In line with the above and several cases of ethical violations of constitutional judges, it is necessary to initiate honest enforcement by external institutions. It is crucial to consider that several constitutional judges have stumbled on moral issues, whether minor or significant violations, described in the previous discussion. So far, ethical enforcement within the Constitutional Court has existed. Based on the provisions of Constitutional Court Regulation Number 2 of 2014 concerning the Honorary Council of the Constitutional Court, the Constitutional Court Ethics institution is divided into the Ethics Council of the Constitutional Court and the Honorary Council of the Constitutional Court.⁶³ Meanwhile, the presence of the Judicial Commission as an external supervisor of (Supreme and Judges under the Supreme Court) reaped a variety of understandings, which considered that the existence of a Judicial Commission should conduct supervision based on a code of ethics and not intervene in the constitutional rights of judges, which led to the decision that Judicial Commission could not supervise the Supreme Court with the justification that the authority of the court would be disturbed and could not be impartial.⁶⁴ In the context of the construction of external supervision by the Judicial Commission against the Constitutional Court through the Judicial Commission Law, the paradigm used is that the concept and formulation of its meaning are all judges.⁶⁵

According to the author, when it comes to ethics to maintain intervention and independence, it is necessary to consider the existence of an external independent supervisory institution with the task and authority to oversee the behaviour of judges and handle complaints related to ethical violations by establishing

⁶³ With the amendment of Law Number 7 of 2020, the Constitutional Court is in a status quo state; it looks helpless, considering that the Constitutional Court legally states that the presence of this law marks the end of the Ethics Council's existence.

⁶⁴ See further in Constitutional Court Decisions No. 005/PUU-IV/2006.

⁶⁵ For a similar discourse of opinion, see Jimly Asshiddiqie, *The Position of the Constitutional Court in the Structure of the Indonesian State Administration*, in *Constitutional Court, Collection of Constitutional Court of the Republic of Indonesia* (Jakarta: General Secretariat and Registrar of the Constitutional Court RI, 2005); Mohammad Fajrul Falaakh, *Some Thoughts on the Revision of Judicial Commission Law in Judicial Commission: A Compendium of Reflections on One Year of the Judicial Commission of the Republic of Indonesia* (Jakarta: Judicial Commission, n.d.); Wahyu et al., "Reformulation of Supervision of the Constitutional Court to Increase the Effectiveness of Enforcement of the Code of Ethics for Constitutional Judges," *Jurnal Studia Legalia: Jurnal Ilmu Hukum* 3, no. 2 (2022): 21–43; Titik Triwulan, "Supervision of Constitutional Judges in the Judge Supervision System According to the 1945 Constitution of the Republic of Indonesia," *Jurnal Dinamika Hukum* 12, no. 2 (n.d.), and compare with Natabaya's opinion and considerations in Constitutional Court Decision No. 005/PUU-VI/2006 on Judicial Review of Law No. 22 of 2004 and Law No. 4 of 2004 on Judicial Power.

a clear code of ethics and implementing an effective enforcement mechanism, one of which is honest enforcement against Constitutional Court judges.⁶⁶ Namely: The first alternative is to extend the current external institution--the Judicial Commission--morality--with the condition that it expands its duties and authority in carrying out ethical trials--with the consequence of amending the 1945 Constitution. The second alternative is a further idea for establishing a new institution, such as the Ethics Court, to enforce external ethics.⁶⁷ When referring to the idea of establishing an ethics court--the Ethics Court--will answer the issue of various ethical violations that occur in the Constitutional Court or other institutions; on the other hand, some ethical decisions that contain errors committed by each code of ethics enforcer in each agency can file legal remedies--such as appeals--in the context of ethics, considering that ethics and law are different entities, with the justification that ethically guilty people are not necessarily guilty in the eyes of the law, and vice versa.

Second, it encourages broader public participation in constitutional litigation by providing facilities for public scrutiny, public monitoring, expert opinions, and contributions from civil society in cases relating to human rights and other important constitutional issues. The Constitutional Court should provide ample opportunity for affected parties or other stakeholders to submit opinions or *amicus curiae* or "friends of the court" in some cases for judges to consider in deciding matters in the wider community's interest.⁶⁸ It will ensure broader representation and diverse perspectives in the judicial process.

Especially for Constitutional Court decisions that go beyond and are not in line with the Constitution, according to the author, there are alternative efforts that can be made by implementing: *the first* alternative solution, providing an appeal mechanism in constitutional cases by the Constitutional Court; this is

⁶⁶ Wiryanto, *Etik Hakim Konstitusi: Rekonstruksi Dan Evolusi Sistem Pengawasan [Constitutional Judges' Ethics: Reconstruction and Evolution of the Supervision System]* (Depok: Rajawali Pers, 2019), 1-17.

⁶⁷ MPR RI, "Konvensi Gagasan Dan Kesepahaman Tentang Pentingnya Keberadaan Mahkamah Etik [Convention of Ideas and Understandings on the Importance of the Existence of the Ethics Court]" (Jakarta: MPR RI, August 2020).

⁶⁸ Linda Ayu Pralampita, "The Position of *Amicus Curiae* in the Indonesian Judicial System," *Jurnal Lex Renaissance* 5, no. 3 (2020): 558-572.

needed as one of the solutions to various Constitutional Court decisions that do not offer or represent the wishes of the community at large. The author tries to outline an alternative procedural mechanism for resolving requests that can be carried out under the following conditions: 1) The existence of Ground for Appeal, where the appeal mechanism must be based on clear reasons,⁶⁹ For example, in the context of fundamental legal errors in the initial decision or critical constitutional questions that require further review through this appeal mechanism. 2) New facts that have been discovered and have yet to be considered during decision-making. 3) A transparent procedure with a set time limit for filing an appeal aims to ensure legal certainty and the technicality of the judicial process. 4) The final decision of the appeal becomes a binding and final decision and becomes the basis for resolving constitutional cases in the domestic sphere.

The second alternative solution is the existence of the International Constitutional Court. The opportunity to establish the International Court of Justice is an idea that arises to combat the strengthening forces of authoritarianism in various countries, which have caused distrust of domestic institutions that have extended and existed.⁷⁰ While there is no denying that there are challenges and significant efforts to reach a standard agreement and conception in various countries around the world, it is worth noting that the current development of a complex network of global and regional laws and judicial bodies provides an alternative blueprint for how international courts operate and function.⁷¹ The project, purpose, importance, and direction of the International Constitutional Court have primary considerations. The First, as the guardian of 3 (three) significant texts of higher law in global governance, including the Universal Declaration of Human Rights, the International Convention on Civil and Political Rights, and the International Covenant on Economic, Social, and Cultural Rights.

⁶⁹ Rosalind Dixon and Anthony Stone, "The Australian High Court and the Relationship between Appeals and References," *Sydney Law Review* 27, no. 4 (2005): 607–629.

⁷⁰ Yascha Mounk and Roberto Stefan Foa, "This is How Democracy Dies," *The Atlantic*, January 29, 2020, in Richard Albert, "Does the World Need an International Constitutional Court?," *Rutgers International Law & Human Rights Journal*, Jurisprudence Lecture by Edward J. Bloustein, 2023, 2–3.

⁷¹ Albert, *Does the World*, 2–3.

Second, the need for an International Constitutional Court is urgent due to the many cases of evidence related to “Constitutional Fraud,” which is used to justify building a democratic regime but does not fully reflect democracy.⁷², so it is necessary to find new alternatives to “Autocratic Legalism” —applying the law to achieve goals and then the onset of the coming autocracy—⁷³. *Third*, the design of the International Constitutional Court from its composition, functions, jurisdiction, and powers. The court will have 21 judges selected by the UN General Assembly from a closed list of 42 candidates, including representatives from the International Court of Justice and the International Criminal Court. Its two main functions are to advise and resolve disputes with guidance on “Principles and rules relating to democracy and civil liberties that are universally and regionally applicable”.⁷⁴

On the other hand, establishing an International Constitutional Court is based on 5 (five) guiding principles of *Internationality*; this Constitutional Court should be housed in an international organization with members from all countries worldwide *and inclusiveness*, including democracies and autocracies countries. *Representativeness* is the way that the court’s judges must be diverse and represent people around the world. *Independence* relates to the mechanism for electing judges and the terms and limits of the office of judges—*advice* by providing non-binding advice through advisory rulings.⁷⁵

The author realizes that there is urgency in the existence of these two alternatives, considering that the various ethical problems and decisions that occur in the Constitutional Court today are also the same in the global context, so there is a lot of awareness and efforts from the worldwide community to combat various problems in resolving constitutional cases. Still, in some conditions, further study is needed to determine the most appropriate mechanism that can be used in the Indonesian context by looking further at the potentials that can arise from the two alternatives described above.

⁷² Albert, *Does the World*, 5.

⁷³ Kim Lane Scheppelle, “Autocratic Legalism,” *The University of Chicago Law Review* 85, no. 2 (2018): 545–584.

⁷⁴ Albert, *Does the World*, 4–11.

⁷⁵ Albert, *Does the World*, 19–20.

III. CONCLUSION

Constitutional morality is the soul of the Constitution that contains constitutional moral values. It means that it is reasonable and correct according to the moral values of the Constitution, with the justification that the resulting consequences are good and right. Constitutional morals contain the idea that the government organized by and on behalf of the people is subject to several restrictions. The existence of the Constitutional Court is central as a benchmark in assessing the conflict of legal norms by reviewing the law and interpreting it regarding constitutional morality. Constitutional morality is realized in every decision and action issued and carried out by the Constitutional Court, which must adhere to the principles of judicial independence (including impartiality, political insularity, and institutional stability). Given that the composition of the selection of judges tends to be appointed rather than elected, and there are often significant checks and balances involved in their appointment, there are consequences of intervention from various political actors (Executive and Legislative) accompanied by multiple cases of ethical violations and Constitutional Court decisions that go beyond so that some decisions reflect Constitutional Immorality.

The various problematic facts of political intervention, violations of judges' ethics, and decisions that reflect the Immorality Constitution, the author initiates a concept through Constitutional morality to limit the intervention of other branches of power against the Constitutional Court with efforts: The need for legislative provisions that specifically regulate the prohibition of conflict of interest and ethics of state administrators, the construction of institutions/ethics courts as external institutions that enforce the ethics of state administrators, the reconstruction of the process of selecting and dismissing Constitutional Court judges fairly and transparently, the Constitutional Court must have independent administrative and financial autonomy. Various problematic facts of political intervention, violations of judge ethics, and decisions that reflect constitutional immorality, the author initiates a concept through constitutional morality to limit the intervention of other branches of power against the Constitutional

Court with efforts: The need for legislative provisions that specifically regulate the prohibition of conflicts of interest and the ethics of state administrators, the development of ethical institutions/courts as external institutions that enforce the ethics of state administrators, the reconstruction of the process of selecting and dismissing Constitutional Court judges pretty and transparently, while problems related to decisions of the Constitutional Court that exceed and are not in line with the Constitution can provide an appeal mechanism or the establishment of the International Constitutional Court as an important institutional mechanism to strengthen constitutional morality. The urgency of the need for an International Constitutional Court is due to the many cases of evidence related to “Constitutional Fraud,” which is used as a justification for building a democratic regime but, at the same time, does not fully reflect democracy itself.⁷⁶It is necessary to find new alternatives to “Autocratic Legalism”.

BIBLIOGRAPHY

- Aggarwal, Urvika. “Situating Dworkin in Indian Jurisprudence: An Analysis with Respect to Constitutional Morality.” *SSRN*, May 1, 2020: 1–9.
- Albert, Richard. “Does The World Need An International Constitutional Court?” *Rutgers International Law & Human Rights Journal*. Jurisprudence Lecture by Edward J. Bloustein, 2023.
- Arizona, Yance, Tria Noviantika, and Mochamad Adli Wafi. “Skandal Mahkamah Keluarga: Kaminasi Publik Putusan Mahkamah Konstitusi Nomor 90/PUU-XXI/2023 Mengenai Batas Usia Calon Presiden Dan Wakil Presiden [Scandal in the Family Court: Public Commentary on the Constitutional Court Ruling No. 90/PUU-XXI/2023 Regarding the Age Limit for Presidential and Vice Presidential Candidates].” Yogyakarta: Departemen Hukum Tata Negara, Fakultas Hukum UGM, 2023.
- Asshiddiqie, Jimly. “Kedudukan Mahkamah Konstitusi Dalam Struktur Ketatanegaraan Indonesia [The Position of the Constitutional Court in the

⁷⁶ Albert, *Does the World*, 5.

- Constitutional Structure of Indonesia].” In *Mahkamah Konstitusi: Bunga Rampai Mahkamah Konstitusi RI [The Constitutional Court: A Compendium of the Constitutional Court of the Republic of Indonesia]*, Jakarta: Setjen dan Kepaniteraan Mahkamah Konstitusi RI, 2005.
- Asshiddiqie, Jimly. *Peradilan Etik dan Etika Konstitusi: Perspektif Baru Tentang Rule of Law and Rule of Ethics & Constitutional Law and Constitutional Ethics [Ethical Judiciary and Constitutional Ethics: A New Perspective on the Rule of Law and Rule of Ethics & Constitutional Law and Constitutional Ethics]*. 2014.
- Asshiddiqie, Jimly. *Oligarki Dan Totalitarianisme Baru [Oligarchy and New Totalitarianism]*. Jakarta: LP3ES, 2022.
- Barata, Atep Adya, and Bambang Trihartanto. *Kekuasaan Pengelolaan Keuangan Negara/Daerah [The Power of State/Regional Financial Management]*. Jakarta: Elex Media Komputindo, 2004.
- Bhongale, Jay Kumar. “Dr. B. R. Ambedkar’s Constitutional Morality.” *SSRN*, January 4, 2023. <https://doi.org/10.2139/ssrn.4312052>.
- Bumin, Kirill M., Kirk A. Randazzo, and Lee D. Walker. “Institutional Viability and High Courts: A Comparative Analysis of Post-Communist States.” *Australian Journal of Political Science* 44, no. 1 (2009). <https://doi.org/10.1080/10361140802657052>.
- Butt, Simon. “The Function of Judicial Dissent in Indonesia’s Constitutional Court.” *Constitutional Review* 4, no. 1 (2018).
- Chandrachud, Abhinav. “The Many Meanings of Constitutional Morality.” *SSRN*, January 18, 2020. <https://ssrn.com/abstract=3521665>.
- Dicey, A.V. *Pengantar Studi Hukum Konstitusi-Terjemahan [Introduction to Constitutional Law Studies - Translation]*. Bandung: Nusa Media, 2015.
- Dixon, R., and A. Stone. “The Australian High Court and the Relationship between Appeals and References.” *Sydney Law Review* 27, no. 4 (2005).

- Dixon, Rosalind, and David Landau. *Abusive Constitutional Borrowing: Legal Globalization and the Subversion of Liberal Democracy*. Oxford: Oxford University Press, 2021.
- Dworkin, Ronald. *Freedom's Law: The Moral Reading of the American Constitution*. Cambridge, MA: Harvard University Press, 1996.
- Eisgruber, Cristopher L., and Lawrence G. Sager. "Religious Liberty And The Moral Structure Of Constitutional Rights." *Cambridge University Press Legal Theory* 6 (2000): 253–68.
- Falaakh, Mohammad Fajrul. *Beberapa Pemikiran Untuk Revisi UU Komisi Yudisial Dalam Komisi Yudisial [Some Thoughts on the Revision of the Judicial Commission Law Within the Judicial Commission]*. In *Bunga Rampai Refleksi Satu Tahun Komisi Yudisial RI [A Compendium of Reflections on the First Year of the Judicial Commission of the Republic of Indonesia]*. Jakarta: Komisi Yudisial.
- Fleming, James E. "Fidelity to Our Imperfect Constitution." *Fordham Law Review* 65, no. 4 (1997): 1335–55.
- Gadamer, Hans Georg. *Kebenaran Dan Metode [Truth and Method]*. Translated. Yogyakarta: Pustaka Pelajar, 2010.
- Greenwood-Reeves, J. "He Democracy Dichotomy: Framing the Hong Kong 2019 Street Protests as Legitimacy Counterclaims against an Incoherent Constitutional Morality." *Asia-Pacific Journal on Human Rights and the Law* 21, no. 1 (2019): 35–62. <https://doi.org/10.1163/15718158-02101003>.
- Hardiman, F. Budi. *Deliberative Democracy*. 3rd ed. Yogyakarta: PT Kanisius, 2023.
- International Commission of Jurists. *Judicial Accountability: A Practitioner's Guide No. 13*. Geneva, Switzerland: International Commission of Jurists, 2016.
- Isra, S., and F. Amsari. "Perubahan Konstitusi Melalui Tafsir Hakim [Constitutional Amendments through Judicial Interpretation]." *Bphn. Go. Id*, 2019. http://bphn.go.id/data/documents/makalah_fgd.rtf.

- J, Gireesh Kumar, and Arjun Philip George. "Constitutional Morality and Its Oracle." *PalArch's Journal of Archaeology of Egypt / Egyptology* 18, no. 08 (2021): 4309–19.
- Khurshid, Salman. *Judicial Review: Process, Powers, and Problems*. Cambridge: Cambridge University Press, 2020.
- Kumar, Ajay. "Two Different but Same Perspectives on Constitutional Morality." *ILI Law Review* Winter 2022: 258–75.
- Lailam, Tanto. "Membangun Constitutional Morality Hakim Konstitusi di Indonesia [Building Constitutional Morality of Constitutional Judges in Indonesia]." *Jurnal Penelitian Hukum De Jure* 20, no. 4 (2020): 511–29.
- Levitsky, Steven, and Daniel Ziblatt. *How Democracies Die*. New York: Viking, 2018.
- Magnis-Suseno, Franz. "Machiavelli: Guru Benar Atau Guru Konyol [Machiavelli: A True Teacher or a Foolish Teacher?]" In *Jika Rakyat Berkuasa Upaya Membangun Masyarakat Madani Dalam Kultur Feodal [If the People Hold Power: Efforts to Build a Civil Society within a Feudal Culture]*, edited by Tim MUALA. Bandung: Pustaka Hidayah, 1999.
- Mahkamah Konstitusi RI. *Naskah Komprehensif Perubahan UUD NRI Tahun 1945, Buku VI, Kekuasaan Kehakiman [Comprehensive Text of the Amendments to the 1945 Constitution of the Republic of Indonesia, Book VI, Judicial Power]*. Jakarta: Mahkamah Konstitusi RI, 2010.
- Marzuki, M. Laica. "Konstitusi Dan Konstitusionalisme [Constitution and Constitutionalism]." *Jurnal Konstitusi* 7, no. 4 (2016): 001–008. <https://doi.org/10.31078/jk741>.
- Marzuki, Peter Mahmud. *Penelitian Hukum [Legal Research]*. Jakarta: Prenada Media, 2005.
- Melero, Mariano C. "Weak Constitutionalism and the Legal Dimension of the Constitution." *Global Constitutionalism* 11, no. 3 (November 2022): 494–517. <https://doi.org/10.1017/S2045381722000077>.

- Mochtar, Zainal Arifin. *Kekuasaan Kehakiman Mahkamah Konstitusi Diskursus Judicial Activism Vs Judicial Restraint [Judicial Power of the Constitutional Court: A Discourse on Judicial Activism vs. Judicial Restraint]*. Jakarta: PT Rajagrafindo, 2021.
- MPR RI. “Konvensi Gagasan Dan Kesepahaman Tentang Pentingnya Keberadaan Mahkamah Etik [Conventions, Ideas, and Consensus on the Importance of the Existence of an Ethics Court].” Jakarta: MPR RI, August 2020.
- Muchsin. *Kekuasaan Kehakiman Yang Merdeka Dan Kebijakan Asasi [An Independent Judicial Power and Fundamental Policies]*. Jakarta: STIH IBLAM, 2004.
- Noviantika, Tria. *Gagasan Peradilan Etik: Penataan Kelembagaan Penegakan Kode Etik Penyelenggara Negara [The Idea of an Ethics Court: Institutional Arrangement for the Enforcement of the Code of Ethics for State Organizers]*. Master’s thesis, Magister Ilmu Hukum, Universitas Gadjah Mada, 2024.
- Pralampita, Linda Ayu. “Kedudukan Amicus Curiae Dalam Sistem Peradilan Di Indonesia [The Position of Amicus Curiae in the Judicial System in Indonesia].” *Jurnal Lex Renaissance* 5, no. 3 (2020): 558–72.
- Ramadan, Wahyu Aji, Irma Aulia Nusantara, and Tanti Mitasari. “Reformulasi Pengawasan Mahkamah Konstitusi Demi Meningkatkan Efektivitas Penegakan Kode Etik Hakim Konstitusi [Refomulating the Oversight of the Constitutional Court to Enhance the Effectiveness of Enforcing the Code of Ethics for Constitutional Judges].” *Jurnal Studia Legalia: Jurnal Ilmu Hukum* 3, no. 2 (2022): 21–43.
- Rumadan, Ismail, Pri Pambudi Teguh, Zainal Arifin Hoesein, and Arifudin. “Budget Independence of The Supreme Court In The Implementation Of The Functions Of Judicial Power [Independence of the Budget of the Supreme Court in the Implementation of Judicial Power Functions].” *Jurnal Hukum Dan Peradilan* 10, no. 3 (2021): 421–29.

- Scheppele, Kim Lane. "Autocratic Legalism." *The University of Chicago Law Review* 85, no. 2 (2018): 545–84.
- Strong, C.F. *Konstitusi-Konstitusi Politik Modern-Terjemahan [Modern Political Constitutions - Translation]*. Bandung: Nusa Media, 2015.
- Sumardjono, Maria SW. *Bahan Kuliah Metodologi Penelitian Ilmu Hukum [Lecture Materials on the Methodology of Legal Research]*. Edisi Revisi. Yogyakarta: Universitas Gadjah Mada, 2019.
- Triwulan, Titik. "Pengawasan Hakim Konstitusi Dalam Sistem Pengawasan Hakim Menurut Undang-Undang Dasar Negara RI 1945 [Supervision of Constitutional Judges within the Judicial Oversight System According to the 1945 Constitution of the Republic of Indonesia]." *Jurnal Dinamika Hukum* 12, no. 2.
- Wheare, K.C. *Konstitusi-Konstitusi Modern-Terjemahan [Modern Constitutions - Translation]*. Bandung: Nusa Media, 2018.
- Wiryanto. *Etik Hakim Konstitusi: Rekonstruksi Dan Evolusi Sistem Pengawasan [Reconstruction and Evolution of the Oversight System]*. Depok: Rajawali Pers, 2019.
- Wolff, Jonathan. *Pengantar Filsafat Politik (Translated) [Introduction to Political Philosophy]*. Bandung: CV Nusa Media, 2013.