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## FREEDOM OF SPEECH AND THE ROLE OF CONSTITUTIONAL COURTS: THE CASES OF INDONESIA AND SOUTH KOREA

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# FREEDOM OF SPEECH AND THE ROLE OF CONSTITUTIONAL COURTS: THE CASES OF INDONESIA AND SOUTH KOREA

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## Article Info

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## Abstract

*Freedom of speech is a constitutional right that must be protected in a democratic society. However, there is an alarming problem in many countries where governments limit freedom of speech by targeting people espousing views contrary to those of the government. Many free speech cases handled by the Constitutional Courts of Indonesia and Korea demonstrate a gradual decline in the quality of democracy there. This article aims to assess the extent to which the Constitutional Courts' role and responsibilities contribute to the protection of freedom of speech. Through its decisions, the Constitutional Courts in those two countries have contributed to institutionalizing freedom of speech as a permanent fixture of democracy by keeping the state institutions transparent and making the state responsive to public opinion and criticism. Although freedom of speech is not an absolute right and can be limited, the limitation should be done only under strict conditions, where it is required and proportionate. When dealing with freedom of speech cases in any future judgments, the Constitutional Courts should consider the proportionality test against State arguments. This method would allow the Courts to determine the limitation in freedom of speech cases.*

**Keywords:** *freedom of speech, democracy, Constitutional Court, Indonesia, South Korea*

## Abstrak

*Kebebasan berbicara merupakan hak konstitusional warga negara yang harus dilindungi oleh masyarakat yang demokratis. Namun demikian, saat ini terdapat masalah yang mengkhawatirkan di banyak negara, di mana pemerintah secara tidak adil membatasi kebebasan berbicara, seperti menangkap orang-orang yang memiliki pandangan berbeda dengan pemerintah. Kasus-kasus kebebasan berpendapat yang telah ditangani oleh Mahkamah Konstitusi Indonesia dan Korea menunjukkan bahwa terdapat penurunan kualitas demokrasi secara bertahap di kedua negara tersebut. Artikel ini bertujuan untuk menganalisis tentang sejauh mana peran Mahkamah Konstitusi berkontribusi dalam melindungi kebebasan berbicara di Indonesia dan Korea? Melalui putusannya, Mahkamah Konstitusi Indonesia dan Korea telah berkontribusi dalam melembagakan kebebasan berbicara sebagai instrumen penting demokrasi, dengan cara menjaga agar lembaga negara bersikap transparan dan membuat mereka responsif terhadap opini dan kritik publik. Meskipun kebebasan berbicara bukan merupakan hak yang absolut dan dapat dibatasi, pembatasan tersebut harus dilakukan dengan pertimbangan yang ketat dan secara proporsional. Ketika Mahkamah Konstitusi menangani kasus kebebasan berbicara di masa yang akan datang, Mahkamah Konstitusi harus mempertimbangkan uji proporsionalitas terhadap argumen Negara. Metode ini dapat memungkinkan Mahkamah dalam menentukan batasan dalam kasus kebebasan berbicara.*

**Kata Kunci:** *kebebasan berbicara, demokrasi, Mahkamah Konstitusi, Indonesia, Korea Selatan*

## I. INTRODUCTION

As a foundational principle of democratic institutions, freedom of speech<sup>1</sup> creates the space for the exchange of ideas and is essential for other rights as well,<sup>2</sup> including freedom of assembly and the press. To make an effective democracy, freedom of speech facilitates democratic deliberation and contests, such as participation in political decision-making, where citizens can supervise and criticize state institutional activities.

However, the protection of free speech is an essential issue in many countries. Of note is that freedom of speech is very complex and continues to invite challenges. Currently, the principle of free speech is in decline around the world. There is an alarming global risk of democratic backsliding,<sup>3</sup> where governments are unjustifiably limiting freedom of speech by targeting people with contrasting views from the government.<sup>4</sup>

Indonesia is the third-largest democracy in the world.<sup>5</sup> Yet, it is currently experiencing a gradual decline in the quality of its democracy. In this situation, Mietzner found a “deployment of authoritarian innovations in Indonesia,” where the elite have collectively issued illiberal initiatives.<sup>6</sup> A similar situation is found in South Korea, which is also widely considered a well-functioning democracy.<sup>7</sup> Haggard and Jong-sung identified several problems there, including defamation, limitations on freedom of speech, restrictions related to the internet, and the use of state power to control the media.<sup>8</sup>

Even though the essential components of democracy appear to be under threat around the world, that does not mean there is no reason for optimism. The idea of constitutionalism as the backbone of citizens’ fundamental rights must be protected to the greatest possible extent while governmental limitations of those rights must be limited as much as possible.<sup>9</sup>

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<sup>1</sup> The term “freedom speech” and “freedom of expression” are sometimes used synonymously. But “freedom of expression” includes any act of seeking, receiving, and giving information. See Article 19 of the Universal Declaration of Human Rights (UDHR) and Article 19 of the International Covenant on Civil and Political Rights (ICCPR).

<sup>2</sup> Emily Howie, “Protecting the Human Right to Freedom of Expression in International Law,” *International Journal of Speech-Language Pathology* 20 no. 1 (2018): 12-15.

<sup>3</sup> Ginsburg and Huq describe that there are two models of democratic decay: “authoritarian reversion”, a quick and near-complete collapse of democratic institutions, and “constitutional retrogression”, a democratic decline in more subtle. See Aziz Z. Huq and Tom Ginsburg, “How to Lose a Constitutional Democracy,” *UCLA Law Review* 65 no. 1 (2018): 78-169.

<sup>4</sup> This situation is happening not only in a democratic transition state but also in a stable democratic state. The example countries that passed through the democratic transition period and recently experienced a decline in democratic quality, such as Turkey, Poland, and Russia. Whereas, the country that has a stable democracy and experienced democratic instability, such as in the United States after the presidential election in 2016. See Tom Ginsburg and Aziz Z. Huq, *How to Save a Constitutional Democracy* (Chicago: University of Chicago Press, 2018).

<sup>5</sup> Within the same group as the United States of America and India, Indonesia is the third-largest democracy in the world.

<sup>6</sup> Marcus Mietzner “Authoritarian Innovations in Indonesia: Electoral Narrowing, Identity Politics and Executive Illiberalism,” *Democratization* (2019): 1-16.

<sup>7</sup> Kyu Ho Youm, “The Constitutional Court and Freedom of Expression,” *Journal of Korean Law* 1 (2001): 39.

<sup>8</sup> Stephan Haggard and Jong-Sung You, “Freedom of Expression in South Korea,” *Journal of Contemporary Asia* 45 no. 1 (2014): 1-13.

<sup>9</sup> Youm, “The Constitutional Court” p. 56.

Korea and Indonesia are countries with established Constitutional Courts as part of a constitutional-reform movement from the totalitarian government to democracy.<sup>10</sup> In this context, the Constitutional Court essentially functions as a guardian of the Constitution, democracy, and fundamental rights. It must come to play a central role to ensure that the Constitution is adhered to by all state institutions. There will be consistency and harmonization in the drafting of legislation and state policies by enshrining the Constitution as the supreme law of the land, especially in keeping state institutions transparent and responsive to public opinion and criticism.<sup>11</sup>

Besides the background similarities of their constitutional courts, according to Duke University Professor of Law and Political Science Emeritus Donald L. Horowitz, “many constitutional courts make invaluable contributions to the establishment and maintenance of democratic institutions.”<sup>12</sup> The Constitutional Courts of Indonesia and Korea have issued important decisions regarding the maintenance of the constitutional democratic state.<sup>13</sup> There are similarities and differences between the two.

The focus of this article is to analyze problems and cases concerning the protection of freedom of speech in both countries. Then we will examine to what extent their respective Constitutional Courts contribute to the protection of freedom of speech. The study is conducted through a case analysis, which analyzes some of their Constitutional Courts’ most groundbreaking decisions.

## II. FREEDOM OF SPEECH AND THE ROLE OF CONSTITUTIONAL COURTS

The protection of fundamental citizens’ rights means that when a violation of the Constitution occurs, citizens, as the rights holders, must be provided legal remedies to maintain their rights as guaranteed by their Constitutions.<sup>14</sup> This guarantee is established by various legal instruments and judicial institutions to ensure the protection of fundamental rights by the state’. The establishment of the Constitutional Court in each country is triggered for a variety of reasons. In general, it is initiated by the process of political change from authoritarian power to constitutional democracy.<sup>15</sup> That was the case in both Indonesia and South Korea.

South Korea began its transformation from military-dominated authoritarian regime to democracy with the adoption of its constitution in 1987. It was that transition that provided for the establishment of the CCK.<sup>16</sup> Today, the CCK can look back upon more than 30 years of history since its establishment in 1988.<sup>17</sup>

As the younger constitutional court, compared to South Korea, the CCI is only 17

<sup>10</sup> Andrew Harding, “The Fundamentals of Constitutional Courts,” *International IDEA Constitution Brief* (2017): 2.

<sup>11</sup> The issues of fundamental rights can be solved by constitutional adjudication.

<sup>12</sup> Donald L. Horowitz, “Constitutional Courts: A Primer for Decision Makers,” *Journal of Democracy* 17 no. 4 (2006): 128.

<sup>13</sup> The important decisions related to freedom of speech of the Indonesian and Korean Constitutional Courts will be discussed in the next part.

<sup>14</sup> M. Lutfi Chakim, “A Comparative Perspective on Constitutional Complaint: Discussing Models, Procedures, and Decisions,” *Constitutional Review Journal* 5 no. 1 (2019): 96-133.

<sup>15</sup> M. Lutfi Chakim, “Institutional Improvement of the Indonesian Constitutional Court: Based on Comparative Study with South Korea and Germany,” *Master’s Thesis of Law, Seoul National University*, (February 2020), p. 1.

<sup>16</sup> Chen, *op.cit.*, p. 14.

<sup>17</sup> Constitutional Court of Korea, *Thirty Years of the Constitutional Court of Korea* (Seoul: the Constitutional Court of Korea, 2018).

years, having been established on August 13, 2003. Indonesia's constitutional reform began in 1998 with a regime change from an authoritarian government to a democratic state. During the 32 years of Suharto's regime, the Indonesian Constitution had never been amended.<sup>18</sup> After Suharto's fall in 1998, the People's Consultative Assembly (*Majelis Permusyawaratan Rakyat, MPR*) amended the Constitution four times, in 1999, 2000, 2001 and 2002.<sup>19</sup> The third constitutional amendment of 2001 provided for a Constitutional Court, which was duly established in 2003.

It should be appreciated that the rejection of authoritarianism in the two countries has prompted the demand for democratic state administrations, including the establishment of the constitutional courts. Since the implementation of constitutional adjudication, the Indonesian and Korean courts have contributed important functions to the institutionalization of freedom of speech as a permanent fixture of democracy.

Furthermore, the Constitutional Courts have brought an essential meaning to every constitutional enforcement effort through the implementation of their constitutional power and authority. One of the Courts' jurisdictions is to review laws that run contrary to the constitutions.<sup>20</sup> Through this jurisdiction, Constitutional Courts maintains harmony in the legal system, thus ensuring that legal acts stay within the appropriate boundaries as mandated by the constitution at all times. Another important jurisdiction in many countries, including Korea, is the constitutional complaint,<sup>21</sup> which can be defined as a filing by an individual citizen who considers his or her rights to have as been violated by the act or omission of the public authority.<sup>22</sup>

## A. Constitutional Safeguards and Jurisprudence Regarding Freedom of Speech in Indonesia

With the post-Suharto era, Indonesian citizens have won their long struggle for democracy. Constitutional reform started in 1998 with regime change from an authoritarian state to democracy, and the creation of fundamental principles, such as the separation of powers and the protection of fundamental rights guaranteed by the Constitution. Indonesia's commitment to the promotion and protection of freedom of speech has been demonstrated in its constitution, in Article 28E (3), "Every person shall have the right to the freedom of association and expression of opinion." The following article, 28(f), provides:

Every person shall have the right to communicate and obtain information for the development of his/her personal life and his/her social environment, and shall have

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<sup>18</sup> Soeharto, the second Indonesian president, built the New Order authoritarian regime for the next three decades (1966-1998). During the Soeharto era, there was no presidential term limitation, and constitutional amendments were prohibited.

<sup>19</sup> The People's Consultative Assembly (MPR) is the legislative institution in Indonesia's constitutional system. It consists of the members of the House of Representative (DPR) and the Senate (DPD).

<sup>20</sup> There are two models of judicial review: (1) Decentralized judicial review, commonly known as the American Model, employed in the USA, Australia, Canada, and the Philippines. This model involves concrete review, and the decision is strictly *inter partes*, not *erga omnes*; (2) Centralized judicial review, known as the European model, which applies in Indonesia, South Korea, Austria, Germany, South Africa, Turkey, and many more. Constitutional review via this model can include both concrete and abstract reviews, with the decision of the Constitutional Court an *erga omnes*.

<sup>21</sup> The Indonesian Constitutional Court doesn't have constitutional complaint jurisdiction. See Chakim, "A Comparative Perspective on Constitutional Complaint," pp. 96-133.

<sup>22</sup> I Dewa Gede Palguna, "Constitutional Complaint and the Protection of Citizens the Constitutional Rights," *Constitutional Review* 3 (2017): 2.

the right to seek, acquire, possess, keep, process, and convey information by using all available channels.<sup>23</sup>

These provisions have had a significant impact on the development of constitutional democracy in Indonesia today. The provisions concerning freedom of speech are considered insufficient to protect citizens' rights. For this reason, the CCI has rendered judgment on many statutes related to freedom of speech, as, for example, in the *lese majeste* case, sowing of hatred, defamation, and recently, in a legislative members' legal immunity case. The following sections will discuss the essential constitutional review cases of the CCI related to freedom of speech.

## 1. Defamation and Hate Speech

Indonesia has adopted certain defamation law instruments to protect individuals from assault on their reputations.<sup>24</sup> The CCI has annulled many freedom of speech provisions allowed the Constitution. For example, in a 2006 *lese majeste* case involving a political activist and a lawyer prosecuted for insulting President Yudhoyono and Vice President Jusuf Kalla.<sup>25</sup> The applicant was Eggi Sudjana, accused of violating Articles 134 and 136 of the Criminal Code. In deciding the case, the CCI found that the Criminal Code Articles originated from Dutch colonial rule, known as hate sowing (*haatzaai-artikelen*), which were designed to safeguard the royal family and colonialists from opinion and criticism by citizens.<sup>26</sup> The CCI concluded that the articles violated the Constitution.

Another *hate-sowing* case (2007)<sup>27</sup> concerned the applicants Yusak Pakage and Filep Karma, of Papua. The pair were sentenced to 10 and 15 years in prison, respectively, in April 2005 for raising the Papuan independence flag in Papua province. The applicants were charged under Articles 154 and 155 of the Indonesian Criminal Code, regulating "public expression of feelings of hostility, hatred or contempt towards a public official." The articles prohibit "the expression of such opinions or views through the media." On 17 July 2007, the CCI decided that two provisions on "hate sowing"—Articles 154 and 155 of the Criminal Code—were unconstitutional. The CCI considered the articles could "allow abuse of power," insofar as they can be easily sentenced by public authorities to justify criminalizing citizens simply for criticizing them, when such speech is a fundamental right protected by the Constitution.<sup>28</sup> In a 2008 case of defamation,<sup>29</sup> Risang Bima Wijaya and Bersihar Lubis filed for constitutional review, claiming that provisions in the Criminal Code related to defamation ran contrary to constitutionally-protected freedom of speech. In its legal consideration, the CCI stated that the Indonesian Constitution guarantees the rights and freedoms of citizens, along with state protection.

Based on the constitutional cases mentioned above, *The Lese Majeste* (2006) and *Hate-Showing* (2007) cases positioned citizens whose "crimes" consisted only

<sup>23</sup> The term "all available channels" mentioned in Article 28(f) of the Indonesian Constitution means including expressions on the internet.

<sup>24</sup> The provisions concerning defamation can be found in Articles 310, 311, 315, 317, 318, and 320 of the Criminal Code, and Article 27 of the Law No. 19/2016 on the Amendment to Law No. 11/2008 on Information and Electronic Transactions.

<sup>25</sup> Constitutional Court of Indonesia, "Decision No. 013/PUU-IV/2006," the *Lese Majeste* Case.

<sup>26</sup> Mietzner, pp. 408-409.

<sup>27</sup> Constitutional Court of Indonesia, "Decision No. 6/PUU-V/2007," the *Hate Sowing* Case.

<sup>28</sup> *Ibid.*

<sup>29</sup> Constitutional Court of Indonesia, "Decision No. 14/PUU-VI/2008," the *Defamation* Case.

in their protected opposition to public authorities. The CCI made strong decisions by annulling several provisions in the Criminal Code considered as obstructing the development of democracy in Indonesia.<sup>30</sup>

## 2. Legislators' Legal Immunity Case

The CCI's role in protecting freedom of speech does not stop there. Recently, in a *Legislative Members' Legal Immunity Case* in 2018,<sup>31</sup> the controversy involved several articles in the 2018 Legislative Bodies Law (the MD3 Law) that were regulated by the House of Representatives (*Dewan Perwakilan Rakyat, DPR*) members' legal immunity from public criticism and criminal investigation. Not long after the enactment of the MD3 Law, a number of legal academics and civil society organizations lodged applications to review the constitutionality of several provisions contained within.

The enactment of certain controversial articles in the MD3 Law was considered back in the New Order period. They made DPR seem a superpower institution in violation of the principles of democracy. Less than six months after the applications were lodged,<sup>32</sup> the CCI decided to partially grant the applications. The Constitutional Court annulled several provisions in the MD3 Law, particularly Article 73 on the forced summoning of citizens, Article 122 on the criminalization of critics to the DPR, and Article 245 on the DPR immunity. Based on these Constitutional Court decisions, Indonesian citizens no longer need worry they will be criminalized should they criticize members of Parliament.

## B. Freedom of Speech in Korea: Constitutional Safeguards and Jurisprudence

Chapter II of the Korean Constitution contains the constitutional rights and duties of Korean citizens. It assures human dignity, the right to equality, personal liberty, civil and political rights, socioeconomic rights, and other important fundamental citizen rights. Among the fundamental rights protected by the Korean Constitution are freedom of speech and the press, and freedom of assembly and association, as enshrined in Article 21:

(1) All citizens shall enjoy freedom of speech and the press, and freedom of assembly and association. (2) Licensing or censorship of speech and the press, and licensing of assembly and association shall not be permitted. (3) The standards of news service and broadcast facilities and matters necessary to ensure the functions of newspapers shall be determined by Act. (4) Neither speech nor the press shall violate the honor or rights of other persons nor undermine public morals or social ethics. Should speech or the press violate the honor or rights of other persons, claims may be made for the damage resulting therefrom.<sup>33</sup>

Even though the Korean Constitution clearly protects the free speech of citizens, exercising that freedom cannot be abused to violate the reputation and privacy of

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<sup>30</sup> Pan M. Faiz, "The Protection of Civil and Political Rights by the Constitutional Court of Indonesia," *Indonesia Law Review* 6 (8 January 2016): 166-167.

<sup>31</sup> Constitutional Court of Indonesia, "Decision No. 16/ PUU-XVI/2018," the Legislative Members' Legal Immunity Case.

<sup>32</sup> The CCI decision No. 16/ PUU-XVI/2018 was announced on Thursday, 28 June 2018.

<sup>33</sup> Korea, *the Korean Constitution*, Art. 21.



other citizens.<sup>34</sup> Therefore, the State allows the possibility to limit the rights of citizens as long as the limitation meets strict requirements.

The CCK has used Article 21 of the Constitution as a constitutional basis on several cases related to the protection of freedom of speech, assembly, and press. Some important decisions have regarded demonstrations, freedom of expression on the internet, and motion pictures. The following sections will discuss CCK decisions related to freedom of speech.

### 1. Demonstrations and the Right to Freedom of Speech and Assembly

Demonstrations engage both freedoms of speech and assembly. In the context of protests, people may demonstrate using verbal and/or non-verbal expression, such as raising banners or placards.<sup>35</sup> The CCK has decided several cases concerning demonstrations. For example, in *the Ban on Assembly Near Foreign Diplomatic Mission Case* (2003), the CCK said that prohibiting outdoor assembly within 100 meters from a foreign diplomatic mission is unconstitutional, as it imposes an excessive restriction on freedom of assembly.<sup>36</sup>

Similar cases related to freedom of assembly can be found in *The Ban on Outdoor Assembly Adjacent to a Courthouse* (2005) and (2018). There are different decisions in these cases. In 2005, the CCK argued that the ban on outdoor assembly and demonstrations within 100 meters of the border surrounding courthouses were constitutional,<sup>37</sup> while in the 2018 case, it had a different argument and ruled the ban unconstitutional.<sup>38</sup>

The CCK has also decided the case on *The Prohibition of Assemblies Near the National Assembly* (2009) and (2018). It is striking that in both of these cases, the CCK reached contradictory decisions. In the 2009 case, the CCK decided that the portion of Article 11.1 of the Assembly and Demonstration Act, outlawing demonstrations within a 100-meter radius of the National Assembly, was not in violation of the Constitution.<sup>39</sup> Just as with the courthouse case above, in the 2018 case, the CCK overturned the earlier (2009) decision and said that Article 11.1 of the Assembly and Demonstration Act is in violation of the Constitution.<sup>40</sup>

The 2018 decision aimed to clarify the CCK position with regard to the freedom of assembly. The CCK justices stressed the role of Parliament as the people's representatives where the people must be given the widest possible latitude to express their aspirations, and also explained the situation after the impeachment of former President Park Geun-hye in 2017,<sup>41</sup> where the peaceful culture of assembly

<sup>34</sup> Kh Youm, "Freedom of Expression and the Law: Rights and Responsibilities in South Korea (Expressive Rights in the Information Age)," *Stanford Journal of International Law* 38 no. 1 (2002): 145.

<sup>35</sup> Howie, *op.cit.*

<sup>36</sup> Constitutional Court of Korea, "Decision No. 15-2(B) KCCR 41, 2000 Hun-Ba 67," *The Ban On Assembly Near Foreign Diplomatic Mission Case.*

<sup>37</sup> Constitutional Court of Korea, "Decision No. 17-2 KCCR 360, 2004 Hun-Ka 17," *the Ban On Outdoor Assembly Adjacent to the Courthouse Case.*

<sup>38</sup> Constitutional Court of Korea, "Decision No. 2018Hun-Ba137," *the Ban On Outdoor Assembly Adjacent to the Courthouse Case.*

<sup>39</sup> Constitutional Court of Korea, "Decision No. 2006Hun-Ba20," *the Prohibition of Assemblies Near the National Assembly Case.*

<sup>40</sup> Constitutional Court of Korea, "Decision No. 2013Hun-Ba322," *the Prohibition of Assemblies Near the National Assembly Case.*

<sup>41</sup> Constitutional Court of Korea, "Decision No. 2016Hun-Na1," *the Impeachment Case of Former*



had been settled. According to these arguments, the variability in the Constitutional Court's decisions can be accepted because the Constitution is a living document. In the future, the emergence of new situations may affect the Constitutional Court's decisions on applications for cases related to free speech.

Another case related to freedom of assembly and protest can be found in *The Prohibition of Night-Time Demonstrations Case* (2014). The CCK decided that the prohibition of outdoor assembly and the stage of *any* demonstration, before sunrise or after sunset, is unconstitutional if it completely prohibits night-time demonstrations, as applied to demonstrations from sunset to 24:00 of the same day.<sup>42</sup>

## 2. Freedom of Expression on the Internet

An historic 2012 case dealing with fundamental issues of democracy-related freedom of expression on the internet can be found in *The Case of the Identity Verification System on the Internet*.<sup>43</sup> This case began with provisions regulating real-name verification, which requires internet users to verify their identity to prevent the harmful effects of immoral posts and lewd comments on the internet, as mentioned in the Act on Promotion of Information and Communications Network Utilization and Information Protection.<sup>44</sup>

Based on this provision, some individuals then filed a constitutional complaint to the CCK, arguing that the real-name verification violates several of their fundamental rights, including freedom of speech, right of self-determination on private information, and freedom of the press. The applicants claimed that they desired to post expressions on a number of Korea-based websites, but were unable to do so because of their refusal to consent to real-name verification.<sup>45</sup>

In deciding this case, the CCK argued that the provisions regulating identity verification have a chilling effect on people's self-expression. Thus, real-name verification violates the Constitution by infringing upon the freedom of expression and freedom of the press.<sup>46</sup>

## III.COMPARATIVE REMARKS

The Constitutional Courts' decisions in Indonesia and Korea are part of a wave to restore citizens' freedom to criticize the state, maintain the quality of democracy, and resist the abuse of power by the state. Demands for freedom of speech, however, were displayed more than anything else when Indonesia and Korea moved from authoritarianism to democracy. The following sections will provide a comparative perspective on the protection of freedom of speech by the Constitutional Courts and its limitations in both countries.

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President Park Geun-hye.

<sup>42</sup> Constitutional Court of Korea, "Decision No. 2010 Hun-Ka2, 13 (consolidated)," the Prohibition of Night-Time Demonstration Case.

<sup>43</sup> Constitutional Court of Korea, "Decision No. 24-2(A) KCCR 590, 2010Hun-Ma47 *et al.*, 23 August 2012," the Case of the Identity Verification System on the Internet.

<sup>44</sup> The Act on Promotion of Information and Communications Network Utilization and Information Protection (revised by Act No. 9119 on 13 June 2008).

<sup>45</sup> John M. Leitner, "Anonymity, Privacy, and Expressive Equality: Name Verification and Korean Constitutional Rights in Cyberspace," *Journal of Korean Law* 14 (June 2015): 167-212.

<sup>46</sup> Constitutional Court of Korea, "Decision No. 24-2(A) KCCR 590, 2010Hun-Ma47 *et al.*," *loc.cit.*

## A. Freedom of Speech and the Possibility of Limitation

Freedom of speech is not an absolute right and can be limited under strict conditions where it is required and done in a proportionate manner. Under the International Covenant on Civil and Political Rights (ICCPR), Article 19(3) permits limitations on certain rights, if regulated by law and necessary for the respect of the rights or reputations of others, protection of national security, public order, public health, or morals.<sup>47</sup> Moreover, freedom of speech is usually restricted to correct or prevent harm to the state power. The state's institutional effort in this regard is justified and necessary. In this sense, an important category of limits on freedom of speech was designed to protect the rights and freedoms of others.

In Korea, Article 21 of the Korean Constitution guarantees that citizens have the right to freedom of speech, but such free speech shall not violate the honor or rights of other persons or undermine public morals or social ethics.<sup>48</sup> Limitation of the freedom and rights of citizens are specified in Article 37 (2) of the Korean Constitution:

The freedom and rights of citizens may be restricted by law only when necessary for national security, maintenance of public order, or for public welfare, and even in such cases, the essential aspect of the freedom or right shall not be violated.<sup>49</sup>

Article 37(2) of the Korean Constitution became standard when the CCK dealt with the case of citizens' rights and freedoms. The CCK applied a four-step proportionality test in reviewing laws that limited constitutional rights: (1) the law shall have a legitimate purpose, (2) the means shall be suitable to reach the purpose of the law, (3) the law shall minimally impair fundamental rights, and (4) as a balance test, the public interest protected by the law shall outweigh the seriousness of the infringed right.<sup>50</sup>

Similarly, in Indonesia, the Constitution also provides limitations in the application of freedom of speech. Article 28J stipulates:

*(1) Every person shall have the duty to respect the human rights of others in the orderly life of the community, nation and state; (2) In exercising his/her rights and freedoms, every person shall have the duty to accept the restrictions established by law for the sole purposes of guaranteeing the recognition and respect of the rights and freedoms of others and of satisfying just demands based upon considerations of morality, religious values, security and public order in a democratic society.*<sup>51</sup>

Referring to these provisions, the CCI considered that restrictions on the freedoms of opinion, speech, and expression are permitted by the Indonesian Constitution and international laws because they are intended to respect the rights and freedoms of others. In this context, the *Film Censorship Case* (2007) can be an example, where the CCI argued that film censorship limits freedom of expression. However, such limitations are allowed by Article 28J (1) and (2) of the Indonesian Constitution.<sup>52</sup>

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<sup>47</sup> United Nation General Assembly, *International covenant on civil and political rights (ICCPR)*, New York, 16 December 1966, Art. 19.

<sup>48</sup> Korea, *the Korean Constitution*, Art. 21.

<sup>49</sup> *Ibid.*, Art. 37.

<sup>50</sup> Constitutional Court of Korea, "Panel Discussion Questionnaire" in *Comparative Constitutional Law Society of the Constitutional Court of Korea*, edited by Constitutional Court of Korea (Seoul: Constitutional Court of Korea, 19 June 2018), p. 3.

<sup>51</sup> Indonesia, *the Indonesian Constitution*, Art. 28 J (1) and (2).

<sup>52</sup> Constitutional Court of Indonesia, "Decision No. 29/PUU-V/2007," the Film Censorship Case.

## B. Rights to Protest and the Constitutional Court's Role in Preventing Democratic Backsliding

Based on the Indonesian and the Korean Constitutional Courts' decisions on freedom of speech cases discussed in the previous section. They demonstrate the vital role and responsibilities of the Constitutional Court in keeping the state institutions transparent and making the state responsive to public opinion and criticism.

The CCK decisions can be references; the CCK has decided important cases concerning freedom of speech and assembly. They have taken active steps to provide the widest possible latitude for the public to criticize the government, putting the CCK as an essential judicial institution to prevent democratic backsliding.

Turning to Indonesia, the CCI has become one of the main actors in Indonesian democracy. In the case of *lese majeste*, *hate-showing*, and *legislative members' legal immunity*, the CCI has made strong decisions in constitutional review cases by annulling several provisions in the Criminal Code and statutes related to free speech considered to interfere with the development of democracy in Indonesia. However, the CCI is still has strongly expected to prevent democratic backsliding from further deterioration, especially under the current crop of elite officials. The elite's efforts to harm democracy are still being carried out through the legislative process. In such situations, the CCI has the authority to maintain that no law shall conflict with the Constitution. Therefore, there is a high expectation that the CCI must always strive to improve its role in the protection of the fundamental rights of citizens.

Apart from the important role of the Constitutional Court, the mechanism to deal with the freedom of speech related to the supervision and criticism against the state power should be objective with regard to whatever criticism people throw its way. Criticism is a natural part of the state power, so they should not use their power to criminalize public criticism. Other than that, the important role of the Constitutional Court in protecting freedom of speech merits attention because an independent judiciary is indispensable for making constitutionalism more than an embellishment.<sup>53</sup> The Constitutional Court, when dealing with freedom of speech cases in any future decision, should take into consideration the standards for balancing opposing rights, and apply the proportionality test against the government arguments, which should allow the Constitutional Court to determine the limitation in cases pertaining to the freedom of speech.

## C. Constitutionality of Censorship

Motion pictures have always been regarded as a powerful medium of expression. Justice Clark of the US Supreme Court said, "It cannot be doubted that motion pictures are a significant medium for the communication of ideas."<sup>54</sup> The question then arises, how far film censorship is compatible with freedom of expression in a democratic country? Although Indonesia and South Korea are democratic countries, in terms of film censorship policies, the two countries have different views, influenced by Constitutional Court decisions.

In *the Film Censorship Case* (2007),<sup>55</sup> the CCI declared that film censorship is

<sup>53</sup> Youm, "The Constitutional Court," p. 40.

<sup>54</sup> Singh Gita, "Role of Freedom of Electronic Media in Indian Democracy", (2017), [https://shodhganga.inflibnet.ac.in/bitstream/10603/186548/6/07\\_chapter%202.pdf](https://shodhganga.inflibnet.ac.in/bitstream/10603/186548/6/07_chapter%202.pdf), accessed 1 July 2020.

<sup>55</sup> Constitutional Court of Indonesia, "Decision no. 29/PUU-V/2007," *op.cit.*

constitutional as is the existence of the Indonesia Censorship Board (LSF) listed in the Film Law, insofar as its fulfilment of conditions remains constitutional. Currently, film is regulated and controlled by the state. Law No. 33/2009 on Film stipulates that every film—films made for cinemas, for television, for festival screenings, music video clips, advertisement films) and their forms of publication (posters, billboards)—must go through LSF before being consumed by the Indonesian public. If not, the government has the authority to impose administrative sanctions and ban the product immediately.<sup>56</sup>

Unlike Indonesia, the CCK has a different argument in *The Motion Picture Pre-Inspection Case* (1996).<sup>57</sup> The CCK struck down the requirement of motion picture pre-inspection by the Ethics Committee included in the former Motion Picture Act,<sup>58</sup> considering that “A motion picture is a form of expression, and its production and showing should be protected by Article 21 (1) and (2) concerning freedom of speech and press.”<sup>59</sup>

Even though the CCK emphasized that film censorship is unconstitutional, the recent impeachment case of the former President Park Geun-hye (2017)<sup>60</sup> shows an example of the relationship between motion pictures and freedom of expression. During the investigation and impeachment process, the existence of the blacklist and whitelist with regard to the state’s support for artists was a key element in the corruption and abuse of power scandal. For these reasons, hundreds of South Korean artists sued the now former President and her aides for breach of privacy rights and freedom of expression.<sup>61</sup> This case can be categorized as indirect censorship, which is different and in some ways more sophisticated than direct or traditional censorship. Instead of killing or attacking artists or journalists, restrictions against free speech are invisible to citizens.<sup>62</sup>

The debate over the constitutionality of film censorship refers back to the needs of each particular country. Taking into account the conditions of society, culture and constitutionality, which are influenced by different historical backgrounds, the various conditions that exist in each country bring significant benefits for citizens and protection of their fundamental rights.

#### IV. CONCLUSION

Constitutional cases on the protection of freedom of speech in Indonesia and Korea are part of an historical movement to restore citizen’s rights to criticize the

<sup>56</sup> Luna Hapsari, “Film Censorship in Indonesia: Contestation Between Indonesia Censorship Board (LSF) and The Public in Defining Pornography”, *Thesis of University of Indonesia* (July 2017): 1.

<sup>57</sup> Constitutional Court of Korea, “Decision No. 8-2 KCCR 212, 93 Hun-Ka 13 *et al.*, 4 October 1996,” the Motion Picture Pre-Inspection Case.

<sup>58</sup> Article 12 (1) and (2), Article 13 (1), and Article 32 ( V ) of the former Motion Picture Act (repealed by Act No. 5129 [the Promotion of Motion Pictures Industry Act] on December 30, 1995) require all motion pictures to be evaluated by the Ethics Committee before showing. Failure to do so is punishable by imprisonment of up to two years or a fine of up to five million won.

<sup>59</sup> Constitutional Court of Korea, “Decision No. 8-2 KCCR 212, 93 Hun-Ka 13 *et al.*,” *loc.cit.*

<sup>60</sup> Constitutional Court of Korea, “Decision on (2016Hun-Na1),” the Impeachment Case Against Former President Park Geun-hye,

<sup>61</sup> Joowon Yuk, “Cultural Censorship in Defective Democracy: The South Korean Blacklist Case,” *International Journal of Cultural Policy* 25 no. 1 (2019): 33-47.

<sup>62</sup> Carlos Cortés, “Indirect Censorship: The Silent Enemy,” <https://www.as-coa.org/articles/indirect-censorship-silent-enemy>, accessed 1 July 2020.

state, maintain the quality of democracy, and resist the abuse of power by the state. The demand and desire for free speech have been demonstrated more than anything else by the movement of Indonesia and Korea away from an authoritarianism to democracy.

Based on the analysis of constitutional cases, it is been found that protecting freedom of speech continues to pose challenges. The elite's efforts to cripple democracy are still being carried out through the legislative process. Nonetheless, the Constitutional Courts have demonstrated the power to guarantee that the laws and government actions will not violate the Constitution.

It is, therefore, imperative that the Constitutional Courts must continue to improve their role in guaranteeing this freedom. The constitutional justices shall be independent and impartial in their enforcement of law and justice. The important role of the Constitutional Court in protecting freedom of speech merits attention because an independent judiciary is indispensable to making constitutionalism more than an embellishment.

When dealing with freedom of speech case in any future judgment, the Constitutional Court should consider the proportionality test against the State arguments, which would allow the Constitutional Court to determine the limitation in cases of freedom of speech.

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