

The Role of the Constitutional Court in Protecting the Right to Free Speech in Indonesia and South Korea

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Abstract

This study aims to determine the constitutional court's role in protecting the right to free speech in Indonesia and South Korea. This study uses qualitative research methods. This study shows that freedom of expression is a fundamental right that the state must protect. In this case, South Korea and Indonesia each regulate the right to freedom of expression as a constitutional right in the constitutions of their respective countries. Safeguarding and protecting constitutional rights belongs to the Constitutional Court as the Guardian of the Constitution.

Keywords

The role; constitutional court; protecting the right



I. Introduction

As a fundamental principle of democratic institutions, Creates space for the exchange of ideas and is essential for other rights, including freedom of assembly and the press. To create an effective democracy, freedom of speech facilitates democratic deliberation and contests, such as participation in political decision-making, where citizens can monitor and criticize state institutional activities.

However, protecting free speech is essential in many countries; note that freedom of speech is complex and continues to invite challenges. Today, the principle of free speech is in decline throughout the world. There is a worrying global risk of democratic backsliding. Where the government unjustifiably limits free speech by targeting people with views that differ from the governments.

Indonesia is the third-largest democracy in the world. However, currently, the quality of democracy is experiencing a gradual decline. In this situation, Mietzner finds “the spread of authoritarian innovation in Indonesia,” where elites have collectively launched illiberal initiatives. A similar situation is found in South Korea, which is also widely considered a well-functioning democracy.

Hangar and Jong-sung identified several problems there, including defamation, restrictions on free speech, internet-related limits, and the use of state power to control the media. Even though essential components of democracy appear threatened worldwide, that does not mean there is no reason for optimism. The idea of constitutionalism as the backbone of citizens' fundamental rights must be protected as far as possible, while the government must limit these rights as much as possible.

Korea and Indonesia are countries that established the Constitutional Court as part of the constitutional reform movement from a totalitarian government to a democracy. In this context, the Constitutional Court protects the Constitution, democracy, and fundamental rights. It must play a central role in ensuring all state institutions adhere to the Constitution.

There will be consistency and harmonization in preparing laws, regulations, and state policies by enshrining the Constitution as the state's highest law, especially in maintaining state institutions that are transparent and responsive to public opinion and criticism. Apart from that, there are backgrounds similar to those of the existence of a constitutional court. Many constitutional courts make an invaluable contribution to establishing and maintaining democratic institutions.

The Constitutional Courts of Indonesia and Korea have issued essential decisions regarding maintaining democratic state constitutions. The two have similarities and differences, especially regarding freedom of expression. Therefore, the author wants to see how the roles and responsibilities of the Constitutional Court compare to freedom of opinion in each of these countries.

1.1 Formulation of the problem

1. How do constitutional protection and jurisdiction concern freedom of speech in Indonesia?
2. How Freedom of Speech in South Korea: Constitutional Protection and Jurisprudence.?

II. Review of Literature

2.1 Understanding Freedom of Opinion

Freedom of opinion is the right of every citizen to express the opinions in their minds verbally or in writing, and to be free from everything they say, but with the existing provisions regulated by the government through legislation. The law governing freedom of opinion is regulated through Law Number 9 of 1998 concerning freedom of opinion in public.

Freedom of speech is Freedom is the ability to express oneself without interference or criticism, although in this context it does not apply to cases of spreading hate speech. Equivalent to the former's use of the term "freedom of expression" not only refers to freedom of speech, but also the act of seeking, adopting and transmitting the knowledge or concepts used. Nevertheless, slander and disgust are not permissible forms of communication. This is basically a kind of behavior that has been considered injustice before the law because it violates the rules of decency. Freedom of the press and freedom of expression are both individual freedoms that are not restricted by the national government. (John W, Johnson, 2001)

III. Result and Discussion

3.1 Constitutional Protection and Jurisprudence Concerning Freedom of Speech in Indonesia

After the Suharto rule, Indonesian citizens won their long struggle for democracy. Constitutional reform began in 1998 with a regime change from an authoritarian state to a democracy and the creation of fundamental principles, such as separation of powers and protection of basic rights guaranteed by the Constitution. Indonesia's commitment to promoting and protecting freedom of speech has been proven in its Constitution, in Article 28E (3), "Everyone has the right to freedom of association and expression of opinion."

Article 28 (f) states, "Everyone has the right to communicate and obtain information to develop their personal and social environment, and has the right to seek, obtain, own, store, process and convey information using all types of available channels.

This provision significantly impacts the current development of democratic state administration in Indonesia. Provisions regarding freedom of speech are considered insufficient to protect the rights of citizens. For this reason, the Constitutional Court has assessed many laws related to freedom of speech, for example, defamation, the immunity rights of legislative members, and many others. The following are several cases in court at the Constitutional Court that relate to freedom of speech.

a. Slander and Hate Speech

Indonesia has adopted specific legal instruments for defamation to protect individuals from attacks on their reputation. The Constitutional Court has struck down many free speech provisions that the Constitution allows, for example, in the 2006 case involving a political activist and lawyer who was prosecuted for insulting President Yudhoyono and Vice President Jusuf Kalla. The applicant is Eggi Sudjana, who is accused of violating articles 134 and 136 of the Criminal Code. In deciding the case, the Constitutional Court found that the Criminal Article used came from the Dutch colonial government, known as spreading hatred (*haatzaai alien*), designed to protect the royal family and colonialists from opinions and criticism from citizens. The Constitutional Court then concluded that these articles violated the Constitution.

Another case of hate speech occurred in 2007 involving applicants Yusak Pakage and Filep Karma from 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 Criminal Code, which regulates "public expressions of feelings of hostility, hatred or contempt" towards public officials." These articles prohibit "the expression of opinions or viewing them through the media." On July 17, 2007, the Constitutional Court ruled that two provisions on "sowing hatred"—Articles 154 and 155 of the Criminal Code—were unconstitutional. The Constitutional Court considers that these articles can "allow abuse of power", insofar as they can be quickly punished by public authorities to justify criminalizing citizens simply for criticizing them, such freedom of expression is a fundamental right protected by the Constitution.

In the 2008 defamation case, Risang Bima Wijaya and Bersihar Lubis filed a constitutional review, arguing that the provisions in the Criminal Code relating to defamation conflict with freedom of speech, which the Constitution protects. In its considerations, the Constitutional Court stated that the Indonesian Constitution guarantees these rights and freedoms of citizens, as well as state protection. Based on the constitutional cases mentioned above, the Constitutional Court vigorously protects the security of freedom of expression in Indonesia. This is a form of the role and function of the Constitutional Court in realizing a constitutional court that protects the constitutional rights of citizens by making solid decisions by canceling several provisions in the Criminal Code that are considered to hinder the development of democracy in Indonesia.

b. Legislator's Legal Immunity Case

The role of the Constitutional Court in protecting freedom of speech continues beyond there. Recently, in the 2018 Case of Legal Immunity of Legislative Members, The controversy involved several articles under examination Law Number 17 of 2017 concerning the MPR, DPR, DPRD, and DPD (UU MD3), which regulates the legal immunity of members of the People's Representative Council (DPR) from public criticism and criminal investigations. Not long after the enactment of the MD3 Law, several legal

academics and civil society organizations submitted applications to test the constitutionality of several provisions contained therein.

Implementing specific controversial articles in the MD3 Law set back the development of democracy. They make the DPR seem like a superpower institution in Indonesia by violating democratic principles. Less than six months after the application was submitted, the Constitutional Court decided to grant the application partially. The Constitutional Court annulled several provisions in the MD3 Law, especially Article 73 concerning the forced summons of citizens, Article 122 concerning the criminalization of criticism of the DPR, and Article 245 concerning the immunity of the DPR. Based on the Constitutional Court's decision, Indonesian citizens no longer need to worry about being criminalized if they criticize members of the DPR.

3.2 Freedom of Speech in South Korea: Constitutional Protection and Jurisprudence

Chapter II, Article 21 of the Korean Constitution contains the constitutional rights and obligations of Korean citizens, which guarantee human dignity, the right to equality, personal freedom, civil and political rights, socio-economic rights, and other necessary fundamental rights of citizens. Among the basic rights protected by the Korean Constitution are freedom of speech and press, as well as freedom of assembly and association. Although the Korean Constitution protects citizens' freedom of speech, this freedom has clear limits set out in the Korean Constitution to protect its society. The South

Korean Constitutional Court has used Article 21 of the Constitution as the constitutional basis for several cases concerning safeguard freedom of speech, assembly, and the press. Some critical decisions have considered demonstrations, internet freedom of expression, and moving images. The following section will discuss several South Korean Constitutional Court decisions about freedom of speech.

a. Demonstrations and the Right to Freedom of Speech and Assembly

Demonstrations involve freedom of speech and assembly. In the context of a protest, people can demonstrate using verbal and non-verbal expressions, such as raising banners or placards. South Korea's MK has decided on several cases regarding demonstrations. For example, in the *Ban on Assembly Near Foreign Diplomatic Mission (2003)* case, the South Korean MK said that prohibiting regulations restricting outdoor protests within 100 meters of foreign diplomatic missions was because imposing excessive restrictions on freedom of assembly was unacceptable. Constitutional.

This decision provides space for freedom of expression in South Korea. Removing the prohibition on demonstrations within 100 meters of foreign diplomatic missions provides a space for expression that accommodates freedom of opinion as regulated in Article 21 of the South Korean Constitution. Another case related to freedom of assembly and protest can be found in the case of *The Prohibition of Night-Time Demonstrations (2014)*. South Korea's MK ruled that the ban on outdoor gatherings and any demonstration stage before sunrise or after sunset was unconstitutional. This means the South Korean Constitutional Court allows demonstrations at night and provides space for freedom of opinion regardless of the rules prohibiting certain hours.

b. Freedom of Speech on the Internet

A historic case in 2012 relating to fundamental issues related to democratic freedom of expression can be found in the case of the *Identity Verification System on the Internet*. This case stems from provisions governing accurate name verification, which require internet users to verify their identity to prevent the harmful effects of immoral posts and obscene comments on the internet, as stated in the *Law on Guiding Information and Communication Network Utilization and Information Protection*.

Based on this provision, several individuals then submitted a constitutional review to the South Korean Constitutional Court, arguing that accurate name verification violated fundamental rights, including freedom of speech, self-determination over personal information, and freedom of the press. The petitioners claimed they wanted to post the expressions on several Korea-based websites but could not because they refused to agree to real-name verification.

IV. Research Method

That freedom of expression is a fundamental right that the state must protect. In this case, South Korea and Indonesia each regulate the right to freedom of expression as a constitutional right in the constitutions of their respective countries. Safeguarding and protecting constitutional rights belongs to the Constitutional Court as the Guardian of the Constitution. The two Constitutional Courts have decided several cases that hamper and limit freedom of expression, where the decision of the Constitutional Court in each country has given its role and responsibility in safeguarding the constitutional rights of citizens.

References

- "freedom of speech" and "freedom of expression" are sometimes used synonymously. However, "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).
- Ahmad Fathono. Comparative Study Between the Constitutional Court of the Republic of Indonesia and the Constitutional Court of South Korea. Jember University Faculty of Law Thesis. 2005. Page 35 <https://repository.Un.ac.id/bitstream/handle/123456789/64483/Ahmad%20Fathoni%20000710101033.pdf?sequence=1&isAllowed=y>.
- Article 28 letter E number 3 of the 1945 Constitution of the Republic of Indonesia.
- Article 28 letter f of the 1945 Constitution of the Republic of Indonesia.
- Constitutional Court Decision Number 16/PUU-XVI/2018
- Dae Kyu Yoon. The Constitutional Court System of Korea: The New Road for Constitutional Adjudication. *Journal of Korean Law* Vo. 1 No. 2. 2001. Pg. 7. [https://pravo.hse.ru/data/2012/06/06/1253006988/Journal%20of%20Korean%20Law.2001,%20%D1%81%20%D0%B7%D0%B0%D0%BA%D0%BE%D0%BD%D0%BE%D0%BC%20%D0%BE%20%D0%9C%D0%A7%D0%9F%20\(%D0%B0%D0%BD%D0%B3%D0%BB.\).pdf](https://pravo.hse.ru/data/2012/06/06/1253006988/Journal%20of%20Korean%20Law.2001,%20%D1%81%20%D0%B7%D0%B0%D0%BA%D0%BE%D0%BD%D0%BE%D0%BC%20%D0%BE%20%D0%9C%D0%A7%D0%9F%20(%D0%B0%D0%BD%D0%B3%D0%BB.).pdf).
- Emily Howie, "Protecting the Human Right to Freedom of Expression in International Law," *International Journal of Speech-Language Pathology* 20 No. 2 Pg. 12-15. <https://www.tandfonline.com/doi/pdf/10.1080/17549507.2018.1392612?cookieSet=1>.
- Ginsburg and Huq explain two models of democratic decay: "authoritarian inversion," the rapid and almost complete collapse of democratic institutions, and "constitutional decline," the more subtle decline of democracy. See Aziz Z. Huq and Tom Ginsburg. "How to Lose a Constitutional Democracy," *UCLA Law Review* 65 no. 1. 2018. https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=13666&context=journal_articles.
- Indonesian Constitutional Court Decision Number 013/PUU-IV/2006.
- Indonesian Constitutional Court Decision Number 14/PUU-VI/2008.

- Indonesian Constitutional Court Decision Number 6/PUU-V/2007.
- John W, Johnson. "Peran Meedia Bebas". Demokrasi. Office of International Information Programs U.S. Departement of States. 2001. h. 53.
- Korean Constitution Article 21.
- Kyu Ho Youm, "The Constitutional Court and Freedom of Expression," Journal of Korean Law Vol 1 No. 2. 2001. Pg 39
[https://pravo.hse.ru/data/2012/06/06/1253006988/Journal%20of%20Korean%20Law.2001,%20%D1%81%20%D0%B7%D0%B0%D0%BA%D0%BE%D0%BD%D0%BE%D0%BC%20%D0%BE%20%D0%9C%D0%A7%D0%9F%20\(%D0%B0%D0%BD%D0%B3%D0%BB\).pdf](https://pravo.hse.ru/data/2012/06/06/1253006988/Journal%20of%20Korean%20Law.2001,%20%D1%81%20%D0%B7%D0%B0%D0%BA%D0%BE%D0%BD%D0%BE%D0%BC%20%D0%BE%20%D0%9C%D0%A7%D0%9F%20(%D0%B0%D0%BD%D0%B3%D0%BB).pdf).
- Kyu Ho Youm. The Constitutional Court and Freedom of Expression. Journal of Korean Law Vol.1 No.1. 2001.
<https://sspace.snu.ac.kr/bitstream/10371/85040/1/3.%20The%20Constitutional%20Court%20And%20Freedom%20of%20Expression.pdf>.
- Lidya Suryani. Hate Speech: Definitions and Prohibitions. Short Info Journal Vol 10 No. 6. 2018.
<https://berkas.dpr.go.id/sipinter/files/sipinter-2475-180-20210722101553.pdf>.
- Nicolas Nova. Case study: South Korea's Internet Identity Verification System.
<https://catalystsforcollaboration.org/case-study-internet-identity-verification-system/>
- Nilwan Wize Ananda. Guarantee of Citizens' Constitutional Rights by implementing Constitutional Complaints through the Constitutional Court in the Unitary State of the Republic of Indonesia (Study of the Implementation of Constitutional Complaints in South Korea). Diponegoro Law Review Vol. 5 No. 2. 2016. Page 13.
[file:///C:/Users/Lenovo/Downloads/10809-20974-1-PB%20\(1\).pdf](file:///C:/Users/Lenovo/Downloads/10809-20974-1-PB%20(1).pdf).
- Otto Yudianto. The Character of Pancasila Law in Reforming Indonesian Criminal Law. Journal of Legal Studies Vol. 12 No. 23.
- Peter Mahmud Marzuki. Legal Research. Jakarta. Kencana. 2010.
- Provisions regarding defamation can be found in Articles 310, 311, 315, 317, 318, and 320 of the Criminal Code and Article 27 of Law Number 19 of 2016 concerning Amendments to Law Number 11 of 2008 concerning Information and Electronic Transactions.
- Sunaryati Hartono. Legal Research in Indonesia at the End of the 20th Century. Bandung. Alumni. 1994.
- This situation occurs not only in transitional democracies but also in stable democratic countries. Examples of countries that have gone through a period of democratic transition and have recently experienced a decline in the quality of democracy are Turkey, Poland, and Russia. Countries with stable democracies are experiencing democratic instability, such as in the United States after the 2016 presidential election. See Tom Ginsburg and Aziz Z. Huq
<https://www.law.uchicago.edu/news/how-save-constitutional-democracy>.