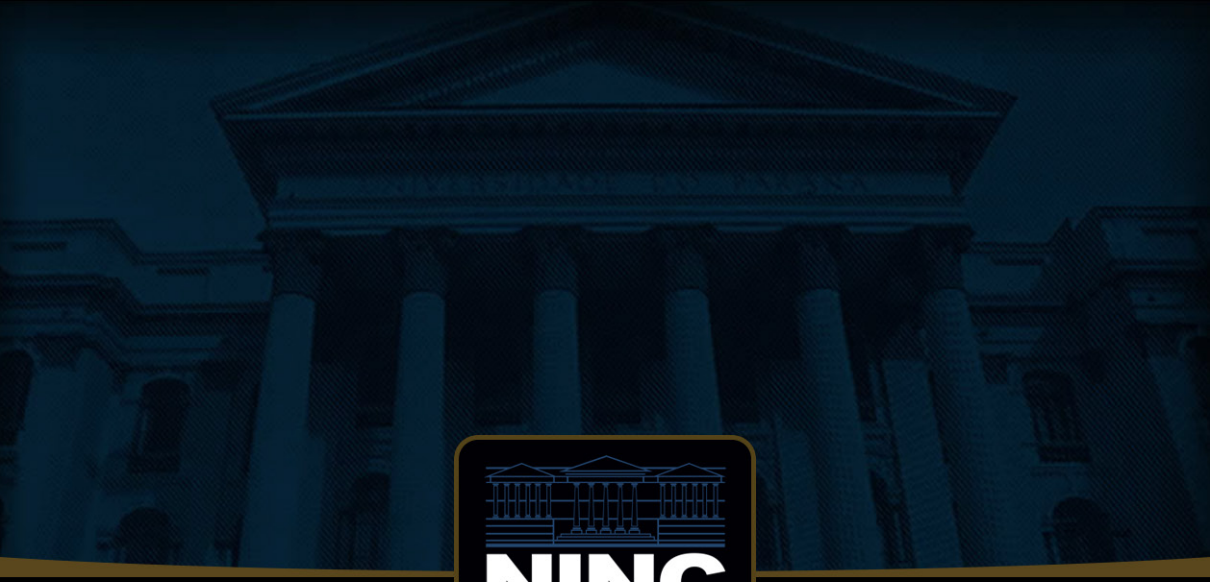

NINC
NÚCLEO DE INVESTIGAÇÕES CONSTITUCIONAIS
UFPR

REVISTA DE INVESTIGAÇÕES CONSTITUCIONAIS

JOURNAL OF CONSTITUTIONAL RESEARCH

VOL. 10 | N. 3 | SETEMBRO/DEZEMBRO 2023 | ISSN 2359-5639

Articles

Revista de Investigações Constitucionais
ISSN 2359-5639
DOI: 10.5380/rinc.v10i3.89341

Strengthening the Legitimacy of the Indonesian Constitutional Court Decision through Supermajority Requirement: Lesson from the South Korean Experience

Fortalecendo a legitimidade da decisão do Tribunal Constitucional da Indonésia através da exigência de maioria qualificada: lição da experiência sul-coreana

TRI SULISTYOWATI [I,*]

[I] Universitas Trisakti (Jakarta, Indonesia)
tri.s@trisakti.ac.id
https://orcid.org/0009-0004-0083-7166

ABDURRACHMAN SATRIO [I,*]

[I] Universitas Trisakti (Jakarta, Indonesia)
abdurrachmans@imr.or.id
https://orcid.org/0000-0002-8248-7072

Recebido/Received: 06.01.2023 / 6 January 2023
Aprovado/Approved: 27.08.2023 / 27 August 2023

Abstract

Criticism toward the legitimacy of the constitutional court decisions in judicial review cases remains to be a common problem for many courts around the world, including the Indonesian Constitutional Court (popularly known as 'MK'). Thus, the Indonesian Constitutional Court was established with its structure designed

Resumo

As críticas à legitimidade das decisões dos tribunais constitucionais em casos de controle de constitucionalidade continuam a ser um problema comum para muitos tribunais em todo o mundo, incluindo o Tribunal Constitucional da Indonésia (popularmente conhecido como 'MK'). Assim, o Tribunal Constitucional Indonésio foi estabelecido com

Como citar esse artigo/*How to cite this article*: SULISTYOWATI, Tri; SATRIO, Abdurrachman. Strengthening the Legitimacy of the Indonesian Constitutional Court Decision through Supermajority Requirement: Lesson from the South Korean Experience. **Revista de Investigações Constitucionais**, Curitiba, vol. 10, n. 3, e246, set./dez. 2023. DOI: 10.5380/rinc.v10i3.89341

Senior lecturer in the Faculty of Law, Universitas Trisakti (Jakarta, Indonesia), where she teached courses such as constitutional law, theory of legislations, and human rights law. Ph.D in Law from Universitas Trisakti. LL.B. and Master of Laws from Diponegoro University, Indonesia. In addition to that, she currently also held a position as a Vice Dean of Cooperation and External Affairs in the Faculty of Law Universitas Trisakti.

Lecturer in the Faculty of Law Universitas Trisakti (Jakarta, Indonesia). LL.B. from Padjadjaran University and LL.M. in Comparative Constitutional Law from Central European University, Vienna. His research interest focuses on the topic of comparative constitutional law and democracy, particularly on the context of Indonesia and Southeast Asia. His works were published in some journals such as Vienna Journal on International Constitutional Law and Australian Journal of Asian Law. In addition to that, he often writes a report about the development of Indonesian constitutional law in notable constitutional law blogs such as Verfassungsblog, Iconnect, or IACL-AIDC Blog.

to minimize the legitimacy problems in its decisions. Although efforts to minimize the problem of legitimacy have been made, the criticism toward Indonesian Constitutional Court's legitimacy remains throughout its development, especially when the institution decides against public opinion. Over the years, the issue of legitimacy became even more complicated; the existing political institutions had expressed their intent to intervene in the Indonesian Constitutional Court through their power to appoint its judges. As such, there is a strong likelihood that the public will not consider the Court Decisions as independent, which in turn may further hamper its legitimacy. To resolve this issue, this paper shall discuss the 'supermajority' mechanism, in which a supermajority vote amongst the judges is required in order for a law to be declared unconstitutional. We use Constitutional Court of South Korea's experience in implementing this mechanism as an example to prove that the adoption of the supermajority requirement has the potential to succeed in strengthening the legitimacy of the decisions of the constitutional courts as well as making it more difficult for the political institutions to capture the court.

Keywords: legitimacy; judicial review; Indonesian constitutional court; supermajority requirement; constitutional court of South Korea.

a sua estrutura desenhada para minimizar os problemas de legitimidade nas suas decisões. Embora tenham sido feitos esforços para minimizar o problema da legitimidade, as críticas à legitimidade do Tribunal Constitucional Indonésio permanecem ao longo do seu desenvolvimento, especialmente quando a instituição decide contra a opinião pública. Com o passar dos anos, a questão da legitimidade tornou-se ainda mais complicada: as instituições políticas existentes manifestaram a sua intenção de intervir no Tribunal Constitucional Indonésio através do seu poder de nomear os seus juízes. Como tal, existe uma forte probabilidade de o público não considerar as decisões do Tribunal como independentes, o que por sua vez pode prejudicar ainda mais a sua legitimidade. Para resolver esta questão, este artigo discutirá o mecanismo de "maioria qualificada", no qual é necessária uma votação por maioria qualificada entre os juízes para que uma lei seja declarada inconstitucional. Utilizamos a experiência do Tribunal Constitucional da Coreia do Sul na implementação deste mecanismo como exemplo para provar que a adopção do requisito da maioria absoluta tem o potencial de conseguir fortalecer a legitimidade das decisões dos tribunais constitucionais, bem como tornar mais difícil para as instituições políticas para capturar o tribunal.

Palavras-chave: *legitimidade; controle de constitucionalidade; Tribunal Constitucional Indonésio; exigência de maioria absoluta; Tribunal Constitucional da Coreia.*

CONTENTS

1. Introduction; **2.** Discussion; **2.1.** The Supermajority Requirement: A Lesson from South Korea; **2.2.** How the Supermajority Mechanism Can Work in Indonesia; **3.** Conclusion; **4.** References.

1. INTRODUCTION

Democratic Legitimacy remains to be a major problem for many constitutional courts across the world. This could be seen from the general view regarding the decisions of the constitutional court, where the court decision—especially that of which invalidates the laws formed by the legislature—are often considered as having counter-majoritarian character since the legislature was elected by the people.[1] The concern led many constitutional courts to be formed with an institutional design specifically aimed to minimize its counter-majoritarian nature.

To combat the counter-majoritarian concerns, the Indonesian Constitutional Court *(Mahkamah Konstitusi,* hereinafter referred to as MK) developed an appointment mechanism for its justices; among the nine Justices of this court, three are elected by

[1] See BICKEL, Alexander M. **The Least Dangerous Branch**: The Supreme Court at the Bar of Politics. New York: Yale University Press, 1962.

the President, three by the legislature, and another three by the Supreme Court. The equal distribution of power to appoint given to the three democratic branches was formulated because during the amendment process of the Indonesian 1945 Constitution – which resulted in the decision to create the Constitutional Court – there were several members of the People Consultative Assembly (MPR) – a legislative institution that amends the Constitution – who questioned the legitimacy of the MK, especially its authority to annul the law made by democratically-elected branches, namely the President and the Legislatures. In their views, it is unjust to give the power to annul a law towards an institution of which was not directly elected by the people.[2] Responding to this criticism, the then-members of the MPR decided to distribute the process of appointing the justices to the aforementioned institutions (including the President and the House of Representatives, who are directly elected), with the hopes that the judges of MK would gain more democratic credentials.

Although the efforts to strengthen MK's legitimacy have been taken—including by designing the process of appointing its justices—criticism toward its legitimacy still persists. The critics are heightened when MK decides not only against public opinion, but also achieved such a decision by a split, with four justices issuing dissenting opinions, as can be seen in the Decision No. 46/PUU-XVI/2016 (popularly known as "LGBT case"). In this case, MK refused to grant the request to expand the interpretation of Article 292 of the Criminal Code – which criminalizes adults who perform obscene acts toward children – which would enable said article to criminalize adults who conduct same-sex relations.[3] In the LGBT case, the MK received a lot of criticism from the public, where the public believed that the majority Justices were wrong and the right one was the opinion made by the dissenters, especially the dissenting opinion made by the then Chief Justice, Arief Hidayat.[4]

To resolve the problem regarding its legitimacy, in this paper we would like to propose one of the mechanisms that can be used to strengthen the legitimacy of the MK, namely by requiring the judges of the MK to meet the supermajority vote (two-thirds majority) in declaring a legislation as unconstitutional. The reason why we propose this mechanism to be adopted in Indonesia is that with the supermajority requirement (6-3), each decision of the MK that invalidate the law will only be made with broad judicial

---

2 See for example the opinion of former MPR member Dimyati Hartono in Wasito, Wiwik Budi (Et. Al). **Naskah Komprehensif Perubahan Undang-Undang Dasar 1945**: Buku VI Kekuasaan Kehakiman. Jakarta: Mahkamah Konstitusi, 2010. p. 567.

3 See SATRIO, Abdurrachman. LGBT Rights and the Constitutional Court: Protecting Rights without Recognizing them. In CROUCH, Melissa (Eds.). **Constitutional Democracy in Indonesia**. Oxford: Oxford University Press, forthcoming 2023. p. 261.

4 RAHADIAN, Lalu. MUI Pertanyakan Putusan MK yang Tolak Kriminalisasi LGBT. **Tirto**, 2017. Available at https://tirto.id/mui-pertanyakan-putusan-mk-yang-tolak-kriminalisasi-lgbt-cBMh, Accessed in 20 November 2022.

consensus,[5] which in turn could help MK to ensure that each decision will have stronger democratic legitimacy and minimize the chance for the public to criticize its decision.

In addition, to strengthen the legitimacy of its decision, another benefit of adopting the supermajority requirement is that it maintains the independence of MK. In the Indonesian context, apart from the issue of legitimacy, it cannot be denied that in recent years there are some attempts from political institutions (notably the House of Representatives) to "capture" MK, which in essence is ensuring that the Justices of the MK will be in favour of the interest of the political institutions. This can be seen in the recent actions of the House of Representatives that replaced Justice Aswanto, with the reason that Aswanto – who was appointed by the House of Representatives – often takes an opposite position to the interest of the legislature.[6] This move certainly threatens the independence of the Constitutional Court, because while the justices of the MK are appointed by democratic institutions, as a judicial body they must make a decision independently and base their reason on the text of the constitution.

In this study, we will discuss the Supermajority requirement practiced by the Constitutional Court of Korea (CCK) as an example of how this mechanism can increase the legitimacy of the constitutional court. Initially, this mechanism was designed to limit CCK's authority, however in its development, this mechanism has succeeded in strengthening the CCK's legitimacy in the eyes of the public and political institutions,[7] because this mechanism can guarantee that important and controversial issues are not decided based on a single vote. Not only that, in some cases this mechanism has even succeeded in strengthening the influence of the CCK toward the political institutions and the public. While the CCK cannot invalidate a law when the decision is split by 5:4, such an occurrence can pressure the legislators to change or revise the law in question.

2. DISCUSSION

2.1 The Supermajority Requirement: A Lesson from South Korea

It must be admitted that the supermajority requirement is not a common mechanism in the practice of the constitutional tribunal.[8] There is only a small number of

---

5 ROZNAI, Yaniv. Introduction: Constitutional Courts in a 100-Years Perspective and a Proposal for a Hybrid Model of Judicial Review. **Vienna Journal on International Constitutional Law**, Vienna, Vol. 14, n. 4, p. 355-377, 2020. p. 373.

6 EDITOR, 'Legislative Overreach', **Jakarta Post**, 2022. Available at https://www.thejakartapost.com/opinion/2022/10/09/legislative-overreach.html, Accessed in 02 November 2022.

7 See HONG, Joon Seok. Signaling the Turn: The Supermajority Requirement and Judicial Power on the Constitutional Court of Korea. **American Journal of Comparative Law**, Oxford, Vol. 67, n.1, p. 177-217, 2019. p. 177.

8 ROZNAI, Yaniv. Introduction: Constitutional Courts in a 100-Years Perspective and a Proposal for a Hybrid Model of Judicial Review. **Vienna Journal on International Constitutional Law**, Vienna, Vol. 14, n. 4, p. 355-377, 2020. p. 369.

jurisdictions which apply this mechanism, such as the Czech Republic which requires its Constitutional Court to reach two-thirds (2/3) votes among its judges (9 of 15) in order to annul the law or international treaties;[9] or the Judicial Yuan in Taiwan that until very recently can only declared a statutes unconstitutional if they fulfill the requirement of two-thirds of the majority from the quorum of two-third of the justices must present in the decision-making forum.[10] Although this mechanism is not a common one, and even has been criticized in one jurisdiction for slowing the productivity of the constitutional court,[11] in recent years there is a growing idea of adopting this mechanism in various constitutional tribunals, including in the United States Supreme Court which is often viewed as the most influential constitutional tribunal in the world. In their paper discussing the problem of decreased legitimacy of the US Supreme Court, Ganesh Sitaraman and Daniel Epps argue that the adoption of the supermajority requirement to annul federal legislation is one of the steps that can be taken to save the Supreme Court from the current crisis of its legitimacy due to the partisan attitude of its judges.[12] In their articles, Sitaraman and Epps also noted that the discourse to impose the supermajority requirement in the decision-making process of the Supreme Court had already emerged since the 1920s.[13]

Meanwhile, Yaniv Roznai highlighted several advantages that can be obtained from the use of supermajority requirement:[14] *First*, he argued that this mechanism will reduce the counter-majoritarian character of judicial review, since it will place the process of invalidating the law as "the last resort"; *Second*, this requirement will ensure that court decisions are made with more deliberative considerations and accommodate more diverse views within the bench; *Third*, this requirement can limit the chances of political institutions to capture the courts through the mechanism for appointing judges. *Fourth*, Roznai believes that the supermajority requirement can increase public

---

9 See Section 13 of the Constitutional Court Act of the Czech Republic 1993.

10 See KUO, Ming-Sung; CHEN, Hui-Wen. Constitutional Review 3.0 in Taiwan: A Very Short Introduction of Taiwan's New Constitutional Court Procedure Act. **Int'l J. Const. L. Blog**, 07 jan. 2022. Available at http://www.iconnectblog.com/2022/01/constitutional-review-3-0-in-taiwan-a-very-short-introduction-of-taiwans-new-constitutional-court-procedure-act/, accessed in 06 January 2023.

11 KUO, Ming-Sung; CHEN, Hui-Wen. Constitutional Review 3.0 in Taiwan: A Very Short Introduction of Taiwan's New Constitutional Court Procedure Act. **Int'l J. Const. L. Blog**, 07 jan. 2022. Available at http://www.iconnectblog.com/2022/01/constitutional-review-3-0-in-taiwan-a-very-short-introduction-of-taiwans-new-constitutional-court-procedure-act/, Accessed in 06 January 2023.

12 SITARAMAN, Ganesh; EPPS, Daniel. How to Save the Supreme Court. **Yale Law Journal**, New Haven, Vol. 129, n. 1, p. 148-206, 2019. p. 148

13 SITARAMAN, Ganesh; EPPS, Daniel. How to Save the Supreme Court. **Yale Law Journal**, New Haven, Vol. 129, n. 1, p. 148-206, 2019. p. 191-192.

14 ROZNAI, Yaniv. Introduction: Constitutional Courts in a 100-Years Perspective and a Proposal for a Hybrid Model of Judicial Review. **Vienna Journal on International Constitutional Law**, Vienna, Vol. 14, n. 4, p. 355-377, 2020. p. 372-373.

confidence in the constitutional court, since it will suppress the number of dissenting opinions, thus reducing the chance for the public to doubt the court decision.

Apart from these advantages, the reason why this mechanism can increase the legitimacy of the constitutional court according to Cristobal Caviedes is due to the nature of this mechanism that: rather than boosting the achievement of the best decision, the requirement operates in a way that prevent the birth of the worst.[15] This is because with a relatively small number of judges (usually not more than 15), an error in the form of a constitutional court declaring law unconstitutional (when it is actually not so) has a much more damaging effect on the constitutional system than an error in the form of not declaring a law unconstitutional (when it is actually so).[16] If the former constitutional error occurs, apart from going against the will of the political institutions elected by the people, this error can only be fixed through a constitutional amendment process which is very difficult to be performed. Meanwhile, if the later error occurs, then the process to fix it can be conducted through an ordinary legislative procedure, which is significantly less arduous.[17]

One example where the supermajority requirement was considered to be successfully implemented could be seen in Korea. Article 113(1) of the Constitution of Korea and Article 23(2) of the Constitutional Court Act stipulate that in declaring unconstitutional laws, deciding impeachment, dissolving a political party, or granting a constitutional complaint, the approval of six from the nine justices of the CCK is required. The reason why the CCK adopted these requirements cannot be separated from the history of this institution; prior to the enactment of the current Constitution of Korea in 1987 (and subsequently the Constitutional Court Act in 1988), Korea already had an institution that also functioned as a constitutional tribunal, namely the Constitutional Council (established in 1972).[18] However, during the authoritarian regime of President Park Chung-hee—who governed the country using his harsh Yushin Constitution—this Council worked more like a servant of the government rather than as an independent institution. This is evidenced by how the Constitutional Council never declared any

---

15 CAVIEDES, Cristóbal. A core case of supermajority rules in constitutional adjudication. **International Journal of Constitutional Law**, New York, p. 1-45, Forthcoming 2022. Available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3919335. Accessed in 25 November 2020. p. 14.

16 CAVIEDES, Cristóbal. A core case of supermajority rules in constitutional adjudication. **International Journal of Constitutional Law**, New York, p. 1-45, Forthcoming 2022. Available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3919335. Accessed in 25 November 2020. p. 14.

17 CAVIEDES, Cristóbal. A core case of supermajority rules in constitutional adjudication. **International Journal of Constitutional Law**, New York, p. 1-45, Forthcoming 2022. Available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3919335. Accessed in 25 November 2020. p. 25.

18 YUN, Jeong-In Yun. Constitutional Review Complaint as an Evolution of the Kelsenian Model. **Vienna Journal on International Constitutional Law**, Vienna, Vol. 14, n. 4, p. 423-446, 2020. p. 426.

legislations unconstitutional during Park's Period,[19] and the supermajority requirement is one of the instruments used by the Park Chung-hee regime to limit the role of the Constitutional Council.[20] For this reason, when the CCK was later established while maintaining some of the basic institutional structures previously used by the Constitutional Council such as the supermajority requirement, many observers were initially skeptical or had low expectations toward CCK's role in Korean politics. Many even doubted that CCK will exercise its power to declare a legislation unconstitutional.[21]

However, in practice, the CCK succeeded in surprising many observers with their ability to play a very important role in Korean constitutional politics. The CCK has succeeded to annul many legislations which are the legacy of past authoritarian regimes.[22] For example, in 1992 the CCK invalidated Article 19 of the National Security Act (NSA), which was often used to suppress the opposition by the previous authoritarian regimes that ruled Korea before 1987. The CCK reasoned that such an Article contradicted the right to a speedy trial guaranteed by the Constitution, since the article allowed for longer pre-trial detention for those accused of particular crimes, notably political crimes.[23]

The influential role of the CCK certainly refutes the initial assumption that the supermajority requirement will weaken the institution, as evidenced by its success in invalidating hundreds of unconstitutional laws. In an article written in 2019, Joon Seong Hook argued that this requirement became one of the factors that strengthened the CCK's influence on the Korean constitutional system. Through its majority decision of 5:4, the CCK —without necessarily invalidating the law—can give a signal to legislators to repeal or amend the law they have reviewed. Despite still operating, the law that survived the 5:4 decisions would often suffer from reduced legitimacy in the eyes of the public.[24] Seong Hook even argued that in sensitive cases, the 5:4 decision can bring unintended consequences to promote social and political change without giving the impression that the CCK is acting too politically or intervening too much in the domain of political institutions.[25]

---

19 HONG, Joon Seok. Signaling the Turn: The Supermajority Requirement and Judicial Power on the Constitutional Court of Korea. **American Journal of Comparative Law**, Oxford, Vol. 67, n.1, p. 177-217, 2019. p. 183.

20 Ibid, 193. HONG, Joon Seok. Signaling the Turn: The Supermajority Requirement and Judicial Power on the Constitutional Court of Korea. **American Journal of Comparative Law**, Oxford, Vol. 67, n.1, p. 177-217, 2019. p. 193.

21 HONG, Joon Seok. Signaling the Turn: The Supermajority Requirement and Judicial Power on the Constitutional Court of Korea. **American Journal of Comparative Law**, Oxford, Vol. 67, n.1, p. 177-217, 2019. p. 183.

22 GINSBURG, Tom. Constitutional Courts in New Democracies: Understanding Variation in East Asia. **Global Jurist**, Turin, Vol. 2, n. 1, p. 1-24, jul. 2002. p. 7.

23 GINSBURG, Tom. Constitutional Courts in New Democracies: Understanding Variation in East Asia. **Global Jurist**, Turin, Vol. 2, n. 1, p. 1-24, jul. 2002. p. 8.

24 HONG, Joon Seok. Signaling the Turn: The Supermajority Requirement and Judicial Power on the Constitutional Court of Korea. **American Journal of Comparative Law**, Oxford, Vol. 67, n.1, p. 177-217, 2019. p. 205.

25 HONG, Joon Seok. Signaling the Turn: The Supermajority Requirement and Judicial Power on the Constitutional Court of Korea. **American Journal of Comparative Law**, Oxford, Vol. 67, n.1, p. 177-217, 2019. p. 205.

Seong Hook then gave an example of the invalidation of Article 241 of the Criminal Act— which criminalizes adultery by a married person and a person who had sex with the married person of which is not said person's spouse—in 2015 as an example that through the supermajority requirement, the CCK can bring social change without creating too much backlash with the public and political institution. Before the 2015 decision, the CCK had already handled several cases concerning adultery, whereas in their previous decisions they always refused to declare adultery provisions as unconstitutional.[26] However, one of their decisions in 2008 played a massive role in encouraging the CCK to declare such a provision to be unconstitutional in 2015. In its 2008 decision, the CCK upheld the constitutionality of the adultery provision, but they decided this case through a split decision, where five judges declared the adultery provision unconstitutional. Although the CCK failed to overturn the adultery provision since it did not reach the quorum of six judges to invalidate the law, it cannot be denied that the effect of this decision succeeded in slowly changing the opinion of the public.[27]

When the 2008 case was decided, around 70% of South Koreans still supported the criminalization of adultery.[28] However, it was the opinion of the five majority judges plus the exposure of this case – which was brought forth since the applicant is a high-profile celebrity – which slowly made room for opposing views on the provision to influence public perception. The implication is that not long after the case was decided, there was an attempt in the legislative branch to abolish the Adultery provision in the Criminal Code. Although this idea failed to sail due to a political deadlock in the legislature, this shows an incremental change in public perception on the issue of adultery. Thus, when the CCK finally decided to invalidate the Adultery provision in 2015 through a supermajority decision (7-2), there was almost no rejection from the public against this decision.[29]

What has been illustrated in the Adultery case shows two important lessons regarding the supermajority requirements, namely: *First*, with the requirement to reach a supermajority vote, constitutional judges will have more freedom when deciding a politically sensitive case. Through majority decisions (5-4), the constitutional court can put pressure to the political institutions or public perceptions without fear that their decision will be viewed as too interfering with the authority of political institutions and

---

[26] Since 1993 until 2015, the CCK has heard five cases about adultery. See HONG, Joon Seok. Signaling the Turn: The Supermajority Requirement and Judicial Power on the Constitutional Court of Korea. **American Journal of Comparative Law**, Oxford, Vol. 67, n.1, p. 177-217, 2019. p. 206.

[27] HONG, Joon Seok. Signaling the Turn: The Supermajority Requirement and Judicial Power on the Constitutional Court of Korea. **American Journal of Comparative Law**, Oxford, Vol. 67, n.1, p. 177-217, 2019. p. 209-213.

[28] HONG, Joon Seok. Signaling the Turn: The Supermajority Requirement and Judicial Power on the Constitutional Court of Korea. **American Journal of Comparative Law**, Oxford, Vol. 67, n.1, p. 177-217, 2019. p. 212.

[29] See LEE, Seokmin. Adultery and the Constitution: A Review on the Recent Decision of the Korean Constitutional Court on 'Criminal Adultery'. **Journal of Korean Law**, Seoul, Vol. 15, n. 2, p. 325-353. jun. 2016. p. 326.

public opinion; *Second,* when the court finally overturns the law through the supermajority requirement, the decision usually has greater legitimacy to the public, because the fewer the number of judges who present dissenting opinion, the fewer arguments that can be used to criticize the decision.

2.2 HOW THE SUPERMAJORITY MECHANISM CAN WORK IN INDONESIA

As explained in the early part of this paper, one of MK's long-standing issues is related to the credibility and legitimacy of their decisions in the public eyes. In recent years, this problem has become more acute; in addition to the increasing amount of politically sensitive cases—which often forces them to make a decision that contradicts the opinion of the public—there have also been efforts by political institutions to fill the MK with the judges who are loyal to them, as perfectly exemplified with recent action by the House of Representative to replace Justice Aswanto in the middle of his term of office under the reason that Aswanto served against their interests in his decisions. Thus, this section would like to explain how the mechanism of supermajority requirement practiced by the CCK can be the answer to overcome the legitimacy problems faced by the MK.

However, before entering our main argument, we want to explain why it is very relevant to use the experience of the CCK as a lesson to improve the MK. When the members of the MPR that amended the 1945 Constitution in 2001 decided to create the MK, they designed the MK by using the CCK as the main reference instead of the European constitutional courts.[30] The choice was deliberate; at that time, there were attempts made by many MPR members to prevent one political faction from dominating the MK in the future. Amid such concern, they decided to design the appointment process of the judges in the MK by sampling the appointment process of the Judges in the CCK which equally distributed the opportunity to each branch of governments such as the President, Legislature, and Judiciary, thus making the court harder to be controlled from a specific faction.[31] Despite this pragmatic interest, the choice to use the CCK as an example to design the MK is also a reasonable step, because both countries have similar political trajectories. Prior to their transition to democracy, both Indonesia and Korea were ruled by military authoritarian governments that did not respect the judiciary.[32] Not only that, these two countries also have a similar pattern of transition

[30] HENDRIANTO, Stefanus. **Law and Politics of Constitutional Courts**: Indonesia and the Search of Judicial Heroes. New York: Routledge, 2018. p. 52-53.

[31] HENDRIANTO, Stefanus. **Law and Politics of Constitutional Courts**: Indonesia and the Search of Judicial Heroes. New York: Routledge, 2018. p. 55.

[32] See POMPE, Sebastiaan. **Indonesian Supreme Court**: A Study of Institutional Collapse. Ithaca: Cornell Southeast Asia Program, 2005; See also HONG, Joon Seok. Signaling the Turn: The Supermajority Requirement

to democracy, where both of them made the transition incrementally through negotiations between members of the previous authoritarian regime and the supporters of democracy. The CCK and the MK were formed as a result of democratic amendments to the constitution, each in 1987 and 2002 respectively.[33]

Even though Indonesia uses the CCK as the main reference in designing the authority as well as the process for appointing the MK judges, not all of the mechanisms contained in the CCK are adopted in the MK. The choice not to apply the supermajority requirement is what distinguishes the trajectory of these two constitutional courts. Although both of these courts played an important role in the successful transition to democracy, it cannot be denied that compared to its Korean counterpart, the MK is often dubbed as an "activist court".[34] This epithet comes from the term "judicial activism" that is used to describe a situation when the court decides a case based on the ideological motivations of its judges rather than the legal norm. This term first appeared in American political literature and is usually associated with controversial cases that are considered to be decided without a strong constitutional basis.[35] In Indonesia itself, this term emerged because the MK made several decisions whose substance was contrary to public opinion, as shown in the LGBT case[36] which contradicted the interests of the government and the House of Representative; the Education Budget case (2009)[37] – when the Constitutional Court declared the 2008 State Budget unconstitutional; and the Omnibus Law case (2021).[38] Additionally, during the leadership of Chief Justice Mahfud, the MK – due to its Chief Justice intellectual vision and political interest – often branded themselves as a pro-social justice court and the saviour of the poor in its decisions.[39]

---

and Judicial Power on the Constitutional Court of Korea. **American Journal of Comparative Law**, Oxford, Vol. 67, n.1, p. 177-217, 2019. p. 181-183.

33 See HOROWITZ, Donald L. **Constitutional Change and Democracy in Indonesia**. Cambridge: Cambridge University Press, 2013; See also GINSBURG, Tom. Confucian Constitutionalism? The Emergence of Constitutional Review in Korea and Taiwan. **Law and Social Inquiries**, Cambridge, Vol. 27, n. 4, p. 763-799, dec. 2002. p. 764.

34 See BUTT, Simon. Indonesia's Constitutional Court: Conservative Activist or Strategic Operator. In: DRESSEL, Bjorn (Eds.). **The Judicialization of Politics in Asia**. New York: Routledge, 2012. p. 98.

35 ROUX, Theunis. Judicial Activism. In **Elgar Encyclopedia on Comparative Law**. New York: Edward Elgar, Forthcoming. Available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3923921, Accessed 18 November 2022. p. 3.

36 In the LGBT Case, the MK rejected the claimant's petition, because they believe that accepting the petition will make them perform judicial activism, due to the MK not having the power to create a new norm. Interestingly, many Islamic organizations see this decision as illegitimate, since it contradicts the majority opinions that want LGBT to be criminalized. See PRATIWI. Priska Sari. MUI: Zina dan LGBT harusnya dipidana. **CNN Indonesia**. 2017. Available at https://www.cnnindonesia.com/nasional/20171215154930-20-262683/mui-zina-dan-lgbt-harusnya-dipidana, Accessed in 08 December 2022.

37 HENDRIANTO, Stefanus. **Law and Politics of Constitutional Courts**: Indonesia and the Search of Judicial Heroes. New York: Routledge, 2018. p. 157.

38 See the Indonesian Constitutional Court Decision No. 91/PUU-XVIII/2020.

39 See HENDRIANTO, Stefanus. **Law and Politics of Constitutional Courts**: Indonesia and the Search of Judicial Heroes. New York: Routledge, 2018. p. 163.

Curiously, unlike the MK, the CCK has never been dubbed as an activist court, even though many of its decisions also contradict public perception or the interests of political institutions. This could be seen in the Adultery Case (2015) when the Court decriminalized adultery acts while adultery is still a sensitive issue for most Koreans; or in the Relocation of Capital City Case (2014) where the CCK invalidated the law that ordered the establishment of a new capital city in Chungcheong, which is the political program of the then President Roh-Moo Hyun. The latter case was very controversial because not only did the CCK oppose the government's most politically-inclined program, they also based its decision not on the text of the constitution but on unwritten norms termed as "customary constitution".[40] The reason why the CCK is rarely called an activist court is very likely due to the existence of the supermajority requirement. In both aforementioned decisions, there are only two dissenting opinions, which in turn minimizes the likelihood of the Court's legitimacy being questioned by the public.

The practice of dissenting itself can be seen as a way to increase the court's transparency, which in turn could strengthen the credibility of the constitutional court in the public eyes.[41] However, if there is a high level of public distrust toward the court, then the publication of dissenting opinions has the potential to bring the opposite effect, for it can give an impression that the argument of the majority judges does not have a strong constitutional basis. In fact, the weakening of court legitimacy from dissenting opinions can even be greater if the court is handling a case that touches sensitive topics for the public. In the context of Indonesia, it should be kept in mind that the level of public trust toward the courts is still quite low, as a result of Indonesia's bad experiences in regards to the pre-democratic era courts which acted more as a yes-man to the authoritarian regime.[42] Thus, when Indonesia transitioned to democracy they created a new and separate constitutional court, rather than giving the ordinary court (the Supreme Court) the power to review the constitutionality of the law. This explains why in the cases where the MK makes decisions that are contrary to public opinion coupled with the split decisions—such as in LGBT Case—criticism toward the legitimacy of the MK also emerged.

Another problem in the MK that can be solved with the supermajority requirement is related to the substance of dissenting opinions they produced. It should be noted that the publication of dissent has been allowed to increase the court's transparency to the public and to show the independence of the judges from their colleagues and

---

40 PARK, Jonghyun. The Judicialization of Politics in Korea. **Asian Pacific Law & Policy Journal**, Honolulu, Vol. 10, n. 1, p. 62-113, jan. 2008. p. 76.

41 KELEMEN, Katalin. Dissenting Opinions in Constitutional Courts. **German Law Journal**, Washington, Vol. 14, n. 8, p. 1345-1371, aug. 2013. p. 1356.

42 POMPE, Sebastiaan. **Indonesian Supreme Court**: A Study of Institutional Collapse. Ithaca: Cornell Southeast Asia Program, 2005.

superiors.[43] Beyond that, the existence of dissent logically can also improve the quality of the court decisions; with the publication of dissent, each judge on the bench will be forced to develop their legal arguments carefully to avoid risks of being critiqued by other judges.[44] The belief that dissenting opinion can improve the quality of the court decisions was even one of the considerations used by the Supreme Court in its Judiciary Reform Strategy blueprint that has been published in 2003,[45] and it was later adopted in all of the Indonesian courts, including the MK.[46]

Even though this idea has a positive purpose, a recent study by Simon Butt reveals that the publication of dissent does not guarantee the improvement of the quality of court decisions.[47] This can be seen in the decisions of the MK; as the court with the highest dissenting rate in Indonesia, when they reach a decision with dissenting opinions, the majority and minority rarely address each other's opinion.[48] Dissenting by the minority justices is often made without specifically mentioning the argument of the majority even if the dissent draws a conclusion that is contrary to the majority opinion. Similarly, the majority justices rarely respond to the opinion of the minority in their decisions, which indicates that the majority judges do not see the need to improve the quality of their arguments despite the existence of a dissenting minority.[49] As argued by Butt, this situation was best exemplified in the first Blasphemy Law case (2009),[50] where in this decision—which upheld the constitutionality of Law No. 1 of 1965 on Blasphemy Law—there was a dissenting from Justice Maria Farid Indrati. In her dissent, Justice Maria considered Art. 1 of the Blasphemy Law as unconstitutional since it discriminated against many religious groups since Article only recognized six official religions in Indonesia.[51] Her argument was a direct contradiction to the majority of justices, who believe that this provision is not discriminatory since it still provides an opportunity for

---

43 KELEMEN, Katalin. Dissenting Opinions in Constitutional Courts. **German Law Journal**, Washington, Vol. 14, n. 8, p. 1345-1371, aug. 2013. p. 1359.

44 KELEMEN, Katalin. Dissenting Opinions in Constitutional Courts. **German Law Journal**, Washington, Vol. 14, n. 8, p. 1345-1371, aug. 2013. p. 1364.

45 BUTT, Simon. The Function of Judicial Dissent in Indonesia's Constitutional Court. **Constitutional Review**, Jakarta, Vol. 4, n. 1, p. 1-26, may. 2018. p. 8.

46 BUTT, Simon. The Function of Judicial Dissent in Indonesia's Constitutional Court. **Constitutional Review**, Jakarta, Vol. 4, n. 1, p. 1-26, may. 2018. p. 10.

47 BUTT, Simon. Why do Indonesian Judges Dissent?, **Australian Journal of Asian Law**, Melbourne, Vol. 23, n. 1, p. 1-19, nov. 2022. p. 1.

48 BUTT, Simon. Why do Indonesian Judges Dissent?, **Australian Journal of Asian Law**, Melbourne, Vol. 23, n. 1, p. 1-19, nov. 2022. p. 7.

49 BUTT, Simon. Why do Indonesian Judges Dissent?, **Australian Journal of Asian Law**, Melbourne, Vol. 23, n. 1, p. 1-19, nov. 2022. p. 8.

50 BUTT, Simon. Why do Indonesian Judges Dissent?, **Australian Journal of Asian Law**, Melbourne, Vol. 23, n. 1, p. 1-19, nov. 2022. p. 9.

51 See the Indonesian Constitutional Court Decision No. 140/PUU-VII/2009, p. 317.

non-recognized religions and beliefs to continue their existence in Indonesia.[52] Despite this fact, the majority and the dissenter refuse to mention each other's argument in their opinion, showing that the existence of the dissenting mechanism has not given any incentive for the judge to improve their argument.

With that problem in mind, we believe that the adoption of a supermajority requirement like what has been practiced by the CCK could solve the problems regarding legitimacy that can arise from the publication of dissenting opinions. Through this mechanism, there will be a guarantee that every judicial review case by the MK will always be decided with the slightest number of dissenting opinions. Apart from that, this requirement can also prevent one political institution from dominating the MK, as demonstrated by the dismissal of Justice Aswanto by the House of Representatives for working against their interests. This action certainly threatens the independence of the MK; as it only needs five judges to declare legislation unconstitutional or not, this means that the Justices who are chosen by the House of Representatives only need to persuade two of their other colleagues in the bench to reject or accept a petition to annul the law. With the supermajority requirement, this potential will certainly be suppressed, because every decision of the Constitutional Court will need the support of at least six of the nine judges.

3. CONCLUSION

The Korean experience reveals how the use of supermajority requirements can strengthen the legitimacy of constitutional court decisions in the eyes of the public. Adopting it in accordance with the Indonesian context could be beneficial to enhance MKs credibility, especially considering the fact that it had attended a growing number of cases that touched on politically sensitive issues, including a case that forces the MK to make an unpopular decision. This paper is confident that requiring the MK to decide with unanimous or supermajority vote among its justices will in turn reduce the opportunity of the public to criticize its decision, which in turn could strengthen the MK legitimacy. In addition to that, by imposing these conditions, any efforts from political institutions to control the MK will also be made increasingly difficult, because even though there is one political institution that has succeeded in securing the votes of the three justices of the MK that it has appointed, their support has only reached the half of the requirements to declare a law unconstitutional.

[52] The Indonesian Constitutional Court Decision No. 140/PUU-VII/2009, p. 290.

4. REFERENCES

BICKEL, Alexander M. **The Least Dangerous Branch:** The Supreme Court at the Bar of Politics. New York: Yale University Press, 1962.

BUTT, Simon. Why do Indonesian Judges Dissent?. **Australian Journal of Asian Law**, Melbourne, Vol. 23, n. 1, p. 1-19, nov. 2022.

BUTT, Simon. The Function of Judicial Dissent in Indonesia's Constitutional Court. **Constitutional Review**, Jakarta, Vol. 4, n. 1, p. 1-26, may. 2018.

BUTT, Simon. Indonesia's Constitutional Court: Conservative Activist or Strategic Operator. In: DRESSEL, Bjorn (Eds.). **The Judicialization of Politics in Asia**. New York: Routledge, 2012.

CAVIEDES, Cristóbal. A core case of supermajority rules in constitutional adjudication. **International Journal of Constitutional Law**, New York, p. 1-45, Forthcoming 2022. Available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3919335.

EDITOR, 'Legislative Overreach'. **Jakarta Post**, 2022. Available at https://www.thejakartapost.com/opinion/2022/10/09/legislative-overreach.html.

GINSBURG, Tom. Constitutional Courts in New Democracies: Understanding Variation in East Asia. **Global Jurist**, Turin, Vol. 2, n. 1, p. 1-24, jul. 2002.

GINSBURG, Tom. Confucian Constitutionalism? The Emergence of Constitutional Review in Korea and Taiwan. **Law and Social Inquiries**, Cambridge, Vol. 27, n. 4, p. 763-799, dec. 2002.

HENDRIANTO, Stefanus. **Law and Politics of Constitutional Courts**: Indonesia and the Search of Judicial Heroes. New York: Routledge, 2018.

HONG, Joon Seok. Signaling the Turn: The Supermajority Requirement and Judicial Power on the Constitutional Court of Korea. **American Journal of Comparative Law**, Oxford, Vol. 67, n.1, p. 177-217, 2019.

HOROWITZ, Donald L. **Constitutional Change and Democracy in Indonesia**. Cambridge: Cambridge University Press, 2013.

KELEMEN, Katalin. Dissenting Opinions in Constitutional Courts. **German Law Journal**, Washington, Vol. 14, n. 8, p. 1345-1371, aug. 2013.

KUO, Ming-Sung; CHEN, Hui-Wen. Constitutional Review 3.0 in Taiwan: A Very Short Introduction of Taiwan's New Constitutional Court Procedure Act. **Int'l J. Const. L. Blog**, 07 jan. 2022. Available at http://www.iconnectblog.com/2022/01/constitutional-review-3-0-in-taiwan-a-very-short-introduction-of-taiwans-new-constitutional-court-procedure-act/.

LEE, Seokmin. Adultery and the Constitution: A Review on the Recent Decision of the Korean Constitutional Court on 'Criminal Adultery'. **Journal of Korean Law**, Seoul, Vol. 15, n. 2, p. 325-353. jun. 2016.

PARK, Jonghyun. The Judicialization of Politics in Korea. **Asian Pacific Law & Policy Journal**, Honolulu, Vol. 10, n. 1, p. 62-113, jan. 2008.

POMPE, Sebastiaan. **Indonesian Supreme Court**: A Study of Institutional Collapse. Ithaca: Cornell Southeast Asia Program, 2005.

PRATIWI, Priska Sari. MUI: Zina dan LGBT harus nya dipidana. **CNN Indonesia**. 2017. Available at https://www.cnnindonesia.com/nasional/20171215154930-20-262683/mui-zina-dan-lgbt-harusnya-dipidana.

RAHADIAN, Lalu. MUI Pertanyakan Putusan MK yang Tolak Kriminalisasi LGBT. **Tirto**, 2017. Available at https://tirto.id/mui-pertanyakan-putusan-mk-yang-tolak-kriminalisasi-lgbt-cBMh.

ROZNAI, Yaniv. Introduction: Constitutional Courts in a 100-Years Perspective and a Proposal for a Hybrid Model of Judicial Review. **Vienna Journal on International Constitutional Law**, Vienna, Vol. 14, n. 4, p. 355-377, 2020.

ROUX, Theunis. Judicial Activism. In **Elgar Encyclopedia on Comparative Law**. New York: Edward Elgar, Forthcoming. Available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3923921.

SATRIO, Abdurrachman. LGBT Rights and the Constitutional Court: Protecting Rights without Recognizing them. In CROUCH, Melissa (Eds.). **Constitutional Democracy in Indonesia**. Oxford: Oxford University Press, forthcoming 2023.

SITARAMAN, Ganesh; EPPS, Daniel. How to Save the Supreme Court. **Yale Law Journal**, New Haven, Vol. 129, n. 1, p. 148-206, 2019.

YUN, Jeong-In Yun. Constitutional Review Complaint as an Evolution of the Kelsenian Model. **Vienna Journal on International Constitutional Law**, Vienna, Vol. 14, n. 4, p. 423-446, 2020.