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REPUBLIK INDONESIA



PROCEEDING CONGRESS AACC

**3RD CONGRESS OF THE ASSOCIATION
OF ASIAN CONSTITUTIONAL COURTS
AND EQUIVALENT INSTITUTIONS**

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PROCEEDING

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A. VERBATIM OF THE 3rd CONGRESS

MASTER OF CEREMONY (MC)

Bismillaahirrahmaanirrahiim. Your Excellency the President of the Republic of Indonesia, Mr. Joko Widodo; Your Excellency Chief Justice of the Constitutional Court of the Republic of Indonesia, President of the Association of Asian Constitutional Courts (AACC); His Excellency Mr. Arief Hidayat. Excellencies, Asian Chief Justices and Justices of the Constitutional Court and Equivalent Institutions, Excellencies Ministers from the Working Cabinet of Indonesia, Members of the Indonesian House of Representatives, Governor of Bali, Mr. I Made Mangku Pastika, Honorable Delegates, observers, international organizations to the Congress, distinguished guests, ladies and gentlemen.

Assalamualaikum warahmatullahi wabarakatuh. May peace be upon us all. Om swastiastu. Welcome to the Island of the Gods, Bali, and welcome to the Official Opening Ceremony of the 3rd Congress of the Association of Asian Constitutional Courts and Equivalent Institutions. This event draws the theme '*Promotion and Protection of the Constitutional Rights of Citizens.*' We hope that the meeting stage here in this paradise island of Bali, Indonesia, will bring fruitful benefits for AACC members and equivalent institutions. Your Excellencies, ladies and gentlemen, to start this August occasion, welcome remarks from the governor of Bali. May I kindly invite Mr. I Made Mangku Pastika.

MR. I MADE MANGKU PASTIKA GOVERNOR OF BALI

Om Swastiastu. Your Excellency the President of the Republic of Indonesia, *Bapak* Joko Widodo; Your Excellency Chief Justice of the Constitutional Court of the Republic of Indonesia, *Bapak* Arief Hidayat; Your Excellencies the Ministers of *Kabinet Kerja*, Republic of Indonesia. Your Excellency the Chief Justices, distinguished participants, ladies and gentlemen.

First of all, allow me to extend my warmest welcome to all of you to Bali -- on behalf of the Bali province government and also the people of Bali -- to this island of Gods, island of Paradise, island of peace and tolerance and democracy and also, last but not least, the island of love. The last title, we got after the pretty woman Julia Roberts, made her film here with the title '*Eat, Pray, Love.*' She decided to go from New York to Italy to have parties, to eat there with the Italian food, but she couldn't find happiness. Then she decided to go to India for praying, practicing yoga and everything, and also couldn't find happiness. And she decided to go to Bali. And here in this island of Gods, island of Paradise, she found her true love here in Bali. So since then, Bali has the new title, the Island of Love.

So I advise you or seniors -- I understand that Chief Justice must be very senior already - - to come again to Bali with your spouses and family to strengthen and renew your love here in Bali because love must be renewed and strengthened, especially after we are

growing old. Ladies and gentlemen, once again I would like to extend my gratitude and thanks to the Committee and to the Congress of the Asian Constitutional Courts and Equivalent Institutions and organizations to hold the Congress here in Bali.

I hope that the spiritual and mystical condition of Bali will give you inspiration and motivation to strengthen your cooperation each together, and also of course we hope you will give -- you'll make the result of this Conference to strengthen our commitment for the constitutional rights of the citizens. And hopefully after this, today is, thursday, tomorrow is Friday, Saturday and Sunday hopefully we will stay, you will lengthen your stay in Bali go around and don't forget to get to buy small gift, small remembrance back as your remembers, ladies and gentlemen hopefully I wish this congress will make a fruitful and benefit to all of the people thank you very much om santhi santhi.

Master of Ceremony (MC)

And now ladies and gentlemen, report by the chief justice of the constitutional court of the Republic of Indonesia, it is my great honour to welcome His Excellency Mr Arief Hidayat

MR. ARIEF HIDAYAT (INDONESIA) CHIEF JUSTICE/CHAIRPERSON

The name of God, Most gracious most benevolent, may peace and prosperity be upon us all, good morning and blessing to all of us, *om suasti ashtu, namu budaya*, your excellency, President of the Republic of Indonesia Mr Ir Joko Widodo, Excellency Chief of Justice and justices of Constitutional courts and equivalent institutions Honourable Head of State, Ministry of working cabinet and state officials, Honourable deputy chief of justice and justices of the constitutional court of Republic of Indonesia, Honourable Governor of Bali province and head of Badung region, distinguish participants of the congress of constitutional courts and equivalent institution, guess ladies and gentlemen, let us praise God Almighty Allah SWT, that today we were given the strength to attend together in the opening ceremony of the 3rd congress of the Association of Asian Constitutional Courts and Equivalent Constitutions abbreviated AACC, which takes place at Nusa Dua Bali in our best of health, in this auspicious occasion first of all I will would like to bid you welcome as well as to extend my gratitude ,my sincerely, my sincere gratitude to all delegates and participant from friendly counties, as well as any participants who are here to attend our invitations to these congress, Mr President, Ladies and Gentlemen the constitutional court of the Republic Indonesia act as the host of the 3rd congress AACC and its capacity as the President of the Association, and the constitutional court of Republic of Indonesia receive the mandate and trust to act as president of the association in the year 2014 when the constitutional court was under the presidential of Doctor Alfah Sulhah who are also here today this morning and the mandate was given during the second congress of AACC which took place in Istanbul Turkey. May we convey as well your Excellency Mr President that since the beginning, the constitutional court of Republic Indonesia takes part in the initiation to establish AACC which was initiated by declaration issued in Jakarta. Since the idea to establish was introduce in 2015 the constitutional court of Republic Indonesia has been actively

involved in the discussion of development and the future of constitutional adjudication in the Asia region. Particularly in global and general and until finally the idea was attained in 2010 with the signing of Jakarta Declaration of the 12 of July 2010. This marks an important event for inter-country cooperation among judicial institutions in particular with the jurisdiction to perform judicial review within the Asia Region, the member of AACC not only consists of constitutional court but also judicial institution that bears the same authority, constitutional authority or at the very least has the power to review constitutionality of law and legislation. Therefore the name association also bears the word equivalent institutions considering that they are variations of models for constitutional adjudication in Asia, I would like also to .. during the establishment AACC was formed by or made up by seven states member, and today we have 16 institutions from 16 countries in Asia which is officially registered and actively participating as member of AACC.

Excellency Mr President, honourable delegates ladies and gentlemen, in this third congress the constitutional court of Republic of Indonesia certainly after the approval from the board of members of AACC bears as the theme promotion and protection of citizen constitutional rights, from the history point of view the promotion and protection of such is an integral part inseparable part.

From the history of establishment of constitutional court in various parts of the world and furthermore the history of constitution in nature in itself is a struggle of human to attain their basic rights.

Let's take a look, the birth of Magna Charta in England in the year 1215 for example, is the manifestation of people demanding their rights which was limited by the power of the king, as well as Virginia Bill of Rights and Declaration of Independence in the year 1776, both contain the freedom for individual from power of state. In France Déclaration des droits de l'homme et du citoyen in the year of 1789 is a reflection of a successful phenomenon of the people struggle opposing an absolute power of the king. Equally important is the Universal Declaration of Human Rights in 1948, which was seen as a reaction of human rights demand which have been in changes for long.

In the development of global constitutionalism the protection and guarantee of human rights are absolute prerequisites for human life, with the objective that all individuals enjoy dignified life in line with the real sense of humanity. That's why, the suggestion to incorporate protection and guarantee of human rights in constitutional articles in many countries can no longer be prevented. In fact, such aspects have become one of the main characteristics of modern constitution, furthermore the protection and guarantee of human rights in the constitutional article is believed to be the fundamental ground to build, or to form the law of a state.

A law that is inspired by a constitutionalism spirit and without such protection and guarantee of human rights a constitution is like a document without a life.

And therefore the constitutional court as the guardian of the constitution, the guardian of the constitution has the mandate, a constitutional mandate to uphold constitution through the mechanism of citizen constitutional right protection, and so for the nature of constitutional court in any country is the same, which is to uphold its function as a protectors of human rights and the protectors of citizen constitutional rights at the same time.

We have a note here that Indonesia has a specification as, a specialty human rights and constitutional rights are incorporated in our five principles, the Pancasila, and it is stated in our 1945 constitution under paragraph 4.

Personally human rights is not universal, but it's particular Indonesia has a strong specific characteristic which is built based our ideology, the 5 principle that we called Pancasila. And that's why the constitutional court of Indonesia is also the guardian of ideology in Indonesia.

Excellency Mr President, delegates, ladies and gentleman the discussion on citizen constitutional rights also talks about human rights, both are interconnected.

To understand both concepts, let's put it this way; Human rights, when it is implemented within international domain is used in international domain, and in domestic context, human rights being implemented is called constitutional rights, as explained before, Indonesia has a very specific characteristic and the justice system, the legal system in Indonesia are build based on ideology on our five principles Pancasila. However the constitutional rights and human rights are protected by constitutional called the human rights that is protected by the constitutional... by the constitution. So not all constitutional rights are human rights, but all human rights are constitutional rights of the citizen. For example, the right of citizen to hold opposed in the government is the citizen's constitutional rights and this right does not apply to everyone, does not apply to non-citizen. For example, in the constitution of United States, for example, that is differences between the people's rights and the citizen's rights. In the normative perspective the definition of constitutional rights in Indonesia can be found in the elucidation of article 51, Law on Constitutional Court. It is stated there that constitutional rights are rights that are governed in 1945 Constitution and therefore this means that all citizen rights govern under the 1945 Constitution can be categorised as constitutional rights without any exception.

Excellency, Mr President, delegates, distinguished ladies and gentleman. It is something that we have understood and recognised that to uphold constitution is a long, struggling, process. The problem that are face by many countries in upholding constitution is sometimes to draw or to drive a fixed script that is relatively abstract and institutionalised at the practical realistic level. The most common argumentation put forward on this, is that the in formes of law involve various design architecture and interpretation of law, the dynamic of political economic and social powers, as well as character of each country. The promotion and protection citizen constitution rights in each country is also different.

The norm in each constitution, however, are equal in substance and also equally noble, which is to provide the promotion and protection to all citizen. The dynamic can be diverse in each country and thus the practical... the practice and the experience are also diverse. Even though there maybe similarities when we compare from one country to other country, but we are here not to talk about which is the most ideal and which isn't, because we understand that such practice, such experience, must have its own ground, argumentation, and strong history basis. In Indonesia for example, the role of the Constitutional Court of the Republic Indonesia in protecting the citizen constitutional right, this far, has been implemented through the review of law or judicial review.

Whenever there are laws that are repressing and revoking the constitutional rights of people, based on request by the people, the Constitutional Court of Republic Indonesia can play its role to protect, to promote, and to rehabilitate the constitutional right of the citizen from such suppression. In Indonesia, the promotion and protection of constitutional right must also be enlighten by the light of God. Indonesia is place not in the secular view, but it has to be enlighten by the light of God Almighty. The justice, we have nine justices at the Constitutional Court. We have Hindu, ehm Christian, Catholic, and when deciding a case we always consider and take the light of God based on the religious and faith uphold by each justices.

Mr President, guest, ladies and gentleman. Through this congress, we will understand and we will learn the interesting variety of practice and experience in many countries. In this event, at the very least there'll be presentation about the implementation, mechanism in each country in promoting and protecting the constitutional court of the citizen. The role of constitutional court and equivalent institution and the challenges as well as difficulties in promoting and protecting constitutional rights of the citizen, considering that is congress is attended by delegates from constitutional courts and equivalent institutions from more than twenty countries, from Asia region and other region, we will for sure will broaden our horizon and enrich our experience and take lesson from other country.

The presentation from the delegates will broaden our horizon and our views as well as to rise or to serve as an inspiration for other country. In addition to that, more strategic cooperation can be taken to address challenges upholding constitution as well as in promoting and protecting constitutional rights of the citizen. Before I end my remark, I would like particularly extend my utmost gratitude to the president of Republic of Indonesia, Mr. Ir. Joko Widodo, for his Excellency's appreciation and support to the constitutional court of Republic Indonesia, and I always remember his words, President of Republic Indonesia will always uphold the constitution and will execute any decision from the constitutional court strongly and accordingly. Thank you as well, thanking him as well that despite his busy schedule to implement tax amnesty in Indonesia, Your Excellency are able to be here together with us at this opening ceremony to all delegates and participant of the congress I would like to congratulate you and wish you luck in following this congress, also an extend of gratitude to Mr. Governor, Bapak Made Mangku Pastika for providing er, space, place, for us to hold this congress in the island of

god, a very beautiful and religious island, thank you. Wa'alaikum salam, warrahmatullahi wabarakatuh. Om, shanti, shanti, om, terima kasih.

MASTER OF CEREMONY (MC)

And now ladies and gentlemen, speech by His Excellency, the President of the Republic of Indonesia, followed by the striking of the gong, marking the official opening of the third congress of the Association of Asian Constitutional Courts and Equivalent Institutions. Please give a warm welcome to His Excellency, Mr. Joko Widodo.

MR. IR. JOKO WIDODO PRESIDENT OF REPUBLIC OF INDONESIA

Bismillahirrohmanirrohim

Assalamualaikum warahmatullahi wabarakatuh

Good morning, peace be upon us all. Om Swastiastu, namo buddhaya. His Excellency Chief Justice of the Constitutional Court of the Republic of Indonesia and Deputy Chief Justice of the Constitutional Court of the Republic of Indonesia. His Excellency Chief Justice and Justice of the Constitutional Courts and Equivalent Institutions. Honorable Heads of Delegation of other Countries. Honorable Heads of Institutions Minister of Kabinet Kerja ambassadors. Governor of Bali, and Badung regent. Distinguished ladies and gentlemen. In the name of people and the government of Indonesia, I would like to say, Welcome to Indonesia

I welcome you to Indonesia. We are a nation that consist of many and we appreciate the diversity and we are full of tolerant and respect each other. We are a country with a majority of the people are moslem and democratic and we are always advancing the economy and the social welfare of the people. We are people that love peace and build trust and uphold the law. So I welcome the role of Indonesia as the host for the third congress of Association of Asian Constitutional Court and Equivalent Institutions today.

Distinguish guest, ladies and gentlemen, the theme for the promotion and protection of citizen's constitutional rights is an important agenda for Indonesia and also the world in general that the country has a responsibility to uphold, to fulfill the constitutional rights of each of its citizens and Indonesia works hard so that the responsibility, the constitutional responsibility of the country can be improved and become a reality. Reform in the constitutional field in Indonesia began in 1999 and has placed the constitutional court in a very strategic position. The constitutional court has the responsibility to safeguard the constitution. The constitutional court has a, the responsibility to give protection and rights to the people for its constitutional rights in its constitution. And that is why the constitutional court of Republic of Indonesia has the authority to test the laws and also the constitution. The Indonesia, in Indonesia we have the authority to take cares and harmonize the use of constitution...

To realize the mechanism and among the field of power in Indonesia and to encertain the right of the.... right of the constitutional right of the people. And I hope in the future that consistency of the law and the constitution will be in line. And it will be

more quality in the law. And time and time again I mention that Indonesia must always increase the quality of its law. And... That Indonesia is not a country of law but it is a country of law. And.. Finally the people of Indonesia awaits and also the other people world also await for the welfare and prosperity of their lives. We have need to have peace and stability. And we have to put forward the marginal people the people under the poverty line and those who are marginalized. And finally what the people hope is the presence of the state... Presence of the country that protects them, country that gives them prosperity, a country that gives...security and also encertain the justice for the people. And I hope this congress will be used as our space to exchange ideas and to strengthen cooperation and I am sure that this congress will make breakthrough to put forward constitutionalism and also the civilization of constitution and also for the upholding of law that give prosperity and sense of security and also a sense of justice to the people. And by saying *Bismillahirrohmanirrohim* the third congress of the association of the Asian Constitutional Court and Equivalent Institution, officially I declare open. Thank you, *Wassalamualaikum warahmatullahi wabarakatuh. Om santhi, santhi santhi om.*

MASTER OF CEREMONY (MC)

The president of the Republic of Indonesia for the striking of the gong. Chief justice of the Constitutional Court of the Republic of Indonesia, his Excellency Mr. Arif Hidayat, Governor Of Bali Mr. Made Mangku Pastika, and Secretary General Of The Constitutional Court Of The Republic Of Indonesia, Mr. M. Guntur Hasan.

The Third Congress of the Association of Asian Constitutional Court and Equivalent Institution is officially opened.

Ladies and gentlemen, we have come to the end of the opening ceremony of The Third Congress of the Association of Asian Constitutional Court and Equivalent Institution. We thank his Excellency the President of the Republic of Indonesia, for gracing us with his attendance. We are honored that his Excellency the President of the Republic Indonesia will conduct a photo session with all Heads of delegation and delegates at the vouyers. Before we begin with the photo session, Ladies and Gentlemen, please rise, his Excellency the President of the Republic of Indonesia will firstly proceed to the holding room for a while, while awaiting preparation for the photo opportunity.

MR. LEE KANG KOOK (KOREA) FORMER PRESIDENT OF THE AACC

Honorable Chief Justice of the Constitutional Court of Indonesia, the President of the Association of Asian Constitutional Court and Equivalent Institutions, Arief Hidayat, President and Chief Justices of comm... Constitutional Courts of the member states and the delegations and the distinguished guests that are here today. It's my prerogative pleasure to be invited to this honorable event and to give congratulatory remarks. I sincerely congratulate the successful hosting of the third Congress of the AACC. As we all

know constitutional civilize nations in the world embrace freedom and the basic rights of humans and the equality and justice. In appreciation of such unive...universality of the constitutional ideology, more international groups of constitutional courts have been formed extensively at the regional level and actively performing their mission. And they now have become a symbol of trust and hope of the world all around the world. Despite its long history and the tradition and the broad cultural heritage in Asia, history of democracy still not long and the principal of ru... rule of law has not taken strong route. For such reasons, constitutional education as a means of protecting the constitution have only recently started out to develop in Asia, individually and independently, according to the needs of each nation. However, as the consensus grows in Asia, that it also needs a regional permanent group that promoting to action and cooperation and where members can exchange experience and ways on constitution educations, judges of constitutional courts in region agree to form a preparatory committee for the AACC at the third seminar of Asian Constitutional Court Judges held in Ulaanbaatar, Mongolia in September of 2005. Through four follower meetings thereafter on July 12th, 2010, launch of AACC was officially dec-- declared by adapting the Jakarta Declaration on the establishment of the... of the Association of Asian Constitutional Courts and Equivalent Institutions. With it in other congress held in Seoul Korea, May 24th 2012, the efforts of the past seven years finally have bound truth. In six years after its birth, the AACC has produced a tremendous accomplishment with the number of its members states more than doubling from seven to sixteen nations, the Association has now progress to an institution that is actively to have influence over more countries in Asia. Increase and enforcement of the exchangeable human and material resources and the cooperation between the members of the AACC have been highly recognized and appraised by many pol... professionals and experts over the world. As the fourth President of the association, who had the privilege of closely watching the inception process of the association, I personally take much pride and joy in the great success of the AACC. I would like to express my deepest gratitude and honor to everyone who worked so hard for the development and the success of the AACC. Under the current state when foundation and solidarity have bee-- have quite been formed in the AACC, launching of the permanent secretariat of the association, which it has been under discussion continuously can be an innovative opportunity for the new products. If the permanent secretariat on the... the cooperation and the close coordination with the term presidency can expand and enhance the exchange of a human and material...

It is over the ideals of the constitution and the constitutional education, not only between constitutional institution in Asia including members states but also among constitutional institutions across the worlds, freedom and the human rights, and the equality and the justice of Asian shall be guaranteed to a great extent. Furthermore, he will be able to make a greater contribution to the development of democracy and the rule of law in Asia and the world as a whole. And accordingly, we have the trust and the hope of the people in Asia and the world. Lastly, i once again would like to express my sincere appreciation to a chief justice Arief Hidayat and everyone else of the constitutional court of Indonesia for the successful hosting of the 3rd congress in this beautiful island of Bali and for their hard work and their warmth welcome. I truly hope the friendship and the relationship started from this event all will be a beautiful and

wonderful memories for a long time and i wish everyone here has the happiness and the best for you and your family. Thank you very much.

MASTER OF CEREMONY (MC)

Thank you for the honorable **Mr. LEE KANG KOOK** for delivering his remarks and now ladies and gentlemen i have the honor to invite the honorable Mr., **GIANNI BUQUICCHIO** president of Venice commission to deliver his remarks. Ladies and gentlemen please give a warmth welcome to **Mr. GIANNI BUQUICCHIO**. (Clapping)

GIANNI BUQUICCHIO PRESIDENT OF VENICE COMMISSION

Honorable Chief Justice of the Constitutional Court of the Republic of Indonesia and the President of the association of Asian constitutional courts, honorable presidents and judges, Ladies and Gentlemen. It is a privilege and the pleasure to take part in the 3rd Congress of the Association of the Asian Constitutional Courts and Equivalent Institution. Kindly hosted by the Constitutional Court of the Republic of Indonesia in this magical place of the Nusa Dua. Before we embark on today's topic, I would like to briefly speak to you about the Venice commission and its relationship with Constitutional Courts and Courts of Equivalent Jurisdiction. Venice Commission is an advisory body of the Council of Europe in the field of Constitutional Law. While it's main activates center on advising states on draft constitution, constitution amendments and para constitutional legislation such as law on constitutional courts or electoral legislation. Venice Commission was always aware that this facts have to be implemented in practice in order to be usable. It was therefore, natural for Venice Commission to turn its attention to Constitutional Courts and the Equivalent Bodies such as Constitutional Councils or Supreme Court as this institutions are where implementation can be accompanied best. The Venice Commission is always in favor of the creation of regional Constitutional Courts networks and has been supporting this structures for the past 25 years. I'm therefore, very pleased to see that the Association of Asian Constitutional Court and the Equivalent Jurisdiction, better known as the AACC has prospered. The cooperation between the AACC and the Venice Commission was officially recognized with the signature of our cooperation agreement in Seoul, in May 2012, over 4 years ago. This agreement gives the AACC members access to our database on constitutional case law called cortexes which contains some 9.000 Constitutional Judgments from all over the world and I call upon all of you to actively contribute to this joint endeavor through your liaison officers of vocal points. because this is not only a showcase of your judgment that can be seen by other courts and the public at large but more importantly, it offers unmatched spectrum of constitutional arguments which provide you with a valuable comparative law basis that could assist you in completing the case before your respective courts. Mr. Chief Justice, Ladies and Gentlemen, seeing the importance of exchanges information and the ideas between Constitutional Courts and Courts with Equivalent Jurisdiction as always been promoted by the Venice Commission, the next logical step.. one networks were in place was to bring them together on a global level, this idea had flourished in Cape Town, South Africa where the first congress of World

Conference of Constitutional Justice took place in January, 2009. It was agreed that among the nearly one hundred Constitutional Court and Courts of Equivalent Jurisdiction that gathered there that WCCJ would promote Constitutional Justice understood as constitutional review that include human rights case law as a key element for democracy, the protection of human rights, and rule of law. When the statute of the World Conference was adopted in 2011, the Asian Constitutional Courts immediately became one of its founding regional group, the 3rd Congress of the World Conference was a very successful event hosted by the Constitutional Court of Korea, in Seoul in September 2014. I hope that we left the pleasure of greeting all of you at the 4th Congress of the World Conference hosted by Constitutional Court of Lithuania from 10th to 13th September 2017, in Vilnius, Lithuania. Distinguish Justice, you've choose timeless topic for this event "the Promotion and the Protection of Constitutional Rights of the Citizen" the protection of fundamental... or human rights is for the most part secured by states through their constitutions, hence constitutional rights and since it is important for the protection of human rights to begin at a domestic level, the constitutional courts role in this context is crucial as a guardian of the supremacy of the constitution. The Constitutional Court protects constitutionally guaranteed rights, it is therefore important that this court be able to carry out its tasks effectively. Fortunately today, we are increasingly witnessing the situation in which undue pressure in place is place on constitutional courts by other branches of powers either by questioning the jurisdiction or by drafting new laws that limit their powers or aim to control their composition. This tests the limit of the constitution and sometimes breaches them, the Venice Commission condemns this type of practice, it runs counter to the model of a democratic state based on rule of law, and governance governed by the principle of the separation of powers. The Venice Commission as adoption in declaration, March of this year, following several cases of undue interference in the world of constitutional courts, in its member states expressing concern of other state of affairs. We have to remember that when other state bodies publicly attack constitutional courts, this institution's independence and neutrality is put at risk. Constitutional Justice is a key component of the check and balances of constitutional democracy. The Venice Commission on the world conference of constitutional justice are ready to support constitutional court where and whenever they are unduly attack by other state powers. Ladies and Gentlemen, individual access to Constitutional Court, a notably the constitutional complain because it is an effective way of protecting these rights is a topic that is very dear to The Venice Commission, for the reason The Venice Commission strongly support the introduction of this type of procedure by constitutional courts. In Europe, the effectiveness of this type of access procedure was confirmed by the European Court of Human Rights Statistics which showed that countries which had introduced the full individual complaint procedure have a lower number of cases before the Strasbourg Court than those that had not. This was also confirmed by the study that The Venice Commission have took in 2010 on individual access to Constitutional Justice, covering the various forms of access to constitutional justice in over fifty countries with the aim of analyzing the merit of various system that exist which we are currently updating, a full individual complaint procedure is all the more necessary in region where there is no regional human rights court as is the case or the moment in Asia. As you know the creation of such court, bringing together like-minded countries to enhance human rights

protection was supported by the world conference in its own communique adopted its 3rd Congress hosted by Constitutional Court of Republic of Korea. Given the heterogeneity of Asia. The establishment of such a court cannot be advanced as an effort for time being. Nevertheless, like-minded countries which are intercept in effective protection of human rights would join in such an endeavor. Honorable Justice, Ladies and Gentlemen, I would like to hand by wishing you a very fruitful dialog and discussions today and tomorrow. And they opt to be able to continue our well-established cooperation in the future. Thank you for your attention.

Ms. Tia (MC)

Thank you very much to the Honorable **Mr. Gianni Buquicchio**, President of the Venice Commission who have given us an insight on the Venice Commission and its relationship with AACC. Before I turn the floor to Hana for the working session, session one. We would like to make announcement. Please kindly check whether you have with you a correct bag with you. Please check whether it is your right bag. Because somebody from the Indonesian delegation, Mr. Edi Praptono is losing his bag, and inside is a red tab Samsung, medicine, as well as cellphone charger, and room key to his room. So, if he cannot find the bag, he cannot enter his room. So, please kindly check whether you have your right bag or not.

Ladies and gentlemen, now we are going to the session one. Mechanism for promotion and protection of citizen's constitutional right. Different perspective from countries, I now hand the floor to Hana.

Ms. HANA (MC)

Thank you Ms. Tia. Now, we shall proceed with the first session of the 3rd Congress of Asian Constitutional Courts and Equivalent Institutional. I would like to invite His Excellency **Mr. Zuhtu Arslan**, of the Constitutional Court of the Republic of Turkey as a chairperson of this session. And the first speaker is His Excellency **Mr. Arifin Zakaria** from Malaysia, second speaker His Excellency **Mr. Gadis Gadzhiev** from Russia, third speaker, His Excellency Mr. Lee Jin Sung from Korea, forth speaker, His Excellency **Mr. Mohammad Achargui** from Morocco, first respondent, His Excellency **Mr. Igor Rogov** from Kazakhstan, and the second respondent, His Excellency **Mr. Twekiat Menakanist** from Thailand. To His Excellency, **Mr. Zuhtu Arslan**, the floor is yours.

**MR. ZUHTU ARSLAN (TURKEY)
CHAIRMAN**

Distinguish participants, Ladies and gentlemen, welcome to the first session of the 3rd Congress of AACC. Before we start, I would like to thank Chief Justice of the Indonesian Constitutional Court, Mr. Arief Hidayat for his warm hospitality. And I would also to thank to staffs of course judges of the Indonesian Constitutional Court for organizing such a wonderful congress. Today and tomorrow we are going to talk about the protection and promotion of the constitutional rights of citizens. Actually, we will talk about not only the rights and liberties of citizens, but also rights and liberties of all

individual. Because rights and liberty are not restricted to citizens only. As you all know in today's law, terrorism remains the most formidable threats to the protection and promotion of constitutional rights. And terrorism affects constitutional rights. Negatively, in two ways. First, it possesses a great danger to protection and promotion of rights by violating the basic rights of individual, like right to live, and um... right to property. As we all know terrorist's activities throughout the world results, result in killing so many innocence civilians. Second, terrorist acts often lead to declaration of states of emergency in democratic countries such as France and more recently Turkey. And constitutional rights are more restricted in times of emergency than in times of normalcy. On this occasion, I'd like to strongly condemn the recent terrorist attacks that took place in Turkey on the 15th and 16th of July. And as the result of this serious and heinous terrorist attacks, about 250 innocent people including civilians -- actually most of them were civilians -- died and more that 2000 people were injured. I want to express my deep sadness and sorrow for those who were killed by the failed cruel perpetrators. May Allah have mercy on their souls.

Finally, I would like to -- thank you very much, thank you very much for your sympathy and understanding for our grief. Terrorism has no territory or nationality therefore we should unite our strength and power to fight against terrorism and any terrorist act by any means we have. Now, after this introductory remarks, I want to focus on the subject of this session, which is '*The Promotion and Protection of Rights Through Different Mechanisms Available before the National Institutions, most notably Constitutional and Supreme Courts.*' The idea of the constitutional justice attempts from the realistic view of power. Lord Acton famously said that "Power tends to corrupt, and absolute power corrupts absolutely." This observation as to the nature of power calls for control of Legislature and Executive powers. Constitutional justice has proved to be the most effective way of protecting constitutional rights through constitutional control of Legislative and Executive branches.

As Mr. Arief Hidayat indicated in his introductory remarks this morning, the Constitutional Courts are seen as the guardians of the Constitution. But, they are also guardians of constitutional rights and liberties. Therefore, the most important institution to protect the rights and liberties of individuals are the Constitutional or Supreme Courts. And what kind of mechanism these courts have in order to promote and protect constitutional rights? I must say that there are two main mechanisms available before us as the Constitutional and Supreme Courts to protect and promote constitutional rights. First, abstract and concrete review of constitutionality of laws enacted by the Parliament. Almost all constitutional courts have the power to annul laws which are contrary to the Constitution and the laws which violate constitutional rights and liberties.

The second effective way of protecting constitutional rights is the mechanism of constitutional complaint, as the President of Venice Commission has indicated a few minutes ago. The adoption of constitutional complaint in different countries, in many countries, in fact turn these Constitutional Courts in to a kind of National Human Rights Courts, charged for protecting and promoting basic constitutional rights. The Turkish Constitutional Court has been doing its best to protect constitutional rights through these two mechanisms. Because as one of the most experienced courts in the world, I'm

as 55 years old Constitutional Court, Turkey's Constitutional Court has been doing its best to protect constitutional rights and liberties in Turkey through these two mechanisms. And ever since the introduction of individual application to the Turkish Constitutional Court, our court has adopted a rights based approach in its jurisprudence giving certain priority to individual rights and liberties.

This morning, Chief Justice Arief Hidayat emphasized the connection between human rights and constitutional rights. As he rightly observed that is here right to observe that constitutional rights are in a way domestication of human rights at international level. I will give you an example of this connection by a reference to the Turkish situation. When we adopted the mechanism of individual application in 2012, we defined the subject material of individual application as the constitutional rights which are at the same time protected by the European Commission on Human Rights. So, in Turkey anybody may appeal to the Turkish Constitutional Court on the grounds that his or her constitutional rights, which also protected by the European Commission on Human Rights, are violated. So, this is a typical example of the relationship between the term or conception of human rights and constitutional rights.

Now, we have in this first session for speakers to talk about the different mechanisms of protecting and promoting constitutional rights, and they will tell us their experience and their model of protecting constitutional rights from their perspective. For speakers from Malaysia, Russian Federation, Korea and Morocco, and we have two respondents from Kazakhstan and Thailand. Now, I will give the floor to Mr. Arifin Zakaria, Chief Justice of the Malaysian Supreme Court. Mr. Zakaria, you have 15 minutes.

MR. ARIFIN ZAKARIA (MALAYSIA)
CHIEF JUSTICE

Bismillahir Rahmanir Rahim, Assalamu'alaikum, and very good morning for everyone. The Honourable Prof. Dr. Arief Hidayat, President of AACC, Chief Justice of the Constitutional Court of the Republic of Indonesia. Mr. Chairman, the Chief Justice of the Honourable Court of the Constitutional Court of Turkey. Honourable Heads of Delegations and Members of the AACC. Ladies and Gentlemen, I am indeed delighted to be given the honour to share Malaysia's perspective on the topic, '*The Mechanism for the Promotion and Protection of Citizen's Constitutional Rights*'. Let me begin with a brief note on the Federal Constitution of Malaysia.

Malaysia is a Federation of thirteen states and the government is headed by *Yang Di-Pertuan Agong*, or His Majesty the King, a constitutional monarch which acts on the advice of the Cabinet in exercising his functions. The government of Malaysia is closely modelled with the Westminster parliamentary system. We have a written Constitution which spells out the functions of the three branches of government, mainly the Executive, Legislative, and the Judiciary. The Constitution or the Federal Constitution is the supreme law of the Federation, and any law passed after the *Merdeka* Day, or Independence Day, which is inconsistent with the Constitution shall to the extent of the inconsistency, be void. This is provided under our Article 4 at the Constitution.

Ladies and Gentlemen, the constitutional rights guaranteed under the Federal Constitution, human rights are universally recognized around the globe, they have been incorporated in the Constitution of various states, they also been the aspirations of various movements and organizations around the world. In Malaysia, human rights is part of our constitutional right, and it's incorporated into part 2 of our Federal Constitution. These are referred to as our fundamental rights and are contained in the following articles.

I'll briefly state the various articles: Personal Liberty, which is in Article 5; Prohibitions Against Slavery and Labor, Article 6 of the Constitution and protections against prospective criminal laws and retrospective trust; Equality Before the Law and the Rights to Equal Protection of the Law, Article 8; Prohibition of Banishment and Freedom of Movement, Article 9; Freedom of Speech, Assembly, and Association in Article 10; Freedom of Religion, Article 11; Rights and Respect for Education, which is Article 12; and finally, Right to Property which is in Article 13.

Now, let me discuss briefly the mechanism that has been put in place in the Constitution, and in the law in upholding and protecting these constitutional rights. Constitutional complaints in Malaysia could be made in various books to the court. The Federal Constitution has specific provisions conferring power on the courts to review legislative and executive actions on the grounds of unconstitutionality under the Federal Constitution. The court should have powers to review and grant public law remedies. The principal notes of Constitutional Complaints may be summarized as follows: One, application for judicial review, which is under our Order 53 of the Rules of Court read by the Court Adjudicator at 1964 and the Specific Relief Act 1950; Two, application for the declaration of the law is invalid as founded in Article 4 in the Federal Constitution; and finally, Thirdly, election petition under Article 118 of the Federal Constitution and also under our Election Offences Act 1954.

We begin briefly with the Judicial Review. The application for judicial review are governed by Order 53. The application must be preceded by an application for leave, made to a judge in chambers. This requires the court to issue what was traditionally known as a prerogative writ, but now are statutorily provided. It's the decisions of the public authorities which are regularly hold up for scrutiny by the courts. Generally, these authorities include Ministers charged with public decision making powers under the rule of law, for example (a) the Minister of Human Resources regarding decisions concerning industrial employment disputes, and recognition or non-recognition of trade unions under the Industrial Relations Act. (b), the industrial court; (c), officers under various legislations charged with decision-making powers concerning a range of matters namely the registration of birth, citizenships, just to name a few; (d), general law enforcement officers of departments like immigration, police, customs, internal revenue, domestic trade, and so forth. Finally, (e) the various disciplinary bodies be it governmental or non-governmental for example Police Disciplinary Boards, Police Service Commission, Public Service Commission, Malaysia Medical Council, Bar Council, universities, and Board of Engineers of Malaysia.

Then we also have bodies like (f) Specialized Tribunals - the Tribunal for Home Buyer's Claims established under our Housing and Development and Licensing Act, and the Tribunal for Consumer Claims. (G) Election Commission, Sports Commission, Securities Commission, and the *Pengurusan Hartanah Berhad*. (H) Security role powers.

Judicial review is a mechanism involving the court's scrutiny over the lawfulness of the powers and duties of those exercising public functions. Generally, it refers to the processes of jurisdiction exercised by the High Court over proceedings and decisions of inferior courts, tribunal, and other bodies or persons who carry out courts and judicial functions or who are charged with the performance of public acts and duties. In these circumstances, the court will look at the structure, nature, powers, duties and functions of the body and exercise the look or the existence of public element. Judiciary, in this regard, is equipped with judicial procedure, procedure advice, by way of judicial review as I mentioned earlier to ensure that the powers given to the legislative and executive are exercised within the permitted parameters of the Federal Constitution and the law.

It has been held in many of our cases in Malaysia that the executive discussions whether by statute or prerogative is amendable to judicial review. This position is profoundly explained by the Federal Court in a recent case, the titular Roman Catholic Archbishop of Kuala Lumpur and the Minister of Home Affairs. Then when a person, such as a Minister, is entrusted with a discretionary power, he's under an obligation to exercise it reasonably, and in accordance with the terms of the relevant provisions of the statute, that confers him the powers of discretion. This principle is applied with vigor even when the language of the stated power is couched in terms. However, whether such discussions are amendable to the jury review is dependent on the facts of each case. The court must also hold the view that courts must be wary of unduly extending its judicial arms to matters which are exclusively within the domain of the executive, as was decided in a number of cases.

In one of the cases decided by the court, the Presiding Judge then summed up the importance of judicial review in the following terms: "*Nothing but a potent and effective procedural device within the harmony to supervise and control decision-making process of public bodies are right to ensure that they are within the powers of the Statutes, and if necessary, to restrain the decision maker from acting in excess or abuse their power. This process is also used to check and address executive excesses and encouragement.*"

I need to briefly mention...

MR. ARIFIN ZAKARIA (MALAYSIA)
CHIEF JUSTICE/HEAD OF DELEGATION

Challenging these act that's why we off, issuing the order of statutory, all the statutory is a normal procedure to quash the position of institute inferior tribunal of public authority then we have the what it called read of *quo warranto* which is issued to question a public decision makers authority to hold a public, a public office by calling upon the person to show to the cop, under what authority is he holding that office. *Quo warranto* literally means where is your warrant of appointment. There is nothing, no cases in Malaysia pertaining to this relief but there was one, wish to quote noted, high

quote as the power and the team proceeding for *quo warranto*. Mandamus is another mode which is an order to compel the performances of illegal duty imposed by the law, mandamus may be granted to direct an authority which has declined jurisdiction, the exercise is, is just, a, is function. In the case of ministry of finance or government of Sabah and the Patrajasa, respondent had sued the state government of Sabah for breach of an agreement, and for some due to respondent adjustment was obtained and the certificate under section 33 of the government proceeding act 1957 was issued, where deputy register with the high court order a state government to pay respondent, there may just in the sum of six over million ringgit with interest, the state government failed to pay up the sum, respondent files application for an order of mandamus plus one to order 53 of the rules of the high court. The high court dismissed respondent application, they cover appeal a lot. They appeal and leave most granted appellant to appear in the front of the court to question whether judicial review proceeding may be taken against the appellant, I mean the government of the state compare payment of adjustment some a certified and registered on government proceeding act. On the issue as to whether an order mandamus may be issued against minister of finance, government of Sabah, the federal court finds that the affective arms of the government is amenable to judicial review proceeding. The landmark case refer to is the case of council of civil service union at minister of services. The other is prohibition which is order issued to prevent the public authority from acting without jurisdiction, prohibition issued at the stage where the public authority has not yet reached each determination where some for proceeding are open to the applicant and such proceeding may if taken would be without proper authority. The other mode is injunction, the cop may grant an injunction against the state power to grant such injunction subject to the government proceeding act and despite the relief act, and despite the government, the the government proceeding act 1958/56 the better view now is that injunction may be issued against the government. These are found in the number of cases decided by the high court. I wish also to mention another mode which is an important mode available to the citizen to challenge the government authority they still reach of *habeas corpus*. The remedy of *habeas corpus* is provided under is provided under section 356, 365 of the criminal procedure code. The rate of *habeas corpus* is designed to protect the personal liberty, personal freedom of those who have been illegally detained in prison, hospital or private custody. Section 365 gave the high court power certain order whenever it tastes fit regarding the application of *habeas corpus*. Appeal from the decision to the high court lies to the federal court, the right to apply for a rate of *habeas corpus* is entrenched in our article 51 of federal constitution which provide there no person should be deprived of this life of personal liberty save in the accordance with the law. And due of the time constraint, I am not going to go into the detail but just mention briefly the mode available to challenge the authority, left with three minutes.

Well, *habeas corpus* made exceptionally be available where the court passing sentence have no jurisdiction to the soul, such as the absence of jurisdiction must be pattern of the record and not by have an request outside of the record, this is found in the caseis sukma dharmawan suspistamaja ,the other important the mode is the declaration, declaration that law is a valid on the ground mention in article 3-4 as I mention earlier, shall not be comment without leave over judge of federal court, there has been a number

of cases decide from these matter by the federal court, so far in front of law, have sum up that proceeding for declaration of law is valid maybe brought back individual against another individual or against the government or by a government against individual invalidity ground to be for reason parliament has no power to make such a law or the law is inconsistent with the constitutions or in the case of state with federal law. Apart from the court we have also nine judicial institutions where active and promoting and protecting constitutional rights. This is found in the human right commissions of Malaysia, which is an incorporated form under our human rights act.

While upholding the universal principle of human rights Malaysia accentuates this human rights values which take into account the history of the country as well of a religious *factual* and culture diversity of its communities. This is to ensure that respect for social harmony is preserved and protected. The practices of human rights of Malaysia are reflection of a wider Asian value system, where welfare and collective wellbeing of the community are most significant compared to individual right.

Malaysia commitment in human rights has been translated into the establishment of human right commissions. Human right commissions of Malaysia was established by parliament under the human right commission of Malaysia at 1999. And the act came to effect September 9, the function and power of the commission are to be found in the human right in the act in section 4 namely to promote awareness and to provide education relation to human rights be too advice and assist the government in formulating, formulating legislation and enlisted the directives and procedures, see to recommend to the government with regards the subscription of excession of treaties and other international instruments in field of human rights and d to inquire into complains regarding infringement of human rights.

So this another excess, another mooch, where public can complain against a, encouragement, infringement of human rights for fundamental with this.

Other present mechanism in upholding protective our constitutional rights of human rights sufficient. The faded constitutional and laws from I get it by parliament provide the necessary procedure as I mentioned earlier for the protection of constitutional right in Malaysia. however I must say, that procedure are far from being simple and easy for ordinary citizen to understand the challenge before us is to simplified the current procedures so as to make it easily understood by the public. And that in that manner justice may be make more accessible to one and all.

In conclusion I wish to say this, in a country where written constitutions, the court, especially the federal court we did a back court, it as the arbiter of the conflict that may arise within its citizens and the public authorities. It plays a very crucial role in the protection of these rights. As a former chief justice of United States of supreme court once remark, a constitution is what judges see it is, and such event sadly a judges at the court will be of England and whereas once without that.

The reverse is true as well, if judges are not prepared to speak for it, a constitution is nothing, in this, in this judging this duty, the court, the constitutional court or equivalent constitution, institution, we have to adopt the moral reading of the act, for the constitution though interpreting the statute with the languages is abstract and moral terms as restriction in the powers of public authorities.

With this observation, I end my remarks on this important topic, and I wish to thank all of you for listening, thank you very much.. [Clapping]

MR. ZÜHTÜ ARSLAN (TURKEY)
PRESIDENT/HEAD OF DELEGATION

Thank you very much, Mr Zakaria now the next speaker is Mr Gadis Gadzhiev from the Russian federation he is the judge of constitutional court of Russian Federation, you have 15 minutes.

MR. GADIS GADZHIEV (RUSSIA)
JUDGE/HEAD OF DELEGATION

Thanks you Mr Chair. I prefer to speak in Russia language because from yesterday Russian language is a second official of Asia, of our ah, Associations. I would like to use this opportunity to congratulate everyone in the Republic of Indonesia for the upcoming Independence Day. And I would like also to send my gratitude for your warm welcome and warm hospitality for the arrangement of this congress.

Reformal, one of the philosophy from German very famous one once said that in the establishment of human right. He said that human rights is tangible it is real, even though it is not reflected on the constitution and this means that this is not a positivism approach on human rights because even when human rights are not stated on the constitution, human rights still exist although it is limited by the constitution.

Thus there is only one way to propose and what we called as original-ism or textual-ism on the constitution and this is what we call as the method of historical method. The emergence of a new constitution. related to the fact that for the community there is always a person who feels the right for this. For example, if a journalist tries to protect his right when he has a big ambition. For example, the constitutional for the future always emerge in a conflicting situation and this can be a conflict between the individual and the government, or with the public authority. For example when they want to uphold their rights to die without any suffrage. Every person who tries to uphold his rights.. human rights and we try to overcome this sort of acts, there is a new view or ideology on the constitution of Russia is base not only the approach of positive witty towards human rights. In it is so many ideology.. judicial ideology and that the human rights is attached to that person when he is born.. since he was born and if in the constitution it is called a right or not, we're actually is should not deny that person's rights.

In Russia, it is not only the constitutional court that protects the rights that is mentioned in the constitution about when it is possible. It will also admit the new rights that

appears from the beginning. I'm using the anthologies hypothesis because we have to differentiate between the two meanings; the meaning of the reality. The height of reality rights is not only judicial, but on the other hand, the judicial view that accepts that there is a reality on rights. So that the rights is there, it doesn't mean that when the government accepts that rights then only it becomes real. So, this is.. this can be seen there is a difference ontological difference between the rights in reality but it is far from practice.. legal practice, whether it will help to reveal the peculiar functions of constitutional courts, because it also reflects the both court and parliaments because this is where the process of promotion of new rights. And how is the.. the.. this is an issue that is very complicated.

In aspect which of the constitutional rights also become as universal rights or whether there is a difference between the each countries culture and then it also causes other debates on the relativism of culture. In his speech, Mr. Arief Hidayat also mentioned about that in the Indonesian Constitution there is the ideology Pancasila and the understanding of a.. human rights is also influenced by that ideology and it is not by accident that he.. understands.. there is an understanding of the human rights and a particular understanding of human rights. I think this is also the same for us. We also review in our work this views. So, how about the rights that is not stated in the constitution? The ideas on justice for example. Of course this develops continually and it will always face a positive law and there is a need to admit new rights that this right needs to be oathcat.. should we accept this as reality.. real. And the emergence of this rights also between the re.. legal.. legal reality is a right issue. Furthermore, this is a very difficult situation for the practice.. those who practice in this field.

We can not dif.. say how far the acceptance of that rights appear if there is a universal rights for all humans or there are rights that is acceptable or not. Only.. is it.. only acceptable in Asia or Europe. And how far the re.. is the responsibility on the emergence of this rights in this human rights. A few years ago, leaders of the ASEAN countries sign.. the.. Asia Declaration, we are all aware the existence of the Arab charter or the Cairo declaration on human rights in Islam, I think it is not by accident that these, in this de, e, er, documents, there is an under, there is a stress that the human rights has an eastern legal tradition. And as arise, and it also shows that it is also a modification of what is considered as human rights because the understanding that is not fully from the western point of view, we ha, see there are three main ideas here and the most important is, I think, the idea that we also have to consider the constitutional of each state. I feel that it is not the best choice when one country or one nation or perhaps a group of nation underlines or stresses that their values is the universal value and it is used by all other nations for their own good. I feel that this sort of choice or this vara, variety, where the universalism, is not tangible. I think Russia here has succeeded in conducten, conducting super national conception where recently it was used in the constitutional court in Russia, where, when the court decided the possibility that it is in line with the k, in line with the constitutional court in Russia, in cases that happened in Russia, eh, there was a case in Russia where the, a case, a murder case, where the accuse was sentence life, li, life sentence, but then the sentence was cut by, to, fifteen years and when they were in prison, they were said as wanted to take part in the presidential election but in line with the constitution of Russia, those who are in prison, are not, do

not have the right to take, to, take part in the voting process. And then they complained this to the European Union, oh, I'm sorry, to the European court and they stated that Russia has conducted a violation to, against er, human rights in not allowing a person to take part in the election. And the constitutional court and then agreed with the European court and saying that the equivalent, the principle equivalents, er, but then the constitution, eh, the Russian constitutional court said the relationship between the European convention is only possible when there is a dialog for a not, a subordinate, absolute subordinate, for example, the Garuda in the symbol of Indonesia, there is, there it is written Bhineka Tunggal Ika, Diversity in U, Unity, or Unity in D...Diversity. So this is one of the wisdom of Indonesia which also reminds us on the universe, false, universalism in which that the human right, there's a universal human right in the world. Of course, the human right has several version from, for the preservation of canonic fundamentals, but of course not all this views is the, in line with the state who have, who are in the eh, transition period, so I think that the conception of legal country or reichstaat, this should not be a dogma, and from here there will be a tension between the canonical..

MR. GADIS GADZHIEV (RUSSIA)
JUDGE/HEAD OF DELEGATION

And what is happening in other countries that's going through a transition we all know about the book of one of the famous justice of the Supreme Court of United States, Oliver Holmes, "The Path of Law", I think that the part of each country to... to watch the supremacy of human right. There is an understanding on the continuity of law. So we need objective reality. And the differences between countries is very possible because the speed of progression is different.

MR. ZUHTU ARSLAN (TURKEY)
CHAIRPERSON

Next speaker is Mr. Jin Sung Lee, from Korea, he is the judge of Korean Constitutional Court. Now the floor is yours, Mr. Lee. And you have fifteen minutes.

MR. LEE JIN SUNG (KOREA)
SPEAKER

I'd like to extend my deep appreciation to honorable chief justice Arief Hidayat and his hospitality and chairperson of this session, Zuhtu Arslan. These two chief justices are my... best friend of mine.

My presentation is still with the Korean experiences of constitutional complaint, and the implication to new comers in the perspective of comparative studies.

Many countries have designed and developed a constitutional complaint system suited to their own needs and situations. And the type and scope of constitutional complaints may differ from one country to another depending on the country's political, social

situation, as well as on whether they are defined in constitutions and laws or determined by the interpretation of such constitutions and laws.

The Korean Constitution provides that the Constitutional Court shall have jurisdiction over "constitutional complaint as prescribed by Act." Since the Constitution does not provide for any specific ideas or concepts of constitutional complaints, the legislature has been granted broad discretion in formulating the constitutional complaint system.

The Constitutional Court Act of Korea stipulates two types of constitutional complaints. First, any person who claims that his or her constitutional fundamental right is violated by an exercise or non-exercise of governmental power may file a constitutional complaint. Known as the "constitutional complaint as remedy of rights"

Second, when an individual files a motion with an ordinary court requesting review of a statute and this motion is denied, the individual may directly file a constitutional complaint with the Court, known as constitutional complaint as constitutional review of the statute. The later one is peculiar to the Korean traditional system.

These two types of constitutional complaints are very actively used by the Korean people since it's established on September, 1st 1988. The court has received 22.968 Constitutional Complaint in remedy of rights. As of April 30, this year, the court disposed of 22.556 cases out of which the complaints were upheld in 722 cases. Meanwhile, the court received 5.596 Constitutional Complaints in constitutional review of the statute. Among them, 5.310 cases were disposed of and the complaints were upheld in 316 cases.

Although, ordinary courts of Korea had the constitutional review power, before the birth of the constitutional court they had not been willing to exercise it. Most of the request for constitutional review had not been admitted by the ordinary court. Consequently, the parties had little chances of reviewing the constitutionality of statutes relating...related to pending trial. The constitutional court act does not acknowledge the power of the court to review judgments of ordinary court. Hence, this kind of constitutional complaints used as constitutional review of status allows party to a case whose request for constitutional review was denied by any level of ordinary court to file a constitutional complaint directly with the court. Which provides counter balance to the possible approach of ordinary court towards constitutional review.

The party needs not to wait for the ruling of a higher court. In this context the constitutional complaint is a constitutional review of status is as a wise method for complementing the limitation of courts' power of norm control, please see pages three... pages three article three. Uh... the constitutional complaint as a remedy of rights faces a view impediments related... related to the admissibility requirements. The first obstacle is the principle of subsidiarity, in other words, if any remedy is provided by other laws no one may... may file a constitutional complaint without having exhausted all such processes. Second, constitutional complaints cannot be filed against the judgement of ordinary courts. The reason why constitutional complaints are being actively filed is because the court has broadened the applicable scope of constitutional complaints through

interpretation. First, the court widely recognized exceptions to subsidiarity. The court has stated that individuals can bring constitutional complaints directly without the exhaustion of other legal processes in such cases as when the right of the complainant can hardly be restored through other legal procedures. B; it is uncertain whether such legal procedures are applicable from an objective view. And C; when such procedure to obtain legal remedies have no prospect of implementation. Second, the court has specified that the government power in article sixty eight section one of the act, refers to at all actions by public authorities that exercise legislative and other administrative powers, which means constitutional complaints can be filed against the laws enacted by the national assembly or legal orders adopted by the executive. This may not be a typical type of claims anticipated from the constitution but this claims have been established as one of the main types of constitutional complaints through the int... interpretation of the court. For such reason mentioned above, the constitutional court has contributed a valuable share to activate constitutional complaint system through the positive interpretation of the constitution and statutes under such statutory limitations. At the international symposium on constitutional complaint held in Jakarta last year, Justice Palguna of the Constitutional Court of the Republic of Indonesia mentioned the obstacles in introducing constitutional complaints and the efforts to seek a solution to this problem. According to his explanation there were two main reasons why the constitutional complaint system fail to be adopted the Indonesian constitution. The first one was a fear on manageable caseload; and second one was a concern that it might trigger the overlapping of competence with the other courts of general jurisdiction. He also stated that constitutional amendment to introduce constitutional complaint was not a practical solution and so suggested other alternatives instead. The first one is legislative interpretation and the second one is judicial interpretation. I was deeply moved by the presentation of Justice Palguna that the Constitutional Court of Indonesia has been thinking hard about the constitutional complaint system as a way of reinforcing the protection of fundamental rights. In fact, given my limited knowledge of constitutional system and realities of Indonesia, I feel very cautious about commenting on this issue of Indonesia's introduction of constitutional complaints. Still, I wish to offer some of my views in an effort to share the short and concern of the Indonesian Constitutional Court. The Indonesian Law of the Constitutional Court stipulates the possibility for individuals to directly file agai... applications against the laws that allow for the acts of state or public officials. I believe it is not entirely impossible to introduce a general form of constitutional complaint without constitutional amendment. It can be done through constitutional interpretation and amendment to the Constitutional Court Act. This appears to be a model that depends on the will of the legislature; still, the Indonesian Constitutional Court should have considerable room to contribute such a legislative process. On the other hand, the introduction of the constitutional complaint can be done through constitutional interpretation. In fact, there may be a controversy over the constitutionality of introducing constitutional complaint without the amendment. As the Constitutional Court has the power to review constitutionality of laws it would not be entirely impo--

That the power to review the constitutionality of laws may include the power to review the constitutionality of the ejection of laws. No matter how constitutional a law may be, even on the constitutional ejection of that law cannot be revoked by the Constitutional

Court. A vacuum will be generated in term of the protection of the fundamental rights. The problem stemming from the overlapping of competence of our jurisdiction with our courts, with other courts can be partly resolved by the principle of subsidiarity. Once the constitutional complaints system is adopted, the rising in the case law is index-able. We can see the dramatic increase of numbers of individual applications in Turkey during recent 3 years. In 2015, the Korean Court received about 18.059 cases and more than 90% of those cases are constitutional complaints and around 80% of cases were dismissed but still over 500 hundreds cases were decided by the full branch of the court in last year. Of course, there are other types of the cases in the court. Most of the Constitutional Courts or Supreme Courts of the world have the same concern in term of dealing with heavy case laws. The US Supreme Court granted only some 1% of about 1.000 petitions for certiorari per year. The review on the read of certiorari is not a matter of right but of judicial discretion. In comparison, the German constitutional justice has a mechanism called Admission Procedure ("*Annahmeverfahren*" in German). The law on Federal Constitutional Court of Germany provides that complaints shall be admitted when the case has the general constitutional significance. This authority to decide on the admission ability of a case allows for discretion and so the case law can be greatly reviewed to a certain extend. But I also know that even though the admission procedure is not a matter of judicial discretion unlike the US certiorari system, some German scholars called it is a "lottery of Karlsruhe" since it is difficult to predict which case will be admitted. The Korean constitutional court has not have a similar discretionary system in the process of preliminary review but it could be noted that the case law is still within the managerial level. The Korean system is very actively resorted to and used by the Korean people and this is largely due to the fact that Korean court has lowered the threshold of constitutional court complaints through its proactive interpretation. It is true that compared to Korea, Indonesia faces more legal obstacles to the introduction of constitutional complaints but I believe that Indonesian Constitutional court will be able to play an important role in overcoming such setbacks by applying active legal interpretation which gives top priority to the protection of the people fundamental rights. Thank you for attention.

Mr. ZUHTU ARSLAN (TURKEY)
CHAIRPERSON

Thank you very much Mr. Lee, our final speaker is **Mr. MOHAMMED ACHARGUI** he is the president of constitutional council of Morocco. The floor is your **Mr. ACHARGUI**, you have 15 minutes.

MOHAMMED ACHARGUI (MOROCCO)
SPEAKER

Thank you. uhmm. I would like to say thank you to His Excellency **Mr. Arief Hidayat** as chief of... Chief Justice of the Constitutional Court of Indonesia for his hospitality and his welcome for our participation in AACC. For this occasion, I also, as president of *jaringan*, network of the South Africa and West Africa Association in Morocco and I would like to greet the association of the Asian Constitutional Court where with the dynamics, the

good dynamics which have been shown here in its consolidation and its relationship between the members. For us this is a very good example for us, for that I would like to convey congratulation to the association and also for uhh... to Indonesia for more success in the future. On this occasion, Ladies and Gentlemen, we will talk about the progress and protection of ehh... citizen.

Constitutional rights where by my experience, our experience, in my country, Morocco, for the promotion and protection of the constitutional rights of the woman where we can see that through the referendum in 2011. It has given the woman a very important position, we can see, the form of the constitution, because for the first time, women are said to be twenty times in the constitutions and in the constitution it has given an answer, principle answer for the equivalence of gender for political, economy, social, and culture and also economy. We all know that the constitution of Morocco has embraced three generation that is the rights of political and social, social, culture and also the third, is the third generation as the rights for the solidarity and there is also a gender equivalence, equal gender but in reality, we do not just need gender equality, so that woman can enjoy their rights because there are other cultural inhibition are setbacks and in this condition we are well aware of that, and that is way the new constitution of Morocco has adopted a politi- a voluntary politic that wishes to make ways to make it easier for the woman to achieve responsible role in society and that is why as an example of which I can mention here is that the constitution in the article 115 talks about the composition of the justice rights to give the quota system by looking, by paying attention that the Woman Justice must be in proportion with the whole number of Justices, there is 20% for woman, so that 25% of the members must be woman. Article 30 also states that there are regulation that makes it easy for the access of man as well as woman to get involved in election, for example in article 29 as a Head of Region and so on and it is also states that the law must also make steps that aims towards the representation of woman in a better way in that representation and most important and in this item is that article 19 that introduces the principle gender equality and also the formation of authority for gender equality and also to go against all types of discrimination, and in the disposition and in the execution of the disposition, the government as well as the legislature has adopted several techniques to conduct constitutional steps to make it easier for the constitutional rights of the woman, I will mention the three techniques that has been used, that in the law, that is for quota by giving by creating or allocation, allocating several chairs or seats in the government for the woman. It says that 60 seats must be given to the woman and there are 30 seats that is given to the young people male as well as female and the same type technique, a quota technique is also given for the regional government where we in one region only allocated for woman and the law states that woman must be, must fill in the seat at least of one third of the regional government and the second technique is that in gender equality that is used for the senate, the government for, government for senate states that, or the law for senate states that the list of candidates must not have the same name twice, or the same gender, it must be like male female male female, and the third technique here is for... to assist financially... they assist financially in their expenses during election, for example you can have a decree that says for every woman that has been elected, their political will give five times of the nominal or the assistance for

finance, for example if the political party wishes to get more money or more funds. They must give better access for women in their parliaments. And these techniques which is a positive discrimination has given us results and has increased the representation of women in the parliament, but in the senate as well as in the regional government. And for the constitutional court, and its contribution for the development of women's rights, the constitutional courts here has a political way to enable women and given many, making many decisions and sometimes very advanced and to make it easier for the women to obtain important positions. The constitutional court in Morocco has a political, has a very level or stable politics that has made it possible for the election and also the function of election as well as non-election functions. And for the election functions, the Constitutional Court in Morocco regards that when there is a quota for women in the parliament and also in the regional government, it is in line with the constitution and the same goals for the list of mixed candidates, that is used for the constitutional election, and it also states, and also requested political parties to further invite representation, women's representation in the political parties, and finally there is a very important decision that states when a woman or member of parliament, a female member of parliament resigns, then she must be, the position must be filled by a woman and not by a man. So, for the function, functions that is in line with election or professional functions, the constitutional court here has made it easier for with the principle of equality, so there is no excuse to implement political declaration, if political role position in the constitutional courts itself. Because the constitutional court considers that the law and also the procedure for election of the members of the Constitutional Court must be conducted in equally for men and women without giving, without dividing the seats between men and women. And so, the Constitutional Court has tried to combine the principle of gender equality. I would like, as a closing, I would like to say that, the fact that all constitution at this time underlines, stresses the gender equality principles. But, this is not, this is not the principle that shows that women can obtain high position, because there will always be inhibition. For example for the cultural side, which does not assist in increasing the rights of the women. So, there should be a voluntary political will from the lawmakers, and also from the constitutional court to assist in this application. That will enable the women to become an effective equality. And here I would like to invite you to study the case in Morocco. Thank you for your attention.

**MR. ZUHTU ARSLAN (TURKEY)
CHAIRPERSON**

Thank you **Mr. Achargui**. Now we have two respondents. First, **Mr. Igor Rogov** is the President of Constitutional Court of Kazakhstan. **Mr. Igor Rogov** you have five minutes.

Mr. IGOR ROGOV (REPUBLIC OF KAZAKHSTAN)

Thank you Excellency Chairman. Allow me to convey my gratitude as well to the president of association who's the Chief of Justice of the Constitutional Court of the Republic of Indonesia for the successful arrangement of this event. It is a trend in the world to guarantee the and human rights. And human rights are often an important

argument because it serves as the basis for many issues; economic, political, humanitarian, as well as the basis when we provide sanctions to people. The guarantee for human rights is a reflection of values and spirituality of human. Initially, the human rights are implemented internally within the country. There is a shift of that, that human rights are now governed both by domestic law as well as international law. There is more international human rights law incorporating international principles and values which needs to be abide by all countries. The stability and security issues of a country is also a big issue that we are facing now. Terrorism, narcotics, and organized crime for example. With the rampant threats of this kind of crimes, there are new sovereign countries when they comply with international law, they would have to customize or adjust the international law to their national law. They have to prioritize the national law and prioritize national values by also considering the political factor in the country. A country will also need to consider when to adopt or when to comply with one or more international responsibilities or principles. That's why human rights are not understood differently, as mentioned by Russia who explained about regional mechanisms like the European Convention, African and Asian Convention, for example. With regards to what has been said earlier, this is very actual and there's been a contradicting value between the universal human rights and the interpretation of human rights in their domestic level.

Can we then accept this conflict? I am in the opinion that we can accept this conflict. For example, a state can position itself as a democratic country as well as a law-abiding country. So this kind of different mechanism for a legal practitioner, for a legal expert needs to understand about the relationships between domestic laws and international law. That's why the Constitutional Court in Kazakhstan has the authority not only to review domestic law, but also international treaties ratified by our country. There was once a case where Kazakhstan was reviewed or Kazakhstan did a review on decisions made by General Courts, and usually such cases will be decided based on the Constitution by referring to the Constitution.

Most recently for example, the Constitutional Board of Kazakhstan have done this and we would like to also congratulate the Venetian Commission who have supported us and assisted us to integrate the national system and by also considering the sovereignty of our country. With regards to that, and also taking into consideration international treaties, our government also take into consideration when drafting laws and legislation the interest of the nation. So the filter in this interest is the constitutional institutions in the country. And this Conference really helps us in understanding better about this kind of issues, as well as exchanging experience and knowledge. Thank you very much.

MR. ZUHTU ARSLAN (TURKEY)
CHAIRPERSON

Thank you, Mr. Rogov. Now, second please.

MR. NURAK MARPRANEET (THAILAND)
PRESIDENT

Mr. Chairman, thank you. Honorable Judges, Distinguished Delegates, ladies and gentlemen. Mechanism of promotion and protection of citizen's constitutional rights in my point of view. Those rights must be guaranteed by three composition. The first one is the substantive law. The second one is the due process of law. And the third one is efficiency of the mechanism of law enforcement. Thailand's experience, very basic. The Personal Name Act, 1962 of which the provision determined a married woman to use her husband's surname. It cause abuse of human right, sex inequality and gender discrimination. So, the Constitutional Court of Thailand ruled that it's Unconstitutional to compel the wife to use her husband's family name after her marriage. So, married woman have the right to choose whether she would like to use her husband's family name, or continue to use her own family name. The principle is, "*More choice is more equality.*" Thank you very much.

MR. ZUHTU ARSLAN (TURKEY)
CHAIRPERSON

Thank you very much. Now, we have finished the speeches of all the speakers and respondents. We have 30-40 minutes for question and answers and also comments. Now, if there is any question - okay, here. Could you please introduce yourself? Sorry, I was noticed that we should limit the question and answer session for roughly 10 minutes. But, I will use my authority to increase it to 20 or 30 minutes.

MRS. HESTI ARMI WULAN (INDONESIA)
LECTURER

My name is Hesti Armi Wulan, I am a lecturer and Professor at the Faculty of Law at the University of Surabaya. There are several questions I would like to convey. First of all, I would like to thank you for the opportunity given to me, I would like to convey as what has been conveyed by His Excellency from Russia about False Universalism. If we refer to the Convention of Vienna in 1993, there are two principles that we have to understand. The first one is the universality of human rights, and perhaps my thinking is that there is no false universalism. But, what we need to understand, perhaps is we need to differentiate which are universal human rights, and which are human rights that requires specificity, so there is no false universalism. But, we have to understand the derogable rights and non-derogable rights. That's the first thing I would like to convey.

Secondly from Morocco, on the rights of women incorporated in the Constitution, that's very interesting but I would like to convey that in my understanding there is no 'positive discrimination.' Discrimination is always negative, but within this context, I would like to say that perhaps it's better not to use 'positive discrimination' but more appropriately called 'affirmation action' or 'special measures', so not talking about positive discrimination because in principle, discrimination in any form is negative. So therefore, rights of women or rights of the vulnerable groups may use the term affirmation action.

Those two concerns are my concerns based on what I have listened from this session's presentation. Thank you.

MR. ZUHTU ARSLAN (TURKEY)
CHAIRPERSON

Thank you very much. Any other question, please.

MR. I DEWA GEDE PALGUNA (INDONESIA)
CONSTITUTIONAL COURT JUDGE

Thank you, Mr. Chairman. I was deeply impressed by presentation of the Justice from the Federation of Russia that especially when Your Honor mentioned that Russia doesn't apply the positivist approach towards human rights. But as the consequence, if I am not mistaken, it means that such an approach or stance will give wider room for constitutional justice to make an interpretation to the Constitution. But on the other hand, it could also trigger direct conflict with the legislature. I would like, maybe, Your Honor would cordially share your experience within the legislature within the Russian Federation in this case. And the second one, may I have two question? A certain question for Justice Lee from the Korean Constitutional Court. If I'm not mistaken, there's a decision or verdict of the Korean Constitutional Court concerning the status of the capital city, Seoul. It is interesting, if I'm not mistaken, that when the Constitutional Court of Korea decided to overrule or not to approve the proposal by the President to move the city of Seoul to another place, then the Constitutional Court of Korea also reversed the decision within the customary law in the context of constitutional law. I think it will be very valuable to all of us here in the room if you would share your experience in this case. Thank you very much, Mr. Chairman.

MR. ZUHTU ARSLAN (TURKEY)
CHAIRPERSON

Thank you. Any other questions? Please.

MR. WAHIDUDDIN ADAMS (INDONESIA)
CONSTITUTIONAL COURT JUDGE

Thank you, my name is Wahiduddin Adams, Justice at the Constitutional Court of the Republic of Indonesia. I would like to ask about a more specific matter to the delegate of Morocco. You mentioned that under Article 1.11, and the enforcement or the implementation of Constitution. So the question here is, is it temporary, or is it a permanent thing that you apply? Because you mentioned that it does not relate to the Constitution and applicable laws. But, it relates to social and culture. You also mentioned that we require a strategic policy, be it your authority to review social matters. This is a punitive action, you mentioned. A temporary action. How long will you extend this specific action? And the social matters you mentioned, being a hindrance to your work. Thank you.

MR. ZUHTU ARSLAN (TURKEY)
CHAIRPERSON

Any other questions or comments?

MRS. NUR AINUN (INDONESIA)

Thank you, my name is Nur Ainun. I would like to pose a question to the third speaker from Russia. I'm interested on the political rights that is related to the democratic development and the law that is adopted by the country. There was a case about a convict who was sentenced and proposed his political rights. And also with other cases in Indonesia, I would like to know further about the experiences in Russia on how the democracy was developed, and is democracy a concept that is combined with law or how is it in reality? Because, if we look at the case...

MR. ZÜHTÜ ARSLAN (TURKEY)
CHAIRPERSON

where a person is already sentenced by a court then there are some crimes especially related to a politic then his political right is also taken away . And if there other inhabitant like these what short of exsa do it in Russia for example if it is none is it allowed then how is democratic concept in law build in Russia ,thank you

ROJAHAN PANJAITAN (INDONESIA)
PARTICIPANT

Hmm terimakasih, thank you. I am Rojahan Panjaitan from Bandung my question to all of you who are seated in front. I would like to ask you how far does your country conduct the execution for the constitution in conducting your country in executive as well as legislative so how far other sentences of the constitution court followed especially in your by your government because in Indonesia, there is so many decision by the constitution court, by the supreme court, legislative and executive and is not respected at all, the decision of the constitution court.

MR. ZÜHTÜ ARSLAN (TURKEY)
CHAIRPERSON

Okay thank you very much, I would like to give the floor with the same order and i 'll give the speaker and respondent if they wants to respond. Hmm just two minutes to respond okay Mr Zakaria? You have two minutes.

MR. ARIFIN ZAKARIA (MALAYSIA)
SPEAKER

Mr chairman, I only 1 question is the general question asked by Mr Panjaitan from Bandung, how far decision of the court of the constitutional court is followed or respected by the executive but as far as Malaysia as concern, there is no problem at all it is subscribe to the rule of law, therefor the government is oblige to follow decision of the

court then so far there has not been any breach of the ruling of the court. any decision of the court has to be followed by the executive to the letter of the order of the court so that experience in Malaysia perhaps because the draw our years of independence since 1957 the executive is always be the compliance with as always been compliance with the court order be it that for subject to liberty of citizen, liberty of citizen or property right and so forth because the law are well entrenched not only in the constitution but also in other written law and in the supported by decision of the court and the we in Malaysia of course is a common law country so we rely on what we called precedent or earlier decision of the court which is binding not only on the is binding on executive so any decision, any executive action well always take into consideration, previous court decision and also the provision of written law thank you very much.

**ZÜHTÜ ARSLAN (TURKEY)
CHAIRPERSON**

Thank you Mr Zakaria, less than two minutes thank you, now Mr Gadzhiev the floor is yours.

**MR. GADIS GADZHIEV (RUSSIA)
SPEAKER**

Thank you. First of all I would like to say that what has been stated by the lecturer from Surabaya it is true, I am with you, I agree what you've said now in relation to the question on how active the constitutional court in Russia. I've been with the constitutional court for twenty five years. Maybe, I do not have enough experience, not much experience. But, I think in the constitutional court we have to be courageous and of course we have to really pay attention to how we have to be very careful with when we in the constitutional court, maybe for the politician for the constitutional court in Russia maybe it is one of the most active court in the world on the decision of the court in Russia in relation to, relationship to human right in Europe here there is a conflicting situation which is very conflicting because in Europe the consensus whether the person who is tense, or can they be active in a political activity it is clear in our law that they cannot be involved in election the decision in relation to their British courts in Europe and then they decided that all parties that is in present and also in Italy when a person is sentenced for a not too long period they can take part in the election, but if the sentence is long then his participation in the political process is not allowed.

The situation in Russia these parties they are sentenced for life, and then question occurs, are they allowed to take part in a political process? I would like to underline here that the constitutional court in Russia on how they decide on how to proceed with the decision of the courts in Europe, would you like to stress that we must oblige, follow the human rights decision of the courts in Europe, and in relation to how it is conducted then in line with the Russian federation decision it is guaranteed and the guarantor is the President of the Russian federation in line with law of the presidential, President of Russia.

And after, six days after the sentence is given then they must adjust and they must appeal for an amendment in the law and saying that I, and I have never seen a problem in this execution of the law here.

MR. ZÜHTÜ ARSLAN (TURKEY)
CHAIRPERSON

Terima kasih pak Gadzhiev.

The floor is yours.

MR. LEE JIN SUNG (KOREA)
SPEAKER

OK, em, thank you their question of Indonesian justice, as I mention in my presentation, ee... the acts by the adjective are subject to review of the constitutional court as well as the statute and uh, ee.. the decision of the ordinary court are not subject to the review of the constitutional court, but our court has proclaimed that the ordinary court decisions that have violated the fundamental rights of the people by applying unconstitutional laws can be appealed against by constitutional complaints.

This way, ordinary court decisions can be appealed to the court in the form of constitutional complaints and I understand your question on the custom is subject to the review of the constitutional court in Korea, there are two cases whether the custom are subject to the review, of the, by the constitutional court the conclusion was the custom are, uh, review by the constitutional court but there is, there are some dissenting opinions on that.

Consequently, the, it is significant that the broadening of the interpretation of the constitutional court is very important, thank you.

MR. ZÜHTÜ ARSLAN (TURKEY)
CHAIRPERSON

Thank you Mr Lee

Mr Achargui the floor is yours.

MR. MOHAMMED ACHARGUI (MOROCCO)
SPEAKER

I would like to, first of all comment on your comment Madame Professor, I agree with you, it is correct that we should use a terminology affirmative action, because positive discrimination is never been used by legislative, this is a terminology used by the press, but there is such terminology however it is only used by the press.

The main important thing is that we have political votary for women right, for the equality of women and the second question whether the protection of women's right is a

temporary thing that should be safeguarded by the constitutional court or is it a permanent.

For the promotion of women's right involved three matters, first, the constitutional right itselfAnd then secondly the parliament should provide a law in such a way that women can reach high position. The third one, constitutional court.. will.. also provide a guarantee for women's rights. The Constitutional Court of Morocco has produced a.. an important decision. which state that any decision made by.. any decision made for women to be able to sit at the Parliamentary function means that gender equality has been achieved. It should not be limited for women. And considering the social cultural of our country and also other country, the legislative needs to be actively involve and needs to actively contribute until the elimination of discrimination is achieved.

The measure is that we have taken is to include the elimination of all kinds of discrimination. As for constitutional rights decision, the execution of such, I can say that in Morocco all decision made by Constitutional Court have never.. always complied and followed up by all branches; the executive, legislative, and opposition, even because decision from the Constitutional Court of Morocco should be or must be respected by all branches, all institutions. Thank you.

**MR. IGOR ROGOV (KAZAKHSTAN)
SPEAKER**

In Kazakhstan, there was.. there was a question about how ehm the decision is executed by other branches. We have seen none issue. We have no issue with that because of usually if legislation is unconstitutional, the President would not sign of such legislation. And if a legislation is applied for ehm review and the.. because the President of Republic of Kazakhstan is the safeguard of.. is the guardian of the human rights and constitution, therefore, it is automatic. It's something automatic that we all will take part in the control of guaranteeing the protection of human rights by all officials. So no issue in terms of execution of constitutional court decision.

**MRS. MARIA FARIDA INDRATI (INDONESIA)
JUDGE OF CONSTITUTION COURT**

Mr Chairman, we have one clarification about the statement of..

**MR. ZÜHTÜ ARSLAN (TURKEY)
CHAIRPERSON**

Wha.. Okay please. Madam Justice.
Just clarification. No no.
No.
Iya.
Okay..

**MARIA FARIDA INDRATI (INDONESIA)
JUDGE OF CONSTITUTION COURT**

Ya. Kami hanya mau mengklarifikasi terhadap perta..

I would like to clarify on the question.. questioning about the execu.. the execution of Constitutional Court of Indonesia that are not executed by the executive and legislative. We.. we feel that there is never an issue for that. Ehm not executed by executive, legislative, or other institutions. What we are facing is that all decision made by our constitutional court with regards to general election and re general election were always executed.. were always complied by the general election commission and other institutions. So whenever we decide on something, for example, to cast revoting and whenever we ask the police, the National General Election Commission, for example, to supervise the revoting then everyone will take part in that. In executing that decision. The former President, Susilo Bambang Yudhoyono, and the current President, always abide and comply to all decision made by Constitutional Court. The decision of Constitutional Court to accept judicial review on articles or laws, we don't immediately amend or change the sentencing.. the sentences or the wording of the legislation, but the wording will change during the amendment process of such legislation. Because there are many of our legislative being, uhm, reviewed and we've dis, we, we provide a decision to actually re, amend the legislation, we issue such decision and such decision is then executed by following through an amendment process of such legislation. Because the constitutional court decision is an *erga omnes* meaning that it our decision will be the same, even though it is being re-applied, or the application is lodge or re-lodge, so we never face any problem on the execution of our decisions, thank you.

**ZUHTU ARSLAN (TURKEY)
CHAIRPERSON**

Mr. Twekiat Menakanist.

**MR. TWEKIAT MENAKANIST (THAILAND)
SPEAKER**

I have a, very few word. Eh, after we have right and we have law to support that right, and now is the problem of efficiency of our mechanism as a court, strictly. If there no complaint or no challenge, there's no judgment, thank you.

**MR. ZUHTU ARSLAN (TURKEY)
CHAIRPERSON**

Thank you very much. Actually I was asked by the organizers to summarize the conclusions of the first session. But I hate summarizing the arguments, because they are in, very, very deep in details, but today I have to comply with the request of the organizers and try to ehm, summarize the conclusions which may be drawn from the discussion during the first session. Ehm, but I, I will eh, do my eb, best to keep it very

short. First, the idea of human rights is universal to a certain extent, even though constitutional rights reflect the culture and nationalistic characteristics of different countries. Second, constitutional review, judicial review and constitutional complaint provides many instruments for protecting and promoting constitutional rights. Thirdly, where techniques such as quota is exist or maybe adopted and applied in order to ensure gender equality and constitutional rights of women. Finally, there are other institution or organs such as human rights commissions to protects and promote constitutional rights. I think we must stop here because we have the right to eat as important part of right to life, as the President and Chief Justices and Justices of the Constitutional Court or Supreme Court, we cannot violate this fundamental right. So thank you, thank you very much for your patience and I'd like also thank the speakers and respondents in this session as well as all the participants, thank you very much.

MASTER OF CEREMONY (MC)

Distinguished delegates, the meeting will adjourn for lunch. For the head of the delegation, the lunch will be served at room Uluwatu...

MR. HAN CHUL PARK (KOREA) CHAIRPERSON

Chief justices and other distinguished representatives all members of the AACC. First of all, let me start by saying that it is a great pleasure and honor for me to chair this session today. My sincere appreciation once again to honor the Chief Justice Arif Hidayat, and other authorizes of the Indonesian constitutional court, especially for having us here, in this beautiful place of Bali for this meaningful forum.

The topic we are going to discuss in this session is “The role of a constitutional court and equivalent institutions in promoting and protecting citizens’ constitutional right through their landmark decision.” We share the idea that the promotion and protection of citizens’ constitutional right shall be guaranteed for the liberal and equal society which requires the constitutional court and other equivalent institution to act as the guardian of this values.

In this session we will review individual court effort to promote and protect citizen’s constitutional right through the landmark decision. I expect we will be able to listen to the insight and perspective from our` member court or the citizen constitutional right not only in the field of civil, political, economic, social, and otherwise implies by the constitution, but the implied rights which are not clearly mentioned under the constitutions. Also, we expect to be able to learn the mechanism that are operating for protecting and promoting the citizens constitutional rights and the extent to which the decisions issued by the court and institution have affected those states and legislation.

For that, we have four presenters, the Constitutional Court of Indonesia, the Constitutional Court of Philippines, and the Constitutional Court of Algeria on behalf of CCDA, and the Constitutional Court of Azerbaijan, which will be followed by the responses from three courts. The Constitutional Court of Tajikistan, and Supreme people

court of Vietnam, Constitutional Chamber of the Supreme Court of Kirgiz Republic. Reminding the presentation respondent to the fact they are kindly advice to stick to the time allocated.

Let me give the floor to our first speaker, Justice Patrialis Akbar from the Constitutional Court of Indonesia.

**MR. PATRIALIS AKBAR (INDONESIA)
SPEAKER**

Thank you Mr. Chairman. Assalamualaikum Warahmatullahi Wabarakatuh.
Bismillahirrahmanirrahim.

Honorable Chief Justice of the Constitutional Court of Republic of Indonesia, Mr. Arief Hidayat

Your Excellences Chief Justices and Justices of Constitutional Courts and Equivalent Institutions

Honorable ladies and gentlemen the participants of the congress.

The Constitutional Court of the Republic of Indonesia is entering 13th (thirteenth) this year. In the span of 13 years, the Constitutional Court of the Republic of Indonesia has successfully resolved national problems that relevant to the Court's role as final interpreter and guardian of the Indonesian Constitution. The Court's decisions bring significant effect in the nation and state life. The Constitutional Court successfully handled deadlocks in constitutional implementation through proper legal considerations. The Court's role is greatly needed in assessing the constitutionality of an Act by examining the values of Constitution articles philosophically, sociologically, and juridically fundamental constitutional law 1945.

In a constitutional implementation, an Act made by legislators and the president might contain short-term political interests that rule out of fundamental principles of the Constitution and citizen's constitutional rights. Thus, Constitutional Court must be able to adjust Court position as constitutional judicial, democratic judicial, political judicial and institution to restore citizen's constitutional rights.

Exercising its jurisdiction on constitutional review, the Constitutional Court of the Republic of Indonesia has functioned a protector of human rights. The Court provide protection with love and care to citizen whose right discriminated and ignored in nation and state life. The Court is a judicial channel for citizens to fight for their rights. Citizen's Constitutional rights have already regulated in the 1945 Constitutional; the rights, among others, are right to implement... implement religious principles; equality before the law and governance; political rights and right to implement democracy; the right to legal certainty; the right to the health, education, work and decent living and right to defend the state. The aforementioned right under the spirit of freedom which limited by the Constitution, the limitation of the right is other people's rights, and it is accordance with justice principle and respect for religious, morality, and laws in Indonesia, including local wisdom that institutionalized in indigenou people. Honourable ladies

and gentlemen the participants of the Congress. Since establishment, the Constitutional Court of Republic of Indonesia has issued landmark decision that later used by legislators to improve reviewed Acts. In this occasion I would like to deliver the landmark decision. There are some criteria of landmark decision. The first is it brings significant changes in constitutional system and it is related to public interest. Secondly, the landmark decision prioritize an aspect of constitutional rights protection and fulfilment as guaranteed by the 1945 Constitutional. Thirdly, landmark decision creates a new legal condition which has not been regulated by the Constitution to the achievement of legal certainty. The fourth is the landmark decision become a reference legislative change. The Court's landmark decisions cover all aspect; political, socio-cultural, economic field. Since Court's establishment until 2015 about 175 decisions regarding the constitutional review that grant application... applicants' petition. The Court successfully protects a citizen's constitutional right regarding natural resources, such as in Decision Number 1 /PUU-I/2003 concerning Electricity Act; Decision Number 33/PUU-X/2012 concerning Oil and Gas Act, and Decision 45/PUU-XI/2013 concerning Water Resources. This decision have a red line; state's control of natural resources. The phrase of 'controlled by the State' and 'welfare to greater people' as stipulated in Article 33 in 1945 Constitution become a crucial point in giving protection... protection in citizen's constitutional rights, particularly right to utilize natural resources. The phrase 'controlled by the State' should be interpreted as State's control in broad sense of sources and originated from the conception of Indonesian people's sovereignty over land, water, and natural resources contained therein, including the definition of public ownership by people's collectivity on the resources aforementioned. People who have collectively constructed by the 1945 Constitution give the mandate to the State to make policy, take care, setting, management, and monitoring that aim for the welfare of greater people. Honourable ladies and gentlemen the participants of the Congress. Moreover, there are some decisions in 2015 which considered as the landmark decision. Decisions among others are Decision No. 95/PUU-XII/2014 concerning the lifting of the ban for the forest people to utilize forest product and Decision No. 43/PUU-XIII/2015 regarding regional head candidacy recruitment. Regarding number 95/PUU-XII/2014, the Constitutional Court assessed the ... assessed the ban of utilizing forest product as regulated in Forestry Act should not be applied to forest people who already lived for the generation in the forest who have the need of food, clothing, and shelter on daily basis by cutting trees and not for commercial purpose. The Act cannot criminally sentence forest people; instead, the State should give protection to them. Regarding Case No.43/PUU-XIII/2015...

requirement ex-convicts to allow ex-convict to run regional head candidacy. The court ascertained that an act only may provide a limitation in accordance with article 28J the 1945 constitution and cannot eliminate citizen voting right. However, ex-convicts should openly declare to the public that was an ex-convict by that the choice is in people's hand whether they are willing to vote ex-convicts or not. Besides the decision aforementioned, a lot of decision regarding the political field, particularly regarding regional elections, which are not possible and describable on by one due to limited time available. However, decision certainly caught public attention, other decisions regarding recent provision for the legislative member who determined... determined as a Regional

Head Candidate. Decision regarding vote requirement for Independent Regional Head candidate and decision regarding a single candidate, this decision can also be considered as a landmark decision. Honorable participants of the congress, that is all my brief presentation on the Rule of Constitutional Court of the Republic of Indonesia protecting citizen's constitutional right as fundamental right regulated in 1945 constitution. The decision of constitutional review, protection of human right has been manifested in whole aspects, political, economy, and social and culture. Hopefully in the future, the Constitutional Court will relentlessly struggle for manifesting constitutional mandates particularly in protecting... protecting citizen constitutional rights. Thank you very much. Wassalamualikum Warahmatullahiwabarakatuh.

**MR. PARK HAN CHUL (REPUBLIC OF KOREA)
CHAIRPERSON**

Thank you **Justice Patrialis Akbar** for the insightful presentation, our next speaker is staff head, **Mrs. Maria Lourdes Oliveros** The Head of the Supreme Court of the Philippine, Mrs. Oliveros, the floor is yours.

**MRS. MARIA LOURDES OLIVEROS (REPUBLIC OF THE PHILIPPINES)
SPEAKER**

Thank you Mr. Chairman, Excellences and your honors, I have the honor to deliver the remarks on behalf of the honorable MARIA LOURDES OLIVEROS, Chief Justice of the Republic of the Philippine. The constitutional design for the judiciary in the Philippine allows the courts to address individual complaints. This is not only on the causes of action in civil or criminal cases but also on constitutional questions that affects individual as well as collective right. The Philippine Supreme Court stands at the apex of the judiciary while it is not formally called a constitutional court as understood or defined in this forum. It nonetheless enjoys the characteristics and possesses the features of a constitutional court. Frequently called upon to interpret the constitution and the laws, the court decision become a part of the law of the land though they do not part of the legislation which is solely the province of the Philippine congress. This power of authoritative interpretation is a court greatest power trough it the court is able to define parameters, clarify boundaries and allocate powers between the state and its citizen, this was held by the court as early as 1936 in the landmark case of **Anggara vs Electoral** commission. In a very real senses, the constitution and the laws are what the Supreme Court say they are. To recall 1803 US case of **Marbury vs Madison** on the notion of judicial review. It is the province of the court to say what the `law is. Does the US supreme court said in that case, it is emphatically the province in duty of the judicial department or judicial branch to say what the law is... Those who apply the rule to particular cases must of necessity expound and interpret that rule. If two laws conflict with each other, the court must decide on the operation of each. When the Philippine went through a peaceful transition in leadership of 1986, the collective expression of sovereign power resulted in among many others, the drafting of a peculiarly written constitution, not only it is the longest of all previous Philippine constitution, the 1987 constitution is distinct for being a reaction to the martial law regime which was the

laboratory of its creation. Thus, its provisions are guarantees and expressions of support for fundamental rights and liberties, both collective and individual, strengthened by an empowered judiciary. For the first time, as provided in article 8 section 1 paragraph 2 of the 1987 Constitution, the Judiciary is empowered to and I quote “determine whether or not there has been a grave abuse of discretion amounting to lack or excess of jurisdiction on the part of any branch or instrumentality of government. This power, recognized as part and parcel of the judicial power, has been used by the Supreme Court significantly to carve out pockets of protection against State overreach through its Decisions on specific rights guaranteed by the Bill of Rights.

This power of the Court has been used to strike down laws that prevent an individual from exercising his rights under Article 3, which is The Bill of Rights, in the Constitution or violate other rights to exercise other rights under the Constitution; it has also been used to enhance the protection of the individual by asserting that he is protected from State abuse.

Article 3 of the 1987 Constitution, or The Bill of Rights, empowers the individual by conferring on him/her specific rights that can be asserted against the State; at the same time, the Constitution also shields the individual from government’s undue intervention, unwanted interference, or unjustified abuse. Reading much like a Magna Carta, the Bill of Rights is possibly the single, most potent antidote to State abuse and overreach and it is often the last resort of those who find themselves aggrieved and their rights limited, diluted, disregarded or violated.

The Supreme Court has expressly characterized the Bill of Rights as a limitation on the power of the State. In the 1991 case of *People of the Philippines versus Marti*, the Court ruled that the Bill of Rights is not meant to be invoked against acts of private individuals because it governs the relationship between the individual and the state. As held in *Marti*, Its concern is not the relation between individuals, between a private individual and other individuals. What the Bill of Rights does is to declare some forbidden zones in the private sphere inaccessible to any power holder. As an overarching framework, the view that the Bill of Rights imposes a burden on the State, not the individual, would be the greatest weapon a citizen would have against undue state interference or overreach. Article 3 protects and guarantees broadly 22 rights and freedoms. Of these, the Supreme Court has ruled significantly on the following protected areas under Article 3: Due process and equal protection; exclusionary rule in relation to searches and seizures and arrests; freedom of and from religion and the Non-establishment clause; the right to counsel in custodial investigations; the rights of the accused at trial; the right to bail in capital and non-capital offenses; the right to information on matters of public concern; Many of the rulings of the Court on these areas have led to their codification as rights and freedoms under the 1987 Constitution. For lack of time, I shall limit myself to two instances.

First, the right to counsel in custodial investigations under Article 3, section 12 was adopted in 1981 case *People of the Philippines versus Duero*, from the 1961 United States Supreme Court Decision in *Miranda versus Arizona*. By adopting the so-called *Miranda Warnings* into its Decision, the Court set the stage for the codification of those warnings into what is now Article 3, section 12 of the 1987 Constitution. The ruling in the 1961 US Case of *Mapp vs Ohio* on the “exclusionary rule” which bars the presentation of evidence that is obtained as a result of an an unreasonable search and seizure was

incorporated by the Court in its Decision in 1967 in *Stonehill versus Diokno* and later led to its codification as a constitutional right, first in the 1973 Philippine Constitution and later in what is now Article 3, sec. 3, paragraph 2 of the 1987 Constitution. The Court has also ruled on many occasions on the rights to due process and equal protection, including the then-novel proposition that the right to earn a living is part of the property right of an individual that is protected by Article 3, section 1 and that the Bill of Rights establishes a hierarchy of rights within... with the rights to life and to liberty being more preferred over property, this is 1981 case of *Philippine Blooming Mills vs Philippine Blooming Mills Employees*. On many occasions, the court has also sustained the right of an individual to protect himself against unreasonable searches, unlawful searches and seizures initiated by agents of the state. In one particular instance, the court upheld the implications of the right by a suspected criminal, who objected to a warrant-less search, and seizure at his house. Said the court, in *Alih vs Castro* (1987), one cannot just force his way into any man's house, on the illegal orders of his superior, however lofty his rank. Indeed, even the humblest hovel is protected from official intrusion, because of the ancient rule, revered in all free regimes, that a man's house is his castle. It maybe frail. Its roof may shake. The wind may enter. The rain may enter. But the King may not enter. All the forces of the Crown, dare not cross the threshold of the ruined tenement. Allow me to end by saying that the Supreme Court of the Philippines is a 115-years old institution tasked through the years with the long view of ensuring a just and equitable society to the discharge of its adjudicative functions. Through the years, its decisions have become the basis for constitutions and for legal principles. Many of which have succeeded in allowing the individual, standing against the State to be an effective majority of one.

Maraming salamat po mabuhay. Terima kasih. Thank you.

MR. HAN CHUL PARK (KOREA)
CHAIRPERSON

Thank you Mrs. Oliveros for your wonderful presentation. This brings us to our next speaker, Secretary General, Moussa Laraba, of the constitutional court of Algeria on behalf of CCJA.

MR. MOUSSA LARABA (CCJA)
SPEAKER

Syukron, bismillahirrahmanirrahim. Assalamu alaikum warahmatullahi wabarakatuh
(Silent)

I will focus my presentation on two things and briefly, just briefly. Um... firstly, with regard to the um... history of the establishment of African Association, the Supreme Court Association of Africa is similar to what we have in Asia, which is to focus on the role of constitutional court in Africa as in line with agenda. Thank you to the president for inviting us in this congress, the 3rd Congress of AACC. This Congress which I am currently representing on behalf of **Mari Mada Orotsu**, the president of Constitutional Court and the President of CCJA, who are, who is not able to be here because of the general election in her country. And the Congress, the CCJA consists of African states...

the Constitutional Court of the African States that has a role to protect and to guard the constitution through the Constitutional Court, the Supreme Court, or other **tribunals** or other courts. We are based in Algeria and Algeria... and um... we have the Secretary General at the secretariat which is also based in Algeria. And we are under one domain which is to improve and disseminate human rights, which is also included in the preamble of our constitution. This initiative is also successful because in 2011 we have support from the Venice um... the Venice Commission, and have introduced CCJA. CCJA now has 36 members, where recently we have the constitutional court of Zambia, and constitutional court of Ethiopia. Then CCJA has observers from Brazil, for example, the Federal Court of Brazil. CCJA adopted universal values to respect human rights as the main principles in protecting Constitution. Related to the African Union, CCJA contributes the achievement of its objectives which is to develop the democratic rule of law and good governance with the participation of citizens in governance. The principles of equality and legality are important parts of universal values and initiative that promote social peace. And for achieving these objectives within the framework of universal values, CCJA has aims inter-cooperation and cooperation with other Constitutional Justice areas in the world. CCJA wishes to have an exchange of experience and information in constitutional jurisprudence and the promotion of constitutional justice in Africa through consultative forum, and this cooperation means are real factors of democratic culture within institutions.

On another level, the partnership with African Union is also in line with the cooperation agreement signed in Addis Ababa, 2nd of April 2015. CCJA participated actively in election observation in African Union. And we have many Justices from the Constitutional Courts of the African region who have supervised the General Election within the last two years -- in 2015 and 2016. There are or there were many Justices -- members of CCJA -- who have participated in supervising General Elections in Guinea, the Ivory Coast and the Central African Republic. CCJA is also an observer in the African region, consisted of institution of members states of the African Union. CCJA also serve as a debate forum. CCJA will enter to the Constitutional Court in Africa and also the Third Congress in Libreville, having the theme '*The Role of Constitutional Court as Regulator*' and the discussion went to a great length during the transitional period in developing Constitutions for democratic states. And it provides an opportunity to the Constitutional Courts to discuss about various sensitive matters. And so, cooperation and exchange of experience and exchange of knowledge is very important.

The international forum, which will take place in Algeria in December, which is to provide access for people to constitution rights. I would like also to express that CCJA will conduct its Fourth Congress from the 23rd-26th April in Cape Town in South Africa, bearing the theme '*Strengthening the Independence of the Judiciary and Respect for the Rule of Law*', and the all regional and linguistic areas that have the same domain as CCJA will be invited. Related to the cooperation with other Constitutional Courts is stipulated under Article Three of the CCJA, paragraph seven, which is '*to develop relations of exchange and cooperation between the Conference and similar organizations in the world.*'

CCJA also would like to build an international cooperation by taking into account the specificities and particularities of the continent to build a political system that is compatible with the African reality. To respect universal values, and protection of human rights to the useful stable development. Therefore, a protocol for or draft of memorandum for the cooperation between CCJA and AACC is ready, and perhaps it will be signed at the next Congress in Cape Town, 2017. I would also like to extend my gratitude in this opportunity to AACC for its active involvement in the dissemination of the role of AACC in Asia through its meetings and also trainings in Summer Schools in Turkey, where Turkey annually welcomes all students. We want to replicate this in Africa.

Your Excellency, by taking part in democracy, the Constitutional Court in the Africa region would like to reiterate our confidence and our recognition to the importance of legal rights and therefore, the Constitutional Courts in the African region has become a very important means in political sphere to protect human rights and also to provide fundamental freedom. The democratic transition in Africa in the 1990's can now be seen by establishment of Constitutional Courts, and this marks or this reflects that the states in African region are moving towards a law abiding state.

We are diverse, but that is also our strength. And therefore, this is demanded by democracy, and this is important for civil society, and this is also important for international community. The control mechanism to respect human rights is a system. There's a control system that is dependent on obligatory and facultative, and there are a lot of constitutional jurisdiction for the basic and fundamental rights, and mostly Justices realize all their function because they do not have... In other countries, such as Mali, the Constitution provides a very important basis for constitutional control, especially for texts that concerns freedom and in the African Region we guarantee and we protect the rights in our preamble, which refers to Declaration of Human Rights in 1948 and the African Charter for Human Rights in 1981 in Africa. These are instruments, both conventional and non-conventional, which serve as the basis for African nations in developing their own Constitution. We have many faces in Africa a priori nations, which provide the opportunity to be tangible. Here, we would like to use the approach which is seen as constitutional by providing opportunity to them. Through their Constitution, we would see whether human right is respected.

The protection need to be controlled obligatorily and facultative, and therefore with this obligatory control the Justices can decide on the fundamental freedoms, and this is an example from the Constitutional Court of Algeria, a very peaceful, democratic nation. In this action, we can see that the political world is a supreme norm where the constitutional control is very upheld and human rights is protected. Example, other Constitutional Court in Africa and the Constitutional Court in Algeria revoke all legislation that are in contradiction with Constitution. For example, the separation of power and the guarantee of freedom. The equality principle is also important to guarantee access to law, access to justice, and therefore we have to ensure that the legislation is in accordance with the Constitution. So, the Constitutional Court of Algeria does not only ensure this fact, but we can also remind the legislative to uphold the human rights and to guarantee an effective mechanism to guarantee freedom for

citizens. On other matters, the Constitutional Court also has the authority to review whether the rights of citizen are protected and not amended or not revoked. And also to provide a control and the constitutional division in 2014 allows exception and unconstitutionality. If there is a need for amendment in the Constitution, Article 128 states that the Constitutional Court can do... but through the Supreme Court, to ensure the rights in the Constitution. And for the progress that has been achieved in terms of democracy and also safeguarding human rights, most important is that in law, there must be a concrete relation and disposition and also conduct good actions, and thus we can uphold the state of law and also the freedom of law and freedom for the people. And once again on behalf of the CCJA, I would like to thank Indonesia who has accepted us in Bali, received us in Bali, and also congratulations to this very great organization from the quality of the work that they have conducted.

MR. HAN CHUL PARK (KOREA)
CHAIRPERSON

Thank you, Secretary General Moussa Laraba for your interesting presentation. Our last speaker is Chief Justice Farhad Abdullayev from the Constitutional Court of Azerbaijan. Chief Justice, take the floor, please.

MR. FARHAD ABDULAYEV (AZERBAIJAN)
SPEAKER

Excellencies, my colleagues, once again allow me to thank the Constitutional Court of the Republic of Indonesia for the hospitality, and I also would like to congratulate our colleagues from Indonesia for holding this Asian Congress, which is wonderful. I also hope greater success in the management of the permanent Secretariat that will be working in tandem in the best way. The theme for the second session is very broad and very tight. *'The Role of the Constitutional Court and Equivalent Institutions in Determining the Constitutional Rights'*, because in the decisions of the Constitutional Courts in maintaining their position, and in that way also they can ensure a good legal situation in determining the rights and freedom of an individual.

And in that context, I would like to be brief, maybe to ask your attention to several aspects in ensuring the rule of law in our country. Azerbaijan is one of the fifteen countries that once was part of the Soviet Union. In 1991, Azerbaijan declared its independence and also inserted in its Constitution, details on the independence. We are in the Caspian Coast, and that is where we are -- at the junction of Europe and Asia. The Constitution of Azerbaijan is the source of law, and also the basis for our Constitution and was formed in 1998. In line with the Constitution, the Constitutional Court has a very broad authority. Among them is to determine the supremacy of law and also protection on the freedom of the people. Fifty-six out of the 158 Articles of the Constitution is aimed towards defending or protecting and also to determine the political orientation of the government, as part of the amendment that was conducted towards the Constitution in 2002. In the subjects, it was also added the citizens and also Ombudsman, we have mentioned the rights of the people. And in December 2003, it was, we also... (37)

(38) accepted the new draft and in the draft we have also recruited the assistant of Venetian commission and there we have already determined a mechanism to at the mechanism of personal complaint or individual complaint and in that also give legal protection as a whole, and it also shows after that, that citizen was actively using this mechanism as an effective way to defend their right and we can say here that the involvement of the citizen in through the present of the constitution court the citizen become the active player of in law to deliver their complain to the constitutional court after the inception, or after it was endorsed at first there were so many complaints that came into the constitutional court, our constitutional court, slowly in practice, slowly in practice and also in the practice, in the function there came a question about the requirement or prerequisite of the its content, constitutional court may help could settle these problem because with nine judges or justices, I think we have been quite successful in a very successful way to deal with these complaints and the volume of the number of complain of our nine justices we are able to effectively fulfil the function our function. The constitutional court I think they not only deal with the complaints from the citizen but in an active way lately are also, we also accept cases from the state institutions from example from ombudsman, human rights committees also very active and also from regular judges or general judges. At these time after individual or citizen cases ,we also receive cases from the general court, in the complaints that came in there often question about the norms and regulations and laws and also the revision of the law usually in relation to the constitutional right and the freedom and individual freedom, in my presentation I would also like to give several concrete example from the sentences or the decision of the court and in brief show you example in relation to violation toward property rights, or personal right for example decision of 7 March 2000/1996 and also on the decision of the supreme court of Azerbaijan and then the court decided that the defence, on property of rights is one of the highest value, that is owned state law, state abiding law and in constitutional s its guarantees in an effective way to conduct these right and then it's why ownership is one of the essential right. I would like also ask your attention on the October 11 decision where by in the complaints of the ombudsman they requested to investigate on article on the citizenship of parents outside the content itself they have the right toward their heritage as their beneficiaries and in that.

Speaker: PATRIALIS AKBAR (INDONESIA)

That was then we found that, that limits the rights of ownership and in the decision of the constitutional court is that whether, even though the...it is part of the fundamental grounds of state that abides by law as other constitutional rights, but it can be limited. And for sure if, an owner during his lifetime owns the right to regulate or do as he is, what he owns as he wishes but he has responsibility towards his children and family, family relationship.

In, is taken care of by one of the member of the family, each member has a right to collect and own but the right is cut off when he dies and he does not become a subject of that ownership. And the right for beneficiary or right for legacy place an important role in his closest family member, and the social justice that is part of, one of the most important part of the constitution court eh, they, bow down to the article that is in line

with the constitution of Azerbaijan. In other decisions, constitution court also marks that in deciding dispute between subjects that conducts, there has responsibility in the communal homes, they must determine good services to those, to the inhabitants or who dwells there, and there is a contract between the owner and the tenant. Each party must clearly determine their position on ownership which is formulated in line with the decision from the constitutional court.

The examples that I have shown you is to illustrate that the constitutional court is not only a judicial institution but also institution that shows the relationship, tangible relationship between many parties, even though the constitutional court also reflect the political will that is reflected in law, and thus we also follows the development and the needs of the modern times.

I would like to congratulate the association and also the equivalent institution, thank you.

**HAN CHUL PARK (KOREA)
CHAIRPERSON**

Thank you, Chief Justice Abdullayev

Invitation now, we will invite out distinguished respondents to make some comments on the presentation.

First let me invite President Mahkam Mahmudzoda from the Constitutional Court of Tajikistan. Mr. President, please.

**MAHKAM MAHMUDZODA (TAJIKISTAN)
PRESIDENT/HEAD OF DELEGATION/RESPONDENT:**

Excellency President, Chairperson, Ladies and Gentleman, allow me first of all to extend or express my gratitude to the organizers and particularly to the chairman of the constitutional court of Indonesia, Mr. Arief Hidayat for the extraordinary preparation and a very good hospitality that we have receive by our delegation from the very first day we arrived in Bali, and we feel that the congress today is a very important moment to discuss about various aspects for constitutional rights and human rights of the citizen which are the most actual matter that we see nowadays.

The Republic of Tajikistan proclaiming itself in accordance with the constitution, a democratic and lawful state, and now state we would like to take part in the world civilization that is based on the recognition of human person, of its rights and freedoms as a supreme value in society and the state...

**MR. FARHAD ABDULLAYEV (AZERBAIJAN)
CHAIRMAN/HEAD OF DELEGATION**

That was then we found that, that limits the rights of ownership and in the decision of the constitutional court is that whether, even though the, it is part of the fundamental grounds of state that abides by law as other constitutional rights but it can be limited and for sure if, an honour during his lifetime owns the right to regulate or do as he is, what he owns as he wishes but he has responsibility towards his children and family, family relationship.

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I would like to congratulate the association and also the equivalent institution, thank you.

**MR. HAN CHUL PARK (KOREA)
CHAIRPERSON**

Thank you chief justice...
Terima kasih hakim Abdullayev

Then tession now, we will invite out distinguish respondents some comments on the presentation.

First let me invite President Mahkam Mahmudzoda from the constitutional court of Tajikistan, Mr President, please.

MAHKAM MAHMUDZO

PRESIDENT/HEAD OF DELEGATION/RESPONDENT: DA (TAJIKISTAN)

Excellency president, chairperson ladies and gentleman, allow me first of all to extend or express my gratitude to the organizers and particularly to the chairman of the constitutional court of Indonesia, Mr Arif Hidayat for the extraordinary preparation and a very good hospitality that we have received by our delegation from the very first day we arrived in Bali, and we feel that the congress today is a very important moment to discuss various aspects for constitutional rights and human rights of the citizen which are the most actual matter that we see nowadays.

The Republic of Tajikistan proclaiming itself in accordance with the constitution a democratic and lawful state, and now state we would like to take part in the world civilization that is based on the recognition of the persons, of its rights and freedoms as a supreme value in society and the state...

The meaning of legal state demands the state to protect constitutional rights and human rights in all aspects and in all branches of the state; executive, legislative, and other organs of the regional government. Without the existence of democratic institution and a competent court, we will not be able to talk about constitutional rights and the specific role in protecting constitutional rights is also provided by the constitutional court as the protector of constitutional rights and we can say that in Tajikistan, there is an improvement of role in our constitutional court in protecting constitutional rights of its citizen and this is the most important function of the government.

The analysis of the constitutional court practice in our country.. in our state is not only to evaluate how we protect the rights but also to design conceptual approaches and also the development of constitutional values that grows or develop within the government. In Tajikistan, an individual has the right, not only to filing a complaint to the general court, but individual complaint can also under our regulation in 1995 since the establishment of constitutional court, can be addressed to.. directly to the constitutional court. That's why individual.. each individual are the most common complaint we received at the constitutional court.

And based on that, today the constitutional court through the normative interpretation.. issued fundamental decisions in the field of human rights. And under article 19 of our constitution is the broadest argument that we can use when it comes to protection of human rights. And even though.. while briefly it is clear in our constitution, but in.. at the practical level we have seen a lot of aspect and diversity in the implementation of our constitution. The Court of Tajikistan implements by accepting review and provide decision based on that review and decisions of the court are used to.. are used as reference for other decisions and other court or other jurisdiction and this is certainly any.. or relapsing and any doubt are certainly prevented.

The normative control thus not only provide corrective measures to normative legislation, but also to provide direction in drafting of new laws.. new legislation by taking into consideration the constitution and in Tajikistan we also respect the supremacy of law and even without.. without supremacy of law there'll be protest

among the community and they had been 3 cases of law reform or legal reform in the court of law and.. which ended.. in which the Constitutional Court of Tajikistan is also entering its twentieth year since its establishment and recently when we endorse a new law on constitutional court, we reiterate all the principles about the enforcement or upholding of constitutional right in Tajikistan.

In particular to guarantee the freedom and the constitutional rights of the citizen. In line with our theme. Our theme is the priority... is priority of our court in Tajikistan. At the end of my presentation I would again like to express my gratitude to organizing committee of this very auspicious event and I do hope the result of this event can be.. or can serve as a strengthening mean of cooperation amongst the constitutional court in this region. I am also very pleased.. I am also very pleased to.. be given the opportunity for this. Thank you for your attention.

MR. HAN CHUL PARK (KOREA)
CHAIRPERSON

Our next respondent.

MC

Yang berikut adalah Deputy Justice dari Vietnam, Mahkamah Konstitusi Vietnam.

NGUYEN THUY HIEN (VIETNAM)
SPEAKER

I'd like to thank the chief justice of the Constitutional Court of Indonesia for his invitation for me to attend the third congress of AACC in Bali. I am very happy to be here. Now I have a, some comment. Eh, my English is not enough, eh, therefore I eh, need, eh, interpreter to help me, my colleague here. I am very happy to attend the third congress of the Association of, eh, ACCA and eh, we think that the topic from this morning to afternoon is very meaningful and very fruitful for us. We think that the establishment of the constitutional court through the speech of all delegates from all country, we think that there are more advantages than disadvantages for the follow reasons. The first one is, the authorities of the constitutional court is very clear. And the second one is the procedure for the court is very scientific and very convenient for individual to accept to the justice. And the third one is ehm, execution of the court's decision, this morning, we're, we're hear that all the decision of the court is follows by the executives and legislative. For the three of the reasons, we think that the establishment of the constitutional court is has more advantages than disadvantages because you know, in Vietnam, we have not have a, the Constitutional Court. And we are also tells a lot of seminar and workshop and to learn from international experiences, but not yet establish one as the parliament of Vietnam have not accept to set up the discourse in Vietnam. Is it the situation, the way to protect the fundamental right of the citizen in Vietnam, so how to protect this, eh, this rights, and I would like to share some information now. And if there are some legal document is, in contrary to the constitution and how to deal with this problem? I will share this issue now.

And from 1946 to 2013 we have a five constitution. And in all the constitution we have very clear provisions on fundamental rights of the human and right of citizens. And through the five constitutions, the fundamental right and freedoms of citizens have considerably been expanded and developed in terms of subject, content, and assurances and enforcement institution. And the constitutional right it defies clearly in the law and as a legal document. And when we're making the law we must follow the principals of law and under law, it means degree of government of the ministry must follow constitution. And the Vietnamese Minister of Justice has been responsible for appraising and to examine the draft of legal document. It must follow the direction and the principal of the constitution. And Vietnamese minister of justice has also authority to adoption, examination of legal document. If they find any errors or any provision is contradict to the law, contradict to the constitution it should be a mandate to reviews. And another way to protect the human right and citizen right is the rose assembly and the national assembly will monitor the progress of the law making. And the court system in Vietnam has authority to deal with the litigants in terms of civil crime, business, and administration. And I would like to share example such as if a person would like to register his business and if authority denied to issues business registration, she or he can bring the issue to the administration court. And the court has authority to deal with these cases. And as the coming time we will conduct more research and study about constitutional court, and we hope us in a very soon we have a...this court in coming time. Thank you.

HAN CHUL PARK (KOREA)

CHAIRPERSON

Thank you, Mrs. Deputy Chief Justice. Let me invite our last respondent, Chairman Erkinbek Mamyrov, from the constitutional chamber of the Supreme Court of the Kirgiz republic to respond. Mr. Chairman, you have the floor.

MR. ERKINBEK MAMYROV (KYRGYZ REPUBLIC)

RESPONDENT:

Thank you very much, Chairperson. Excellences, Colleagues, Ladies and Gentlemen, on behalf of the Kirgizstan constitution, we would like to express our gratitude to Mr. Arief Hidayat and to my colleague the Supreme Court of Indonesia for organizing the third congress of AACC.

CHAIRMAN/HEAD OF DELEGATION: ERKINBEK MAMYROV (KYRGYZSTAN)

...stitutions having a theme to promote and protect the constitutional right of the citizen. This is a very actual topic because the fulfillment of such rights also reflects on how government protects this right. The Constitutional Court of Kyrgyzstan states that the freedom and human rights are the most important values and we are protecting such values whenever we have jurisdiction to do so. And therefore the mechanism for such protection is also within the power of Constitutional Court to fulfill the fundamental

rights of human. I would like to explain about the activity of our Court. And the most important mandate of this Court is to protect the Constitutional rights of the citizen through controlling norm where we trial contextuality and incontextuality of legislation, and the Constitution of Kyrgyzstan in 2010 guarantees all rights to all citizen of Kyrgyzstan to give complaint, or to file complaint, to the Constitutional Courts of Kyrgyzstan. And therefore this means that all each individual... any violation to such individual can be brought to the Supreme Court. The... this has the objective to guarantee that all institutions protect also the freedom and the fulfillment of such rights and it is no doubt that this has provide to all citizen, to the majority of citizen, the protection of oneself, each individual against such violation. The complaint that we have received or filed by the individual increases, compare to the previous era where they were not able to file complaint. And there are several cases that have been decided by the Constitutional Court. Within the past three years, we have decided sixty one cases which are directly or indirectly related to the protection of rights and freedoms of humans and citizen. Thus, in decisions relating to the protection of right to freedom of religion, the Constitutional Chamber has indicated that all religious association are equal under the law. And the person or group of persons of a particular religion should not be in a privilege position in comparison with representative of other religions. Protecting constitutional guarantees of freedom of thought and speech; the court emphasize that everyone has the right to freedom of thought and opinion; right to free expression of opinion; freedom of speech and press-- press; right to freely seek, receive, keep, and use information and disseminate it orally, in writing or otherwise, and no one may be subject to criminal prosecution for the dissemination of such. This... the norm also prevents any criminalization of the dissemination of defamation and the Court in relation to that, human... the... the right to freely express their thought and words is one of the most important and universally recognize, protected by the majority of international Acts such as Universal Declaration of Human Rights. And the Constitutional Chamber also in the opinion that everyone shall have the right to inviolability of one's private life and the protection of honor and dignity; the right to secrecy of correspondence, telephone, and other conversation, non-electronic, is also protected by law and the limitation of this right is also... al--allowed only in accordance with law and exclusive for the purpose of protecting national security and public order. So only limited if it concerns the protection of national security or public order, health and moral of the population as well as rights and freedoms of other person. Those dis... dissemination of confidential information as well information of private life of a person without his or her consent...

Except for cases envisage in the law, other areas of human rights activities of the constitutional chambers showed in an association on cases of property rights, social security and judicial protection. The right for employment for example social security, the constitutional court declared that there shall be a new law and legislation for social security which shall not be in contradiction with any social security for marginalized, for the marginalized and the government has the responsibility also to draft, to design an effective mechanism for the transitional period towards new law and legislation. One of the efforts that we have done through constitutional court in Kirgizstan, trough many of its decisions we have conveyed our ideas... on people who are faced by criminalization,

they have the right to appeal before the law... where the constitution guarantees that people or citizen can defend themselves in the court of law and the constitution also said that during trial the criminal, the criminal trial, the rights of the defendant in trial before any trial, any criminal trial can begin the constitutional court as the authority to check whether the proceeding is already accordance. In accordance to the law on criminal proceeding, that does not violate the human rights and the right of a citizen. So, the court has the authority to that. In regard to the time, because i have limited time, i have to end my presentation here and i would like to reiterate that if a constitution found a legislation violates the freedom or the constitutional rights of a citizen, the such legislation must be immediately revoked and as a conclusion, i would like to emphasize that the activity of the constitutional chambers to ensure the supremacy of the constitution is aim at achieving the main goal, establishing in the Kirgizstan republic, the `democratic social and constitutional state. Thank you for your kind attention.

Mr. HAN CHUL PARK (KOREA)

Mr. Chairman **MAMYROV**. As we have had all the presentations panels delivered their presentations, let me offer for the questions and answers. Please, you're the floor.

Mr. I DEWA GEDE PALGUNA (INDONESIA)

Thank you Mr. Chairman, I'm justice. From the Indonesia constitutional court aah I would like to yaa aah to maybe to seek a deeper explanation about eeh... a statement in the eeh aah presented by the representative of the Philippine. eeh, in page 2 eeh eeh there is a statement there. For the first time, the judiciary is empowered to determine whether or not there has been a grave abuse of discretion amounting to lack or excess of the jurisdiction on the part of any branch of all instrumentality of government. I think this is a eeh eeh quite e...vague eeh aah vague expression, especially what does it mean by a grave abuse of discretion amounting to lack or excess of jurisdiction. I would like to ask you a question, is there any specific reference aah of this phrase? Thank you Mr. Chairman.

MR. HAN CHUL PARK (REPUBLIC OF KOREA)

Thank you, any other question?

Okay.

Ms. HESTI AMAWULAN (LECTURE OF UNIVERSITAS AIRLANGGA SURABAYA, INDONESIA)

Thank you for your time, my name is Hesti Amawulan I'm from the University of Surabaya. One thing that I would like to ask, in the constitutional court of the republic of Indonesia... Besides having the mandate as has been determined in the constitution or the constitution, the constitutional court of the republic of Indonesia has other mandates that is based on the law, we would like to ask whether in your country, respectively you have the authority ladies and gentlemen. I don't want to be gender

biased, is there an authority that is given to their constitutional court in your country beside that has been the mandate or the duty of the constitution court as we have in Indonesia, the constitutional court in Indonesia beside having the mandate from the constitution also has the mandate from the law to check into and also... get involved with election... regional election.

MR. HAN CHUL PARK (KOREA)

Ok, Thank you.

Ok, you have the floor

Ms. AYU (LECTURE, PADJAJARAN UNIVERSITY, BANDUNG, INDONESIA)

Terimakasih, terimakasih saya, saya dari Universitas Padjajaran, yang ingin saya tanyakan pada Bapak-bapak dan Ibu semuanya, Yang Mulia, yang ada di depan. Bahwa saat ini berkembang pemikiran untuk antara satu negara dengan negara yang lain diantara Mahkamah Agung ataupun Mahkamah Konstitusi-nya itu untuk mempelajari putusan-putusan yang sifatnya landmark decision dan itu kemudian mungkin sekali untuk menjadi bahan pertimbangan dalam mengambil keputusan ketika menangani satu perkara. Nah, lalu ini saya ingin minta pendapat bagaimana ketika kita bicara antara satu negara dengan negara lain saling mempelajari putusan-putusannya dan kemudian dijadikan sebagai bahan pertimbangan padahal juga kita akan sampai kepada bahwa masing-masing negara tentu punya karakter yang unik diantaranya masing-masing, terlebih lagi tadi Ketua Mahkamah Konstitusi Republik Indonesia mengatakan bahwa Mahkamah Konstitusi itu juga sebagai the Guardian of Ideology, ini saya minta tanggapan dari Bapak dan Ibu semuanya. Terimakasih.

MR. HAN CHUL PARK (KOREA)

Could anyone interpret the question?

Ok, any other question?

(Quite)

Oh, ok, you have the floor, please

MR. OKKA MAHENDRA (INDONESIA)

Thank you, Okka Mahendra from Indonesia,

Okka Mahendra from Indonesia, one question

Ya, tadi dikemukakan bahwa jika Mahkamah Konstitusi..

If the constitutional court decide on a law which is in conflict with the rights of the constitutional individual and thus the law need to revoked, thus the country, or your country, or your parliament in your respective countries complied to that constitutional court decision what if that law is not revoked, is there a consequence? Thank you

MR. HAN CHUL PARK (KOREA)

Ok, thank you. No further question? Ok, all right. Mister and Misses Speakers, please give your response to each question you've received.

Ok, that's good

MR. MARIA LOURDES OLIVEROS (REPUBLIC OF THE PHILIPPINES)

Thank you Mr. Chairman, to the question of Justice of from the Indonesian Constitutional Court regarding grave abuse of discretion, this term, in fact in the 1987 Constitution has been interpreted many time by the Philippine Supreme Court. One meaning from grave abuse of discretion is such capricious and whimsical exercise of judgment as is equivalent to lack of jurisdiction, the abuse of discretion must be patented and gross as to amount to an evasion of a possible--of a positive duty or a virtual refusal to perform the duty, so this has been used several times. Umm, for the most part with respect to reviewing the decision of lower courts... but also with respect to acts of the other department, executive and the legislature whereby there has been a grave abuse in performing their duties as to amount to a capricious or whimsical exercise of such, so I could, you know, I, umm, yes for example one recent pronouncement by the Supreme Court with respect to anti-graft court, the appreciation of evidence, our former president was recently released, he was in detention And some of you may have read this from, in the newspaper, but the Supreme Court's majority decision decided that the decision of the anti-grave court committing, a...a... or allowing the continue the tension of President Mapagal Arroyo was a great abuse of discretion on the part of the grave court. And thus, um... she was in effect acquitted and is now released from the tension. So, that is one of the most recent examples of um... how standard of grave abuse of discretion as provided in the constitution. Yes, to find and that's okay. Thank you, Sir.

H.E. MR. HAN CHUL PARK (REPUBLIC OF KOREA)

Thank you, Mrs. Oliveros. Next answer...

MR. ERKINBEK MAMYROV (KYRGYZSTAN)

(Russian Language)

It will broaden the efforts towards other law. In Kyrgyzstan, this is only determined by the constitution, and cannot be broaden by other law. And relation to the second question, the representation of women in the institutions, state institutions, in Kyrgyzstan there is a law on transgender... oh, equality of gender, where 30% of women are represented in the institutions, state institutions. And in our courts, four out of nine are women. And this is also compulsory, obligatory, including in the parliament. And in relation to the third question, in *Aquinnah*. Oh... the acknowledgment of regulation that is not constitutional. Usually, the regulation or law will not be used, and during when the time the decision is revoked. The century revoked the law is conducted. And in relation to. Is not a mandate, but it is a quota in Tajikistan. In relation to... because, we have not determined the quota for women. And the courts, but in our law, it is determined that we only have seven constitutional court justices, and at least one is, must be a representation of a region, an autonomous region, Gorno-Badakhshan, the highest mountain in the world. And the representation of that autonomous region must also be represented in constitutional court. And besides that in 1999, the President of the State Mr. Emomali Rahmon, he determined the role of women in the lives of the people in the

State. And, it was determined that the institution that uphold the law in our country must include the women. So, this becomes one of the tension of the government of Tajikistan. And in Tajikistan we have also passed a law and this law is then. And there is a tradition in this law, where the rights of the women are protected towards, for example, efforts in relation to the traditional family. And number two on the authority of the constitutional court, the constitutional court of Tajikistan clearly states in their constitution. It says that we cannot be um... influenced by other law or other constitution. So, this can be characterized by clear, making clearly, making it more clearly in the law in Tajikistan. We cannot make a decision that is different on a same case. If the same case is um... repeatedly um... put to the court, then this is not allowed by our justices then. Thank you.

MR. PATRIALIS AKBAR (REPUBLIC OF INDONESIA)

Um... I would like to answer by speaking in Bahasa. *Saya ingin memperjelas.*

MR. PATRIALIS AKBAR (INDONESIA)

CONSTITUTIONAL COURT JUDGE

I would like to clarify what was mentioned by *Ibu Hesti* from the University of Surabaya that, indeed, actually the authority and the responsibility of the Constitutional Court is governed by the Constitution. That's why it is called the *Constitutional Court* -- because it is derived from the Constitution. In Indonesia, we have four authorities and one responsibility, but then there is a law that gives a mandate to the Constitutional Court of Indonesia as a court to trial or to decide the disputes on local General Election or Head of Region General Election. That is a polemic -- that law has created polemic because at that time, there was a regional election -- one of the biggest one in Indonesia -- and because there was a law on that already, the Constitutional Court of course needs to comply to the law, provided that the law has not been revoked or has not gone through a judicial review by the Constitutional Court.

Complying to such law, there was a complaint or a request -- an application to do a judicial review for that law, and the Constitutional Court decided that the Constitutional Court does not have the authority to decide on the disputes of Regional Elections, because the court only has authority to trial or to decide on General Elections at the national level. But, along the way Indonesia then implemented direct election for its Regional Elections as well, direct voting. So, even when the Constitutional Court has revoked that law and to recognize that it is beyond our jurisdiction to decide on dispute of Regional Elections, but considering the best interests of the nation -- the interest of the people, in order for good governance and for the state, the Constitutional Court then provided an exemption at the end of the decision stating that provided that there is no Special Court to be established by the government together with the legislative. Until then, the Constitutional Court will still bear the authority or still have the authority to decide on disputes of Regional Elections. So again, we take it into consideration the greatest interest of the nation. However, because the Constitutional Court has a very sovereign authority, until today the parliament -- Mr. Abubakar who is here also present

today this afternoon, one of Member of Parliament and the President, because according to our law, the law is made by the government. The President, together with the Parliament.

And those two institutions have not yet established a specific court under the Supreme Court to deal with disputes on regional elections. And today, we are still facing a transitional period. But when the time comes, where the President together with the Parliament draft a law to establish a specific court for that, then for sure, the mandate of the Constitutional Court to decide on any matters regarding Regional Election will be revoked, will be ended. I would also like to inform to everyone here that the Constitutional Court in deciding cases, we always refer to three aspects at the very least. The first is Justice, the second is Legal Certainty, and the third is Efficiency. These are the considerations or efficacy -- these are the consideration of the Constitutional Court when deciding dispute on Regional Election. And I would like to conclude my comment to the fact that we already exist for 13 years, through two Presidential terms, under Mr. Susilo Bambang Yudhoyono, who always have our Constitution the booklet in his pocket. He reiterated that all institutions needs to comply all the decision of the Constitutional Court. I know this for a fact because I was his assistant for Justice and Human Rights. So, even when the decision is not a popular one, but when we have decided on something the President will immediately comply. As well as with President Joko Widodo. He has expressed appreciation to the Constitutional Court, one of which appreciation was his attendance here in this meeting, and several times during his remarks including the keynote speech that he conveyed earlier this morning, the government of Indonesia comply with and obey all the decision of the Constitutional Court. So, that why I would like again to reiterate that the Constitutional Court of Indonesia has very high dignity for the Indonesian people. Thank you.

MR. HAN CHUL PARK (KOREA)

CHAIRPERSON

Because we have spent all our time allocated for the session, this will conclude the Q and A session. I think this was a great opportunity to share diverse perspectives on the topic '*The Role of Constitutional Courts and Equivalent Institutions in Promoting and Protecting Citizen's Constitutional Rights through its Landmark Decisions*'. It was very interesting to hear about experiences from Indonesia, the Philippines, Africa and Azerbaijan, and perspectives from Tajikistan, Vietnam and Kyrgyzstan. I certain that those landmark decisions has brought and will continue to bring changes for stronger protection of basic rights and democracy. Sharing our experiences is certainly a very important function of the AACC. And now, I would like to add that especially, the establishment of the permanent Secretariat in Indonesia and Korea will facilitate a more active interaction and deeper research on important constitutional justice.

Once again, I would like to express my sincere appreciation to all the participants here, especially to the speakers and all respondents today, and this concluded this session. Thank you for your attention.

MASTER OF CEREMONY (MC)

Distinguished delegates, this concludes our meeting for today. Let me remind you that tomorrow, we still have the last session of our Congress which will begin at 9 AM.

Friday, 12 August 2016

MASTER OF CEREMONY (MC)

Welcome to the 3rd Congress of the Association of Asian Constitutional Courts and Equivalent Institutions. For today's session, acting as the Chairperson of the meeting is His Excellency Mr. I Dewa Gede Palguna of the Constitutional Court of the Republic of Indonesia. And first speaker is His Excellency Mr. Jantsan Navaanperenlei from Mongolia. Second speaker is Mr. Zuhtu Arslan from Turkey. Third speaker is His Excellency Mr. Abdulah Shafae from Afghanistan. And respondent is Her Excellency Mrs. Hla Myo Nwe from Myanmar.

Along with His Excellency Mr. I Dewa Gede Palguna, I have the honor to invite the speakers and the respondents to come forward to head table on stage. I would like to invite all the speakers and the respondent. To his Excellency Mr. I Dewa Gede Palguna, the floor is yours.

MR. I DEWA GEDE PALGUNA (INDONESIA)

CHAIRPERSON/CONSTITUTIONAL COURT JUDGE

Thank you very much. Honorable Chief Justices and Justices and all distinguished participants of the Congress. Good morning. May safety, happiness and peace be with us. Firstly, I would like to thank especially to the organizing committee for giving me a chance to chair this session. Frankly speaking, I feel so honored. And yeah, because this is.. I think.. this is would be good, at least, because this is the final session of the Congress.

Distinguished guests, there is a famous song named 'At Last' by Etta James, so at last now we are entering the final session of the Congress. Yesterday, during the two previous sessions we have discussed respectively two interesting topics: '*Mechanism for Promotion and Protection of Citizen's Constitutional Rights*' and '*The Role of the Constitutional Court and Equivalent Institutions in Promoting and Protecting Citizen's Constitutional Rights*.' Now, we are entering another interesting as well as quite delicate issue, that is '*Current Challenges and Future Direction for Strengthening Promotion and Protection of Citizen's Constitutional Rights*.'

Justice William J. Brennan of the US Supreme Court once cited and modifying a famous statement of Justice Felix Frankfurter, says, "*We, Justices, are certainly aware that we are final, not because we are infallible but we are infallible only because we are final.*" I think, to me personally, this famous statement will always be a kind of a wake up call in dealing with each and every case before handing down a decision or a verdict, which is in nature is final and binding. No matter how simple the case looks like, let alone cases which involve complexities reflected in our topic at hand now.

Distinguished participants, we have three speakers now and one respondent. The first speaker will be...

MR I DEWA GEDE PALGUNA (INDONESIA)

JUSTICE/CHAIRPERSON

your honourable, ee. (indistinct voice)
You the Chief Justice of Mongolia ya? Chamsam. Ya, you the Chief Justice of Mongolia ha?
Ya, ya. Ya. Justice Jantsan Navaanperenlei. I am sorry if my pronunciation just not
correct the second speaker will be honourable President of the Constitutional Court of
Turkey Mr Zuhtu Arslan and the third speaker shall be Mr Abdullah Shafee from the
Islamic republic of Afghanistan and the one and the only respondent will be
distinguished Justice Mrs Hla Myo Hwe from the Republic of the Union of Myanmar. So
hmm, all distinguished participant of the congress according to the Governor of Bali in
his welcoming remarks. He said that Bali is the island of love so let's pray and lets hope
that the spirit of love will guide us to the fruitful discussion of these last session so I
would like to first invite your excellency distinguished Justice Mr Jantsan
Navaanperenlei to present your presentation, time is yours.

MR JANTSAN NAVAANPERENLEI (MONGOLIA)

ACTING CHAIRMAN/HEAD OF DELEGATION/SPEAKER

Honourable Chairperson, honourable president of the constitutional courts Chairman
Chief Justices, ladies and gentlemen let me begin with sincere gratitude on behalf of the
constitutional courts of Mongolia and my own name to the constitutional court of the
Republic of Indonesia for hosting the third congress of Association of Asian
Constitutional Courts and Equivalent institutions and wish it's great success in the
future endeavour. My warm thanks go to the delegate who have prepared presentation
with the view to sharing with us to reach experience of their own countries. I am
convince that these congress will be fruitful and successful as the previous congresses.
Firstly the constitution is legal and political document of supreme important as shows
as a guarantee of the independence and sovereignty, human and citizen rights and
freedom, separation and balance of the state power and exercising the constitutionalism
of a country. And issue that extracted special attention when adopting its new
constitution following the transition of Mongolia to democracy was ensuring human
rights by constitution and their practical implementation as well as their protection. As
special chapter 2 the human rights and freedom was included in the constitutional
Mongolia in compliance with the treaty and convention relevant to the human right and
freedom adopted by the United Nations base on the letter and the spirit of the universal
declaration of Human Rights. In other word Mongolia in line with internationally set
practices declare inline able political, social, culture and economic rights and freedom in
the new constitution adopted in 1992. There must be a mechanism to protect human
rights and freedom enshrine in the constitution and other laws in case as those rights
and freedom will not be a real, reality just on their own. There is always a possibility
that they could be violated, the highest form to provide for such protection in domestic
legislation is the constitutional court. The constitutional court of Mongolia called it has
its discretion to initiate constitutional proceeding on the basis of petition and
information receive from the citizen, the constitutional courts also examine and settle
constitutional dispute at the request of the Parliament, president, prime minister,

supreme court and the prosecutor general. Apart from citizen of Mongolia foreign citizens and stateless persons residing lawfully in the territory of Mongolia enjoy the rights to submit petition and notification to the constitutional courts of Mongolia. Citizen could submit petition, information and complaints to the constitutional court regarding any issue which falls under its jurisdiction and it doesn't require the rights and freedom of the citizen to be violated. Or the case to be previously set by court, apart from this issue regarding violation of individual rights of citizen, he or she may submit petition information and complaints regarding violation of the rights and interest of the public

The right of the citizen to apply for a constitutional review on all issues which fall under constitutional court jurisdiction gives broader opportunities in comparison with other states. Thus the constitutional court of Mongolia protects the rights and freedom of the citizen through an abstract form of supervision over implementation over the constitution.

Thirdly, the constitutional court of Mongolia has taken numerous decisions aimed at stopping violation of human rights following court proceeding on petitions and information received from citizens. It should be mentioned that this decisions will set a standard which will be essential in preventing this kind of violations in the future have practical influence in promoting and protecting human rights and freedoms and formation of the constitutionalism.

Since its establishment the constitutional court of Mongolia adopted approximately 240 decisions. And over than 60% of them determined that the constitution had been breached. As mentioned above, the constitutional court of Mongolia has examined and settled numerous disputes regarding human rights and freedoms.

As the following are brief examples of some cases, as regards the personally and violable rights of freedoms arresting or putting into custody of a *castus* citizen affected by alcohol or drugs according to the relevant law was regulated by the rules adopted by the public official.

The constitutional court of Mongolia repealed it after having established that this provision breach the concept of the constitution regarding infringement of the citizens' rights only according to the grounds and procedure prescribed by law. The information on the person with AIDS was removed from the category on confidential information by amending the law on protection of confidential information individual.

The constitutional court settled that disputes on this issue and repealed an abomination laws provision after having concluded that this was a regulation that could result in infringing the confidential individual information of the sick person or slandering him or her.

As for the economic rights the provision of the civil law and law on hypothec that debate the rights of the owner and gave a privileged position to the encumber on her or, or the organs of the states where repealed.

As to the political rights and freedoms, a citizen with the criminal record would never have a right to run for the parliament. The constitutional court repeal it establishing that it infringed on the right of the citizen to be elected and right of supporting citizens to elect him or her. In the same way, the right of the state's service employees such as doctors and teachers to stand for elections was seen as infringed as they were put into the same position as the civil servant as they do not enjoy the right to stand for election while in office.

Fourth, it should be noted that, not every decision of the constitutional court had been received favourably. The majority of the disputes settled at the constitutional court of Mongolia are related to the laws adopted by the parliament. Thus it should be mentioned that quite a few attempts on the part of members of parliament and political parties were made to influences the judges trough exerting pressure and slandering them by a mass media in order to mislead the public opinion.

In order to make it clear, I should explain you, a distinctive feature of the constitutional procedure in Mongolia. The constitutional court of Mongolia does not immediately take a final decision after examining and settling a dispute and a distinctive, distinctive feature lies in the fact that the constitutional procedure of our code hasthat is a constitutional dispute is examined by 5 member middle bench session and the judgement this deliver to the parliament. The parliament shall consider it within the period prescribe by law and in case of its acceptance, the judgement becomes a final decision. If the parliament rejects the judgement, the constitutional court shall re-examine the dispute by a 7 to 9 member full-bench session and take a final decision.

The Constitution Court of Mongolia does not immediately repeal and issue as unconstitutional and adverse delivers it to the parliament consideration. On the one hand, it gives the law makers an opportunity to correct a mistake which have a positive effect where by respectful attitude between the Constitutional Bodies its maintained. On the other hand, the above had also a negative effect which was reflected in parliaments procrastination of the constitutional court issue that resulted in the interruption of the constitutional court final decision making process.

In addition, in many cases the parliament treated an issue in the most conflicting manner, tried to excerpt pressure rather than right to find the violation during the consideration of the constitutional court judgements. I would like to mention here an example of the beginning of the 2016 when amendment where put into the law on Constitutional Court of Mongolia and constitutional procedure, which affect to litigated the guarantee of the independence of the constitutional court and impartiality of the judges on an.. and limited the constitutional court's jurisdiction.

In June this year, the Constitutional Court of Mongolia examined this case and found it would be breaching the constitution. Our judges made this decision regardless the pressure on the parts of the authorities. Despite this difficulties, the Constitutional Court

of Mongolia has fulfil its obligation in good faith honourably and consistently to guarantee a strict observance of the constitution and protect human rights. Fifth, we have a good number of issues that would be dealt with, in order to improve the constitutional review and constitutional jurisdiction with a view to guarantee protection and promotion of human rights.

First of all, there are important issues such as keeping the constitutional review continually alive. Developing constitutionalism and rule of law. Reducing influence and pressure from political parties and authorities. Insuring impartiality of the constitutional court. Therefore, the Constitutional Court of Mongolia needs to improve the law on the constitutional court and constitutional procedure so that it would conform to global standards. This is our objective in the near future.

In addition, it should be noted that today the law on constitutional procedure, which is currently enforce, does not prescribe in detail matters concerning the implementation of Mongolian Constitutional Court decision. This shows that we somewhat lack behind other countries in this matter. Thus, an active cooperation of constitutional courts and equivalent institutions is important in determining future trends and directions, enhancing quality, and effect of the court decisions. I would like to stress the Mongolian Constitutional Court considered view that the activities of our regional association are great important in this connection. Thank you very much for your kind attention.

MR I DEWA GEDE PALGUNA (INDONESIA)

JUSTICE/CHAIRPERSON

I think there is a.. some interesting points it needs to be noted here where that eh.. the Mongolian Constitutional Court all.. it is called SAD in Mongolia sell.. all.. always put into its consideration when deciding cases within its jurisdictions. Any instrument internation.. eh any international eh law instruments the protecting human rights. And the second.. the.. the second note that I can be eh.. eh.. that can be emphasised here is that it is an interesting point the presented during the presentation that foreigners legally residing in Mongolia. A given standing to lodge a complaint with a.. the Constitutional Court of Mongolia. This is eh.. I thinks academically speaking this is maybe a kind of a..

MR. I DEWA GEDE PALGUNA (INDONESIA)

CONSTITUTIONAL COURT JUSTICE

Your popularis, er, *aksi popularis* doctrine, it is implemented in Mongolia, well, that's the first presentation, thank you very much, your Excellency, it its Mr. Navaanperenlei. Now we will invite eh, presentation from the Republic of Turkey, no one else but the Mr. President of the Constitutional of Turkey itself, that is Mr. **Arslan**, time is yours, please.

MR. ZUHTU ARSLAN (TURKEY)

SPEAKER/ PRESIDENT/ HEAD OF DELEGATION

Thank you Mr. Chairman, Distinguished participants, Ladies and Gentlemen, once again I would like to thank the Chief Justice of Indonesian Constitutional Court, Mr. **Hidayat** for his warm and generous hospitality.

Actually it's a pleasure ehm, for me to be here and speak to such distinguish colleagues, as you know, our country Turkey has experienced a flagrant coup attempt recently, and fortunately the perpetrators have failed and our democratic regime survives because of brave resistance of Turkish people. There is no doubt that the recent coup attempt created a new constitutional and legal situation in Turkey. This is perhaps one of the most serious challenges that our constitutional democracy has faced so far.

In my speech, I will explain the possible implication of this incident, for the future of Turkish democracy, for the constitutional and legal system, and of course for the jurisprudence of the Constitutional Court of Turkey.

I'd like to, first, give you a brief information about eh, what happen at that night, by showing you a short video, if you have video available, we can now show it.

Well, it was, it was indeed a horrible day for all of us in Turkey. It was the day that lasted more than a hundred years, to borrow the words of Chinghiz Aitmatov. I was at home with my family while the fighter just started to bomb parliament, which is only a few kilometers away from us. It was as if, ourselves, were bombarded. My youngest son, who is only twelve, kept asking me this question with a shaking voice, "Daddy, are this war planes going to bomb us? Are they going to kill us?" I said, "No", but I wasn't sure my answer was correct. I wasn't sure because the following day we found out that the perpetrators a faction or junta within the army, launched a terrorist campaign, firing at their own people and bomb the Turkish parliament, office of the presidency and some police headquarters. This attempt soon was taken under control due to continuous effort of the political leadership including the President and the Parliament, all political parties, the media, and significant sections of security forces from both the army and the police. Above all, it was a democratic will and resistance of the Turkish people which brought to be decisive in stopping this coup attempt. The failed coup attempt is an indication of Turkish people's awareness and the consolidation of Turkish democracy.

The Turkish constitutional court, made a public statement at the very beginning of coup attempt, after a couple of hours when we realize it was a coup attempt. In the statement we pointed out that we repudiate all kinds of anti-democratic attempt against the constitutional order and stand beside of democratic constitutional state.

The Turkish constitutional court's public statement played an important role to protect constitutional order and democratic values by demoralizing the plotters and encouraging the Turkish people. The Constitutional Court's firm reaction to the attempted coup was followed by other high courts such as the Court of Cassation, the

court of...the Military Court of Cassation, and the Council of State. On 16th July 2016, the Public Prosecutor ordered to arrest hundreds of thousands of people who were believed to be either the plotters of the coup, or connected with the organization behind the coup.

They included two judges of the Constitutional Court, 140 members of the Court of Cassation, above fifteen members of counselor state, and more than three thousand judges and prosecutors of first instance courts.

The authority stated that from the very beginning that the failed coup was planned and executed by the Gulenist Terrorist organization, *Hatırat*, which is also known as Parallel State Structure in Turkey. As explain in the previous indictments, and court decisions, this group created a parallel organization in key posts of the state. Especially in security, judiciary, and civil bureaucracy. For a long time the group acted more like a messianic organization than a simple Islamic faction and function in a secrecy within a state institution. "Concealment" has been the key tactic of the members of the organisation. The members of this group are ordered to disguise their affiliation with the movement.

Well these are the expressions taking from the decision of Turkish Constitutional Court on the removal of two judges from office. In order to fight against this organization in a comprehensive and effective manner which poses a grave threat to survival and security of the state through its clandestine infiltration to state mechanisms, the Council of Ministers of Turkey declared a nationwide state of emergency following the failed coup attempt.

It must be noted that, like France, Turkey resorted to the right of derogation from the obligations in the Convention...European Convention of human right for a 3 month period as prescribed in Article 15 of the Convention. I must also say that the coup attempt which was a kind of sophisticated terror attack is more extensive and disruptive compared to the terror attacks in France or actually in any other European state.

It may be compared to it Nine Eleven event of United States, in terms of its traumatic effect. During the state of emergency, the Council of Ministers, meeting under the chairpersonship of the President of the Republic, may issue decree laws on matters required by the state of emergency.

Under normal circumstances, the Constitutional Court shall examine the constitutionality of decree laws. But, decree laws issued during a state of emergency, martial law or in time of war shall not be brought before the Constitutional Court alleging their unconstitutionality. That means the Turk constitutional court has no competence to review the constitutionality of emergency decree laws. Nonetheless, within the state of emergency period, the administrative acts and activities are subject to judicial review. The only limitation for administrative courts is that they may not render stay of execution decisions. This regarding decisions and Acts of Administration in the ninety days state of emergency period. The right to individual application before the Constitutional Court is also available for individuals during the time of emergency. Ultimately, individual may also lodge an application to the European Court of Human Rights if they are not satisfied with the decision of the Constitutional Court after having

properly exhausted domestic remedies The Emergency Decree Laws ehm... declared during the state of emergency seem to have two main objectives. First, they aim to demilitarize the social and political life and to ensure the... the full democratic and civilian control on armed forces. To this end, the army forces of land, air, and navy were detached from the Chief of Military Staff and attached with the Ministry of Defense. Likewise, some of the military schools, colleges were closed down. Second objective of the Decree Laws is to completely eliminate what is called 'parallel state structure', which was defined by the National Security Council as a terrorist organization even before the coup attempt. The Decree Law number 677 clearly stipulates that members of the judiciary including the Constitutional Court and all state officials shall be dismissed from the profession or public service if they are considered to have... to have affiliation, membership, cohesion, or even connection to terrorist organizations or to groups, formations, or structures determined by the National Security Council to be engaged in activities against the national security of the states.

Now let me talk about the Turkish Constitutional... Constitutional Court uhh... position towards the coup attempt and um... decisions taken following the coup attempt. As one of the guardian of the democratic constitutional order, the Turkish Constitutional Court promptly reacted and took immediate measures during and after the failed coup attempt.

The Court first initiated a disciplinary investigation about two member judges who were arrested and subsequent...subsequently detained on remand within the scope of the criminal investigation. The plenary of the Constitutional Court removed them from the office in accordance with Article 3, one of the Decree Law on measures taken within the scope of state of emergency. Actually this was the first Decree Law issued by the Council of Ministers. In addition, the Court administration, Constitutional Court administration, the Presidency of the Court removed totally thirteen...one three...rapporteurs coming from the other public bodies and institutions and seconded to the Constitutional Court from office and send back to their institutions. It has been informed that suspension from office and detention decisions were rendered about eight of this rapporteurs. We also decided on 29th July 2016 that one rapporteurs and seven assistant rapporteurs and fifty six staff members be suspended from office until a final evaluation is made against person to Article 4 of the Decree Law. In this decision concerning the removal of member judges from the court, Constitutional Court, a. explain the meaning of the coup attempt for constitutional democracy, b. interpreted the relevant provision of the Decree Law number 667.

According to Court, the 15th July attempted coup was the most devas-- devastating attack against democratic constitutional orders, constitutional rights, and liberties and national security. It was already a dark mark in the history of the Turkish democracy. The Court also interpreted the parameters of Article 3 of the Decree Law in the following temps... terms. According to the aforementioned Article, applying the measure of dismissal from profession on Constitutional Court Judges: a. It is necessary that a Judge is considered to have affiliation, membership, cohesion, or connection to terrorist organizations or to groups, formation, or structures determined by the National Security

Council to be engaged in activities against the National Security of the state and, b. the second conditions, that this consideration is decided by the simple majority of Plenary...Plenary of the Constitutional Court. Normally the Law on...

ZUHTU ARSLAN (TURKEY)
PRESIDENT

Court stipulates that in order to remove a judge from office, two third majority is required, two third majority of the plenary of the court is required. But the the decree eeh reduces this majority to as simple majority. eeh anyway the decision eeh on this two judges about taking unanimously eeh that means this change in fact did not affect the situation of 2 judges. And To apply the measures eeh, it does not require absolutely a bond between a constitutional court judge and a terror organization and terror activities by the way of coup attempt, but it is found sufficient if there is a link to a structure formation or groups that are determined by the nation security council to be engaged in activities against the national security. On the other hand in order to apply the measure of dismissal from profession, it is not obligatory that the link is in the form of an affiliation or a membership. Even a connection is already regarded sufficient. In the end, the article states that, article 3 of the decree laws states that certainty or absolute proof for the link between the judges and the structure formation or groups determined by national Security Council to be engaged in activities against national security is not require. Nevertheless, it is found sufficient that such a link is considered by the plenary of the constitutional court. This consideration expresses the opinion that is formed by the simple majority of the plenary. There is no doubt that this consideration is independent from the existence of a criminal liability. The necessity to rely on a certain type of evidence to form this opinion is not set forth in article 3 of the decree law. It is up to the, against the simple majority of the plenary of the constitutional court based on which, as which aspects this opinion will be formed. What is important here, is to stay away from arbitrariness while forming an opinion. Applying these arguments and parameters of the decree law to the current problem, the court declare that taken into account of the circumstances of the concrete case, we must remember that these 2 judges were arrested immediately after a coup attempt and they were detained only months. The social background information that they are related to the mentioned structures and the common opinion of the constitutional court judges, this is very important, the common opinion of the constitutional court judges that, that was formed over time, it is considered that these 2 judges has such link to the aforementioned structures that it is not appropriate for them to carry out their profession. The court has emphasized that otherwise the credibility of and respect for the judiciary especially the constitutional judiciary would be impaired. It was decided unanimously that it is not appropriate for the members of the constitutional court to remain in office and that they ehh they're dismissed from their professions. As a conclusion, I will say Turkey face a devastating terrorist coup attempt that our country had ever faced before. I would like to mention that there is no doubt that Turkish constitutional court is to ensure the fundamental rights and freedom of individual in the state of emergency period. Turkey is getting normalized and our court has been exercising its vital role in the normalization period as in other times. I'm sure that the decree laws and the application

of these decree laws will increase the already heavy work load of the Turkish Constitutional Court but we will sort out these problems by applying new techniques of the language in the individual application. We as the presidents of and justices of constitutional supreme court should be very well aware of the fact that if there is no democratic constitutional order, there would be no constitutional rights to be protected by these courts, thank you very much for your attention.

MR. I DEWA GEDE PALGUNA (CHAIRPERSON)

Thank you very much Mr. President, that is an interesting explanation, such an interesting explanation. We had a chance, maybe a rare chance to watch even a glimpse picture of the attempted and failed coup happening in Turkey but the most interesting, is there the quick step taken by the constitutional court of Turkey who launched an internal investigation, shortly after the failed coup, again, because two of its members allegedly involved or had a link with the perpetrators of the coup and the two are finally dismissed from its position if I'm not mistaken, well, there is another one, another challenge for the constitution, for upholding the principle of constitutional... constitutionalism and the rule of law as well. And now we've arrived the third speakers. So, I would like to invite, Your Excellency, His Excellency, Mr. Abdullah Shafae from the Islamic Republic of Afghanistan, well time is yours.

Oh, ok, If you would like to.

**MR. ABDULLAH SHAFAE (AFGHANISTAN)
MEMBER**

Thank you, Mr. Chairman. *Bismillahirrahmannirrahim*, current challenge and future direction for strengthening the promotion and protection of citizen's constitutional rights, honorable ladies and gentlemen, please allow me to convey the warmest regard of the Chairman of Afghanistan Independent Commission for Overseeing the Implementation of Commission. Our Chairman are very much delighted to participate in the 3rd Congress of the AACC but due to his crucial engagement and the electoral reform efforts in Afghanistan, he could not make it. During this opportunity, I would like to congratulate His Excellency Mr. Arief Hidayat, the termed President of AACC and the Chief Justice of the Constitutional Court of Republic of Indonesia for the wonderful arrangement of the 3rd Congress of the AACC. I also extend my gratitude and appreciation to the constitutional court of Indonesia that and the termed Presidency of AACC for their warm hospitality, according to the agenda I would like to point out a number of the current challenge and future direction for strengthening the promotion and protection of citizen's constitutional rights, ladies and gentlemen, there can be numerous challenge to the promotion and protection of citizen's constitutional rights, the nature of the challenge differ in each extend a context, there are also challenge to the protection of citizen rights in Afghanistan, a country threatened by international terrorism and extremism, therefore it is difficult to cover all of the chall... current challenges in fifteen minutes. With it's said, I will place my effort to touch upon a view of them, for the purpose of today's meeting, to make it easily understandable. I put my argument into two section. In section one I discuss the

theoretical challenge, in section two I concisely, touch upon a practical challenge facing the promoting of the constitutional rights of the citizen in Afghanistan, finally I will, with a recommendation to the permanent joint secretariat of AACC. Theoretical challenge. This section revolves around the definition of two concepts: 1) citizenship, and 2) rights. In this explanation, you will acknowledge that the contest's notion of, notions of citizenship and rights can possess, that give us challenge to the promotion and protection of constitutional rights of citizens... citizenship. In a careful scrutiny of the concept of um... of the concept of citizenship, one can reach a conclusion that the term has um... contested notion, and does not when itself to um...straightforward definition. For example, in the academic arena, it is difficult to offer a comprehensive response to the courts, such as: 1) who is citizen, 2) how a citizen different from resident, 3) can we call um... and immigration, and refugee, citizens or not. Existence the, um... of this comprehensive um... possess um... immense challenge to the um... protection of constitutional rights of citizens around the clock. A number of academic divided the terms citizenship into political citizenship, social citizenship, tribal citizenship, and so forth. Its division, its division is entitled to various different rights and privileges. This existence can possess a huge challenge to the promotion and protection of the constitution, constitutional rights of the citizens. There are opposing arguments, failures to consider the number of a legitimated armed conflict groups, the citizens of the state. um... for they do not accept the constitution of the um... state. They are supposed considerable efforts to other through the legitimated government. Undoubtedly, we all agree that such group exists, not only in Afghanistan, but also in a number of other states party in AACC. This existence can possess a huge challenge to the promotional, promotion and protection of the constitutional rights of the citizens in a number of countries. Their populations are classified into primary citizens and secondary citizens. The later classification is considered unimportant due to their religion, race, sex, language, and political beliefs. This existence can possess a huge challenge to the promotion and protection of the constitutional rights of the citizens, given all the above. In order um... to encounter the above challenge, there is a need to offer a comprehensive um... definition for the terms citizenship. A definition which should be brought in each court, and can embrace all the rights that one is entitled for. Rights and its origin. A careful um... scrutiny revere that academics and

MR. ABDULLAH SHAFARAE (AFGHANISTAN)

SPEAKER/MEMBER

...there is also a fight over the origin of the rights. For some, the origin of the rights is the human nature, for some it is God's will, for others it is the social contract or the state. Each argument has its advantages and disadvantages, it also can cause serious implications on the constitutional right to be protected. Different understanding on the concepts of human rights and constitutional rights can be another challenge to our promotion of citizens' rights. Some believes that human rights should be defined within the boundaries of the state. However, others believe that human rights are universal.

If we argue that rights should be defined based on the principles of human nature, then citizenship should not be a prerequisite for constitutional rights. As evidenced, in most

Constitutions to be entitled for a number of rights, one has to have a citizenship. For example, you cannot vote for the Presidency of USA if you are not its citizen. This divides their rights into two different states. One right before the citizenship, and rights after the citizenship. This existence can pose a huge challenge to the promotion and protection of the constitutional rights of the citizen. Therefore, we need to offer an overarching definition for the rights and base our arguments about the origin of them on solid justification to particular challenges.

The promotion and protection of civil constitutional right also encounter some challenge in practice. I hereby present a few examples from my country. One, the Afghanistan Independent Commission for Overseeing the Implementation of the Constitution cannot overrule the decision of the Supreme Court of the country. Because, based on the Constitution, the final decision of the Supreme Court must be enforced. There is no chance for any party of the case to argue that his constitutional rights is not respected by Supreme Court and they should therefore file their complaint in the Commission.

Two, in order to promote and protect the constitutional of citizens, a number of organic laws should be crafted and put in place. Based on the Constitution, the ratification of organic laws lies on their authority of the Legislation. The non-existence of this organic laws can also pose a challenge to the protection of the constitutional rights of the citizen.

Three, lack of public awareness from the constitutional rights can also pose challenge to promote and protect the constitutional rights of the citizens. Four, there are a number of cases in my country that constitutional rights have been overshadowed by local traditions. This existence also pose a challenge to the promotion and protection of a constitutional rights to the citizen.

Ladies and Gentlemen, given all mentioned before, I suggested that the Court of Korea who managed the Research and Development of the Secretariat of AACC can help us find a solid mechanism to deal with both challenges through research. I hope, we should work all together to find out better solutions and leave a world wherein everyone's rights are respected. Thank you for your attention.

MR. I DEWA GEDE PALGUNA (INDONESIA)

CHAIRPERSON/CONSTITUTIONAL COURT JUDGE

Thank you, His Excellency Mr. Abdullah Shafae for the presentation. It's interesting to mention here that Afghanistan has no Constitutional Court, but it's called the Afghanistan Independent Commission for Overseeing the Implementation of the Constitution. There are two main challenges according His Excellency Mr. Shafae: the first challenge is the issues concerning theoretical concepts, especially concerning the concept of citizenship and all the issues surrounding it, especially the concept of rights. And the practical challenges -- he said there are at least 4 practical challenges. The first being that the Commission cannot overrule decision of the Supreme Court of the country; Secondly, that a number of organic laws should be crafted or drafted and put in place if we want to protect the citizen's constitutional rights; And also according to the

presentation, there is also a lack of public awareness from constitutional rights can also pose challenges to the protection of constitutional rights itself. The last, he said there are a number of cases in which constitutional rights have been overshadowed by local traditions and ideology.

I think it is an interesting aspect to be discussed in this session. Well, all the speakers has been presented and now we would like to invite the one and the only respondent from the Republic Union of Myanmar, Her Excellency Mrs. Hla Myo Nwe. The time is yours.

MRS. HLA MYO NWE (MYANMAR)

RESPONDENT/MEMBER OF TRIBUNAL

Good morning, His Honorable Mr. Chairman, all participants of the Congress, ladies and gentlemen.

Please me allow me firstly to express our gratitude to Excellency Mr. Hidayat, the Chief Justice of the Republic of Indonesia and the Constitutional Court of Indonesia to give us the warmest hospitality and to hosting this important Congress. I am sure that this meeting is important to make fruitful presentation, discussions, particularly in the field of current challenges and future direction for strengthen, promotion, and protection of constitutional rights of citizens.

Normally, the Constitution reflects a combination of social pluralism, secularism and protection of constitutional rights. The Constitution has to effectively address the actual rights. The approach may vary, but we also have to take into account of an international tendency towards combining a set of overall values or the values of universal rights. This enumerated list of human right may reflect international standards as well national experiences and political agenda. The general references to respect for constitutional rights stressed interlinkages between rule of law, democracy and constitutional right as well the fact that the state should both respect the constitutional rights and actively ensure the enjoyment of such rights. The fundamental principles are often regarded national ambition and imperative in policy making, decision making or any other state action, as well as for nations co-existence.

As the protection of constitutional rights is one of the core and fundamental elements of the Constitution, it's important to ensure an effective and efficient protection of constitutional rights within the constitutional framework. The Constitutional Tribunal of the Republic of the Union of Myanmar consider the protection of constitutional rights of citizens as our important task and principle. As people from the suburb or remote areas have a lack of knowledge about their rights, internal dissemination of knowledge on the constitutional rights are also being given as priority in order them to learn more about understanding their rights so as to enable them to cling and protect their rights and liberties recognized and safeguarded under the law. The citizen's constitutional rights are provided in the chapter 8 of the Constitution of Myanmar enumerates several fundamental rights in to areas of various protection against discrimination and protection of the constitutional rights.

A mandate of constitutionality control is being exercised by constitutional tribunal during the course of examining constitutional cases. Myanmar Constitutional Tribunal, when it is necessary, takes into consideration of the international conventions in its proceeding of the constitutional cases. Since the mandate of the of the Tribunal to assess the constitutionality of the law is not very wide, the protection and promotion of the constitutional rights shall be enhanced through a progressive interpretation of domestic rights with reference to international law. Information service is also an important tactic. The Tribunal, within the framework of the challenge of constitutionality can control the flagrant violations of the constitutional rights. The Supreme Court of Myanmar also plays an important role in protecting and promoting the citizen's constitutional rights, a person whose rights or liberties as recognized by the Constitution has been violated, has the rights to submit the writs to the Supreme court for their remedies.

They may also claim for a ruling that a provision of law is contrary to or inconsistent with the Constitution. The exercise of all these rights is subject to a case which the exercise of rights by other means has been exhausted. Another mechanism is the Myanmar National Human Rights Commission. It has the mandate to receive and consider complaints to submit *amicus* brief or advice to bring cases before the Court for the violation constitutional rights. It is to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or any other adverse circumstances. Previously, many people including Civil Society Organizations, did not rely much on the Myanmar National Human Rights Commission approach as they assumed it would not be very effective, but now this opinion has changed as the public has become to trust the Commission. Some commentators are of the view that certain constitutional rights are absolute in Myanmar, but some are qualified such as the right to free expression. Their view is that it is guaranteed only insofar as its exercise is not contrary to the laws enacted for union security prevalence of law order, community, peace, and tranquility of public order.

In order to treat children who find themselves caught up in the criminal justice system, Myanmar Police Force and UNICEF made the joint cooperation to amend training manual and codes of practice. Free expression, subject to certain qualifications, is especially problematic in a country where penalizing political speech was questionable in the past. However, the new government has made a lot of changes such as the enactment of the Peaceful Demonstration and Gathering Act which allows for the authorization of public protest and also entitled, and also enacted the Right to Peaceful Assembly and Peaceful Procession Act. The restrictions on the subject of censorship has been relaxed, too. According to the new Media Act, submission of printed material to press security and registration division for approval right to publication has been abolished. There is also enactment of a new Broadcasting Act which will affect equivalent liberalization to the radio and television media. Previously, there are some complaints about procedural abuse or complexity of procedure such arbitrary trial, solitary confinement, transfer to remote detention facilities, the denial of education, health care, and acts of torture, but after observation and effective control, the violation of these rights are currently rare or reduced.

The serious challenges of use of child soldiers is ceased under the action plan of the Myanmar government and UNICEF. These changes have been complimented by the ongoing process on the question of forced labor. Early Childhood Development Law, Law on the Rights of Person with Disabilities are also under process for the effective protection of children in practical. And also woman participation in political arena is also increased. Previously, woman participation in Parliament is very few, but now under the new administration it is increased nearly 50%. It is quite obvious that you may see in Myanmar's delegations all three of us are the women or female representatives. The call for compliance with the law depends on the reputation of the institution being independent, impartial, efficient and representing high quality principles. And the establishment of non-discrimination...

MRS HLA MYO NWE (MYANMAR)

MEMBER OF TRIBUNAL/HEAD OF DELEGATION

or some form of legality as critical and the government should try to promote judicial system that is accountable and transparent. thank you very much

MR I DEWA GEDE PALGUNA (INDONESIA)

JUSTICE/CHAIRMAN

Well yeah. Thank you very much your excellency, it is interesting to hear that Myanmar has set fourth constitutionally eh constitutional mechanism which is, so well at least when we had the presentation concerning the protection of the citizen constitutional right of Myanmar. So, I just consult the organizing committee that before the Friday prayer we still have around yeah. I think we had enough time to for discussion and it is around 42 - 45 minutes so if you would, okay. Ah well.

MR ABU BAKAR (INDONESIA)

INDONESIAN PARLIAMENT

Yak, ok. It's Abu Bakar.

MR I DEWA GEDE PALGUNA (INDONESIA)

JUSTICE/CHAIRMAN

Which one?

MR TANIARI (INDONESIA)

PARTICIPANT

Taniari. *Pak* Taniari.

MR ABU BAKAR (INDONESIA)

INDONESIAN PARLIAMENT

Abu Bakar *DPR*.

MR TANIARI (INDONESIA)

PARTICIPANT

Pak Taniari.

MR ABU BAKAR (INDONESIA)

INDONESIAN PARLIAMENT/PARTICIPANT

Abu Bakar *DPR* Indonesia.

MR I DEWA GEDE PALGUNA (INDONESIA)

JUSTICE/CHAIRMAN

Pak Abu Bakar and then *Pak* Taniari and.

MR ASRUL SANI (INDONESIA)

PARTICIPANT

Pak Asrul Sani.

MR I DEWA GEDE PALGUNA (INDONESIA)

JUSTICE/CHAIRMAN

Eh iya Pak Asrul Sani, tunggu dulu pak.

MODERATOR

Asrul Sani *DPR*

MR I DEWA GEDE PALGUNA (INDONESIA)

JUSTICE/CHAIRMAN

Ladies, *Ibuk Yan*, and *disana ibu Hesti ya. Udah borongan gak usah deh dulu ya. Ibu Suwinta ibu yang disana kemudian itu eh. Okay four questions for the first round and then we will continue with the second round.*

MR ABU BAKAR (INDONESIA)

INDONESIAN PARLIAMENT/PARTICIPANT

Assalamu'aikum warahmatullahi wabarakatuh. I am Abu Bakar. May peace upon you in the name of God most gracious most benevolent thank you Pak Palguna. For the

Mongolian constitutional courts the legal standing in applying a complaint to the constitutional court is important thing to have and therefore Indonesia has a strict prerequisite for one to submit a complaint to the constitutional courts. One of which there the loss or the violation of the constitutional right must be proven. In Mongolia foreign citizen can file a complaint to the constitutional court meaning that are they bind or bound by the constitution of Mongolia? What are the requirements, what are the prerequisites for them to file a complaint to the constitutional courts of Mongolia? The second question for Turkey, I would like to express my appreciation for your presentation the dismissal of two judges or two justices. I think that an extraordinary measure, an extraordinary measure, can they be immediately dismissed by the national security just like that? Don't they have to go through an ethical board or to other means of court or trial isn't this constitutional? Those are my two questions, thank you *walaikumsalam*

MR I DEWA GEDE PALGUNA (INDONESIA)

JUSTICE/CHAIRMAN

Pak. Mr Siahaan.

MR SIAHAAN (INDONESIA)

PARTICIPANT

I will speak in *Bahasa Indonesia*. Ladies and gentlemen, speakers from Mongolia, Afghanistan, Myanmar and Turkey. I perceive from your presentation about the promotion and protection, but the way I see it we are talking more about political rights and what lies here is that how constitutional courts can be, can guard the constitutional rights of the citizen because from the experience in Turkey, Mongolia, Afghanistan and Myanmar. It seems that the independence of constitutional courts does not exist as expected there are influences by various conditions and as political court the constitutional court needs to be a strong pillar, but in reality sometimes institutional court its influence by political power, on the other like Indonesia for example, the recruitment of justices is from the parliamentary people, the government people and the supreme court 3 justices. I don't know the recruitment system in other countries but there is a, it's difficult to erase the influence, political influence in recruitment and I would like to ask all four speakers what measure in Myanmar, Turkey, Afghanistan and Mongolia in acting as justices at constitutional court? How do we face the political interest that are constantly changing because constitution is a longer term mean when conditions are often different and changing like *coup d'État* in Turkey for example. To be considered, we are from, I am from the constitution forum and I was part of the drafter on the establishment of the constitutional court of Indonesia with the intention to have accord that will safeguard the constitutional rights of our citizen. Thank you.

Apologize for any shortcomings, thank you.

MR I DEWA GEDE PALGUNA (INDONESIA)

JUSTICE/CHAIRMAN

Name first.

MRS VITA IMELDA CORNELIA (INDONESIA)

LECTURER OF UNIVERSITY KARTINI/PARTICIPANT

Terimakasih pimpinan sidang. Thank you Mr. Chairperson my name is Vita Imelda Cornelius I'm from the University of Kartini, Surabaya. My question is actually similar, in line with the first question about the petition and notification to the CC of Mongolia, this is very interesting. So my question is whether in the constitution of Mongolia stipulate about foreign rights, foreign citizen rights and whether foreign citizen who can apply petition and notification to the Constitutional Court of Mongolia has to fulfil some requirements, does tourist also count to file petition and notification?

MR I DEWA GEDE PALGUNA (INDONESIA)

JUSTICE/CHAIRMAN

Vita Imelda, and then the second *Bu Fitri, Ibu Fitri*.

MS SUSANTI (INDONESIA)

PARTICIPANT

Thank you, thank you very much,

Terima kasih banyak, nama sayaaa..

Indonesia general school of law, first of all I would like to extend my gratitude to the organizing committee for this very well organized event, and also I'm thankful for the members of the panel for the fruitful discussion. Um, I would like to ask for comments from the members of the panel. It's a very interesting topic about how the constitutional court actually can promote and protect the citizen constitutional rights.

And when the topic came up, um, what came to my mind is, first of all I think there are two problems for the effort to promote and protect constitutional right of the citizen by the constitutional court, the first one is, actually was mentioned before, ee... is about how the constitutional court actually involved with the regime or with the political institutions and actors.

And the second one, um is, I found it more challenging because the second one I think is related to the judges background. I think it's an inevitable that judges have, in the back of their mind, um, you know, values from the religious background or political lining and all

that. And when we think further then probably to deal with that situation is, a first of all about the design of the court itself, for example also mentioned by previous people who asked the question, for example, how judges are elected i.e. how far political institutions and actors involved in the selection of judges, and probably also the... approval of budget.

But the, the second one probably is, how legal arguments are presented in the decision of the constitutional court so that academia and the public can scrutinize the decision, at least, you know, to give, a, to, to open the room for a public control for the judges, so, so we know which judges, you know, put forward more his or her religious background instead of legal arguments.

I would like to have, a, the honourable members of the panel comments, on that and, perhaps it will be very interesting to also, if you can also give some examples for, from your countries, thank you.

MR I DEWA GEDE PALGUNA (INDONESIA)

JUSTICE/CHAIRMAN

OK, thank you *Ibu* Bifitri, and for the first half of the discussion I would like to invite who is want to answer or to give a comment on this, e, ee., questions presented by all the participant.

President, Mr President, it's OK, yeah, you should be the first.

MR ZÜHTÜ ARSLAN (TURKEY)

PRESIDENT/HEAD OF DELEGATION/SPEAKER

Thank you for very good questions, first question was um, raised by Abu Bikir. Abu Bakar? Sorry, sorry about pronunciation, we call it Abu Bikir in Turkish, hahaha.. OK.

Well, yes you are right, its, it's an extraordinary measures, and it was perhaps our most difficult decision we have ever had so far, I mean, you can imagine that it is very hard, very difficult for any court to take a decision resulting, you know.... or removal of a colleague from.. from the court. This is an extra..extraordinary ehm measure. This is an emergency measure, in fact. And I'm.. I'm not sure whether there is another example eh.. in.. in.. in the history of constitutional justice. Ehm, but I think the.. we.. we had to decide on this issue under the circumstances of.. of the eh.. state of emergency. While.. the.. the.. the.. there is.. there are two aspects of.. of this problem. First aspect is the criminal investigation which is separate from.. from.. eh the proceedings before the constitutional court. And the.. the public prosecutor investigated while. has.. has investigation concerning the criminal liability of this two judges. This is nothing to do with the Constitutional Court of Turkey.

The second eh aspect of the issue is the disciplinary measures. That is something to do with the constitutional court and our decision was not a judicial decision. Is a.. Is an

administrative.. its a disciplinary decision. And in the sense, I believe that it is subject to judicial review. So this two judges may appeal to the the administrative court in Turkey on the ground that ehm.. its.. its.. its.. it was contrary to the law and they.. they may ehm.. eh.. appeal to the administrative court and then even they may go to the eh.. eh Council of State if eh they are not satisfied with the decision of.. of the administrative court.

Ehm I think then nothing eh.. there.. there is no any provision preventing them from using the right to appeal to.. to the.. administrative court. Ehm.. the second course in our command eh.. is concern the independency of Constitutional Court in general. Eh.. while.. while.. while I would say in Turkey we have no eh.. significant problem in terms of independency of constitutional court. I.. I mean there is no ehm political pressure on.. on the constitutional court. Constitutional court is free to have a.. any decision. Ehm but as we all know that we are not exercising our jobs.. our duties in our home.

As.. as any institution eh in a democratic state we as a constitutional court are also influence eh by.. by the social political and cultural environment. So there is no absolute, in this case, absolute independency ehm for.. for.. for constitutional courts. But.. but.. but.. eh this is also related to the last question. I must say that ehm the.. the decision and judgements of the constitutional course are and must be subject to public scrutiny, ehm public criticism. While we had experience eh.. really harsh criticism ehm recently, 3 or 4 months ago. We delivered a judgement concerning ehm to journalist and we found a violation of ehm right to eh.. e.. liberty and also violation of, freedom of expression. Freedom of press of these two journalist.

And the court was.. was swiftly criticised by the media and by.. by the politicians and by academics. Bu.. but this doesn't change the fact that constitutional court ehm are working in a.. a.. in an independent environment. So it doesn't change our.. our attitude, but we sometimes learn ehm something from this public criticism. Thank you very much.

MR I DEWA GEDE PALGUNA (INDONESIA)

JUSTICE/CHAIRMAN

Is there any specific mechanism for the selecting of judges?

MR ZÜHTÜ ARSLAN (TURKEY)

PRESIDENT/HEAD OF DELEGATION/SPEAKER

For?

MR I DEWA GEDE PALGUNA (INDONESIA)

JUSTICE/CHAIRMAN

Eh for the selecting of constitutional judges in.. in Turkey

MR ZÜHTÜ ARSLAN (TURKEY)

PRESIDENT/HEAD OF DELEGATION/SPEAKER

Oh yes. E.. e.. I mean e.. the judges, the constitutional courts judges are ehm selected or elected by the President of Republic and the parliament, Turkish Parliament. Ehm three of the judges out of 17 judges are elected by the parliament and rest of them are ehm elected by the President. But the President doesn't elect all judges of the Turkish Constitutional Court directly. Ehm most of them are propose by the High Court, like Court of Ca.. Cassation, Council of State, and eh other courts. Eh especially Board of eh Education. High Board of Education also propose eh 3 members, 3 professors of eh law and eh President elects judges among these...

MR. ZUHTU ARSLAN (TURKEY)

SPEAKER/ PRESIDENT/ HEAD OF DELEGATION

Thank you

I DEWA GEDE PALGUNA (INDONESIA)

CONSTITUTIONAL COURT JUSTICE/ CHAIRPERSON

Thank you. Ok, thank you very much, Mr. President. And now, let's, I would like to, give Your Excellency from Mongolia to answer the question, please.

JANTSAN NAVAANPERENLEI (MONGOLIA)

RESPONDEN/ ACTING CHAIRMAN/ HEAD OF DELEGATION

Spasiba.

I would like to respond in Mongolia and my translator respond in Russia.

The question was how foreign citizen can apply a petition or notification to Mongolia. Our constitution stipulate that all human is equal before the law, everyone is equal before the law. And as such, the constitution stipulates that foreign citizen and citizenless people who are residing within the territory of Mongolia have the right to file petition to Mongolia. And based on our experience for the past 25 years, we can see that even such, the burden, the work burden at the Supreme Court is not increased, provided that the petition should be filed under the jurisdiction of Mongolia and the subject is of course within the jurisdiction of our court as well. And we have had a case where foreign citizen file a petition to the constitutional court of Mongolia, to be precise, a Russian citizen filing petition to the constitutional court of Mongolia, and the, one of the characteristic in our constitutional court is that people can file petition on the cases not

only for violation of rights against oneself, or, but also to others, violation against others. And the next question was the constitutional court perform its duty independently for the past 25 years. And with regards to the law on constitutional court there are several points and articles that stipulates the constitutional court similarly like in Russia, Korea and Myanmar. And therefore, we feel that we can perform the promotion and protection of all rights of citizen also based on other experiences from these countries that I've mentioned. I would also reiterated in my presentation, the parliament and the government have tried to influence the decision of our constitutional court, also the political party influences our decision.

We feel that the constitutional court perform duty not under influences of those parties. We are annul law, we revoked a law that limits the mandate of the constitutional court. We cannot limit the constitutional mandate but we are the holder of such mandate.

MR. I DEWA GEDE PALGUNA (INDONESIA)

CHAIRPERSON/ CONSTITUTIONAL COURT JUSTICE

Whether tourist have a right before the constitutional court, er... before the constitutional court?

Mr. JANTSAN NAVAANPERENLEI (MONGOLIA)

RESPONDENT/ ACTING CHAIRMAN/ HEAD OF DELEGATION

With re...In accordance to the law this is permissible, but in practice it has never happened.

MR. I DEWA GEDE PALGUNA (INDONESIA)

CHAIRPERSON/ CONSTITUTIONAL COURT JUSTICE

Your Excellency Mr. Abdullah Shafae from the Islamic Republic of Afghanistan.

MR. ABDULLAH SHAFAE (AFGHANISTAN)

RESPONDENT / MEMBER

Thank you very much. I would like to touch upon the mechanism that the members of the Afghanistan element commission for constitutional officials are elected.

Actually according to the constitutional of the country there are differences between the duties and activities of the Supreme Court of Afghanistan and the Independent Commission of...for overseeing implementation of the commission. According to the constitutional of the country the Supreme Court is responsible to deal with all the cases that are being filed for Supreme Court and...The Afghanistan independent commission for the overseeing the implementation of

the constitution does not have the authority to receive direct complaints from the afghan citizens.

Therefore, if anyone, any citizens in Afghanistan has any kind of complain about the violation of their right, they need to refer to Supreme Court of Afghanistan, not to the commission. However, there are some other institutions that they can refer the cases to our commission.

The procedure for the election or selection of the members of the commission is that the president of the country nominates certain people, seven professionals, legal professions, and then, the nominees need to get the vote of confidence for the part of parliament the country. Here also what important point that I would like to make it here. We have a specific chapter in our constitution which discusses the right and duty of afghan citizens. And.... The commission is committed to oversee the proper implementation of that chapter in practice. Thank you very much.

MRS. HLA MYO NEW (MYANMAR)

SPEAKER/ MEMBER OF TRIBUNAL/ HEAD OF DELEGATION

Ladies and Gentlemen, and also from Miss Bugi Putri. I regret to learn that the gentlemen feel that our constitutional rebuttal is influenced by political actors or political power. But I have to admit that there are challenges on access to justice and independent of judiciary. Because not only yourself, many people in the country feel that access to justice remain exclusive. While implementing decision challenges such as intervention under the influence of the executive sector in the judiciary has been widely criticized. As you know-- all know very well, that as constitutional rights need to be enforceable and justifiable; compliance and implementation of the decision should be sh...strictly monitor so that under the mu... reform process our new government pay a lot of attention on this part. Because the judiciary independence is deter-- uhh... also it's related to the corruption. Judicial corruption is detrimental to judicial independence and adversely fight public trust so focus on judicial independence is a priority that the government is going to atte--- uh make the reform process under the judicial and legal reform process. And lack of accountability, scarcity of resources and low public awareness about rights and justice are the matters that also government is taking priority in the reform process. And as you all know that we are in the right track of the democracy. And democratic government usually we need both legal and political safeguard in order to bring a significant influence in the permit...promotion and protection of the constitutional rights of citizens; because the political approach will not be full enough to cover powerful increase exerting excessive influence. So legal safeguard can guarantee rights as well as designating and limiting government power. It can also counted as an opposite by independence body. So the... the n... the new government's independence of the uh... judiciary including the Constitutional Court is the most important uh... sector that the new government pay attention in priority. And... with my experience; I'm with the Constitutional Tribunal for three years, my first three years are already expired and now with the new terms, an during these three... uh during-- even though we receive a

lot of criticism from the public but during my term of uh... during my term of three years we didn't receive any uh... pressure or any influence from the executive side or from the legislative side. And also... and I would like to answer the question from the lady that the...as what you said is correct because previously the selection of the judges of the Constitutional Tribunal, we may have some priority based on the... based on the special interest but uhh... according to our constitution the nine members of the Constitutional Tribunal are selected; three members by the president, three members are selected from-- by the... uhh national uhh... parliament, and also three from the remaining... three from the ...nat-- uhh... ju--uhh People's Parliament. So when they are aware of that we have to be uh... free from the political. So as long as, if we are civil servant or if we are outsiders, as long as we assumed in the Constitutional Tribunal, we have to keep-- we have to quit from the political you possessed. And uh... if... if you-- if the member of the Constitutional Tribunal is the member of any political party, he shall not take any p--- he shall not take part in any party's activities during his term. So this is the restriction that uhh... it imposed in the constitution. Thank you.

MR. I DEWA GEDE PALGUNA (INDONESIA)

CHAIRPERSON/ CONSTITUTIONAL COURT JUSTICE

Well, thank you. Uh... I was, yeah I was consulted by the organizing committee that we have another ten... ten minutes additional time. So yeah, it is... uhh... uhhh... *tadi Pak Asrul Sani sudah deposit satu...*

There was Mr. Asrul Sani from the House of Representative; and our former...
... Siahahan, this is another Siahahan. The-- the first one *Pak Pataniari Siahahan* and the second one uh... *Pak Maruarar Siahahan*. And uh... I think the... I would like to ask Professor uhh Nyoman from Braw-- Brawijaya University. I'm sorry *Pak Oka*, and I'm sorry because I have-- we have uh... limited time. Yes *Pak Asrul Sani* first, and then *Pak Maruarar Siahahan* and last Professor Nyoman.

MR. ASRUL SANI (INDONESIA)

MEMBER OR HOUSE OF LEGISLATIVE

Yeah, thank you Mr. Chairman. Constitutional rights as well as human rights constitute rights which have many similarities in term of constitutional provision between one country and other countries. Also in term of conceptual development, constitutional right also develop from time to time. In this context, my question to each speaker is how Constitutional Court judgement of other countries may influence, or has a room for comparison in your judgment. Thank you.

MR. I DEWA GEDE PALGUNA (INDONESIA)

CHAIRPERSON/ CONSTITUTIONAL COURT JUSTICE

Okay, *Pak Asrul Sani* and then... *Pak-- Mister Siahahan. Pak Maruarar Siahahan.*

MR. MARUARAR SIAHAAN (INDONESIA)
RESPONDENT

Ya, terimakasih Pak Moderator...

MR. I DEWA GEDE PALGUNA (CHAIRPERSON)

Thank you Mr. Moderator because there are interpreted that I know and very familiar and I'm sure she translated it for me. first of all I would like to congratulate to both constitutional court to Turkey when there was a coup, of which I think was an emergency situation and it cannot be faced with acts, normal acts, it must be faced with emergency actions so I think I do not mind, I really approve of what has been mentioned by the chairman, eeh the chief of the constitutional court of Turkey because I was always taught by my teacher in the 60s, what he said as non-motive-craft that is in-etched if a field Kudeta happens the fact is that it will become a very valid situation, if it is successful then it becomes constitutional so I agree with the chairman, eh the chief of the, chief justice of the constitutional court of Turkey but I think in Indonesia, there is no representation here except for the moderator because this session is a, the current challenges in future development and the question, it becomes a question to me when it was very interested yesterday from the Philippine saying that what is mentioned as the grave abuse of discretion, amounting to lack of jurisdiction from part of any, so this is overcome by what is called as the empowerment trough interpretation, and from Korea said to overcome on what they called as no matter how constitutional a law may be, the execution of that law cannot be revoked by the constitutional court, a vacuum will be generated in term of the protection of the fundamental rights. The present condition in Indonesia, perhaps among us, the members of the MPR judicial review and they have also formed a review body so in not distance future, I hope there is a change in the constitution. The challenges is also the same on what is the authority of the constitution court and what is related to what the Philippine and the Korean has mentioned, if we found that there is a decision from the court that has the, that has power and exhausted all efforts but that against the constitution can the constitutional court with they called as the empowerment of the constitution court through interpretation by taking a position for the future on what as, it is mentioned as the protection of constitutional rights of the citizen is made through the constitutional court, that is my question. Thank you.

MR. NYOMAN NURJAYA (INDONESIA)
LECTURER OF BRAWIJAYA UNIVERSITY, EAST JAVA

Thank you Mr. Chairman. I'm I nyoman Nurjaya from faculty of law, Brawijaya University in east Java. I would like to convey a comment and question and suggestion for eeh especially the distinguished presenter and the comment for us, for all of us with regard to the uhhh human right concept. When we are talking about human rights, we should eeh... make a differentiation of with regard to the concept of human right. I heard of, from the previous distinguished presenter yesterday and this morning, we should

that differentiate between human rights, people rights and citizen rights. Human rights is a right natural given by the god and enacted universally within the life of human being in all over the world. When we are talking the citizen rights, we are addressed to the basic or fundamental norms, or legal norms in diversified country. It means that, citizen rights connected, I mean implemented to the citizen of the each country, people's rights mean that, the rights defined and regulated in the constitution for the citizen and the people means beyond of the citizen, there is just umm should be taken into account when we are talking about human rights, that's my comment. and the second, when we are talking about human rights an especially the citizen right It could be differentiated between individual between individual rights and collective rights, especially for indigenous people, I mean indigenous people include the citizen in this country. It means that indigenous right...

MR. I DEWA GEDE PALGUNA (CHAIRPERSON)

Would you make it shorter Professor Nyoman?

**MR. NYOMAN NURJAYA
BRAWIJAYA UNIVERSITY, EAST JAVA**

Yes, Indigenous right should be taken into account as a human right in the country and my question is how the constitution in the diverse country from the distinguished presenters defines and regulates respecting and recognized by the state for the indigenous right as a legal entity, as a legal entity? That is my question for the distinguished presenter, I think it is important to be understood that the collective right for the indigenous people as a legal entity should be defined and regulated in the constitution.

MR. I DEWA GEDE PALGUNA (CHAIRPERSON)

Thank you, so the next round. I would like to invite Mr. President of the Constitutional Court of Turkey, please, would you please?

**MR. ZUHTU ARSLAN (TURKEY)
PRESIDENT**

Thank you very much, well if I understood correctly, the first question was related to the influence of other constitutional courts decisions in in the decision of our own constitutional court. I would say that constitutional court is open to the case law and jurisprudence of other constitutional courts as well as international human rights courts especially in the field of individual application we benefited a lot from the jurisprudence of Germany Constitutional Court and Spanish Constitutional Court, but in writing and the language the decision concerning individual application, we frequently refer to the jurisprudence of the European Court of Human Rights, this is in fact necessary because our constitution clearly stipulates that the subject matter of the individual application are those rights, those constitutional rights which are at the same time protected by European Commission on Human Rights, in order to determine whether any individual

application are within the scope of individual application we have to look at European Commission and also umm interpretation of Commission by the European Court of Human Rights. So, we yes taken into account the decisions given by other constitutional courts as well as the European Court of Human Rights. With regards to the last question, actually the Turks Constitution have special provision dealing with the rights of citizen but most of the constitutional rights in our constitution are applied to all people, all individuals umm whether they are citizen or not and most of the provisions dealing with the constitutional rights start with everybody like the case in European Commission of on Human Rights but the of course as the case in almost every democratic countries constitution clearly states that umm some rights and liberties like the right to elect and be elected are reserved for citizens' only so in this case, in this sense Turks Constitution has special provision regarding the rights and liberty of individual and almost all other provisions deal with the constitutional right of individuals

MR. ZUHTU ARSLAN (TURKEY)
PRESIDENT

Those who lived in Turkey. Thank you very much.

MR. I DEWA GEDE PALGUNA (CHAIRPERSON)

Thank you very much Mr. President of the Constitutional Court of Turkey. Any comment from Mongolia? Your Excellency?

MR. JANTSAN NAVAANPERENLEI (MONGOLIA)
ACTING CHAIRMAN

(Mongolian Language)

I would like to answer a question. I think there is a difference between of course, the rights of citizens, and the rights of, the human rights.

(silent)

In our country, we hold on to this principle that a foreigner who is in the Mongolian territory also has the right to live, right to the property, education, and also to, for their own faiths, or religion. And we also are of the opinion that when this principle cannot be applied, then there would be difficulties in our relationship to other countries, if we do not conduct this. Thank you.

MR. I DEWA GEDE PALGUNA (CHAIRPERSON)

Islamic Republic of Afghanistan any comment?

MR. ABDULLAH SHAFEE (AFGHANISTAN)
MEMBER

Thank you very much. I do agree with the comment given by the Professor earlier that there are differences between the human rights and the citizen rights. However, there are some problems in the concept of the constitution that very contested, sometimes people makes the human rights, the concept of human rights for the concept of constitutional rights. Sometimes people think that human rights are defined by a specific boundaries of the state. This possess problem to support the universal human rights. However, a number of academics believed that human rights are not universal, and they have to be defined within the territorial boundaries of each state. I strongly believe that we have should encouraged all states that should respect to the human rights, and to this concept as universal rights. For example, right to living, right to live, it should be universal. However there are some rights that are going to be limited, for example, a foreigner cannot buy a land or house in some countries. So, right to property, which is a human right in some countries are not recognized properly. So, there are some limitations on the rights of those who are not citizens of the state, but they lived in the state. So, let's say about the election to vote or to be voted. Thank you very much.

MR. I DEWA GEDE PALGUNA (CHAIRPERSON)

(silent)

And challenges and future directions for strengthening the promotion, promotion and protection of citizen's constitutional right. The most important and pivotal factors should be the awareness of the citizens itself about his or her constitutional rights. And...

MR. I DEWA GEDE PALGUNA (INDONESIA)

CHAIRPERSON/CONSTITUTIONAL COURT JUDGE

...the problem shall be how to set a constitutional legal mechanism to reduce the influence and pressure especially from political parties and state authorities in general. So, and the third note, I should say that we should never be underestimate undemocratic attempts just like what happened in Turkey. So, the constitutional awareness will be a pivotal factor to defend the rule of law and constitutionalism itself. And, there is also a need for appropriate mechanism in the selection of Constitutional Court Justices or Equivalent Institutions in many countries to guarantee not only their independency but also their impartiality.

And on the part of the Justices itself, there is a need as to how legal arguments should be presented clearly and undoubtedly, that is strongly based solely on the Constitution, not the influence by any other factor, but the Constitution itself. As to Indonesia, I would like to thank *Pak Siahaan*, but unfortunately I have no mandate to answer the question -- I have my personal opinion on that case, but maybe on the other time and the other occasion.

Thank you very much for joining the session. The time is over, yes. I'm sorry, *Bu*. Make it short, please.

MRS. HESSY

PARTICIPANT

Thank you, Mr. Chairperson. I just would like to interrupt for a while, because this session is very important. We talk about promoting and the protection of constitutional rights, and what you talk about is about the protection. I'd like to underline what His Excellency from Afghanistan has said that the concept is very important, and so the role of promoting the constitutional rights is very important.

On this occasion, I would like to appreciate the Constitutional Court of the Republic of Indonesia which not only play a great role in protecting the constitutional rights of its citizens, but also to answer the question of the Justice from Afghanistan. The Constitutional Court also plays a very important role in promoting through educational programs. So, I think this is the lesson learned for the other countries, the function of promotion is very important because that is one of the rights of the citizen to know what is their constitutional rights. And I think, the role of the Constitutional Court is very important to not just protect in terms of its rights and its mandate, but also in promoting the constitutional rights of the people and we really appreciate what has been conducted by the Constitutional Court of the Republic of Indonesia. Thank you, Mr. Chairman, for the opportunity.

MR. I DEWA GEDE PALGUNA (INDONESIA)

CHAIRPERSON/CONSTITUTIONAL COURT JUDGE

Thank you, *Ibu* HESSY for her commendation, and thank you very much for all fully participating in this session.

MASTER OF CEREMONY (MC)

Distinguished delegates, this concludes the 3rd Congress of AACC. For the Members of AACC, after lunch break, we are expecting you are at Nusa Dua Room 2 for the Board of Members Meeting at 2 PM. As for the rest of the delegates and participants, the closing ceremony of this Congress will commence at 4 PM. For the Head of Delegations, the lunch will be served at Uluwatu Room 5. And for other delegates, the lunch will be served at Jimbaran Cafe.

C. SUMMARY REPORT



THE ASSOCIATION OF ASIAN CONSTITUTIONAL COURTS AND EQUIVALENT INSTITUTIONS

SUMMARY REPORT

THE 3RD CONGRESS OF THE AACC

“The Promotion and Protection of Citizen’s Constitutional Rights”

Thursday, 11 August 2016

Session 1: *“Mechanism for Promotion and Protection of Citizens’ Constitutional Rights: Different Perspectives from Countries”*

Chairperson: Mr. Zuhtu Arslan, President of the Constitutional Court of the Republic of Turkey

Remarks by Hon. Mr. Lee Kang-kook, former President of the AACC:

- The 2nd Congress of the Association of Asian Constitutional Court and Equivalent Institutions (AACC) was held in 2012, and since its establishment the AACC has achieved accomplishments. The Association has had influence in the region and in this regard he would like to thank all parties who had been involved in garnering success for the Association. Through solidarity, the Association came into agreement to establish a permanent secretariat which would be in close coordination with the term president. As such, the Association would expand its role not only at the regional level, but at the global level.

Remarks by Hon. Mr. Gianni Buquicchio, President of the Venice Commission:

- The Venice Commission is the advisory body of the Council of Europe with its main activity centered on advising the drafting of constitution, law, and regulations in the European Union. The cooperation between AACC and Venice Commission was officially recognized in the Board of Members Meeting in Seoul in 2012. This gave the opportunity for database sharing among constitutional courts of the associations. The decision not only to provide references for judges, but also to construct arguments for the constitutional courts to resolve disputes.
- The theme of the 3rd Congress of the AACC is important and relevant with the effort to protect and ensure constitutional rights of citizens. It is therefore important for constitutional courts to carry out its tasks and responsibilities promptly. However, it was also noted that there are several efforts to interfere the rulings of the constitutional courts by other branches of governments.



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- The citizens' access to constitutional courts are currently being the topic of study carried out by the World Conference on Constitutional Justice (WCCJ), with emphasis on the presence of human rights courts.

Remarks by H.E. Zuhtu Arslan, President of the Constitutional Court of the Republic of Turkey:

- The constitutionalism or constitutional justice relates to power. Constitutional justice is proven to be the protection of rights by separating the power of executive and legislative powers.
- There are 2 main mechanism available for constitutional courts to protect constitutional rights: review of laws and regulations, and constitutional complaint. The complaint mechanism in different countries. The Turkish constitutional courts carries out these 2 mechanisms and adopted a rights based approach in its jurisprudence. Turkey adopted in 2012, individual complaint mechanism to enable citizens submit complaints when their constitutional rights are violated.

Malaysia:

(Mr. Arifin Zakaria, Chief Justice of the Federal Court of Malaysia)

- The Constitution is the supreme law of the Federation of Malaysia and any law passed after Independence Day which is inconsistent with the Constitution shall, to the extent of the inconsistency, be void. Human rights values are also incorporated as fundamental rights in Part II of the Federal Constitution.
- Regarding constitutional complaints, the Federal Constitution stipulates provisions that confers power to the Federal Court to review legislative and executive actions on the ground of unconstitutionality. The courts also review and grant public law remedies. The modes of constitutional complaints are conducted through the application of judicial review, declaration, and election petition to the Federal Court. The protection of human rights in Malaysia is also carried out by non-judicial institutions such as the Human Rights Commission of Malaysia and The Public Complaints Bureau.

Russian Federation:

(Mr. Gadis Gadzhiev, Judge of the Constitutional Court of the Russian Federation)

- The Russian delegation emphasized that people are inherently entitled to human rights protection, even if such rights are not explicitly regulated by the constitution. Furthermore, when a constitution does not expressly define certain set of human rights, it allows for further development and expansion of those rights. In Russia,



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decisions of the Constitutional Court as well as the European Court of Human Rights (ECHR) influenced the interpretation and implementation of human rights norms.

- Various regional human rights declarations reflect that human rights ideas are also present in eastern tradition. In this regard, it would be unwise for certain groups of nations to push their values to be accepted as universal values. Speed of progression for implementation of human rights, rule of law, and democracy may differ in each country, and in this regard a smooth evolutionary development should be supported.

Republic of Korea:

(Mr. Lee Jin-sung, Justice of the Constitutional Court of the Republic of Korea)

- The Constitutional Court of Korea has jurisdiction over the constitutional review of statutes, impeachment, dissolution of political parties, competence disputes, and constitutional complaints. The Korean Constitution provides that the Constitutional Court shall have jurisdiction over "constitutional complaint as prescribed by Act." Since the Constitution does not provide for any specific ideas or concepts of constitutional complaints, the legislature has been granted broad discretion in formulating the constitutional complaint system.
- Since its establishment on September 1, 1988, the Constitutional Court of Korea has received 22,968 constitutional complaints as remedy of rights. As of April 30, 2016, the Constitutional Court disposed of a total of 22,556 cases, out of which the complaints were upheld in 722 cases. Meanwhile, the Constitutional Court received 5,596 constitutional complaints as constitutional review of statutes. Among them, 5,310 cases were disposed of, and the complaints were upheld in 316 cases.

Kingdom of Morocco:

(Mr. Mohammed Achargui, President of the Constitutional Court of the Kingdom of Morocco)

- As part to ensure gender equality, The Constitution of Morocco allows women to bear more responsibilities in the society. This has increased women's participation in the judicial sector as well as in elections. The techniques used to increase women's participation are through quota system as well as financial support in elections. This condition has also been supported by the stable politics as well as the principle equality in Morocco.

Kazakhstan:

(Mr. Igor Rogov, Chairman of the Constitutional Court of Kazakhstan)

- The effort to guarantee the rule of law and human rights has become a trend in the world and its presence also encompasses various fields of issues. The guarantee of



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human rights is also a reflection of values and spirituality. There has been a shift that human rights are now governed by regional and national laws, as well as international laws.

- Current issues arise such as terrorism compel countries to consider national and local values and/or ideology and its adaptability with universal human rights values. There is also a need to review international treaties other than local laws.

Thailand:

(Mr. Twekiat Menakanist, Justice of the Constitutional Court of Thailand)

- The Constitution of the Kingdom of Thailand guarantees citizens' rights and liberties in line with universal standards of the United Nations and several international organizations; for example, the UN Universal Declaration of Human Rights (1948), the International Covenant on Civil and Political Rights (1966), and the International Covenant on Economic, Social and Cultural Rights (1966). Moreover, citizens' rights and liberties are under the protection as the doctrine of precedent of the Thai Constitutional Court.
- As a result, the Constitution of the Kingdom of Thailand provides the missions of the Thai Constitutional Court in widely promoting and protecting civil rights and liberties in connection with human dignity, rights, liberty, equality, and anti-discrimination.

Q & A Session:

1. *In the case of Russia, how can we differ dirigible and non-dirigible rights? In the case of Morocco, the term affirmative action should be used instead of "positive discrimination" towards women.*
2. *In the case of Russia, how does a non-positivistic approach to human rights deal with the potential of non-original interpretation and direct conflict? In the case of Korea, please share your views regarding the verdict on the status of Seoul as a capital city?*
3. *In the case of Morocco, is it in your authority to review social matters as an affirmative action?*
4. *In the case of Russia, how does democracy develop and is it a concept that is combined with the law?*
5. *To all panelist, to what extend is the rulings of the constitutional courts implemented in your respective countries?*



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Response:

Malaysia:

- There are no obstacles in executing the rulings of the Constitutional Court.

Russia:

- There is a conflict on consensus between European countries on whether convicts should be granted political rights, such as the right to vote during general election. The Russian Constitution denies convicts from exercising their political rights, whereas England and Italy allows them. There are no problems in implementing constitutional court rulings because the President of the Russian Federation oversees its execution.

Korea:

- The Constitutional Court of Korea has determined that ordinary court decision that violates civilian constitutional rights can be appealed through constitutional court. In Korea, there are dissenting opinions in this matter. It is therefore significant that the broadening of definitions in the constitutional court be made.

Morocco:

- Agrees that the term 'affirmative action' should be used instead of 'positive discrimination', but nevertheless the political rights of women in Morocco is duly protected.
- In Morocco, the decision of the Constitutional Court is always complied by all branches of governments and institutions.

Kazakhstan:

- In Kazakhstan, there is no issue in ensuring that Constitutional Court ruling is implemented by all institutions.



THE ASSOCIATION OF ASIAN CONSTITUTIONAL COURTS AND EQUIVALENT INSTITUTIONS

Session 2: “The Role of Constitutional Courts and Equivalent Institutions in Promoting and Protecting Citizen’s Constitutional Rights through Their Landmark Decisions”

Chairperson: Mr. Park Han-Chul, President of the Constitutional Court of the Republic of Korea

Indonesia:

(Mr. Patrialis Akbar, Justice of the Constitutional Court of the Republic of Indonesia)

- Since its establishment, the Constitutional Court of the Republic of Indonesia has issued landmark decisions that are later used by legislators to improve reviewed Acts. There are some criteria for the landmark decision: 1) it brings significant changes in constitutional system and it is related to public interest; 2) the landmark decision prioritizes the aspect of constitutional rights protection and fulfillment as guaranteed by the 1945 Constitution; 3) landmark decision creates a new legal condition which has not been regulated by the Constitution to achieve fair legal certainty; and 4) the landmark decision becomes a reference of legislative changes.
- The Court’s landmark decisions cover all aspects; political, sociocultural, and economic. Since the Court’s establishment until 2015, about 175 decisions regarding the constitutional review that grant Applicant’s petition. Moreover, there are some decisions in 2015 which is considered as landmark decisions, such as Decision No. 95/PUU-XII/2014 concerning the lifting of the ban for forest people to utilize forest product and Decision No. 43/PUU-XIII/2015 regarding regional head candidacy requirements.

The Philippines:

(Mrs. Maria Lourdes Oliveros, Chief Justice Staff Head of the Supreme Court of The Philippines)

- The Philippine Supreme Court stands at the apex of the judiciary and, while it is not formally called a constitutional court as understood or defined in this forum, it nonetheless enjoys the characteristics and possesses the features of a constitutional court. Frequently called upon to interpret the Constitution and the laws, the Court’s decisions become part of the law of the land though they do not partake of legislation which is solely the province of Congress.
- Many of the rulings of the Court on these areas have led to their codification as rights and freedoms under the 1987 Constitution, such as the right to counsel in custodial investigations under Article III, section 12 was adopted in *People of the Philippines v. Duero* (1981) from the United States Supreme Court Decision in *Miranda v. Arizona* (1961). Another example is the ruling in *Mapp v. Ohio* (1961) on the “exclusionary



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rule” which bars the presentation of evidence that is obtained as a result of an unreasonable search and seizure. The decisions of the Supreme Court have become the basis for constitutions and for legal principles, many of which have succeeded in allowing the individual standing against the State an effective majority of one.

Conference of Constitutional Jurisdictions of Africa:
(Mr. Moussa Laraba, Secretary General of the CCJA)

- The CCJA has 36 members with observers from countries such as Brazil. The CCJA adopted universal values to respect human rights and protect fundamental freedoms as fundamental principles for the constitutional review. Related to the African Union, CCJA contributes the achievement of its objectives to develop the democratic rule of law and good governance with the participation of citizens in governance. For achieving these objectives within the framework of universal values, CCJA has aims inter-cooperation and cooperation with other constitutional justice areas in the world.
- On another level, as part of the partnership with the African Union in accordance with the Cooperation Agreement signed in Addis Ababa, 2 April 2015, CCJA participates actively in election observation missions by the African Union. Several judges came from different constitutional courts to supervise the intense electoral activity experienced by the continent during the last two years 2015 and 2016 (Guinea, Ivory Coast, Burkina Faso and Central African Republic).

Azerbaijan:
(Mr. Farhad Abdullayev, Chairman of the Constitutional Court of Azerbaijan)

- As a former part of the Soviet Union, Azerbaijan had the opportunity to review and renew its constitution, where 56 articles are now dedicated towards defending and protecting the rights of its citizens. The Constitutional Court helps to address challenges that arises in implementing the new constitution, as well as providing an avenue for citizens in shaping the law and defending their rights. Furthermore, on top of receiving complaints from citizens, the Court can also accept cases put forward by state institutions such as the Ombudsman and other judiciary bodies.

Tajikistan:
(Mr. Mahkam Mahmudzoda, Chairman of the Constitutional Court of Tajikistan)

- The Constitution of Tajikistan defines the state's obligation to recognize, respect and protect the rights and freedoms of man and citizen; as well as determines that the rights and freedoms of man and citizen shall shape the objectives, contents and application of laws, and the activity of legislative, executive, and judiciary branches of the government. The Constitutional Court of Tajikistan is a little more than twenty



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years old, and during that time the Court has successfully protect individual rights and freedoms of citizens and eliminate contradictions between normative legal acts and the Constitution. It should be noted that the constitutional court is not only a judicial body, but such a body which is entitled, in accordance with the Constitution and the law, to exercise oversight over the legislative and executive authorities, and in mediated form - over the judiciary, and in this sense, it represents the highest state power.

- On the basis of individuals' petitions, the Constitutional Court has adopted a number of decisions on the normative interpretation of the provisions of the Constitution. A majority of cases submitted relates to violation of the right to judicial protection established by article 19 of the Constitution of Tajikistan. Decisions of the constitutional court, which resulted in the removal of unconstitutional normative legal acts, are based on thorough considerations of consitutional rights of citizens as well as relevant precedents.

Vietnam:

(Ms. Nguyen Thui Hien, Deputy Chief Justice of the Supreme People's Court of Vietnam)

- In Vietnam there is no Constitutional Court because the Parliament has not accepted the necessity to establish one. The Vietnamese Constitution ensures the upholding of citizen constitutional right, as well as fundamental rights and freedoms of citizens. The Vietnamese Ministry of Justice with the Vietnamese Parliament share duties and authority to review the constitutional validity of various legal articles.
- The establishment of a constitutional court will benefit Vietnam in several ways, particularly regarding clear authorities of the Constitutional Court; procedure of the Constitutional Court is convenient for the individual; and the decisions of the Constitutional Court are executed by all branches of government. At this stage, Vietnam would like to conduct more research and study on the establishment of a Constitutional Court.

Kyrgyzstan:

(Mr. Erkinbek Mamyrov, President of the Constitutional Chamber of the Supreme Court of the Kyrgyz Republic)

- The Constitution of the Kyrgyz Republic determined that the human rights and freedoms are of superior value. The Kyrgyz Republic shall respect and ensure human rights and freedoms to all persons on its territory and under its jurisdiction.
- A special role in the human rights protection mechanism is given to the Constitutional Chamber of the Supreme Court of the Kyrgyz Republic. If the Constitutional Chamber



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recognize that certain provisions of the law are unconstitutional or in violation of the constitutional rights and freedoms of citizens, such laws will be terminated. From the moment of formation Constitutional Chamber has decided 61 cases, which are directly or indirectly related to the protection of the rights and freedoms of humans and citizens. This signifies the Constitutional Chamber's contribution for the protection of rights and freedoms not only for specific claimants, but also the constitutional rule of law in general.

Q&A Session:

1. *What does the term “grave abuse of discretion amounting to lack or excess of jurisdiction” imply?*
2. *Is there an authority given to the Constitutional Court besides the mandate given to the Constitutional Court by the Law (e.g. monitoring of election in Indonesia)?*
3. *There is a rising trend to develop and compare landmark decisions between countries, even though each have differing contexts. How do you see this?*
4. *When the Law obstructs the rights of citizens, then it must be annulled as soon as possible. What is they are not annulled quickly? What are the consequences?*

Response:

The Philippines:

- The term “grave abuse of discretion amounting to lack or excess of jurisdiction” has been interpreted several times, with respect to lower court tribunals and other branches of government in exercising their duties. Such exercise was done in the case of the former President of The Philippines, with regards to accusations of plunder.

Kyrgyzstan:

- In Kyrgyzstan there is a law on equality of gender. When the constitutional court produces a ruling, then the previous related regulations do not apply.

Tajikistan:

- Tajikistan has yet to produce a Law on gender equality, but there exists a law on the rights of women in the family. With regards to mandate, the Constitutional Court of Tajikistan cannot expand its authority by regulation alone.

Indonesia:

- The mandate of the Indonesian Constitutional Court is based on the Constitution. In the case of mandate beyond those stipulated in by the Law, the Indonesian Constitutional Court implements a review mechanism in coordination with other



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institutions such as the Supreme Court. In carrying out its function, the Indonesian Constitutional Court considers aspects of justice, usefulness, and legal certainty.

Friday, 12 August 2016

Session 3: “Current Challenges and Future Direction for Strengthening Promotion and Protection of Citizen’s Constitutional Rights”

Chairperson: Mr. I Dewa Gede Palguna, Justice of the Constitutional Court of the Republic of Indonesia

Mongolia:

(Mr. Jantsan Navaanperenlei, Acting Chairman of the Constitutional Court of Mongolia)

- The Constitution is a legal and political document that serves as a guarantee of human rights and the citizens’ constitutional rights. Following the transition of Mongolia to democracy, human rights has become an integral element in Mongolia’s constitution. This follows to the spirit of the universal declaration of human rights and international set of practices in the field of human rights.
- The Court can initiate constitutional proceedings based on petition of citizens and governmental bodies, as well as foreign citizens and stateless persons residing in Mongolia. are also allowed also submit petitions. Such petitions can be raised for violation of individual rights as well as for public concerns. The Court has made 240 decisions thus far, with numerous disputes involving complaints relating to human rights and freedoms. Moving forward, the Constitutional Court aims to continue improving constitutional laws and procedures to ensure the Court’s impartiality and highest standard of proceedings.

Turkey:

(Mr. Zuhtu Arslan, President of the Constitutional Court of the Republic of Turkey)

- As one of the guardians of democratic constitutional order, the Turkish Constitutional Court promptly reacted and took immediate measures during and after the recent failed coup attempt. The Turkish Constitutional Court made a press statement at the very beginning of the coup attempt, after a couple hours when we realized it was a coup attempt. The statement pointed out repudiation of all kinds of anti-democratic attempts against the constitutional order and stand beside of democratic constitutional state. The Turkish Constitutional Court’s press statement played an important role to protect constitutional order and democratic values by demoralizing the plotters and encouraging the Turkish nation. Other measures include disciplinary investigation and dismissal of profession of judges and personnel affiliated with the



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suspected FETO terrorist organization. These measures were then subsequently processed within the scope of criminal investigation.

- In the wake of the failed coup, the Council of Ministers of Turkey decided on 20 July 2016 that a nationwide state of emergency be declared as from July 21, 2016 for a period of ninety days, pursuant to Article 120 of the Constitution and Article 3 § 1 (b) of the Law on the State of Emergency (Law no. 2935). During the state of emergency, the Council of Ministers, meeting under the chairpersonship of the President of the Republic, may issue decree laws on matters required by the state of emergency. Under normal circumstances, the Constitutional Court shall examine the constitutionality of decree laws. However, decree law issued during a state of emergency, martial law or in time of war shall not be brought before the Constitutional Court alleging their unconstitutionality.

Afghanistan:

(Mr. Abdullah Shafae, Member of the Independent Commission for Overseeing the Implementation of Constitution, Islamic Republic of Afghanistan)

- The Afghanistan Independent Commission for Overseeing the Implementation of Constitution is tasked to monitor how Afghanistan's new Constitution is put into practice. In the course of carrying out this function, the Commission often face both theoretical and practical challenges. At the theoretical level, the definition of citizenship and rights can raise several problems. For example, should terrorists and extremists residing within Afghanistan be considered as a citizens?
- At the practical level, the challenges faced by the Commission are, among others: (1) the Commission's inability to overrule decisions of the Supreme Court, (2) need for more regulations on rights, (3) lack of public awareness on constitutional rights, and (4) how constitutional rights are often overshadowed by local traditions and ideology. In this regard, Afghanistan proposes that the AACC's Permanent Secretariat on Research and Development can undertake research on this issues and assist in seeking solutions to such challenges.

Myanmar:

(Ms. Hla Myo Nwe, Member of the Constitutional Tribunal of Myanmar)

- The protection of constitutional rights is the main task and responsibility of Myanmar's Constitutional Tribunal. The Tribunal is of the view that to strengthen such protection, citizens need to be taught about their constitutional rights. When necessary, the Tribunal takes into account international human rights instruments in deliberating its decisions.



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- Another mechanism for protection of citizen's constitutional rights is the establishment of the Myanmar Human Rights Commission. The new government has also produced regulation to progressively support individual rights including the regulation for peaceful demonstrations, publication of free press, expansion of public health access, women participation, child protection, and protection of workers with disabilities.

Q&A Session (Part 1):

1. *For the Mongolian delegate, are foreign residents bound by the Mongolian constitution? In the case of Turkey, do the judges dismissed by the National Security undergo a court of ethics? Is it not unconstitutional?*
2. *The discussions seem to focus more of political rights, as we can see that decisions from the Constitutional Courts are not entirely independent as is the case of these countries' experiences. What measures are taken to manage political interests?*
3. *In Mongolia, how do foreign residents submit their complaints to the Constitutional Courts?*

Response:

Turkey:

- There is a difference between disciplinary measures and criminal procedures. The decisions made by the Turkish constitutional court towards the judges were disciplinary decisions and the accused may exercise their right to appeal to the administrative court. In the case of managing interests, we need to understand that our duties are not done in a vacuum and there's no absolute independency. However, the decision of the court must be subject to public scrutiny.

Mongolia:

- Essentially, everyone may submit a petition to the constitutional court. As such, the constitution stipulates that foreign residents and citizen less people within Mongolia may submit petition to the constitutional court. This does not add burden to the court, provided that petition is filed under the jurisdiction of Mongolia. This practice is similar with that of Russia, Korea, and Myanmar. Though the parliament of Mongolia have attempted their interests, the constitutional court still performs their duties independently, even annul proposed regulations by the parliament.

Afghanistan:

- There are different duties between the Supreme Court and the Independent Commission on Overseeing the Constitutional Law. Complaints on constitutional rights may be submitted to the Supreme Court. There are specific chapters in the



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constitution that describes the rights and duties of Afghan citizens, and the Commission is responsible to monitor the upholding of that chapter in practice.

Myanmar:

- Undoubtedly, there are challenges in producing and implementing decisions of the constitutional court. Judicial independence is important to prevent judicial corruption, supported by strengthening public awareness. In this case, a democratic system is needed to legally safeguard the democratic values and the independence of the judiciary. There have yet to be external pressure towards decisions made by the constitutional tribunal of Myanmar.

Q&A Session (Part 2):

1. *For each speaker, how does the constitutional court judgments from other countries influence your constitutional court's decisions?*
2. *Can the Indonesian constitutional court practice the empowerment of interpretation as is done by The Philippines and Korea?*
3. *How can we practice the different protection of human rights, people's rights, and citizen's rights? How do you refine and regulate indigenous rights as a legal entity?*

Response:

Turkey:

- Constitutional court is open to the jurisprudence of other courts, since it will bring benefit. However, practice may differ, such as the Turkish case on the issue of individual application of the European Convention of Human Rights. In Turkey, constitutional rights apply to citizens and non-citizen with special provisions regarding the rights and responsibilities for those living in Turkey.

Mongolia:

- Citizen rights and human rights are of course different. In Mongolia, we uphold the principle residing in Mongolia may exercise their educational, living, and religious rights. A violation of these right will sever the relations of Mongolia with other countries, therefore it is unacceptable.

Afghanistan:

- There are contesting definitions between constitutional rights and human rights. Some academics believe that human rights are not universal and must be defined within the boundaries of the State. I encourage countries to uphold the universal principles of human rights.

D. ANNEX

Former President of the AACC

The former President of the Constitutional Court of Korea and the first President of the AACC

Lee, Kang-Kook

Honorable Chief Justice of the Constitutional Court of Indonesia and President of the Association of Asian Constitutional Courts and Equivalent Institutions, Arief Hidayat, Presidents and Chief Justices of constitutional courts of the member states and their delegations, and the distinguished guests here today!

It is my very great pleasure to be invited to this honorable event and to give congratulatory remarks. I sincerely congratulate the successful hosting of the third congress of the AACC.

Constitutions of the civilized nations in the world embrace universal and common values of the humanity, namely, freedom and basic rights of humans, and equality and justice. In appreciation of such universality of the constitutional ideology, more international groups of constitutional courts have been formed extensively at the regional level and are actively performing their mission. Thanks to achievements of these groups, constitutional adjudications, an institutional mechanism for protection of those important values, now have become a symbol of trust and hope of the people all around the world.

Despite its long history and tradition and proud cultural heritage, in Asia, history of democracy is still not too long and “the principle of rule of law” has not taken strong root. For such reason, constitutional adjudications, as a means of protecting the constitution, have only recently started out to develop in Asia individually and independently according to the need of each nation. However, as the consensus grows in Asia that it also needs a regional permanent group that promotes interaction and cooperation and where members can exchange experiences and wisdom on constitutional adjudications, judges of constitutional courts in the region agreed to form a preparatory committee for the AACC at the third Seminar of Asian Constitutional Court Judges held in Ulaan Baatar, Mongolia in September of 2005. Through four follow-up meetings thereafter, on July 12, 2010, launching of the AACC was officially declared by adopting the Jakarta Declaration on the Establishment of the Association of Asian Constitutional Courts and Equivalent Institutions. With the Inaugural Congress held in Seoul, Korea from May 21, 2012, the efforts of the past seven years finally have borne fruit.

In its sixth year after its birth, the AACC has produced tremendous accomplishments. With the number of its member states more than doubling from seven to sixteen nations, the Association has now progressed to an institution that is equipped to have influence over more countries in Asia. Increase and enforcement of the exchange of

human and material resources and cooperation between the members of the AACC have been highly recognized and praised by many professionals and experts over the world.

As the first President of the Association who had the privilege of closely watching the inception process of the Association, I personally take much pride and joy in the great success of the AACC. I would like to express my deepest gratitude and honor to everyone who worked so hard for the development and success of the AACC.

Under the current state where foundation and solidarity have quite been formed in the AACC, in order for the Association to further grow into a core body that can more powerfully promote freedom and human rights, and justice and happiness of Asians, and thus to become a symbol of pride and hope of all Asians, it certainly needs a new system and momentum. At such time, launching of the permanent secretariat of the Association, which has been under discussion continuously, can be an innovative opportunity for the new progress. Particularly, proposal of a new model for cooperation, the joint operation of the secretariat by Korea and Indonesia, which aims to encourage broad and active participation of the member states, is a very meaning attempt.

If the permanent secretariat, under the cooperation and close coordination with the Term Presidency, can expand and enhance exchange of human and material resources over the areas of constitution and constitutional adjudications not only between constitutional institutions in Asia including the member states but also among constitutional institutions across the world, freedom and human rights, and equality and justice of Asians shall be guaranteed to a greater extent. Furthermore, it will be able to make a greater contribution to development of democracy and the rule of law in Asia and the world as a whole, and accordingly will rise to the symbol of trust and hope of peoples in Asia and the world.

Lastly, I once again would like to express my sincere appreciation to Chief Justice Arief Hidayat and everyone at the Constitutional Court of Indonesia for the successful hosting of the third congress in this beautiful island of Bali and for their hard work and warm welcome. I truly hope the friendship and relationship started from this event will be treasured as a beautiful and wonderful memory for a long time, and I wish everyone here health and happiness, and the best for you and your family.

Thank you.

Venice Commission

**Third Congress
of the Association of Asian Constitutional Courts
and Equivalent Institutions (AACC)**

on

Promotion and protection 'constitutional rights'

11-13 August 2016

Nusa Dua, Bali – Indonesia

OPENING SPEECH

**Mr. Gianni Buquicchio
President of Venice Commission**

*President of the Republic of Indonesia,
Chief Justice of the Constitutional Court of the Republic of Indonesia
President of the Association of Asian Constitutional Courts and Equivalent Institutions,
Honourable President and Judges,
Ladies and Gentlemen,*

It is a privilege and a pleasure to take part in the Third Congress of the Association of Asian Constitutional Courts and Equivalent Institutions, kindly hosted by the Constitutional Court of the Republic of Indonesia in this magical place called “Nusa” – for island and – “Dua” for two – as “Nusa Dua” means two islands, I have been told!

Before we embark on today’s topic, I would like to briefly speak to you about the Venice Commission and its relationship constitutional courts and courts with equivalent jurisdiction.

*Chief Justice,
Ladies and Gentlemen,*

Since the importance of exchanging information and ideas between Constitutional Courts and Courts with equivalent jurisdiction has always been promoted by the Venice Commission, the next logical step – once regional networks were in place – was to bring them together on a global level.

This idea had flourished in Cape Town, South Africa, where the first Congress of the World Conference on Constitutional Justice – also known as the “WCCJ” – took place in January 2009.

It was agreed among the nearly one hundred constitutional courts and councils and courts of equivalent jurisdiction that gathered there that the WCCJ should promote constitutional justice, understood as constitutional review that includes human rights case-law as a key element for democracy, the protection of human rights and the rule of law.

When the Statute of the WCCJ was adopted in 2011, the Asian Constitutional Courts immediately became one of its founding regional groups.

The Third Congress of the WCCJ was a very successful event hosted by the Constitutional Court of Korea in Seoul in September 2014.

I hope that I will have the pleasure of greeting all of you at the Fourth Congress of the WCCJ, hosted by the Constitutional Court of Lithuania from the 10th to the 13th of September 2017 in Vilnius.

*Chief Justice,
Ladies and Gentlemen,*

You have chosen a timeless topic for this event: *“The promotion and the protection of the constitutional rights of citizens”*.

The protection of fundamental or human rights is, for the most part, secured by states through their constitutions – hence constitutional rights.

And, since it is important for the protection of human rights to begin at the domestic level, the constitutional court’s role in this context is crucial.

This was also confirmed by a study that the Venice Commission undertook in 2010 on individual access to constitutional justice, covering the various forms of access in 50 countries, with the aim of analysing the merits of the various systems that exist – which we are currently updating.

A full individual complaints procedure is all the more necessary in regions where there is no regional Human Rights Court, as is the case – for the moment in Asia.

As you know, the creation of such a Court, bringing together like-minded countries to enhance human rights protection in the region, was supported by the World Conference in its Seoul Communiqué adopted as its 3rd Congress hosted by the Constitutional Court of the Republic of Korea.

Given the heterogeneity of Asia, the establishment of such Court cannot be a pan-Asian effort. Nevertheless, like minded countries, which are interested in an effective protection of human rights, could join in such an endeavour.

Chief Justice,

Ladies and Gentlemen,

I would like to end by wishing you a very fruitful dialogue and discussions today and I hope to be able to continue our well-established co-operation in the future!

Thank you for your attention.

Kazakhstan

11 августа 2016 года, Носа Дуа, Индонезия

Современные вызовы в глобальном правозащитном движении

**Председатель
Конституционного Совета
Республики Казахстан
Рогов И.И.**

**Уважаемые господин модератор, участники Конгресса,
дамы и господа!**

Позвольте мне от имени Конституционного Совета Республики Казахстан и от себя лично приветствовать вас и выразить нашу благодарность Действующему Председателю Ассоциации - Конституционному Суду Индонезии за плодотворную работу за эти два года и прекрасную организацию Конгресса.

Настоящая сессия посвящена актуальной теме. Одним из важных трендов современного мирового развития является, прежде всего, обеспечение верховенства права и конституционных прав и свобод человека. Именно права человека сегодня стали тем ключевым аргументом, воспринимаемым как основа всех вопросов экономического, политического, социально-гуманитарного характера и действий государств на международной арене, как позитивных, так и иных: санкций, принудительных мер и так далее.

Выдвижение проблемы прав и свобод человека на передний план миропонимания – это свидетельство огромных преобразований в духовной культуре и нравственности. Если первоначально развитие института прав человека осуществлялось исключительно во внутрисударственном праве, то в настоящее время положение кардинальным образом изменилось: права человека регулируются как внутренним, так и международным правом. При этом все более возрастает роль международного права, что выражается в более детальной разработке и конкретизации международных принципов и норм, регулирующих основные права и свободы человека, которые должны соблюдаться государствами.

Многие страны являются участниками так называемых региональных механизмов в области прав человека: *Европейской конвенции о защите прав человека*, *Американской конвенции о правах человека*, *Африканской хартии о правах человека и народов* и др.

Конституционным Судом Кореи и рядом других стран высказываются предложения о создании Азиатского суда по правам человека.

Вместе с тем, стабильность и безопасность государств подрывается терроризмом, религиозным экстремизмом, агрессивным сепаратизмом. Огромную опасность несут в себе незаконная торговля наркотиками и оружием, нелегальная миграция, торговля людьми и организованная преступность.

В связи с возрастающими угрозами безопасности некоторые страны, особенно, сравнительно недавно получившие суверенитет, имплементируют положения международных актов во внутригосударственное законодательство исходя из своего понимания национальных интересов. При этом они руководствуются собственным правом, прежде всего нормами национальных конституций, закрепляющими основы конституционного строя и принципы внешнеполитической деятельности государств. Государства самостоятельно определяют, в каких случаях и в каких целях им следует принимать на себя те или иные международные обязательства.

В этой связи, мы сталкиваемся с проблемой, когда универсальный характер понятия прав человека не всегда и не всеми разделяется.

В условиях обострения угрозы терроризма в некоторых странах мира были приняты законодательные и иные меры, в определенной степени ограничивающие некоторые естественные права, закрепленные в основополагающих международных актах. При этом иногда возникает коллизия между универсальными стандартами защиты прав и свобод человека и интерпретацией этих прав различными государствами в конкретной исторической обстановке. Полагаем, что такая коллизия возможна, но только в тех пределах, которые позволяют государству позиционировать себя как демократическое и правовое.

Изучая проблему соотношения глобального и регионального понимания прав и свобод человека, необходимо учитывать и тот факт, что разные цивилизации имеют различные подходы к пониманию определенных ценностей: если в странах так называемого западного мира приоритет отдается правам конкретного человека, индивида, то во многих странах евразийского пространства сильны коллективистские традиции. Идея первенства общенациональных интересов, от реализации которых зависит способность государства обеспечивать защиту конституционных ценностей, заложена в основу ряда молодых, вновь образовавшихся государств.

Поэтому ко многим международным актам государства нередко присоединяются с различного рода оговорками, учитывающими особенности национальной правовой политики в соответствующей сфере. Это связано с тем, что каждая национальная правовая система покоится на своих, присущих только ей принципах, является «продуктом» общества и, как следствие, отражает его особенности. В связи с этим государства принимают во внимание, что применение международного права в некоторых случаях может привести к результату, не только отличному, но и просто несовместимому с основными принципами построения его экономической, политической и правовой систем.

Перед государствами стоит проблема обеспечения своих публичных интересов одновременно как на международном уровне, так и во внутригосударственной сфере. При создании такого механизма законодатель должен умело сочетать в нем частное и публичное и одновременно найти правильное соотношение внутригосударственного и международного.

Стоя на страже Основного Закона, Конституционный Совет Республики Казахстан наделен полномочиями рассматривать законы и международные договоры на соответствие Конституции Республики.

Конституционный Совет Казахстана ориентирует развитие правовой системы, правотворчество и правоприменительную практику в направлении соответствия их современному пониманию прав и свобод человека и гражданина, закрепленных в основополагающих международных актах. При этом, Конституционный Совет, как и другие органы конституционного контроля, не может оставаться в стороне от происходящих в международных масштабах событий. Полномочие Конституционного Совета по рассмотрению конституционности международных договоров служит цели согласования национального и международного права. Признание последнего соответствующим Конституции Республики открывает дорогу для завершения процесса ратификации и вступления международного соглашения в силу для Казахстана и включения его положений как составной части в правовую систему страны. В противном случае международный договор или отдельные его положения не подлежат введению в действие и применению. Это необходимо для избежания коллизий между национальным правом и международными обязательствами.

Таким образом, придерживаясь основополагающих международных актов и развиваясь в рамках мировых процессов, государства, как нам представляется, вправе учитывать в конституциях и текущем законодательстве свои национальные интересы. Своеобразным «фильтром» в этом механизме являются органы конституционного контроля.

Думаю, что настоящий Конгресс поможет всем нам глубже осмыслить имеющиеся проблемы, обменяться положительным опытом и наметить пути дальнейшей работы по обеспечению верховенства Основных Законов наших стран.

Спасибо за внимание.

Korea

Constitutional Complaint System, The Korean Experiences and Implications to Newcomers

By: Insung LEE
Justice, Constitutional Court of Korea

1. Grounds and Types of Constitutional Complaint System in Korea

Many countries have designed and developed a constitutional complaint system suited to their own needs and situations. And the type and scope of constitutional complaints may differ from one country to another depending on the country's political, social situation, as well as on whether they are defined in constitutions and laws or determined by the interpretation of such constitutions and laws.

The Constitutional Court of Korea has jurisdiction over the constitutional review of statutes, impeachment, dissolution of political parties, competence disputes, and constitutional complaints. The Korean Constitution provides that the Constitutional Court shall have jurisdiction over "constitutional complaint as prescribed by Act." Since the Constitution does not provide for any specific ideas or concepts of constitutional complaints, the legislature has been granted broad discretion in formulating the constitutional complaint system.

The Constitutional Court Act of Korea stipulates two types of constitutional complaints. First, any person who claims that his or her constitutional fundamental right is violated by an exercise or non-exercise of governmental power may file a constitutional complaint (Article 68 Section 1, Constitutional Court Act, known as the "constitutional complaint as remedy of rights"). This type of constitutional complaints is most commonly adopted and witnessed in many other countries around the world. Second, when an individual files a motion with an ordinary court requesting review of a statute by the Constitutional Court and this motion is denied, the individual may directly file a constitutional complaint with the Constitutional Court (Article 68 Section 2, Constitutional Court Act, known as the "constitutional complaint as constitutional review of statutes"). Constitutional complaint as constitutional review of statutes is peculiar to the Korean judicial system and was, in fact, rarely found in other countries at time of its adoption. Although it is named "constitutional complaint," it is in nature similar to the constitutional review of statutes.

These two types of constitutional complaints mentioned above are very actively used by the Korean people. Since its establishment on September 1, 1988, the Constitutional Court of Korea has received 22,968 constitutional complaints as remedy of rights. As of April 30, 2016, the Constitutional Court disposed of a total of 22,556 cases, out of which the complaints were upheld in 722 cases. Meanwhile, the Constitutional Court received 5,596 constitutional complaints as constitutional review of statutes. Among them, 5,310 cases were disposed of, and the complaints were upheld in 316 cases.

2. Constitutional Complaint as a Means of Constitutional Review of Statutes

Although ordinary courts of Korea had the constitutional review power before the birth of the Constitutional Court of Korea, they had not been willing to exercise their constitutional review power. Most of the requests for constitutional review of laws had not been admitted by ordinary courts. Consequently, the parties had little chances of reviewing the constitutionality of statutes related to pending trial. As will be addressed in detail later in this presentation, the Constitutional Court Act does not acknowledge the power of the Constitutional Court to review judgments of ordinary courts. Hence, this kind of constitutional complaint is needed to enable the party to request constitutional review of statutes related to pending trial directly with the Constitutional court.

The constitutional complaint used as a means of constitutional review of statutes allows a party to a case whose request for constitutional review was denied by any level of ordinary courts to file a constitutional complaint directly with the Constitutional Court, which provides a counterbalance to the passive approach of ordinary courts towards constitutional review. The party needs not to wait for the ruling of a higher court in order to file a constitutional complaint. In this context, the constitutional complaint procedure challenging the constitutionality of statutes is widely acclaimed as an original and wise method for complementing the limitations of the Constitutional Court's power of norm control.

This type of constitutional complaints as a means of constitutional review of statutes can be compared with the posteriori constitutional review adopted in 2008 by the French Constitution under the name of *question prioritaire de constitutionnalité*, or QPC. According to the QPC, a claim challenging the constitutionality of a legislative provision may be ruled by the Constitutional Council upon referral by the highest courts (Conseil d'État, Cour de Cassation) requested by a party to the underlying case (Article 61-1, French Constitution), but there are no means of appeal when this request by the individual is denied by the highest courts. This system differs from Korea, where individuals can directly file a constitutional complaint to challenge the constitutionality of a statute with the Constitutional Court.

The Federal Constitution of Austria adopted *Gesetzesbeschwerde*, or complaint against decrees, in 2015. A person who, as a party to the case that has been decided by a court of justice of first instance, alleges infringement of his rights because of the application of an unconstitutional law, can file an application challenging the constitutionality of laws on the occasion of an appeal filed against that decision (Article 140(1)(1)(d), Austrian Federal Constitution). This system of Austria is considerably similar to the Korean constitutional complaints challenging the constitutionality of statutes. However, the Korean system differs in that a party of a case in an ordinary court need not undergo an appeals process against court judgments, and that the process of filing for referral by an ordinary court requesting constitutional review and getting the request denied should be preceded before the party can directly go to the Constitutional Court.

3. Constitutional Complaint as a Remedy of Rights: Limitations of Law and Resolution through Interpretation

The constitutional complaint procedure as a remedy of rights faces a few impediments related to the admissibility requirements for review by the Constitutional Court. The first obstacle is the principle of subsidiarity. In other words, if any remedy is provided by other laws, no one may file a constitutional complaint without having exhausted all such processes (Proviso of Article 68 Section 1, Constitutional Court Act). Second, constitutional complaints cannot be filed against judgments of ordinary courts (Article 68 Section 1, Constitutional Court Act).

A combination of the said two requirements results in the complexity of issues. For example, actions of administrative authorities, which are subject to administrative litigation procedures, should be initially reviewed by ordinary courts due to the principle of subsidiarity, but because the judgments of ordinary courts cannot be appealed against through the constitutional complaint procedure (Constitutional Court says, in this case, even the original administrative actions cannot be appealed against by constitutional complaints), it is mostly impossible to file a constitutional complaint against such administrative actions.

The reason why, despite the circumstances, constitutional complaints are being actively filed with the Constitutional Court is because the Court has broadened the applicable scope of constitutional complaints through its interpretation. First, the Constitutional Court widely recognized exceptions to subsidiarity. The Constitutional Court has stated that individuals can bring constitutional complaints directly before it without the exhaustion of other legal processes in such cases as a) when the rights of the complainant can hardly be restored through other legal procedures, b) when it is uncertain whether such legal procedures are applicable from an objective perspective, and c) when such procedures to obtain legal remedies have no prospect of implementation. As a result, the constitutional complaints against a number of actions by public authorities, such as material acts by governmental power or non-prosecution disposition, have satisfied the admissibility requirements and thus been reviewed on their merits by the Constitutional Court.

Second, the Constitutional Court has specified that the "governmental power" provided in Article 68 Section 1 of the Constitutional Court Act refers to all actions by public authorities that exercise legislative and administrative powers, which means constitutional complaints can be filed against the laws enacted by the National Assembly or legal orders adopted by the Executive if they directly violate the fundamental rights of individuals. These may not be a typical type of claims anticipated from the Constitution or the Constitutional Court Act, but these kinds of claims have been established as one of the main types of constitutional complaints through the interpretation of the Constitutional Court.

Third, the Constitutional Court has proclaimed that the ordinary court judgments that have violated the fundamental rights of individuals by applying unconstitutional laws

can be appealed against by constitutional complaints. This way, ordinary court judgments can also be appealed to the Constitutional Court in the form of constitutional complaints on certain conditions.

For such reasons mentioned above, the Constitutional Court has contributed a valuable share to activate constitutional complaint system through the positive interpretation of the Constitution and statutes under such statutory limitations.

4. Implications to newcomers

At the International Symposium on Constitutional Complaint held in Jakarta, Indonesia in August 2015, Justice Palguna of the Constitutional Court of Indonesia mentioned the obstacles faced by the Court in introducing constitutional complaints and the efforts to seek a solution to this problem. According to his explanation, there were two main reasons why the constitutional complaint system failed to be adopted by the Indonesian Constitution. First, there was fear of unmanageable caseload for the Constitutional Court. Second, there was concern that the introduction of such a new mechanism might trigger the overlapping of competence with other courts of general jurisdiction. He also stated that a constitutional amendment as a way to introduce constitutional complaint was not a practical solution and suggested other alternatives instead. The first alternative is legislative interpretation, which means the legislature makes a formal interpretation of a certain provision of the Law on Constitutional Court, and the second alternative is judicial interpretation, which refers to the role of the Constitutional Court to declare some legal provisions conditionally constitutional or conditionally unconstitutional, as a way of controlling the interpretation of legal norms.

I was deeply moved by the presentation of Justice Palguna that, despite the challenging circumstances, the Constitutional Court of Indonesia had been thinking hard about the constitutional complaint system as a way of reinforcing the protection of fundamental rights. In fact, given my limited knowledge of the constitutional system and realities of Indonesia, I feel very cautious about commenting on this issue of Indonesia's introduction of constitutional complaints. Still, in connection with the presentation of Justice Palguna, I wish to offer some of my views in an effort to share the thoughts and concerns of the Indonesian Constitutional Court.

Unlike Korea, Indonesia does not have a constitutional provision on constitutional complaints. Therefore, introducing the constitutional complaint system through ways other than constitutional amendment will have limitations to a certain extent. Yet, the Indonesian Law on Constitutional Court stipulates the possibility for individuals to directly file applications against the laws that allow for the acts (or omissions) of state or public officials. I believe it is not entirely impossible to introduce a general form of constitutional complaint without a constitutional amendment; it can be done through constitutional interpretation and amendment to the Constitutional Court Act. This appears, basically, to be a matter that depends on the will of the legislature. Still, the Indonesian Constitutional Court should have considerable room to contribute to such a

legislative process. In fact, there may be a controversy over the constitutionality of introducing constitutional complaints without a constitutional amendment.

On the other hand, the introduction of constitutional complaint can be done through constitutional interpretation. In fact, there may be a controversy over the constitutionality of introducing constitutional complaints without a constitutional amendment. As the Indonesian Constitutional Court has the power to review the constitutionality of laws, it would be somewhat difficult, but not entirely impossible to interpret that the power to review the "constitutionality of laws" may include the power to review the "constitutionality of execution of laws." No matter how constitutional a law may be, if an unconstitutional execution of that law cannot be revoked by the Constitutional Court, a vacuum will be generated in terms of the protection of fundamental rights.

The problem stemming from the overlapping of competence or jurisdiction with other courts can be partly resolved by the principle of subsidiarity. On the ground of the principle of subsidiarity, the three-justice panel shall dismiss a constitutional complaint when a constitutional complaint is filed, without having exhausted all the relief processes provided by other laws.

5. A solution for concerns over heavy caseload

Once the constitutional complaint system is adopted, the increase in caseload is inevitable. We can see the dramatic increase of the numbers of constitutional complaints in Turkey during last 3 years.

As far as the Korean constitutional court's caseload is concerned in terms of constitutional complaint, in 2015 the Korean constitutional court received about 1,859 cases and more than 98% of the cases are constitutional complaints, and around 70% of constitutional complaints have no pending cases before "ordinary courts." These cases are "constitutional complaint as a remedy of rights". Among these type complaints, around 80% of cases were dismissed by three-justice panels in the Court without decision upon the merits, but still over 500 cases were decided by the full bench of the Court in 2015, for there were other types of the cases in the Court.

I think that most of the Constitutional Court or Supreme Courts of the world have the same concern as ours in terms of dealing with heavy caseloads, and the U.S. Supreme Court normally receives about 10,000 petitions for certiorari, and only some 1% of those certioraris are granted per year. The review on the writ of certiorari is not a matter of right, but of judicial discretion, and a petition for a writ of certiorari will be granted only for compelling reasons.

In comparison, the German constitutional justice system has a mechanism, called "admission procedure (*Annahmeverfahren* in German)," which was introduced under the influence of the U.S. certiorari system.

Article 93a(2) of the Law on Federal Constitutional Court of Germany, which defines *Annahmeverfahren* of the Court, provides that complaints shall be admitted when the

case has general constitutional significance; when the complainant's fundamental rights or one of his or her rights under the Basic Law are appropriately claimed; and if the complainant would suffer a particular grave disadvantage if the Court refused to decide on the complaint. This authority to decide on the admissibility of a case allows for discretion, and so the caseload can be reduced to a certain extent. Under the system, the refusal to admit the constitutional complaint for decision may be decided by the three-justice chamber, and that decision does not require reasons to be given, and no appeal may be made against it. Even though “admission procedure” is not a matter of judicial discretion unlike the U.S. certiorari system, it has contributed greatly to lessen the caseload of the German Federal Constitutional Court, and I’ve heard that more than 95% of cases were dismissed through admission procedure. But I also know that some German scholars call it “lottery of Karlsruhe” since it is difficult to predict which case will be admitted.

As far as the Korean Constitutional Court is concerned, we do not have a similar discretionary system. The Korean Constitutional Court Act provides that all constitutional complaints that meet the admissibility requirement should be reviewed by the full bench, which means there is no discretion in the process of preliminary review, but in Korea it could be noted that the caseload is still within the manageable level.

The major difference between the U.S., German and Korea is that while the decision for admission is discretionary in U.S. and German, being issued as a simple statement without explanation, the Korean system is not discretionary, and its dismissal of cases comes with reasons why the Court views the case as inadmissible.

6. Conclusion

The Korean constitutional complaint system is very actively resorted to and used by the Korean people, and this is largely due to the fact that the Korean Constitutional Court has lowered the threshold of constitutional complaints through its proactive interpretation. It is true that, compared to Korea, Indonesia faces more legal obstacles to the introduction of constitutional complaints, but I believe that the Indonesian Constitutional Court will be able to play an important role in overcoming such setbacks by applying active legal interpretation which gives top priority to the protection of people's fundamental rights.

Kyrgyz Republic

“ Protection of the constitutional rights of citizens on the example of the Constitutional Chamber of the Supreme Court of the Kyrgyz Republic”

**By: Mr. Erkinbek Mamyrov
President of the Constitutional Chamber of the Supreme Court of the Kyrgyz Republic**

Dear Ladies and Gentlemen!

Let me greet you and express my gratitude to the Constitutional Court of Indonesia for organizing the 3 Congress of the Association of Asian Constitutional Courts and equivalent institutions and the opportunity to share experiences.

Undoubtedly, theme of the Congress is very relevant, because ensure and the compliance constitutional rights and freedoms of citizen’s considered as the most important task of the state activities.

The Constitution of the Kyrgyz Republic determined that the human rights and freedoms are the superior value. The Kyrgyz Republic shall respect and ensure human rights and freedoms to all persons on its territory and under its jurisdiction.

At the same time, in the protecting human rights mechanism special role belongs to the Constitutional Chamber, that implementing the constitutional proceedings aims to ensure the protection of fundamental human rights and freedoms, constitutional system, principles of a democratic, legal, secular state and thereby contribute directly to the rule and direct action of the Constitution of the Kyrgyz Republic on its territory.

Let me inform you about the activity of the Constitutional Chamber of the Kyrgyz Republic.

One of the most important competencies of the Constitutional Chamber to protect the constitutional rights of citizens is a normative control, whereas in the framework of this competence shall be considered and resolved issues regarding the constitutionality or unconstitutionality of normative legal acts.

According to the Constitution of the Kyrgyz Republic everyone shall have the right to challenge the constitutionality of a law or another regulatory legal act in case she/he believes that these acts violate rights and freedoms recognized in the Constitution. In turn, the Constitution providing the right to appeal to the Constitutional Chamber does not associate the action with a direct violation of the rights and freedoms the subject of the appeal. This kind of constitutional review, called an abstract and aimed at compliance with rule-making body of the Constitution and its provisions that regulate human rights and freedoms in the process of adoption of legal acts.

Undoubtedly, abstract kind of control provides more citizens the opportunity to protect their rights through the constitutional justice. *Analysis of the received complaints to the Constitutional Chamber shows that the number of complaints from citizens whose rights*

have not been directly infringed by the impugned regulations, is one third of all complaints to the Constitutional Chamber.

From the moment of formation Constitutional Chamber has decided **61 cases**, which are directly or indirectly related to the protection of the rights and freedoms of humans and citizen.

Thus, in decisions relating to the protection of the right to freedom of religion, the Constitutional Chamber has indicated that all religious associations are equal under the law, and the person or group of persons of a particular religion should not be in a privileged position in comparison with representatives of other religions.

Protecting constitutional guarantees of freedom of thought and speech, the Constitutional Chamber emphasized that everyone has the right to freedom of thought and opinion, right to free expression of opinion, freedom of speech and press, right to freely seek, receive, keep and use information and disseminate it orally, in writing or otherwise. No one may be subject to criminal prosecution for the dissemination of information which abases or humiliates honor and dignity of a person.

This conclusion was made by the Constitutional Chamber in connection with the fact that the legislator has introduced a norm providing for criminal liability for false information, despite the constitutional provision prohibiting the criminal prosecution for disseminating of information which abases or humiliates honor and dignity of a person.

The human right to freely express their thoughts and words - one of the most important universally recognized human rights, which protection provided by the majority of international acts such as the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and others.

Also, in its decisions aimed at protecting the private life the Constitutional Chamber has designated, everyone shall have the right to inviolability of one's private life and the protection of honor and dignity; right to secrecy of correspondence, telephone and other conversations, postal, telegraphic, electronic and other communications. The limitation of these rights is allowed only in accordance with law and exclusively for the purpose of protecting national security and public order, health and morale of the population as well as rights and freedoms of other persons.

Thus, the possibility of legislative intervention on collection, storage, use and dissemination of confidential information as well as information on private life of a person without his/her consent shall not be allowed except for cases envisaged in the law.

Other areas of human rights activities of the Constitutional Chamber showed in its decisions on cases of property rights, social security and judicial protection.

Regarding the right to social security, the Constitutional Chamber in its decision noted that the legislator has the right to introduce a new legal regulation in the area of social security, but such legal regulation must not contradict to constitutional and important

aims to support the socially vulnerable categories of citizens, declared in the Constitution and worsen the situation of persons receiving welfare payments. In this connection, the Government was instructed to develop an effective mechanism for increasing the amount of social payments in connection with the transition to the new legal regulation.

By the right to judicial protection, the Constitutional Chamber expressed its position in their several decisions and indicated that a person, against whom initiate criminal cases, have the right to judicial review of the decision of the investigator to initiate criminal proceedings. This right sets in the Constitution, which guarantees everyone judicial protection of his rights and freedoms, but important in verifying the legitimacy of the decision about initiate criminal case the court is competent to find out, first of all, whether observed the order of judgment, whether there are grounds for instituting criminal proceedings, whether there are no circumstances precluding the proceedings.

I would like to draw your attention that if Constitutional Chamber recognize the, of certain provisions of the law unconstitutional, their actions in violation of the constitutional rights and freedoms of citizens terminated, which entails protecting the rights and freedoms not only of specific applicants, but also the constitutional rule of law in general.

In conclusion, I would like to emphasize that the activity of the Constitutional Chamber to ensure the supremacy of the Constitution and its direct action aimed at achieving the main goal – establishing in the Kyrgyz Republic, the democratic, social and constitutional state, one of the highest values are an individual, his rights and freedoms.

Thank you for your attention.

Выступление Председателя Конституционной палаты Верховного суда Кыргызской Республики Мамырова Э.Т. на 3 Конгрессе Ассоциации Азиатских конституционных судов и эквивалентных институтов на тему: «Защита конституционных прав граждан на примере Конституционной палаты Верховного суда Кыргызской Республики»

Уважаемые дамы и господа!

Разрешите Вас поприветствовать и выразить благодарность Конституционному суду Индонезии за организацию 3 Конгресса Ассоциации Азиатских конституционных судов и эквивалентных институтов и предоставленную возможность обмена опытом.

Безусловно, тематика конгресса является весьма актуальной, поскольку обеспечение и соблюдение конституционных прав и свобод граждан рассматривается в качестве важнейшей задачи деятельности государства.

В Конституции Кыргызской Республики определено, что человек, его права, свободы являются высшей ценностью. Кыргызская Республика уважает и

обеспечивает всем лицам, находящимся в пределах ее территории и под ее юрисдикцией права и свободы человека.

При этом, в правозащитном механизме особая роль принадлежит Конституционной палате, которая осуществляя конституционное судопроизводство стремится обеспечить защиту фундаментальных прав и свобод человека, конституционного строя, принципов демократического, правового, светского государства и тем самым непосредственно содействовать верховенству и прямому действию Конституции Кыргызской Республики на всей территории страны.

Позвольте мне проинформировать Вас о деятельности Конституционной палаты Кыргызской Республики.

Одним из важных полномочий Конституционной палаты в защите конституционных прав граждан является нормоконтроль, поскольку именно в рамках данного полномочия рассматриваются и разрешаются вопросы относительно конституционности или неконституционности действующих нормативных правовых актов.

Согласно Конституции Кыргызской Республики каждый вправе оспорить конституционность закона и иного нормативного правового акта, если считает, что ими нарушаются права и свободы, признаваемые Конституцией. В свою очередь Конституция предоставляя право обращения в Конституционную палату, не связывает это действие с непосредственным нарушением прав и свобод субъекта обращения. Такой вид конституционного контроля, именуемый абстрактным, преследует цель соблюдения нормотворческим органом Конституции и ее положений, регулирующих права и свободы человека в процессе принятия нормативно-правовых актов.

Бесспорно, абстрактный вид контроля предоставил большему числу граждан страны возможность защитить свои права посредством конституционного правосудия.

С момента формирования Конституционной палаты за три года принято **61 решение**, которые прямо или косвенно связаны с защитой прав и свобод человека и гражданина.

Так, в своих решениях, связанных с защитой права на свободу вероисповедания, Конституционная палата указала, что все религиозные объединения равны перед законом, а лицо или группа лиц, исповедующих определенную религию не должны состоять в преимущественном положении по сравнению с представителями иной религии.

Защищая конституционные гарантии свободы мысли и слова, Конституционная палата подчеркнула, что каждый имеет право на свободу мысли и мнения, право на свободу выражения своего мнения, свободу слова и печати, право свободно искать, получать, хранить, использовать информацию и распространять ее устно, письменно или иным способом. Никто не может быть подвергнут уголовному преследованию за распространение информации порочащей и унижающей честь и достоинство личности.

Право человека свободно выражать свои мысли и слова – одно из важнейших общепризнанных прав человека, защита которого предусматривается большинством международных документов, среди которых: Всеобщая

декларация прав человека которая устанавливает, что «каждый человек имеет право на свободу убеждений и на свободное выражение их; это право включает свободу беспрепятственно придерживаться своих убеждений и свободу искать, получать и распространять информацию и идеи любыми средствами и независимо от государственных границ». Близкое по смыслу и содержанию положение закреплено в Международном пакте о гражданских и политических правах.

Также, в своих решениях направленных на защиту частной жизни Конституционная палата обозначила, что каждый имеет право на неприкосновенность частной жизни, на защиту чести и достоинства; каждый имеет право на тайну переписки, телефонных и иных переговоров, почтовых, телеграфных, электронных и иных сообщений. Случаи возможного вмешательства государства в осуществлении права на неприкосновенность частной жизни допускаются только на основании закона с обязательной гарантией судебной защиты и исключительно в целях защиты национальной безопасности и общественного порядка, охраны здоровья нравственности населения, защиты прав и свобод других лиц.

Таким образом, возможность законодательного вмешательства на сбор, хранение или распространение информации о частной жизни человека без его согласия должно соответствовать конституционно значимым целям, обозначенным в Конституции.

Другие направления правозащитной деятельности Конституционной палатой проявились в его решениях по делам на право собственности, на социальное обеспечение и на судебную защиту.

Хотелось бы обратить Ваше внимание, что в случае признания Конституционной палатой, тех или иных положений закона неконституционными, их действия, нарушающее конституционные права и свободы граждан прекращаются, что влечет защиту прав и свобод не только конкретных заявителей, но и конституционного правопорядка в целом.

В заключение хочу подчеркнуть, что деятельность Конституционной палаты по обеспечению верховенства Конституции и ее прямого действия направлена на достижение главной цели – построение в Кыргызской Республике демократического социального правового государства, одной из высших ценностей которого является человек, его права и свободы.

Благодарю за внимание.

The Philippines

A MAJORITY OF ONE: VINDICATING THE BILL OF RIGHTS THROUGH CONSTITUTIONAL ADJUDICATION

Maria Lourdes P. A. Sereno

Chief Justice

Supreme Court of the Philippines

The constitutional design for the judiciary in the Philippines allows the courts to address individual complaints based not only on causes of action in civil or criminal cases but also on constitutional questions that affect individual as well as collective rights.

The Philippine Supreme Court stands at the apex of the judiciary and, while it is not formally called a constitutional court as understood or defined in this forum, it nonetheless enjoys the characteristics and possesses the features of a constitutional court. Frequently called upon to interpret the Constitution and the laws, the Court's decisions become part of the law of the land though they do not partake of legislation which is solely the province of Congress. This power of authoritative interpretation is the Court's greatest power and through it, the Court is able to define parameters, clarify boundaries, and allocate powers between the State and its citizens. (**Angara v. Electoral Commission** [1936])

In a very real sense, the Constitution and the laws are what the Supreme Court says they are. To recall **Marbury v. Madison** (1803) on the notion of judicial review; it is the province of the Court to say what the law is--"It is emphatically the province and duty of the Judicial Department [the judicial branch] to say what the law is. Those who apply the rule to particular cases must, of necessity, expound and interpret that rule. If two laws conflict with each other, the Courts must decide on the operation of each."

Constitutionalizing Individual Access and Protection through Authoritative Interpretation

When the Philippines went through a peaceful transition in leadership in February of 1986, the collective expression of sovereign power resulted in, among many others, the drafting of a peculiarly written Constitution. Not only is it the longest of all four previous Constitutions, the 1987 Constitution is distinct for being a reaction to the martial law regime which was the laboratory for its creation. Thus, strewn across its provisions are guarantees and expressions of support for fundamental rights and liberties, both collective and individual, strengthened by an empowered judiciary.

For the first time, the Judiciary is empowered to "determine whether or not there has been a grave abuse of discretion amounting to lack or excess of jurisdiction on the part of any branch or instrumentality of government." (Article VIII, sec. 1, par. 2) This power,

recognized as part and parcel of the judicial power, has been used by the Supreme Court significantly to carve out pockets of protection against State overreach through its Decisions on specific rights guaranteed by the Bill of Rights.

The Court's Expanded Power and the Majoritization of the Individual

This power of the Court has been used to strike down laws that prevent an individual from exercising his rights under Article III (The Bill of Rights) or violate her rights to exercise other rights under the Constitution; it has also been used to enhance the protection of the individual by asserting that he is protected from State abuse.

Article III of the 1987 Constitution, or The Bill of Rights, empowers the individual by conferring on him/her specific rights that can be asserted against the State; at the same time, the Constitution also shields the individual from government's undue intervention, unwanted interference, or unjustified abuse. Reading much like a *magna carta*, the Bill of Rights is possibly the single, most potent antidote to State abuse and overreach and is often the last resort of those who find themselves aggrieved and their rights limited, diluted, disregarded or violated.

The Court has expressly characterized the Bill of Rights as a limitation on the power of the State. In the case of **People of the Philippines v. Marti** (1991), the Court ruled that the Bill of Rights is not meant to be invoked against acts of private individuals because it governs the relationship between the individual and the state. "Its concern is not the relation between individuals, between a private individual and other individuals. What the Bill of Rights does is to declare some forbidden zones in the private sphere inaccessible to any power holder." (**Marti**) As an overarching framework, the view that the Bill of Rights imposes a burden on the State, not the individual, would be the greatest weapon a citizen would have against undue state interference or overreach.

Article III protects and/or guarantees broadly twenty two (22) rights and freedoms. Of these, the Court has ruled significantly on the following protected areas under Article III:

- 01) Due process and equal protection
- 02) Exclusionary rule in relation to searches and seizures and arrests;
- 03) Freedom of/from religion and the Non-establishment clause;
- 04) The right to counsel in custodial investigations;
- 05) The rights of the accused at trial;
- 06) The right to bail in capital and non-capital offenses;
- 07) The right to information on matters of public concern;

Many of the rulings of the Court on these areas have led to their codification as rights and freedoms under the 1987 Constitution. For lack of time, I shall limit myself to two instances.

1. The right to counsel in custodial investigations under Article III, section 12 was adopted in **People of the Philippines v. Duero (1981)** from the United States Supreme Court Decision in **Miranda v. Arizona (1961)**. By adopting the so-called *Miranda*

Warnings into its Decision, the Court set the stage for the codification of those warnings into what is now Article III, section 12 of the 1987 Constitution.

2. The ruling in **Mapp v. Ohio (1961)** on the “exclusionary rule” which bars the presentation of evidence that is obtained as a result of an unreasonable search and seizure was incorporated by the Court in its Decision in **Stonehill v. Diokno (1967)** and later led to its codification as a constitutional right first in the 1973 Constitution and later in what is now Article III, sec. 3, paragraph 2 of the 1987 Constitution.

The Court has also ruled on many occasions on the rights to due process and equal protection, including the then-novel proposition that the right to earn a living is part of the property right of an individual that is protected by Article III, section 1 and that the Bill of Rights establishes a hierarchy of rights with the rights to life and liberty being more preferred over property (**Philippine Blooming Mills v. Philippine Blooming Mills Employees Organization, 1981**).

On many occasions, the Court has also sustained the right of an individual to protect himself from unlawful searches and seizures initiated by agents of the State. In one particular instance, the Court upheld the invocation of the right by a suspected criminal who objected to a warrantless search and seizure at his house—“one cannot just force his way into any man's house on the illegal orders of a superior, however lofty his rank. Indeed, even the humblest hovel is protected from official intrusion because of the ancient rule, revered in all free regimes, that a man's house is his castle. It may be frail; its roof may shake; the wind may enter; the rain may enter. But the King of England may not enter. All the forces of the Crown dare not cross the threshold of the ruined tenement.” (**Alih v. Castro, 1987**)

A Majority of One

Allow me to end by saying that the Supreme Court of the Philippines is a 115-year old institution, tasked through the years with the long view of ensuring a just and equitable society through the discharge of its adjudicative functions. Through the years, its decisions have become the basis for constitutions and for legal principles—many of which have succeeded in allowing the individual standing against the State an effective majority of one.

Russia

REPORT

to the 3rd Congress of the Association of Asian Constitutional Courts and Equivalent Institutions

Nusa Dua, Indonesia

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*Session 1 “Mechanism for Promotion and Protection of Citizens’ Constitutional Rights:
Different Perspectives from Countries”*

CONSTITUTIONAL IDENTITY AND HUMAN RIGHTS IN RUSSIA

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Robert Alexy in his article on existence of human rights wrote that human rights materially exist even if they have not yet been enshrined in the text of the Constitution. That represents a non-positivistic approach to human rights. If human rights were not present in legal reality in the capacity of protorights, a clot of legal pretensions, then the comprehension of constitutional rights would be limited to those listed in the Constitution. But in such a case, there would be existent only the method of rights promotion which is used to be called originalism and textualism in interpretation of constitution, *i.e.* what is called a historical method of interpretation in the dogmatics of law. The rise of a new constitutional right is always related to the fact that in the society there always people either with a keen sense of justice, or dedicated to their profession (like in case of journalists struggling for their rights), or vested with healthy ambitions.

The future constitutional rights appear in a situation of a conflict. It is either a conflict between an individual and public authority where an individual asserts a new right, say, to death without torment, or it is a conflict between two citizens, each of who is a bearer of a constitutional right equal in its weight to the other one, and therefore a new right appears as a result of resolution of an axiological problem.

The Russian Constitution rests on the non-positivistic approach to appearance and promotion of fundamental rights. It comprises several legal ideas: a) human rights belong to everyone from birth, b) listing of fundamental rights in the Constitution should not be interpreted as a negation of possibility of appearance of other rights not mentioned in the text of the Constitution. Russian courts shall not only protect the rights

mentioned in the Constitution, but recognise other rights and freedoms if necessary. My ontological hypothesis consists in that the legal reality where legal pretensions, protorights exist should be distinguished. And the rights recognised by a state comprise a part of another reality – the reality of rights which have undergone the positivation stage.

This ontological division in legal reality and reality of law only seems to stay far apart from the demands of the legal practice. In sober fact, it is it that avails to reveal peculiar functions of constitutional courts by virtue of which they simultaneously bear the characteristics of both courts and parliaments as long as they actively participate in the process of promotion of new rights.

The question of how the fundamental rights exist in reality is directly related to the basic and the most complicated problem of constitutional law, which is a global one, and that disputable problem is about whether constitutional rights are universal, or cultural diversity of peoples inevitably engenders the phenomenon of cultural relativism, *i.e.* the diversity of comprehensions of even human rights in different cultures. Rather influential European judges Valery Zorkin, Angelika Nußberger, Hans-Jürgen Papier, Gertrude Lübbe-Wolff are convinced in the necessity of taking into consideration of the diversities in legal cultures of different countries, nevertheless, they do not recognise the cultural relativism as a threat to the law and order common to all peoples.

The legal reality is a specific sphere of objective being. As a scientific concept it does not occur to be a juridical one, it is an ontological category. The being is always conflictual, controversial. The epicentre of the legal reality is a right at issue. Furthermore, such a right might not be yet officially recognised. When a right is ever recognised, then the institutionalisation thereof in a form of legal norms occurs. A right which is material appears. And this is entirely a legal concept.

In legal reality human rights that are not listed in the positive law may arise. The reasons of justice, the developing ethics are permanently challenging the positive law in demand of an official recognition of more and more rights, pursuing the object of making them the reality of law. Do we recognise the presence of such rights existing in the legal reality? The issue of the existence of rights precisely illustrates the difference between the legal reality and the reality of law.

Concurrently, issues of very high complicity to lawyers emerge.

Should the state recognise each, any right? And could some certain speed of recognition of rights be designated? Are there any rights universal for all the mankind or, for instance, for Europe which should obligatory be converted into the real ones protected by the state? Should we here and now, say, protect the rights of people desiring to create homosexual families? What is the extent of state's responsibility in this process of transformation of phenomena arising in the legal reality into valid legal rights? Thus, are there any rights common to all countries and cultures? How can we certain of that this question shall be answered positively or negatively? A belief can not be relied upon – I either believe in the universal rights or not! Some protorights should be recognised here and now, some should not.

In 2012 the leaders of the ASEAN countries – the Association of South-East Asian Nations – signed the Asian Human Rights Declaration. We are all aware of the existence of the Arab Charter on Human Rights and Cairo Declaration on Human Rights in Islam. The accent in these documents is not accidentally made on that human rights shall be considered "in the regional and national context". This wording from the Asian Declaration appears as a controversy to the Eastern legal tradition of overall human rights universalisation and as a rise of non-Eastern concepts of human rights. It contains three main ideas:

- 1) the constitutional of each state should be taken into consideration;
- 2) socio-economic rights have supremacy over civil and political ones, and collective ones – over individual ones;
- 3) determination of personality's status is an exceptionally internal issue of a sovereign state. (From the point of view of this idea, there are much fewer sovereign states in the world than members of the United Nations). The loss of previous popularity in the world by the concept of universal constitutional rights is obvious and relates to the political practice that occurred during the presidency of Mr Bush Jr. It is that time when international law was delivered a blow, when constitutional rights comprehended universally began to explicitly be declared as objects and substance of own state politics, which relies upon not on the international law, but upon own ethical values and convictions.

Jürgen Habermas could hardly been not agreed with in that false universalism of past ages empires in the issues of international justice has substituted international law with the own notions of morals of one of the selected nations.

When one nation asserts that its values are universal and obligatory for everyone and should be recognised by all other nations for their own welfare, this is obviously a false universalism.

Russia has found a mean of defense from supra-nationalisation in the sphere of human rights exceeding the bounds of reasonableness with the concept of constitutional identity.

It appeared in the Judgement of the Russian Constitutional Court of 16 April 2016 in the case of resolution of the issue of possibility to enforce in accordance with the Constitution of the Russian Federation the Judgement of the European Court in the case of Anchugov and Gladkov v. Russia. Those two citizens were convicted to death penalty for murder, which was substituted with deprivation of liberty for 15 years by a court of cassation. During their stay in the institutions of confinement they expressed their wish to participate in federal elections.

According to Article 32 of the Russian Constitution, citizens who are kept in places of imprisonment under a court sentence, shall not have the right to elect and be elected. The European Court on Human Rights in 2013 reached a conclusion that Article 32 of

the Russian Constitution violates the subjective right for participation in elections guaranteed by Article 3 of Protocol No. 1 to the European Convention on Human Rights.

The European Court did not recognise the argument of the Russian authorities regarding the proportionality of limitation of electoral rights having considered it of unduly general nature.

Having agreed to that the universal legal principle of proportionality should be duly respected, the Russian Constitutional Court has concurrently denoted that interaction of European conventional and Russian constitutional legal orders is impossible under conditions of subordination, inasmuch as only a dialogue between different legal systems shall be a basis of their proper equilibrium, and the effectiveness of norms of the European Convention of Human Rights depends on the respect for national constitutional identity by the European Court on Human Rights.

There are remarkable words of the national motto written on the silver ribbon held by the golden Garuda bird in its claws: "Unity in Diversity". This wisdom of the Indonesian people reminds us, jurists, of the risks of false, erroneous universalism in the comprehension of the manner in which the human rights in the world should exist. International humanitarian law shall not be substituted with own notions of political morals of any single nation.

The history of human ideas knows the phenomenon of false universalism for a long time, it has its place every time when people strive for preservation of canonic fundamentals, which seem to be absolutely perfect, in their primeval integrity having forgotten of the necessity to duly consider the peculiarities of history, culture of different peoples.

The doctrine of the human rights's supremacy has its own canonic Western European version.

But not everything that comprises canonic comprehension of human rights' supremacy is suitable for constitutionalism of the countries going through transitional period. This is demonstrated by the experience of 25 years of constitutional development of the countries of Central and Eastern Europe, including Russia, as well.

The concept of the supremacy of human rights is powerful by virtue of its flexibility, not rigidity, otherwise a canonic rule turns into a dogma.

And, therefore, a tension between the canonic concept of human rights and the one arising in the countries of transitional period is eventual. I believe, that by recognising this circumstance we discover a realistic and, thus, a reasonable methodology of constitutional development, where the general strategic objective which is the supremacy of human rights remain constant, however certain tactical deviations, which allow for succession in law, are acceptable – namely, what is called legal continuity. All of us the title of the book by famous Justice of the Supreme Court of USA Oliver Holmes "The Path of Law". The path of each country to the supremacy of human rights is sinuous and is not similar to experience of other countries. The legal continuity as an

objective reality means that due to the differences in culture of peoples certain limitations to the speed of progression onward do exist.

My experience of working in the capacity of a Judge of the Constitutional Court of Russia for 25 years suggest that swift revolutionary changes are hardly possible on this path, and smooth evolutionary development is preferable. It is relatively easy to take formal hurdles of adoption of new democratic constitutions, however it is much more complicated to take a material hurdle, which means to create a regime of genuine supremacy of human rights in a country. This circumstance is being constantly emphasised on by a well known scholar, President of the Constitutional Court of Russia Valery D. Zorkin.

ДОКЛАД

3-му Конгрессу

Ассоциации азиатских конституционных судов

и эквивалентных органов

Нуса-Дуа, Индонезия

8–14 августа 2016 года

*Сессия 1 “Механизмы поощрения и защиты конституционных
прав граждан: различное прочтение по странам”*

КОНСТИТУЦИОННАЯ ИДЕНТИЧНОСТЬ

И ПРАВА ЧЕЛОВЕКА В РОССИИ

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Роберт Алекси в своей статье о существовании прав человека писал о том, что права человека реально существуют, даже если они еще не закреплены в тексте Конституции. Это означает непозитивистский подход к правам человека. Если бы права человека не существовали в правовой реальности в качестве протоправ, сгустка правовых притязаний, то тогда понятие конституционных прав ограничивалось бы теми, которые

перечислены в тексте Конституции. Но тогда существовал бы только метод продвижения прав, именуемый оригинализмом и текстуализмом при толковании конституции, т.е. то, что в догматике права называется историческим методом толкования. Зарождение нового конституционного права всегда связано с тем, что в обществе есть люди либо с особо обостренным чувством справедливости, либо люди, преданные своей профессии (как в случае, когда за свои права борются журналисты), либо когда человек наделен здоровыми амбициями.

Будущие конституционные права появляются в ситуации конфликта. Это либо конфликт человека и публичной власти, когда человек отстаивает новое право, скажем, на смерть без мучений, либо это конфликт между двумя гражданами, каждый из которых является носителем конституционного права, равного по весу другому, и поэтому в результате разрешения аксиологической проблемы появляется новое право.

Конституция России основывается на непозитивистском подходе к образованию и продвижению основных прав. В ней содержится несколько юридических идей: а) права человека принадлежат каждому от рождения, б) перечисление в Конституции основных прав не должно толковаться как отрицание возможности появления других, непоименованных в тексте Конституции прав. Суды России должны не только защищать поименованные в Конституции права, но и признавать в случае необходимости другие права и свободы. Моя онтологическая гипотеза состоит в том, что надо различать правовую реальность, в которой существуют притязания, протоправа. А признанные государством права являются частью иной реальности – реальности прав, прошедших стадию позитивации.

Это только кажется, что это онтологическое деление на правовую реальность и реальность права далеко от потребностей юридической практики. На самом деле, именно

оно помогает обнаружить особые функции конституционных судов, благодаря которым они одновременно обладают признаками как судов, так и парламентов, поскольку активно участвуют в процессе продвижения новых прав.

Вопрос о том, как в реальности существуют основные права, напрямую связан с основной и самой сложной проблемой конституционного права, являющейся общемировой, и это спорная проблема того, являются ли конституционные права универсальными или же различия в культуре народов с неизбежностью порождают явление культурного релятивизма, т.е. разнообразие представлений об одних и тех же правах человека в разных культурах. Весьма влиятельные в Европе судьи В.Д. Зорькин, А. Нуссбергер, Х.-Ю. Папир, Г. Люббе-Вольф убеждены в необходимости учета различий в правовых культурах различных стран, но при этом они не рассматривают культурный релятивизм как угрозу общему для всех народов правопорядку.

Правовая реальность – это специфическая область объективного бытия. Как научное понятие оно не является юридическим, это онтологическая категория. Бытие всегда конфликтно, противоречиво. Эпицентр правовой реальности – спор о праве. Причем такое право еще может быть и не признано официально. Когда же право признано, происходит его институционализация в виде юридических норм. Появляется право, которое реально. И это уже всецело юридическое понятие.

В правовой реальности могут зародиться права человека, непоименованные в позитивном законе. Соображения справедливости, развивающаяся этика постоянно бросают вызов позитивному закону, требуя официального признания все новых и новых прав, преследуя цель сделать их реальностью права. Признаем ли мы наличие таких прав, существующих в правовой действительности? Вопрос о существовании прав

точно показывает разницу между правовой реальностью и реальностью права.

При этом возникают очень сложные для юристов вопросы.

Должно ли государство признавать все, любые права? И можно ли обозначить определенную скорость в признании прав? Есть ли какие-то универсальные для всего человечества или, например, для Европы права, которые надо обязательно превращать в реальные, защищаемые государством? Должны ли мы здесь и сейчас, скажем, защищать права людей, желающих создать однополые семьи? Какова степень ответственности государства в этом процессе преобразования явлений, зарождающихся в правовой реальности, в действительные юридические права? Итак, есть ли права, общие для всех стран и культур? Как убедиться в том, что на этот вопрос надо давать положительный или отрицательный ответ? Нельзя же полагаться на веру – верую в универсальные права или не верую! Какие-то протоправа надо признавать здесь и сейчас, какие-то нет.

В 2012 г. лидеры стран АСЕАН – ассоциации государств Юго-Восточной Азии – подписали Азиатскую декларацию прав человека. Все мы знаем, что есть Арабская хартия прав человека и Каирская декларация о правах человека в исламе. В этих документах не случайно сделан акцент на том, что права человека должны рассматриваться «в региональном и национальном контексте». Эта формулировка в Азиатской декларации выглядит как несогласие с западной правовой традицией предельной универсализации прав человека и как появление незападных концепций прав человека. В ней три основных идеи:

- 1) надо учитывать конституционную идентичность каждого государства;
- 2) социально-экономические права обладают приоритетом перед гражданскими и политическими, а коллективные – перед индивидуальными;
- 3) определение статуса личности – это сугубо внутреннее дело суверенного государства. (С точки зрения этой идеи, в мире суверенных государств гораздо меньше, чем участников Организации Объединенных Наций). Утрата понятием универсальных конституционных прав былой популярности в мире очевидна и связана она с той политической практикой, появившейся во время президентства Буша-младшего. Именно тогда международному праву был нанесен удар, когда конституционные права, универсально понимаемые, стали открыто декларироваться как цели и содержание собственной государственной политики, которая основывается не на международном праве, а на собственных этических ценностях и убеждениях.

Нельзя не согласиться с Юргеном Хабермасом в том, что ложный универсализм империй прошлых веков в вопросах международной справедливости заменил международное право собственными представлениями о морали одной из избранных наций.

Когда одна нация утверждает, что ее ценности являются универсальными и обязательными для всех и должны быть восприняты всеми другими нациями ради их собственного блага, то это очевидно ложный универсализм.

Россия нашла способ защиты от выходящей за пределы разумной наднационализации в области прав человека с помощью концепции конституционной идентичности.

Она появилась в Постановлении Конституционного Суда России от 16 апреля 2016 г. по делу, в котором разрешался вопрос о

возможности исполнения в соответствии с Конституцией Российской Федерации постановления Европейского Суда по делу «Анчугов и Гладков против России». Эти два гражданина за убийство были осуждены к наказанию в виде смертной казни, замененной судом кассационной инстанции лишением свободы на 15 лет. Находясь в местах лишения свободы, они заявили о своем желании участвовать в федеральных выборах.

Согласно ст. 32 Конституции России не имеют право избирать и быть избранными граждане, содержащиеся в местах лишения свободы по приговору суда. Европейский Суд по правам человека в 2013 г. пришел к выводу, что ст. 32 Конституции России нарушает гарантированное ст. 3 Протокола № 1 к Европейской конвенции прав человека субъективное право на участие в выборах.

Европейский Суд не признал аргумент властей России относительно соразмерности ограничения избирательных прав, посчитав его имеющим слишком общий характер.

Согласившись с тем, что общий правовой принцип соразмерности необходимо уважать, Конституционный Суд России вместе с тем указал, что взаимодействие европейского конвенционного и российского конституционного правопорядков невозможно в условиях субординации, поскольку только диалог между различными правовыми системами является основой их надлежащего равновесия, и от уважения Европейским Судом по правам человека национальной конституционной идентичности зависит эффективность норм Конвенции о защите прав человека.

На серебряной ленте, которую держит в когтях золотая птица Гаруда, написаны замечательные слова национального девиза "Разнообразие едино это" – или "Единство в многообразии". Эта мудрость индонезийского народа напоминает нам, юристам, о рисках ложного, ошибочного универсализма в представлениях о том, какими должны быть основные права человека в мире. Международное гуманитарное право нельзя заменять

собственными представлениями о политической морали какой-то одной нации.

Феномен ложного универсализма уже давно известен истории человеческих идей, он имеет место всегда, когда люди стремятся сохранить кажущиеся им абсолютно совершенными канонические начала в их первоизданной целостности, забывая о необходимости учитывать особенности истории, культуры разных народов.

Учение о верховенстве прав человека имеет свою каноническую западную европейскую версию.

Но не все, что образует канонические представления о верховенстве прав человека, подходит к конституционализму стран, находящихся в переходном периоде. Это доказывает опыт 25 лет конституционного развития стран центральной и восточной Европы, в том числе и России.

Концепция верховенства прав сильна своей гибкостью, а не жесткостью, иначе каноническое правило превращается в догму.

А поэтому допустимо возникновение напряжения между канонической концепцией прав человека и той, которая складывается в странах переходного периода. Я думаю, что признавая это обстоятельство, мы находим реалистическую, а потому и разумную методологию конституционного развития, когда общие стратегические цели, а это верховенство прав, остаются неизменными, но допустимо временные тактические отступления, учитывающие преемственность в праве, то, что называется правовым континуитетом. Все мы знаем название книги знаменитого судьи Верховного Суда США Оливера Холмса "Путь права". Путь каждой страны к верховенству прав извилист и не похож на опыт других стран. Правовой континуитет как объективная реальность означает, что в силу различий в культуре народов существуют ограничения в скорости продвижения вперед.

Мой опыт работы судьей Конституционного Суда России в течение 25 лет подсказывает, что на этом пути почти невозможны быстрые революционные изменения, и предпочтительнее плавное эволюционное развитие. Сравнительно легко брать формальные барьеры в виде принятия новых демократических конституций, но гораздо сложнее взять фактический барьер, то есть создать режим реального верховенства прав человека в стране. Это обстоятельство постоянно подчеркивает известный учёный, Председатель Конституционного Суда России В.Д.Зорькин.

Tajikistan

THE ROLE OF THE CONSTITUTIONAL COURT IN PROTECTING CONSTITUTIONAL RIGHTS AND FREEDOMS OF MAN AND CITIZEN

By: Mahmudzoda M. A.

Chairman of the constitutional court of the Republic of Tajikistan, Academician of the as RT, Doctor of legal-cal Sciences, Professor

Dear Chairman!

Dear participants of Congress!

Ladies and gentlemen!

Let me first of all express my gratitude to the organizers of this high and representative international forum, in particular to the Chairman of the Constitutional Court of a friendly nation of Indonesia - Mr. Arief Hidayat for the careful preparation, remarkable organization and for the warm hospitality that our delegation feels from the very first day of our stay in the beautiful and attractive Bali.

We wish the Constitutional court of the Republic of Indonesia further development and prosperity, and we wish good health, prosperity and success in professional activities to the team of the Constitutional Court of Indonesia.

Of course, today's meeting of the Association is an important platform for constructive discussion of various aspects of the constitutional control organs, in particular in the field of protection of constitutional rights and freedoms of man and citizen, and overall strengthening of constitutionalism in the States members of the Association.

Dear participants of Congress!

The Republic of Tajikistan, proclaiming itself, in accordance with the Constitution, a democratic and lawful state, announced thereby its intentions to move towards the development of world civilization, based on the recognition of the human person, of its rights and freedoms as the supreme value in society and the state.

The meaning of the legal state is revealed through the Constitution in accordance with which man, his rights and freedoms are recognized as the highest value, and the right to have a decent life and free development is guaranteed to everyone.

In a legal state personal, political, economic, social and cultural rights and freedoms of the citizen are not just proclaimed and declared by the Constitution, but are provided by appropriate mechanisms for their protection.

The constitutional obligation of state is to respect and protect the rights and freedoms of man and of the citizen through creation of conditions for their implementation and mechanisms for their protection.

The Constitution of Tajikistan, defining the state's obligation to recognize, respect and protect the rights and freedoms of man and citizen, determines that the rights and freedoms of man and citizen shape the objectives, contents and application of laws, activity of legislative, executive powers and local bodies of state power and government and are protected by the judiciary.

Ensuring such conditions and protection of the rights and freedoms of man and citizen are the function of all organs of state power, particularly the judiciary, because the idea of the rights and freedoms of man and citizen has always been inseparable from their protection in the Court.

In modern conditions, without the existence of democratically organized and competent court, it is impossible to speak protection of rights and freedoms.

Of course, constitutional court plays a special role in protecting constitutional rights and freedoms of man and citizen, as the body exercising constitutional justice.

It can be noted that the constitutional-legal democratic development of Tajikistan determined the increasing role of the constitutional court in the protection of the rights and freedoms of man and citizen, which, in turn, is also one of the most important functions of the state.

Today the most important task of the body of the constitutional control in the Republic of Tajikistan is to ensure the supremacy of the Constitution and to protect constitutional rights and freedoms of man and citizen, to ensure the equality before the law, equal access to the realization of personal, political, social, economic and other rights of citizens and direct action of judicial protection guarantees of these rights.

Human rights are the main criterion of activity of the constitutional court, which largely have universal value and have an impact on almost every decision on the verification of constitutionality of certain acts.

Analysis of the practice of the constitutional court can not only evaluate the conditions and prospects for strengthening judicial protection of constitutional rights, but also can offer some new conceptual approaches to the protection of the rights of citizens and a to the development of the constitutional values of a democratic social legal state.

The Constitutional Court of Tajikistan, is a little more than twenty years old, and for a short period of time its activities proved efficiency in protection of individual rights and freedoms of citizens and elimination of contradictions between normative legal acts and the Constitution, which itself is a significant achievement.

It should be noted that the constitutional court is not only a judicial body, but such a body which is entitled, in accordance with the Constitution and the law, to exercise oversight over the legislative and executive authorities, and in mediated form - over the judiciary, and in this sense, it represents the highest state power.

Due to the integrating role of the constitutional court is the guarantor of political peace in the state and society and the long-term guardian of constitutional values, the most

important of which is the proper observance of the constitutional rights and freedoms of citizens from abuse by public authorities.

The constitutional court is the true jurisdictional authority, it has the ability to make final and not subject to appeal decision.

The powers vested in the bodies of the constitutional supervision, turn them into a powerful stabilizing force, able to protect the rights and freedoms of citizens, to protect the society from destructive social conflicts.

Constitutional control is an important institution guaranteeing constitutional rights and freedoms of citizens, breaches of which can be caused not only unlawful acts or omissions of public authorities and their officials, but also to be a consequence of conflict of laws constitutional principles.

In this situation, the state is obliged to create conditions in which everyone would have the chance to restore their violated rights.

Dear colleagues!

In Tajikistan individuals and legal entities directly eligible to apply not only to courts of General jurisdiction, but also to the constitutional court.

Individuals are the active subjects of appeal to the constitutional court regarding the determination of conformity of normative legal act with the Constitution.

Constitutional court defends the rights and freedoms of man and citizen, not only in cases of direct appeal, but in the resolution of other cases.

On the basis of individuals' petitions, the constitutional court adopted a number of decisions on the normative interpretation of the provisions of the Constitution.

Most often citizens or legal persons are turning to the constitutional court regarding the violation of the constitutional principle of the guarantee of judicial protection established by article 19 of the Constitution of Tajikistan.

It should be noted that the constitutional principle of the guarantee of judicial protection applied directly recognized not only by the Constitution, but also related to other rights acquired on the basis of laws.

The provisions of article 19 of the Constitution guarantee judicial protection – one of the most common arguments in the court decisions relating to the protection of human rights.

This fundamental principle of law, although it seems at first glance clear and categorical in its constitutional design, is actually inexhaustible in the variety of its specific manifestation, which is clearly seen in numerous court decisions.

In particular, the Constitutional court of the Republic of Tajikistan reviewed the petition of the citizen Mullojonova F. "About determination of compliance of part 2 of article 197

of the Procedure code about administrative offenses of the Republic of Tajikistan article 14, part 1 of article 17 and part 1 of article 19 of the Constitution of the Republic of Tajikistan".

In his petition he pointed out that the provision of part 2 of article 197 of the Procedure code about administrative offenses of the Republic of Tajikistan has limited his constitutional right to judicial protection and protection of human honor and dignity, which is guaranteed by the Constitution of the Republic of Tajikistan, the Declaration of human rights and the International Covenant on civil and political rights.

The constitutional court, having considered the appeal, pointed to the fact that the system of constitutional rights and freedoms of man and citizen guarantees judicial protection and human honor and dignity are central.

This guarantee comes from the characteristics of the democratic, legal and social state such as Tajikistan, in which man, his rights and freedoms in the Constitution recognized as the Supreme value.

Guarantee of the implementation of the right to judicial protection and maintaining a fair trial has been the most important method of access of citizens to justice, strict enforcement procedures, judicial process, equality of citizens before the law and the courts, the implementation of the rights and legal safeguards of the judicial process, as well as the possibility of appeal judicial acts by appeal to the courts.

On the other hand, access to justice is established by the Constitution and laws for the protection of violated rights and lawful interests of individuals and legal entities, I also the most important method of implementation of the constitutional obligations of the state before citizens.

In accordance with that, the constitutional court ensuring the constitutional principle of guarantee for legal protection of rights and lawful interests of individuals and legal entities with the aim of increasing the specificity and improving the circumstances that are grounds for resumption of proceedings on administrative offence, considered appropriate by Parliament and the Government to review part 2 of article 197 of the Procedure code about administrative offences of the Republic of Tajikistan.

Another decision of the constitutional court of the Republic of Tajikistan on the request of the citizen Saidova N.. part 2 of article 363 of the Criminal procedure code of the Republic of Tajikistan concerning what is not subject to appeal and protest made in the course of the trial definition (resolution) with respect to the election, change or cancel of the preventive measure had been declared unconstitutional, that is not corresponding to articles 5, 14, 18 and 19 of the Constitution of the Republic of Tajikistan .

In considering the case the constitutional court, taking into account the norms of international law and of national law relating to the unimpeded enjoyment by citizens of their constitutional rights, particularly the right to judicial protection, in particular, noted that the guarantee of judicial protection under articles 14 and 19 of the Constitution, along with the availability of justice to the subjects of law and participants in the criminal process also means the possibility of appealing against the actions of

public officials at all trial stages envisaged by the procedural law, since the activities of criminal prosecution bodies and courts, in the authority which include implementation of the inquiry, preliminary investigation and trial, does not exclude errors.

The constitutional court also noted that any order that restricts the rights of parties to criminal proceedings for the protection of their procedural rights becomes an obstacle for the implementation of their rights to appeal against judicial decisions considered to be limiting the guarantee of judicial protection and the right to appeal to state bodies established by the Constitution, laws and procedural legislation of the Republic of Tajikistan.

On the basis of this decision of the constitutional court, the Parliament has amended part 2 of article 363 of the Criminal procedure code of the Republic of Tajikistan, and the rule limiting the right to appeal and make protest in the course of the trial definition (resolution) with respect to the election, change or cancel a preventive measure, was removed.

With the purpose of realization and protection of the right to social security, in particular the right to adequate pension provision, which are Central to the social rights of citizens, the Constitutional court considered the petition of the citizen Abdulloev I. N. "About definition of conformity of article 12 and article 117 of the Law of the Republic of Tajikistan "On pension provision of citizens of the Republic of Tajikistan", articles 11 and 39 of the Constitution of the Republic of Tajikistan" .

The applicant has indicated that these articles of the Law of the Republic of Tajikistan "On pension provision of citizens of the Republic of Tajikistan" according to which until the persons specified retirement age, payment of their pensions at the expense of own funds of the organization in which the work was performed, entitling them to preferential pension limits and violates his constitutional rights as a former employee of the printing house for the guarantee of social security.

In considering the appeal, the constitutional court stated that the right to social security is one of the ways of material and moral support of the man and of the citizen on the useful work undertaken by the person during the period of their employment for the benefit of society and the state. This right is also an important way to ensure the life of the citizen, totally or partially incapacitated and the possibility of these and other circumstances provided by the law, to work and to profit from the result of their labor, or deprived of the support of their breadwinner.

Due to the fact that the right to social security has a humanistic nature and importance to man and of the citizen, this right has found its specific regulation by international legal acts and national legislation.

The constitutional court also noted that the legislation on pension provision of citizens aimed at regulation and implementation of the constitutional rights of citizens to social protection by providing the labor and social pensions and guarantees of material security establishes unity of conditions and of rules of pension provision for different categories of workers.

In general, the Constitutional court in the period of its activity on the basis of requests of subjects of law, also discussed other issues concerning the implementation and protection of political, economic, social and cultural rights of citizens, and the decisions are used as precedent when dealing with constitutional rights of citizens in various fields.

It should be noted that a precedent would not be created without private subjects have the right to appeal to the constitutional court.

Decisions of the constitutional court recognized *desiderendi ratio* (basis of decision) by researchers and on this basis, refers to the precedents, of course, this opinion is the undeniable support.

Dear participants of Congress!

Constitutional complaints of Individuals, as well as of their associations and government bodies through their appeal to the constitutional court, "push", the constitutional court actually to exercise lawmaking functions, and it is recognized by the overwhelming majority of scientists-constitutionalists, as well as practitioners.

Verification of the constitutionality of laws is complicated, delicate and critical, requiring judges of high qualification, and it is no coincidence that the Constitution has attributed this feature to the competence of a specialized body acting in a strictly collegial manner.

The constitutional court, not only makes adjustments in existing laws and other normative-legal acts, but also instructs the legislator to the necessity of the adoption of the new law, the application of the law with regard to the legal meaning of the Constitution.

Overall, in exercising its powers the constitutional court ensures the supremacy and the real action of legal norms, and also strengthens the country's legal system.

Since the impotence of the law leads to protests, distrust of people in power.

The acts of the constitutional court on the one hand represent the individual acts of the enforcement authority, on the other hand, the content of the decisions of the constitutional court can be seen as provisions in the form of insights, arguments in the case, which are characterized by the property of norm.

The normative nature inherent in the decisions of the constitutional court in which the regulations are declared unconstitutional and removed from the current system of law.

From this we can say that judges of constitutional courts have a significant impact on the direction of legislation and the effectiveness of the Constitution.

Decisions of the constitutional court, which resulted in the removal of unconstitutional normative legal acts, have the same scope in time, space and people as the decisions of the legislative body, and therefore is the same as the normative legal acts, the total value

that is not inherent in law enforcement by its nature, acts of courts of General jurisdiction and economic courts.

It should also be borne in mind that the constitutional court may not replace the legislator to whose powers include making laws, as well as the changes and additions.

Dear colleagues!

On the basis of judicial reform in Tajikistan with the aim of improving the functioning of the constitutional court in ensuring the supremacy of the Constitution and protection of constitutional rights and freedoms of man and citizen, in line with the practice of constitutional control organs of different countries, the constitutional law of the Republic of Tajikistan "About the constitutional court of the Republic of Tajikistan" was adopted in the new edition.

And it can be noted that modern regulatory framework for the organization and activities of the organ of constitutional justice in our country today is able to provide a solution to the challenges facing them, in particular the protection of constitutional rights and freedoms of man and citizen, strengthening of democratic principles and legal foundations of the state.

And it's safe to note that a stable development of the democratic foundations of our state and ensuring its constitutional legality testify the importance and necessity of functioning of the constitutional court.

At the end of this speech, let me once again thank all the organizers of this event and its hosts – the constitutional court of the Republic of Indonesia for the warm welcome, and the participants of the third Congress of the Association of Asian constitutional courts and equivalent institutions fruitful and successful work.

I sincerely hope that the results of the Congress will be another important factor to strengthen cooperation between the constitutional control bodies of different countries of the world.

Thank you for your attention!

Махмудзода М.А.

Председатель Конституционного суда Республики Таджикистан, академик АН РТ, доктор юридических наук, профессор

РОЛЬ КОНСТИТУЦИОННОГО СУДА В ЗАЩИТЕ КОНСТИТУЦИОННЫХ ПРАВ И СВОБОД ЧЕЛОВЕКА И ГРАЖДАНИНА

Уважаемый Председатель!
Уважаемые участники Конгресса!
Дамы и господа!

Позвольте, прежде всего выразить слова благодарности организаторам этого высокого и представительного международного форума в частности Председателю Конституционного суда дружественного нам государства Индонезии господину Ариефу Хидояту за тщательную подготовку и замечательную ее организацию, а также за радушный прием, который чувствуется с первого дня нашего пребывания в чудесном и привлекательном городе Бали.

Желаем Конституционному суду Республики Индонезия дальнейшего развития и процветания, а его коллективу – *здоровья, благополучия* и новых успехов в профессиональной деятельности.

Безусловно, сегодняшний Конгресс Ассоциации является важной площадкой для конструктивного обсуждения различных аспектов деятельности органов конституционного контроля, в частности в области защиты конституционных прав и свобод человека и гражданина, и в целом укрепления конституционализма в государствах участников Ассоциации.

Уважаемые участники Конгресса!

Республика Таджикистан, провозгласив себя в соответствии с Конституцией демократическим и правовым государством, заявила тем самым о своих намерениях продвигаться в направлении развития мировой цивилизации, исходя из признания человеческой личности, ее прав и свобод высшей ценностью в обществе и государстве.

Смысл правового государства раскрывается через Конституцию в соответствии, с которой человек, его права и свободы признаются высшей ценностью, и каждому гарантируется права на достойную жизнь и свободное развитие.

В правовом государстве личные, политические, экономические, социально-культурные права и свободы граждан не просто провозглашаются и декларируются Конституцией, но и обеспечиваются соответствующими механизмами их защиты.

Конституционная обязанность правового государства соблюдать и защищать права и свободы человека и гражданина состоит в создании условий для их реализации и механизма для их защиты.

Конституция Таджикистана, определяя обязанность государства признавать, соблюдать и защищать права и свободы человека и гражданина, устанавливает, что права и свободы человека и гражданина определяют цели, содержание и применение законов, деятельность законодательной, исполнительной власти, и местных органов государственной власти и самоуправления и обеспечиваются судебной властью.

Обеспечение таких условий и защита прав и свобод человека и гражданина входят в функции всех органов государственной власти, в частности судебной власти, поскольку, идея прав и свобод человека и гражданина всегда была неотделима от их защиты в суде.

В современных условиях развития любого государства, без существования демократически организованного компетентного суда, нельзя говорить о защите прав и свобод.

Безусловно, особую роль в защите конституционных прав и свобод человека и гражданина играет Конституционный суд, как орган осуществляющее конституционное правосудие.

Можно отметить, что конституционно-правовое развитие демократического Таджикистана предопределило возрастание роли Конституционного суда в защите прав и свобод человека и гражданина, что в свою очередь также является одной из важнейших функций государства.

Сегодня наиболее значимой задачей органа конституционного контроля в Республике Таджикистан является обеспечения верховенства Конституции, а также защиты конституционных прав и свобод человека и гражданина, которая заключается в обеспечении равенства всех перед законом, равный доступ к реализации личных, политических, социальных, экономически и иных прав граждан и непосредственного действия гарантий судебной защиты этих прав.

Права человека являются главным критерием деятельности Конституционного суда, который во многом имеет универсальное значение и оказывает влияние практически на каждое решение о проверке конституционности тех или иных актов.

Анализ практики Конституционного суда позволяет не только оценить состояние и перспективы усиления судебной защиты конституционных прав, но и предложить некоторые новые концептуальные подходы к защите прав граждан и своего рода развития конституционных ценностей демократического социального правового государства.

Конституционный суд Таджикистана, который имеет небольшую чуть более двадцатилетнюю историю, за короткий период своей деятельности показал, что он при осуществлении своей деятельности в состоянии эффективно защищать индивидуальные права и свободы граждан и этим устранять противоречия нормативных правовых актов Конституции, что само по себе является существенным достижением.

Следует отметить, что Конституционный суд - это не только судебный орган, но и такой конституционный орган, которому предоставлено право в установленных Конституцией и законом форме и пределах осуществлять надзор над органами законодательной и исполнительной власти, а в опосредованном виде - и над

судебными органами, и в данном смысле, он сам представляет высшую государственную власть.

Этим качеством обусловлена интегрирующая роль Конституционного суда, как гаранта политического мира в обществе и государстве и хранителя долгосрочных конституционных ценностей, важнейшей из которых является надлежащее соблюдение конституционных прав и свобод граждан от злоупотреблений со стороны органов государственной власти.

Конституционный суд является истинно юрисдикционным органом, способным выносить окончательные и не подлежащие оспариванию решения.

Полномочия, предоставленные органам конституционного надзора, превращают их в мощную стабилизирующую силу, способную защищать права и свободы граждан, оберегать общество от разрушительных социальных конфликтов¹.

Конституционный контроль является важным институтом гарантирования конституционных прав и свобод граждан, нарушения которых могут быть вызваны не только противоречащими закону действиями или бездействием органов публичной власти и их должностными лицами, но и быть следствием несоответствия законов конституционным принципам.

В этой ситуации государство обязано создать такие условия, в которых каждый человек обладал бы реальной возможностью восстановить свои нарушенные права.

Уважаемые коллеги!

В Таджикистане физические и юридические лица напрямую имеют права обращаться не только в суды общей юрисдикции, но и в Конституционный суд.

Физические лица являются самыми активными субъектами обращения в Конституционный суд по вопросам определения соответствия примененного в отношении их нормативного правового акта Конституции.

Конституционный суд отстаивает права и свободы человека и гражданина не только в случаях прямого обращения, но и при разрешении иных дел.

На основе обращения физических лиц к настоящему времени Конституционный суд путем нормативной интерпретации положений Конституции принял ряд решений.

Наиболее часто граждане или юридические лица обращаются в Конституционный суд по поводу нарушения конституционного принципа гарантии на судебную защиту установленной статьей 19 Конституции Таджикистана.

Следует отметить, что конституционный принцип гарантии на судебную защиту распространяется не только на непосредственно признаваемые Конституцией, но и на связанные с ними другие права, приобретаемые на основании законов.

Положения статьи 19 Конституции о гарантии на судебную защиту – один из самых распространенных аргументов в решениях суда, касающихся защиты прав человека.

¹ См.: Савицкий В.А. Место решений Конституционного Суда Российской Федерации в правовой системе // Юридический консультант. 2000. № 5. - С. 20-21

Этот фундаментальный принцип права, хотя и кажется на первый взгляд ясным и категоричным в своем конституционном оформлении, на самом деле неисчерпаем в разнообразии его конкретных проявлении, что хорошо видно в многочисленных решениях суда.

В частности Конституционным судом Республики Таджикистан было рассмотрено ходатайство гражданки Муллоджоновой Ф. «Об определении соответствия части 2 статьи 197 Процессуального кодекса об административных правонарушениях Республики Таджикистан статье 14, части 1 статьи 17 и части 1 статьи 19 Конституции Республики Таджикистан»².

Обратившееся в своём ходатайстве указала, что положение части 2 статьи 197 Процессуального кодекса об административных правонарушениях Республики Таджикистан ограничивает её конституционные права на судебную защиту и защиту человеческой чести и достоинства, которые гарантированы Конституцией Республики Таджикистан, Декларацией прав человека и Международным пактом о гражданских и политических правах.

Конституционный суд, рассмотрев данное обращение, указал на то, что в системе конституционных прав и свобод человека и гражданина гарантия судебной защиты, а также человеческой чести и достоинства занимает центральное место.

Такая гарантия исходит из особенностей демократического, правового и социального государства, каковым является Таджикистан, в котором человек, его права и свободы на уровне Конституции признаны высшей ценностью.

Гарантия осуществления права на судебную защиту и ведение справедливого судебного процесса является важнейшим способом доступа граждан к правосудию, неукоснительному исполнению процедуры судебного процесса, обеспечению равноправия граждан перед законом и судом, реализации прав и законных гарантий участников судебного процесса, а также возможности обжалования судебных актов посредством обращения в судебные органы.

С другой стороны, доступ к правосудию является установленной Конституцией и законами возможностью по защите нарушенных прав и законных интересов физических и юридических лиц, а также важнейшим способом осуществления конституционных обязательств государства перед гражданами.

В соответствии с чем Конституционный суд с учетом обеспечения конституционного принципа гарантии на судебную защиту прав и законных интересов физических и юридических лиц с целью большей конкретизации и совершенствования обстоятельств, являющихся основаниями для возобновления производства по делу об административном правонарушении, посчитал целесообразным парламентом и Правительством страны пересмотреть часть 2 статьи 197 Процессуального кодекса об административных правонарушениях Республики Таджикистан.

Другим постановлением Конституционного суда Республики Таджикистан на основании ходатайства гражданки Саидовой Н.А. часть 2 статьи 363 Уголовно-процессуального кодекса Республики Таджикистан в части, касающейся того, что

² См.: Сборник постановлений Конституционного Суда Республики Таджикистан (1996-2015). – Душанбе: ЭР-граф, 2015.

не подлежит обжалованию и опротестованию вынесенное в ходе судебного разбирательства определение (постановление) в отношении избрания, изменения или отмены меры пресечения была признана неконституционной, то есть не соответствующей статьям 5, 14, 18 и 19 Конституции Республики Таджикистан³.

При рассмотрении данного дела Конституционный суд, с учетом норм международного права и национального законодательства относительно беспрепятственного осуществления гражданами своих конституционных прав, в частности права на судебную защиту, в частности отметил, что гарантия судебной защиты, предусмотренная статьями 14 и 19 Конституции, наряду с доступностью правосудия субъектам права и участникам уголовного процесса, также имеет в виду возможность обжалования ими действий государственных должностных лиц на всех судебных стадиях, предусмотренных процессуальным законодательством, поскольку деятельность органов уголовного преследования и судов, в полномочие которых входит осуществление дознания, предварительного следствия и судебного, не исключает ошибок.

Конституционным судом также было отмечено, что любой порядок, который ограничивает права участников уголовного процесса по защите их процессуальных прав и становится преградой для осуществления, в частности, их прав на обжалование судебных актов, считается ограничивающим гарантию судебной защиты и право на обращение в государственные органы, установленные Конституцией, законами и процессуальным законодательством Республики Таджикистан.

На основании данного постановления Конституционного суда, парламентом страны были внесены изменения в часть 2 статьи 363 Уголовно-процессуального кодекса Республики Таджикистан, и норма, ограничивающая права на обжалование и опротестование вынесенного в ходе судебного разбирательства определения (постановления) в отношении избрания, изменения или отмены меры пресечения, была исключена.

С целью реализации и защиты права на социальное обеспечение, в частности право на достойное пенсионное обеспечение, которое занимают центральное место в системе социальных прав граждан, Конституционным судом было рассмотрено ходатайство гражданина Абдуллоева И.Н. «Об определении соответствия части второй статьи 12 и статьи 117 Закона Республики Таджикистан «О пенсионном обеспечении граждан Республики Таджикистан» статьям 11 и 39 Конституции Республики Таджикистан»⁴.

Обратившийся указал, что указанные статьи Закона Республики Таджикистан «О пенсионном обеспечении граждан Республики Таджикистан», согласно которой до достижения лицами, определенного пенсионного возраста, выплата их пенсии осуществляется за счёт собственных средств организации, в которой

³ См.: Сборник постановлений Конституционного Суда Республики Таджикистан (1996-2015). – Душанбе: ЭР-граф, 2015.

⁴ См.: Сборник постановлений Конституционного Суда Республики Таджикистан (1996-2015). – Душанбе: ЭР-граф, 2015.

выполнялась работа, дающая право на льготную пенсию нарушает и ограничивает его конституционные права, как бывшего работника типографии на гарантию социального обеспечения.

При рассмотрении данного обращения Конституционный суд указал, что право на социальное обеспечение является одним из способов материальной и моральной поддержки человека и гражданина на полезный труд, осуществляемый лицом в период своей трудовой деятельности во благо общества и государства. Данное право также является важным способом обеспечения жизни гражданина, полностью или частично утратившего трудоспособность и возможность этим и другими обстоятельствами, предусмотренными законодательством, трудиться и получать прибыль от результата своего труда, или лишившегося поддержки своего кормильца.

Исходя из этого, в связи с тем, что право на социальное обеспечение имеет гуманистический характер и важное значение для человека и гражданина, данное право нашло свое конкретное регулирование международными правовыми актами и в рамках национального законодательства.

Конституционным судом также было отмечено, что законодательство о пенсионном обеспечении граждан направленно на регулирование и осуществление конституционных прав граждан на социальную защиту, путем предоставления трудовых и социальных пенсий и гарантирует гражданам материальное обеспечение и устанавливает единство условий и норм пенсионного обеспечения различным категориям трудящихся.

В целом Конституционным судом в период своей деятельности на основе обращений субъектов права, также были рассмотрены и другие вопросы, касающиеся реализации и защиты политических, экономических, социальных и культурных прав граждан, и принятые по ним решения используются в качестве прецедента при решении вопросов касающихся конституционных прав граждан в различных сферах.

Следует отметить, что прецедент же не был бы создан без частного обращения субъектов имеющих права на обращения в Конституционный суд.

Постановления Конституционного суда отдельными исследователями признаются *ratio decidendi* (основание решения) и на этом основании относится к прецедентам⁵, что конечно же данное мнение вызывает бесспорную поддержку.

Уважаемые участники Конгресса!

Физические лица своими конституционными жалобами, равно как и их объединения и государственные органы через свои обращения в Конституционный суд, «подталкивают» Конституционный суд, фактически осуществлять правотворческие функции, и это признается подавляющим большинством ученых-конституционалистов, а также практиков.

Проверка конституционности законов дело сложное, тонкое и особо ответственное, требующее от судей высокой квалификации, и не случайно, что Конституция отнесла эту функцию к компетенции специализированного органа, действующего строго коллегиально.

⁵ См.: Кажлаев С.А. Судебное усмотрение в деятельности Конституционного Суда РФ // Журнал российского права. - №11. - 2003г.

Конституционный суд, осуществляя нормоконтроль не только вносит коррективы в действующие законы, а также иные нормативно-правовые акты, но и указывает законодателю на необходимость принятия нового закона, применения закона с учетом правового смысла Конституции.

В целом осуществляя свои полномочия, Конституционный суд обеспечивает верховенство и реальное действие правовых норм, а также укрепляет правовую систему страны.

Поскольку бессилие права вызывает протест, недоверие народа к власти.

Акты Конституционного суда с одной стороны представляют собой индивидуальные акты правоприменительного органа, а с другой стороны, в содержании решений Конституционного суда можно усмотреть положения в виде выводов, доводов по делу, которые характеризуются свойством нормативности.

Нормативный характер свойственен постановлениям Конституционного суда, в которых положения нормативных актов признаются неконституционными и устраняются из действующей системы права.

Исходя из этого можно сказать, что судьи конституционных судов оказывают существенное влияние на направление законодательства и эффективность Конституции.

Постановления Конституционного суда, в результате которых неконституционные нормативные правовые акты утрачивают юридическую силу, имеют такую же сферу действия во времени, в пространстве и по кругу лиц, как решения нормотворческого органа, и, следовательно, такое же, как нормативно правовые акты, общее значение, не присущее правоприменительным по своей природе актам судов общей юрисдикции и эконмических судов.

Также следует иметь в виду, что Конституционный суд не вправе подменять законодателя, к компетенции которого относится принятие законов, а также внесение в них изменений и дополнений.

Уважаемые коллеги!

На основе судебной-правовой реформы в Таджикистане с целью совершенствования деятельности Конституционного суда в области обеспечения верховенства Конституции и защиты, конституционных прав и свобод человека и гражданина, с учетом практики органов конституционного контроля различных стран, Конституционный закон Республики Таджикистан «О Конституционном суде Республики Таджикистан» был принят в новой редакции.

И можно отметить, что современная нормативная основа организации и деятельности органа конституционного правосудия нашей страны сегодня способна обеспечивать решение задач, стоящих перед ним, в частности защиты конституционных прав и свобод человека и гражданина, укреплении демократических начал и правовых основ государства.

И можно с уверенностью отметить, что стабильное развитие демократических основ нашего государства и обеспечение в нем конституционной законности свидетельствуют о важности и необходимости функционирования Конституционного суда.

В конце своего выступления позвольте еще раз поблагодарить всех организаторов данного мероприятия и её хозяев – Конституционный суд Республики Индонезия за радушный приём, а участникам третьего Конгресс

Ассоциации азиатских конституционных судов и эквивалентных институтов плодотворной и успешной работы.

Искренне надеюсь, что результаты Конгресса станут еще одним важным фактором укрепления сотрудничества между органами конституционного контроля различных стран мира.

Благодарю за внимание!

Thailand

**in the 3rd Congress of the Association of Asian Constitutional Courts
and Equivalent Institutions (AACC)**

“Promotion and Protection of Citizens’ Constitutional Rights”

8 – 13 August 2016

in Nusa Dua, Bali, Republic of Indonesia

By: H.E. Justice Nurak Marpraneet

President of the Constitutional Court of the Kingdom of Thailand

**Presidents of the Constitutional Courts
and Heads of the Equivalent Institutions in Asia,**

Distinguished Participants,

Ladies and Gentlemen,

On behalf of the Constitutional Court of the Kingdom of Thailand, my delegation and I would like to express sincere thanks to the Constitutional Court of the Republic of Indonesia for kind invitation to the 3rd Congress of the Association of Asian Constitutional Courts and Equivalent Institutions (AACC).

Ladies and Gentlemen,

I may start to give my presentation under the theme of this conference on “**Promotion and Protection of Citizens’ Constitutional Rights,**” which can be divided into 3 parts as follows.

First : the mission of the Constitutional Courts in promotion and protection of citizens’ constitutional rights and liberties.

Second : the trial of the Constitutional Courts in promotion and protection of citizens’ constitutional rights and liberties.

Finally : the role and contribution of the Constitutional Courts in promotion and protection of citizens’ constitutional rights and liberties.

First of all, please let me talk about “**the mission of the Constitutional Courts in promotion and protection of citizens’ constitutional rights and liberties.**”

The Constitution of the Kingdom of Thailand guarantees citizens’ rights and liberties in line with universal standards of the United Nations and several international organizations; for example, the UN Universal Declaration of Human Rights (1948), the International Covenant on Civil and Political Rights (1966), and the International Covenant on Economic, Social and Cultural Rights (1966). Moreover, citizens’ rights and liberties are under the protection as the doctrine of precedent of the Thai Constitutional Court. At this juncture, section 27 of the Constitution of the Kingdom of Thailand, B.E. 2550 (2007) prescribed that “rights and liberties recognized by this Constitution explicitly, by implication or by decisions of the Constitutional Court shall be protected and directly binding on the National Assembly, the Council of Ministers, the Courts, the

Constitutional organizations and State agencies with respect to the enactment, application and interpretation of all laws.” Section 4 of the Constitution of the Kingdom of Thailand (Interim), B.E. 2557 (2014) prescribes that “subject to the provisions of this Constitution, human dignity, rights, liberties and equality of all Thais, which have been protected under the customary practices of the government under the democratic regime with the King as Head of State and under existing international obligations of Thailand, shall remain protected under this Constitution.”

As a result, the Constitution of the Kingdom of Thailand provides the missions of the Thai Constitutional Court in widely promoting and protecting civil rights and liberties in connection with human dignity, rights, liberty, equality, and anti-discrimination.

Secondly, the trial of the Constitutional Courts in promotion and protection of citizens’ constitutional rights and liberties.

In this opportunity, I may present some of the Thai Constitutional Court’s rulings in connection with the constitutionality of bills of law and draft rules as a milestone for promotion and protection of citizens’ constitutional rights.

[1] A criminal presumption in the Act on Offences Relating to the Submission of Bids to Government Agencies, B.E. 2542 (1999), where a plaintiff did not have to prove any act or intention of the accused, except that any wrongdoing of others was presumed as of the accused;

[2] The Revenue Code provided that assessable income of a wife should have been calculated into the income of her husband, so that such a husband and wife shall have paid more tax when doing individually if their marriage had not been registered yet;

[3] Revolutionary Council Order No. 252 dated 16th November B.E. 2515 (1972) provided that food and beverage vendors were not allowed to sell their food and beverage from 01.00 a.m. – 05.00 a.m. without permission by an authorized person. This limited occupational freedom and fair liberal competition;

[4] The Draft of the Optical Disc Production Act B.E. (...) allowed a court to strictly forfeit an accused machine regardless of the court consideration whether or not the owner could prove himself not to connive in a wrongdoing and also the consideration about punishment levels for such a wrongdoing. This serious measure unnecessarily limited a right of property;

[5] The Personal Name Act, B.E. 2505 (1962), of which provision determined a married woman to use her husband’s surname, caused an abuse of women’s rights, sex inequality, and gender discrimination;

[6] The Provincial Waterworks Authority Act, B.E. 2522 (1979), of which provision provided that the Provincial Waterworks Authority did not have to pay compensation to an owner whose land was used or building was removed in order to lay a less-than-eight-centimeter-diameter water pipe under, over, along

or across such land where housing was not located for advantages to produce, distribute, and sell water supply;

[7] The Liquor Act, B.E. 2493 (1950), of which provision that did not allow to make or sell alcohol leavening agent, including malt flour, limited occupational freedom and fair liberal competition; and

[8] The Act on Judges of the Courts of Justice Services, B.E. 2543 (2000), of which provision provided that a person having physically or mentally improper appearance was disqualified to apply for taking a judicial position examination, caused an abuse of the right of the disabled and physical discrimination.

All the above-mentioned cases were ruled by the Constitutional Court to be contrary or inconsistent with the Constitution of the Kingdom of Thailand.

Ladies and Gentlemen,

Those are just some examples of the Thai Constitutional Court's rulings in terms of promotion and protection of citizens' constitutional rights and liberties. It can be seen that they are associated with an overview of civil ways of life, welfare and property.

Finally, the role and contribution of the Constitutional Courts in promotion and protection of citizens' constitutional rights and liberties. I can say the Constitutional Court of Thailand is one of the most important organizations having a role and contribution in promotion and protection of citizens' constitutional rights and liberties. In this connection, I may emphasize the role and contribution of the Thai Constitutional Court as follows.

[1] The Constitutional Court has a significant role and contribution in promotion and protection of citizens' constitutional rights and liberties to meet international agreements, political traditions, and the Constitutional Court's precedents.

[2] The Constitutional Court has a significant role and contribution in guaranteeing civil rights security.

[3] The Constitutional Court has a significant role and contribution in enhancing quality of civil life in terms of welfare and property.

[4] The Constitutional Court has a significant role and contribution in improving civil life conditions based on the rule of law and constitutionality.

[5] The Constitutional Court has a significant role and contribution in laying the basis of peaceful and fraternal relationships among citizens and between citizens and the state.

Ladies and Gentlemen,

I strongly hope that this the 3rd Congress of the Association of Asian Constitutional Courts and Equivalent Institutions (AACC) will contribute to benefaction to improve

several new roles and goals of the Asian Constitutional Courts and Equivalent Institutions in promotion and protection of citizens' constitutional rights and liberties for utmost benefits of our citizens and nations. It will also aid institutional development of the AACC sustainably like the Constitutional Courts' roles for their citizens and nations.

In the end, on behalf of the Constitutional Court of the Kingdom of Thailand, the delegation and I firmly hope that your attention and time spent receiving my presentation will be beneficial to your institutions, countries, and people as a whole. I would like to take this opportunity to express sincere thanks once again.

CCJA

Constitutional Complaint System, Le rôle des cours et conseils constitutionnels africains

dans la promotion et la protection des droits et libertés :

Situation et perspectives

S. E. Monsieur le Président de la Cour constitutionnelle de la République d'Indonésie,,

Excellences, Mesdames et Messieurs,

La Conférence des Juridictions Constitutionnelles Africaines (CCJA) se réjouit de partager la joie de la Cour constitutionnelle de la République d'Indonésie à l'occasion de la fête nationale et remercie S. E. Monsieur Arief HIDAYAT d'avoir invité la CCJA à participer au troisième congrès de l'Association asiatique des Cours constitutionnelles et des institutions équivalentes.

La Conférence des Juridictions Constitutionnelle Africaine, que j'ai l'honneur de représenter ici à la place de Madame Marie Madeleine MBORANTSUO Président de la Cour constitutionnelle de la République du Gabon et président en exercice de la CCJA, retenue par la tenue des élections présidentielles dans ce pays,

Il me plaît ici de rappeler que la Conférence des Juridictions Constitutionnelles Africaines, désignée en abrégé CCJA, est une organisation fédérant, dans un espace africain commun, les juridictions africaines chargées de veiller au respect de la Constitution (Cours suprêmes, Conseils, Cours et Tribunaux constitutionnels).

Son siège qui abrite le secrétariat General, est fixé à Alger.

La création de cet espace répond à un impératif : fédérer les mécanismes africains de justice constitutionnelles dans un espace continental pour leur permettre de participer dans le domaine qui est le leur, à la promotion et à la diffusion des valeurs et principes universels, d'état de droit, de démocratie et des droits de l'homme, consacrés dans le préambule de l'Acte constitutif de l'Union Africaine. Cette initiative a été couronnée de succès, puisque les 7 et 8 mai 2011, et grâce au soutien et à l'appui de la Commission de Venise, s'est tenu à Alger le Congrès constitutif de cette association continentale qui a donné naissance à la Conférence des Juridictions Constitutionnelles africaines.

La CJCA, compte aujourd'hui 36 membres avec l'adhésion récente de la Cour constitutionnelle de Zambie et du Conseil constitutionnel d'Ethiopie, en plus d'un membre observateur, en l'occurrence le Tribunal fédéral du Brésil.

La CCJA a adopté les valeurs universelles en matière de respect des droits de l'homme et de protection des libertés fondamentales comme principes fondamentaux pour le contrôle de constitutionnalité. Adossée à l'Union africaine, la CCJA contribue à la réalisation de ses objectifs, qui sont l'édification de l'Etat de droit démocratique et la bonne gouvernance avec la participation des citoyens dans la gestion des affaires

publiques. Les principes d'égalité et de la légalité font partie des valeurs universelles libératrices des initiatives et qui favorisent la paix sociale, conditions sine qua none pour un développement durable. Ayant pour but la réalisation de ces objectifs dans le cadre des valeurs universelles, la CCJA ambitionne une coopération inter-juridictions constitutionnelles africaines et une coopération avec les autres espaces de justice constitutionnelle dans le monde.

La CCJA a privilégié l'échange d'expériences et d'informations en matière de jurisprudence constitutionnelle ainsi que la promotion de la justice constitutionnelle en Afrique par la concertation et la consultation. Ces moyens de coopération sont de véritables vecteurs de la culture démocratique au sein des institutions.

Sur un autre plan, et dans le cadre du partenariat avec l'Union Africaine et conformément à l'Accord de coopération signé à Addis-Abeba le 2 avril 2015, la CCJA participe activement aux missions d'observation électorale effectuées par l'UA. A ce titre, plusieurs juges venants de différents cours constitutionnelles ont supervisé l'activité électorale intense qu'a connue le continent durant les deux dernières années 2015 et 2016 (Guinée, Cote d'Ivoire, Burkina Faso et République de Centrafrique).

La CCJA a bénéficié du statut d'observateur auprès de l'UA, comme une Organisation composée d'Institutions des Etats membres de l'UA.

Du reste, la Conférence africaine est un lieu de débat. C'est ainsi que le 2^{ème} Congrès de la CCJA qui a eu lieu à Cotonou (Benin) en mai 2013 était consacré à « la justice constitutionnelle en Afrique » et le troisième congrès qui s'est tenu à Libreville, Gabon en Juin 2015 avait pour thème : « La cour constitutionnelle et la fonction de régulation », Les débats entre les participants ont relevé que les juridictions constitutionnelles africaines jouent un rôle essentiel en cette période de transition et d'établissement des institutions propres à l'Etat démocratique.

Le contrôle de constitutionnalité des lois et des lois organiques en particulier, nécessaires au fonctionnement des institutions de l'Etat, donne l'occasion à nos cours et conseils constitutionnels de veiller au respect des principes universels de constitutionnalité. Pour franchir cette étape très délicate, la coopération et l'échange d'expérience sont des moyens utiles pour conjuguer tous les efforts en les inscrivant dans la continuité et le sens du partage. Dans ce cadre, une rencontre internationale est prévue à Alger les 8 et 9 Novembre 2016, où sera débattu le thème de « L'accès des particuliers à la justice constitutionnelle ».

Je saisi cette opportunité pour vous informer que la CCJA tiendra son quatrième congrès du 23 au 26 avril 2017 au Cap en Afrique du Sud, sur le thème « Renforcement de l'indépendance du système judiciaire et le respect de l'état de droit » et que tous les espaces régionaux et linguistiques qui activent dans le même domaine que la CCJA, seront conviés à cet évènement.

Quant à la coopération avec les autres espaces de justice constitutionnelle, elle intervient en application de l'article 3 du Statut de la CCJA qui dans son alinéa 7 explicite l'objectif de « développer les relations d'échange et de coopération entre la Conférence

et les organisations similaires dans le monde ». En même temps, la CCJA aspire à une coopération internationale qui prend en considération les particularités locales et les spécificités du continent comme éléments à ne pas occulter pour l'édification de systèmes politiques compatibles avec la réalité africaine, alliant respect des valeurs universelles et protection des droits humains à la stabilité utile au développement.

A cet effet un projet de protocole d'entente et de coopération entre la CCJA et l'AACC est déjà fin prêt, et il sera probablement signé à l'occasion du prochain congrès de la CCJA qui aura lieu à Cap town en 2017.

Je saisi cette opportunité pour remercier la cour constitutionnelle de la République de Turquie et son Président, pour son rôle actif dans la diffusion de la culture juridique et constitutionnelle en Asie, et ce à travers l'organisation chaque année d'une « académie d'été » connue sous l'appellation « Summer School » et dont la CCJA compte s'inspirer de cette expérience pour la rééditer et la mettre en pratique dans le continent africain qui en a vraiment besoin.

Excellences, Mesdames et Messieurs,

En choisissant de s'engager dans la voie démocratique, les juridictions constitutionnelles africaines, réaffirment par ce choix même, leur détermination à faire du droit la norme suprême de la vie politique et institutionnelle. C'est pourquoi les juridictions constitutionnelles africaines, sont devenues en très peu de temps, la pierre angulaire de la vie politique, une vie politique caractérisée par le pluralisme politique, la garantie des droits humains et la préservation des libertés fondamentales.

En Afrique, du fait de la transition démocratique des années 90, le paysage constitutionnel a été marqué par une éclosion et une floraison de juridictions constitutionnelles, signe que les Etats africains se sont appropriés la notion d'Etat de droit.

Ces juridictions tentent, avec des moyens variés et dans un environnement juridico-politique très souvent peu favorable, de promouvoir la justice constitutionnelle. La protection constitutionnelle des droits fondamentaux en est un témoignage. C'est une exigence démocratique de plus en plus forte des citoyens, de la société civile devenue un levier de contre-pouvoir et de l'opinion publique internationale

Les mécanismes de contrôle juridictionnels du respect des droits fondamentaux varient selon que les Etats disposent ou non d'un système de cumul du contrôle a priori et du contrôle a posteriori. Ils dépendent également du caractère obligatoire ou facultatif du contrôle des normes.

En effet, certaines juridictions constitutionnelles ont des pouvoirs restreints dans le contrôle du respect des droits fondamentaux et les juges s'en accommodent et s'abritent toujours derrière leurs fonctions d'attributions sans faire preuve d'ingéniosité. Parfois, l'occasion ne leur est pas donnée faute de saisine et d'auto saisine, sans compter l'absence d'exception d'inconstitutionnalité.

Au contraire, dans d'autres pays comme le Bénin, le Gabon, le Niger, le Mali, le Ghana etc..., les constitutions mettent un point d'honneur à organiser le contrôle de constitutionnalité notamment des textes portant atteinte aux libertés.

La plupart des constitutions africaines affirment et garantissent les droits et libertés des citoyens dans les préambules qui ont valeur constitutionnelle du fait de la volonté des constituants. Ces préambules renvoient à la déclaration des droits de l'homme et du citoyen de 1789, à la déclaration universelle des droits de l'homme de 1948 et à la Charte africaine des droits de l'homme et des peuples de 1981. Ces instruments à caractère conventionnel et non conventionnel constituent des sources à partir desquelles les Etats africains organisent leur propre système de protection des droits et libertés fondamentaux.

La protection constitutionnelle des droits fondamentaux a de multiples facettes en Afrique. Dans les pays qui disposent d'un système de cumul de contrôle a priori et du contrôle a posteriori comme le Gabon et le Bénin, l'accent est mis sur le contrôle a posteriori par ce que, ce contrôle permet aux justiciables de défendre leurs droits fondamentaux directement et non par l'intermédiaire de leurs représentants, devant une juridiction constitutionnelle. On rapproche ainsi la justice constitutionnelle du citoyen en lui permettant, à l'occasion de l'application d'une loi et donc du litige concret, de faire vérifier par le juge constitutionnel le respect ou le non-respect des droits fondamentaux garantis par la Constitution.

Dans les pays qui ne disposent pas de système de cumul du contrôle par voie d'action et du contrôle par voie d'exception, la protection des droits fondamentaux est possible mais elle se fait dans le cadre du contrôle obligatoire ou facultatif des normes.

Ainsi, à l'occasion du contrôle obligatoire des normes, le juge constitutionnel peut déceler des dispositions attentatoires aux libertés fondamentales.

C'est le cas du Conseil Constitutionnel Algérien, qui a su ancrer les institutions de l'Etat dans les vertus de la démocratie apaisée. Grâce à son action, la vie politique démocratique obéit davantage aux prescriptions de la norme suprême. Le contrôle de la constitutionnalité des lois se fait de manière satisfaisante. Les droits et libertés des personnes sont davantage respectés. A l'instar des autres Cours et Conseils Constitutionnels du continent africain, le conseil algérien n'hésite pas à annuler des dispositions législatives, ou encore des élections nationales lorsqu'elles sont contraires aux prescriptions de la Constitution, ou aux principes fondamentaux du constitutionnalisme, à savoir la séparation des pouvoirs, l'indépendance des magistrats et la garantie des droits et libertés.

Le principe de constitutionnalité consacré dans la constitution, est tout aussi important à respecter, en l'entourant de garanties juridiques et politiques adéquates. Faire respecter ainsi ce principe, c'est vérifié la conformité des textes qui sont soumis à la constitution. Pour cela, le conseil constitutionnel algérien veille de plus en plus à faire respecter par le législateur les droits et libertés prescrits par la constitution. Au demeurant, le conseil constitutionnel ne s'est pas contenté de censurer les atteintes à ces droits mais il est allé plus loin dans un avis jusqu'à rappeler au législateur son rôle

dans la consécration et la préservation de ces droits, en affirmant que « l'action du législateur, particulièrement dans le domaine des droits et libertés individuelles et collectives, doit garantir l'exercice effectif du droit ou de la liberté constitutionnellement reconnu».

Quant aux autres droits et libertés, le conseil veille également à leur protection et n'hésite surtout pas de prononcer l'inconstitutionnalité des lois prises par le législateur pour modifier les droits et libertés des citoyens affirmés dans la constitution. Le conseil constitutionnel en tant que juridiction se prononce sur la conformité des actes législatifs et réglementaires par rapport à la constitution. Il exerce un contrôle de régularité, et non d'opportunité, dont l'objet est de priver d'effet toute disposition déclarée inconstitutionnelle, ce qui équivaut sur le plan pratique à son annulation. Officiellement, le conseil ne dispose pas du pouvoir normatif et ne peut substituer sa volonté à celle du législateur ou du pouvoir réglementaire pour régir les matières relevant de leurs attributions.

La révision constitutionnelle de Mai 2016, qui a permis d'introduire la question de l'exception d'inconstitutionnalité, marque une volonté certaine de faire prévaloir le contrôle de constitutionnalité en cas de non application ou de modification des droits inscrits et garantis par la constitution. Ainsi l'Article 188 stipule que « Le Conseil constitutionnel peut être saisi d'une exception d'inconstitutionnalité, sur renvoi de la Cour Suprême ou du Conseil d'Etat, lorsque l'une des parties au procès soutient devant une juridiction que la disposition législative dont dépend l'issue du litige porte atteinte aux droits et libertés garantis par la Constitution. Lorsqu'une disposition législative est jugée inconstitutionnelle sur le fondement de l'article 188 ci-dessus, celle-ci perd tout effet à compter du jour fixé par la décision du Conseil constitutionnel.»

Ainsi le contrôle de constitutionnalité, constitue une garantie pour les citoyens qui sont conscients que les lois s'appliquent à des domaines divers qui ont des répercussions sur l'exercice des droits et libertés.

Le néo- constitutionnalisme africain marqué au jourd'hui par l'adoption de Constitutions avant- gardistes résultant des printemps arabes en ce qu'elles convergent vers la réalisation de l'Etat de droit et de la garantie des libertés fondamentales.

Excellences, Mesdames et Messieurs,

Au regard des progrès qui ont été déjà fait dans les domaines de la démocratie et la préservation des droits humains, il ne fait guère de doute que l'Etat de Droit est en effet une construction permanente qui se nourrit de cas concrets, et de problèmes vécus. Les violations des dispositions constitutionnelles peuvent prendre des formes subtiles, et inédites. Il faut donc que nos juridictions soient réactifs et inventifs. C'est ainsi que nous pourrons pérenniser l'Etat de droit, préserver les droits humains et les libertés fondamentales et consolider la démocratie pluraliste, pour le plus grand bonheur de nos peuples.

Je voudrais en fin, au nom de la CCJA, remercier les organisateurs pour la chaleur de l'accueil et de nous avoir accueillis dans la jolie ville de Bali, et vous féliciter, pour la parfaite organisation et pour l'intérêt des débats et la qualité des travaux.

Je vous félicite pour tout cela, et vous remercie de nous avoir donné l'occasion de découvrir votre beau pays.

Présenté par Mr. Moussa LARABA

Membre du Conseil constitutionnel d'Algérie

Secrétaire général de la Conférence des Juridictions Constitutionnelles Africaines (CCJA)

Fait à Alger, le 7 Aout 2016



MAHKAMAH KONSTITUSI
REPUBLIK INDONESIA

