MAHKAMAH KONSTITUSI
REPUBLIK INDONESIA

INTERNATIONAL SYMPOSIUM ON
CONSTITUTIONAL COMPLAINT

PROCEEDING

INTERNATIONAL SYMPOSIUM ON CONSTITUTIONAL COMPLAINT

15th–16th AUGUST 2015
JAKARTA, INDONESIA

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PROCEEDING
INTERNATIONAL SYMPOSIUM
ON CONSTITUTIONAL COMPLAINT

First Edition, August 2015
viii + 240 pages; 210 x 29.7 cm

1. Constitutional Court 2. Constitutional Complaint

Registry and Secretariat General of
the Constitutional Court of the Republic of Indonesia
Jakarta, 2015

PREFACE
CHIEF JUSTICE OF CONSTITUTIONAL COURT OF THE REPUBLIC OF INDONESIA

Guarantee of the protection of citizens' constitutional rights is one manifestation of the idea of constitutionalism in modern democracies. This assurance has been supported by the establishment of various legal instruments in order to ensure protection of the constitutional rights as a responsibility of the state. The establishment of Constitutional Courts and equivalent institutions is a phenomena of the modern democratic state in order to guarantee the promotion and protection of citizens' constitutional rights.

Constitutional complaint is one of the legal mechanisms designed to reinforce the guarantee of protection of citizens' rights against any state action, in all branches of power, that violates the constitutional rights of citizens. The authority to hear and decide cases of constitutional complaint has become one of the constitutional authorities of the Constitutional Court and Similar Institutions in a number of different countries.

In countries that do not grant authority to the Constitutional Court to deal with constitutional complaint cases, there is a tendency for cases with elements of constitutional complaint to be filed by individuals and legal entities originating from state actions that impair constitutional rights. These cases are filed either through a judicial authority or other authority related to election disputes.

The development of constitutional complaint cases and the dynamic authority of Constitutional Courts in various countries was the rationale for convening the International Symposium on Constitutional Complaint on 15–16th August, 2015 in Jakarta. The international symposium was organised by the Constitutional Court of the Republic of Indonesia in his capacity as President of the Association of Asian Constitutional Courts and Equivalent Institutions (AACC) as well as to commemorate the 12th anniversary of the Constitutional Court of the Republic of Indonesia. Before the International Symposium, theAACC held the

second meeting of the Secretary Generals on 13th August, 2015, and the Board of Members Meeting on August 14, 2015.

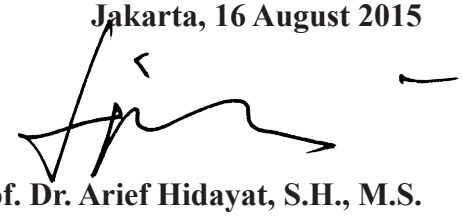
The International Symposium was attended by participants from 17 countries and one international organisation (Venice Commission), as well as legal practitioners and academics from the Faculty of Law in Indonesia. Speakers and panelists in this International Symposium were from various countries in Asia, Africa, Europe, and Latin America.

The International Symposium was conducted in an active, dynamic, and constructive atmosphere. Discussions included the philosophical and theoretical aspects of constitutional complaint as an efforts to protect citizens' constitutional rights, comparison of the conditions and mechanisms of constitutional complaint, as well as the problems and challenges faced in the implementation of constitutional complaint. These three topics were accommodated in the three sub-themes of the Symposium, namely: (1) Constitutional complaint as an instrument to protect the constitutional rights of citizens; (2) Comparative Perspectives on Constitutional complaint; and (3) Problems and challenges in handling cases of constitutional complaint.

Presentations and discussions in the International Symposium demonstrate that the protection of constitutional rights of citizens has become an important function of Constitutional Courts. Efforts to protect the constitutional rights of citizens are conducted through a variety of authorities possessed by the Constitutional Courts, including constitutional complaint. The main problems and challenges faced in the handling of cases of constitutional complaint, among others, are the sheer amount of cases filed on the one hand, but on the other hand that only a few qualified and ultimately make it to trial. Thus, a system is required to filter for cases that are genuinely related to the constitutional rights of citizens. In addition, in some countries, Constitutional Complaint is a subsidiary mechanism, where citizens can file only once they have taken all the usual remedies.

The entire symposium, from opening, presentations, discussions and conclusions to the closing is summarised in these Proceedings of this Symposium. In addition, attached with these proceedings are the papers presented by the speakers and panelists. We hope that these proceedings can be beneficial not only for the participants of the symposium, but indeed to the countries of those participants in improving the protection of citizens' constitutional rights.

Jakarta, 16 August 2015



Prof. Dr. Arief Hidayat, S.H., M.S.

Table of Contents

WELCOME DINNER

MAHKAMAH KONSTITUSI
REPUBLIK INDONESIA

INTERNATIONAL SYMPOSIUM ON CONSTITUTIONAL COMPLAINT

SECRETARY-GENERAL'S REPORTS
AT WELCOME DINNER
INTERNATIONAL SYMPOSIUM ON CONSTITUTIONAL COMPLAINT
Jakarta, 14th August, 2015

Assalamu'alaikum Warahmatullahi wabarakaatuh.

Good evening and best wishes for all of us.

- The Honourable Chief Justice of the Constitutional Court of the Republic of Indonesia, Prof. Dr. Arief Hidayat;
- The Honourable Heads and Members of Delegation to the Board of Members Meeting of the Association of Asian Constitutional Courts and Equivalent Institutions;
- The Honourable Deputy Chief Justice and Justices of The Constitutional Court of the Republic of Indonesia;
- The Secretary Generals of the Constitutional Court and Equivalent Institutions;
- Participants of the International Symposium on Constitutional Complaint;
- Ladies and Gentlemen.

Let us thank God Almighty for the opportunity to attend this Welcoming Dinner in a fit and healthy state.

I wish to express my utmost appreciation and gratitude to all participants of the International Symposium, to members of the Association of Asian Constitutional Courts and Equivalent Institutions, to participants from other countries in Asia, Europe, Africa, and Latin America

and to national participants from Indonesia, academics from the Faculty of Law as well as legal practitioners.

Your Honour Chief Justice of The Constitutional Court of The Republic of Indonesia,

Your Excellencies Chief Justices and Justices,

Ladies and Gentlemen,

The International symposium is intended to commemorate the 12th anniversary of the Constitutional Court of the Republic of Indonesia, which is celebrated annually on the 13th of August, to coincide with the passing of the Constitutional Court Act. This event will conclude on Sunday, the 16th of August, 2015.

This international symposium is an initiative of the Constitutional Court of the Republic of Indonesia in its capacity as President of the Association of Asian Constitutional Courts and Equivalent Institutions, and stands as an official event of the Association.

This International symposium is to be conducted under the theme of "Constitutional Complaint" and aims to approach the topic holistically from philosophical, theoretical, normative, and empirical perspectives, providing all participants the opportunity to exchange views and share ideas and experiences. As such, the theme is divided into three sub-themes:

- The first sub-theme is Constitutional Complaint as an Instrument for Protecting Fundamental Rights of Citizens;
- The second is Comparative Perspectives on Constitutional Complaint; and finally
- Problems and Challenges in Dealing with Constitutional Complaint Cases.

As well as this International Symposium, yesterday, the 13th of August, 2015, we held the second meeting of the Secretary Generals of the members of the Association. Following that, this morning, as mandated by the Association Statute, we held the Board of Members Meeting of the Association in preparation of the 3rd Congress of the Association, which the Board of Members this morning decided will be held in Nusa Dua, Bali on the 25th until the 28th of April, 2016 with the theme, Promotion and Protection of Citizen's Constitutional Rights.

Your Honour Chief Justice of The Constitutional Court of The Republic of Indonesia,

Your Excellencies Chief Justices and Justices,

Ladies and Gentlemen,

This welcoming dinner was organised as a tribute and to show our gratitude to the guests of honour of the Constitutional Court of the Republic of Indonesia, whose presence here tonight is significant. Indeed, we rely heavily on their positive participation and valuable contribution over the next two days to ensure the success of the International Symposium.

On this remarkable occasion, all delegates and guests have come together to greet each other and to partake in warm conversation in an intimate atmosphere. We hope that this dinner plants the seeds of new relationships and as such helps to ensure the smooth and dynamic execution of the International Symposium tomorrow, which will be officially opened by the Vice-President of the Republic of Indonesia at 10 o'clock in the morning at the Vice-President's Palace.

Thank you. Let us now enjoy our dinner together.

Wassalamu'alaikum warahmatullahi wabarakaatuh.

MAHKAMAH KONSTITUSI
REPUBLIK INDONESIA

INTERNATIONAL SYMPOSIUM ON CONSTITUTIONAL COMPLAINT

REMARKS BY
CHIEF JUSTICE OF THE CONSTITUTIONAL COURT
OF THE REPUBLIC OF INDONESIA
AT WELCOME DINNER
INTERNATIONAL SYMPOSIUM ON CONSTITUTIONAL COMPLAINT
Jakarta, 14 August 2015

Assalamu'alaikum warahmatullahi wabarakaatuh.

Good evening. May peace be upon us all.

- Your Honours, Chief Justices and Justices of Constitutional Courts or Equivalent Institutions,
- Your Excellencies, Heads of State Institutions, Ministers of the Working Cabinet, Officials from other countries,
- Your Excellencies, Ambassadors of the states participating in the symposium,
- Ladies and Gentlemen,

Let us praise God Almighty for the opportunity to attend this dinner in a fit and healthy state.

I wish to express my highest gratitude and appreciation to all in attendance at this Gala Dinner, especially the delegations from overseas, representing countries in Asia, Africa, Latin America and Europe, as well as national participants.

This symposium on Constitutional Complaint is hosted by the Constitutional Court of Indonesia in its capacity as President of the Association of Asian Constitutional Courts and Equivalent Institutions. The International Event is also intended to commemorate the 12th

Anniversary of the Constitutional Court of the Republic of Indonesia, which is celebrated annually on 13th August.

As has just been reported by the Secretary General of the Constitutional Court of the Republic of Indonesia, as well as this international symposium, there has also been conducted a meeting of the Secretary Generals of the AACC as well as a meeting of the Board of Members of the AACC. These two meetings were important fora for the continued development of the Association and the cooperation among the member institutions.

Your excellencies, chief justices, justices and heads of state institutions,

Ladies and Gentlemen

Tonight, we are gathered in Jakarta, the capital of the Unitary State of the Republic of Indonesia. Indonesia is the largest archipelagic country in the world, consisting of 18,108 islands with a total coastline 81,000 km and a territory of 3,1 million square meters. Indonesia stretches from Sabang in Aceh, the most western part, to Merauke in Papua, the most eastern part, spreading like an emeralds belt around the equator.

As well as Indonesia's expansive geographical diversity, Indonesia is also host to a wide variety of languages and tribes. There are as many as 726 languages and dialects and 1,128 tribes. These various tribes, traditions, cultures and languages coexist peacefully under the slogan 'Bhinneka Tunggal Ika' which means Unity in Diversity.

For Indonesia, diversity is a blessing, which helps make us a great nation of tolerance, mutual recognition and respect for fellow citizens, all of which has its roots in Pancasila and the 1945 Constitution of Indonesia.

Your excellencies, chief justices, justices and heads of state institutions,

Ladies and Gentlemen,

It is also an honour and a pleasure for us to entertain the participants of the International in this intimate atmosphere. Indeed, I hope that through this event, and with this sense of friendship, we can continue to build stronger relationships and positive cooperation amongst us all. Through these warm friendships, I believe any challenges in in the future of global democracy will be easily overcome.

Finally, on this occasion, let us toast to our health, success and stronger friendship and cooperation amongst our democratic nations. I hope this this evening will provide a welcoming start to your time here in Indonesia and a firm foot forward in promoting togetherness long after you return to your respective countries.

Last but not least, I hope all delegates from the 19 countries will receive the utmost hospitality and comfort while staying in Indonesia.

Sekian dan terima kasih.

Thank you.

Wassalamu'alaikum warahmatullahi wabarakaatuh.

OPENING CEREMONY

MAHKAMAH KONSTITUSI
REPUBLIK INDONESIA

2015
INTERNATIONAL SYMPOSIUM ON
CONSTITUTIONAL COMPLAINT

REPORT BY
SECRETARY GENERAL
CONSTITUTIONAL COURT OF THE REPUBLIC OF INDONESIA
AT THE OPENING OF
INTERNATIONAL SYMPOSIUM ON CONSTITUTIONAL COMPLAINT
Jakarta, 15 August 2015

Bismillahirrahmanirrahim,

Assalamu'alaikum warahmatullahi wabarakatuh,

Good evening and best wishes.

- Your Honour, Vice President of The Republic of Indonesia, Mr. H Jusuf Kalla,
- Your Honour, Chief Justice of The Constitutional Court of The Republic of Indonesia, Prof. Dr. Arief Hidayat, and Deputy Justice and Justices of The Constitutional Court of The Republic of Indonesia.
- Your Honours, Justices of The Constitutional Courts and Equivalent Institutions of the countries participating in the Symposium,
- Your Excellencies, Heads of State Institutions, Working Cabinet Ministers, and other officials.

- Your Honours, Ambassadors from participating countries,
- Esteemed participants and guests,
- Ladies and Gentlemen.

Let us thank God Almighty for the opportunity to attend this International Symposium with the theme "Constitutional Complaint" in a fit and healthy state.

Your Honour, Mr. Vice President,

We herewith report that beginning today, Saturday, August 15th through Sunday, August 16th, 2015, the Chief Justices and Justices of Constitutional Courts and Similar Institutions,

will discuss and exchange experiences on a particularly important issue to the effort to achieve a constitutional democratic state; that is Constitutional Complaint. Constitutional Complaint is an important legal mechanism in various countries, aimed at providing recognition, protection and promotion of human rights.

In a constitutional democratic state, the efforts to guarantee and protect citizens' constitutional rights are essential and fundamental. Therefore, mechanisms for protecting these rights are necessary, one of which is Constitutional Complaint.

In many countries, Constitutional Complaint is an authority of the Constitutional Court. The authority is a consequence of the Constitutional Courts function in maintaining the supremacy of the constitution, particularly the guarantee of citizens' constitutional rights. Each country has different circumstances and experiences regarding the practice of Constitutional Complaint, which are influenced by different legal systems, historical backgrounds, and the various different conditions that exist in each country. Therefore, the exchange of ideas, information, and practical experience is necessary and brings great benefits for the citizens and the protection of their constitutional rights in their respective countries.

It is in light of this brief background, and driven by a strong desire to further promote the protection of the constitutional rights of citizens, that this international symposium has been organised organised with the theme "Constitutional Complaint".

Your Honour, Mr. Vice President,

On this occasion we also report that the International Symposium on "Constitutional Complaint" is one of a series of commemorative activities for the 12th anniversary of the Constitutional Court of the Republic of Indonesia, which falls on the 13th of August, 2015.

Before opening this International Symposium, we also held the Board of Members meeting of the Association of Asian Constitutional Courts on the 14th August, 2015. There, the Chief Justice of the Constitutional Court of the Republic of Indonesia, Prof. Dr. Arief Hidayat, SH, chaired the meeting in his capacity as President of the Association for the period from 2014–2016.

The participants of this international symposium are delegates from 17 (seventeen) countries from various regions of the world, including Asia, Europe, and Africa, plus a representative of the "Council of Europe", better known as the Venice Commission.

Allow me to enumerate the international symposium participant countries, in alphabetical order: Algeria, Afghanistan, Azerbaijan, Indonesia, Kazakhstan, Kyrgyzstan, Malaysia, Mongolia, Myanmar, Philippines, Republic of Korea, Russia, Thailand, Timor Leste, Turkey, Vietnam; Uzbekistan,

Besides the delegations from these countries, this international symposium is also to attended by observers from various groups consisting of academics from the Faculty of Law throughout Indonesia, Association of Teachers of Constitutional Court Procedural Law in Indonesia, and Legal Practitioners. It is also attended by some legal experts from several countries such as Australia, The Netherlands and Malaysia.

Your Honour, Mr. Vice President,

The outcomes of this symposium are expected to contribute to strengthening the application of the principles of constitutional democracy in each participating country. To that end, in order to obtain optimal results, the theme "Constitutional Complaint" is divided into three sub-themes, namely:

1. Constitutional Complaint as an Instrument for Protecting Fundamental Rights of Citizens;
2. Comparative Perspectives on Constitutional Complaint; dan
3. Problems and Challenges in Dealing with Constitutional Complaint Cases.

In order that the benefits can be shared by all levels of society, this international symposium is also being broadcast directly through video conferencing facilities owned by the Constitutional Court of the Republic of Indonesia, which are placed in 43 (forty-three) universities across the 34 (thirty-four) provinces of Indonesia.

To reach those interested in the study of law and democracy, both at home and abroad, the international symposium is also being broadcast online using streaming video facilities through the website of the Constitutional Court of the Republic of Indonesia.

The languages used in this symposium, besides Indonesian, will also be English, Arabic, German, Spanish and Russian.

On the last day of the symposium, delegates will also be introduced to a variety of cultural treasures of Indonesia through cultural programs and see cultural art performances the Dinner Reception for the Anniversary of the Constitutional Court of the Republic of Indonesia on Sunday, August 16th, 2015.

Your Honour, Mr. Vice President,

This is what I would like to report. The success of this international symposium is part of a collective initiative in order to promote human rights, both in Indonesia, and other countries in various regions.

We apologise profusely if still there are any shortcomings in the implementation of this international symposium, and we would like to thank all those who have supported the event.

I would now like to ask the Honourable Mr. Chief Justice of the Constitutional Court of the Republic of Indonesia to give a speech. Furthermore, we ask the Vice President of the Republic of Indonesia, to kindly deliver a keynote speech, and also to officially open the International Symposium on “Constitutional Complaint”.

Thank you

Billahi taufiq wal hidayah,

Wassalamu’alaikum warahmatullahi wabarakatuh.

MAHKAMAH KONSTITUSI
REPUBLIK INDONESIA

INTERNATIONAL SYMPOSIUM ON CONSTITUTIONAL COMPLAINT

REMARK BY
CHIEF JUSTICE OF THE CONSTITUTIONAL COURT OF THE REPUBLIC OF INDONESIA
AT THE OPENING OF INTERNATIONAL SYMPOSIUM ON CONSTITUTIONAL COMPLAINT
15th August, 2015

Bismillahirrahmanirrahim,

Assalamu'alaikum warahmatullahi wabarakaatuh.

Good morning and best wishes for all of us.

- The Honourable, Vice President of the Republic of Indonesia, Mr. H. Jusuf Kalla,
- The noble, the Chairman, Vice Chairman and Chief Justice of the Constitutional Court and other similar institutions,
- Honourable, the Chief of State Institutions, Labour Cabinet Ministers and Other State Officials,
- His Excellency, The Ambassador / Representative of friendly countries, and
- Esteemed participants,
- Ladies and Gentlemen.

Let us offer our praise and thanks to the presence of God Almighty, for His mercy and His grace alone, we are given the opportunity to attend the International Symposium on "Constitutional Complaint" in a fit and healthy state.

On this happy occasion, I must first say welcome and warm greetings to the delegates of the symposium and audience here.

I extend my sincere gratitude to all delegates, who have honoured us by fulfilling the invitation of the Constitutional Court of the Republic of Indonesia to attend this international symposium.

Mr. Vice President, symposium, and ladies and gentlemen,

Protection and promotion of constitutional rights of all citizens in the Act of 1945 is discussed in 3 of the 4 national ideals embodied in the Preamble to the 1945 Constitution, namely (1) protect all the people of Indonesia; (2) promote the general welfare; and (3) educate the nation. To achieve that goal, the state has the responsibility to protect and promote all human rights as well as the constitutional rights of citizens stipulated in the articles of the 1945 Constitution.

The 1945 amendment placed human rights as a 'core value'. This successful constitutionalisation of human rights made the 1945 Constitution one of the most complete constitutions in the world in its efforts to structure and provide security and protection of human rights.

To achieve our national goals to protect and promote the constitutional rights of citizens, state organs were formed and the mechanisms of state administration were set. The 1945 amendment also introduced mechanisms for judicial review of established laws against the Constitution, which became one of the authorities of the Constitutional Court. Through the authority of judicial review of laws against the Constitution, the provisions of the legislation violates the constitutional rights of citizens are declared contrary to the 1945 Constitution and as such have no binding legal force. This mechanism ensures the protection and promotion of citizens' constitutional rights from infringement by the rule of law under the Constitution.

Mr. Vice President,

Esteemed Participants,

Ladies and gentlemen,

In general, Constitutional Complaint is understood as petitions filed by citizens to the court to obtain a verdict against certain violations of the basic rights of citizens guaranteed by the Constitution as a result of the implementation of the power of government or state action.

Constitutional complaint has a strong foundation in the development of schools of thought regarding rule of law, especially in the 20th century. Since then, constitutional complaint has generally become accepted as part of the terms or elements of rule of law.

From a comparative perspective, the authority to hear Constitutional Complaint, previously only possessed by a few countries in Europe, has grown rapidly and has now been adopted in almost all countries in Central Europe, Eastern Europe, Africa, and Asia. In many countries, the authority to hear Constitutional Complaint cases is granted to the Constitutional Court.

In Indonesia, there are no provisions regarding Constitutional Complaint in the 1945 Constitution. As such, the Constitutional Court of the Republic of Indonesia is granted no

authority to hear Constitutional Complaint cases by the constitution. However, this does not necessarily mean that the legislators, in this case the Assembly, refused to give it, but simply that the mechanism had not received enough attentionat the time of the formulation of the 1945 amendment.

Although it does not have the constitutional authority to hear the case Constitutional Complaint, in practice over the years, many cases of judicial review actually contain elements of Constitutional Complaint. Realising that the Indonesian Constitutional Court has no authority to hear Constitutional Complaint cases, citizens as Petitioner have been creative, filing petitions through the door of judicial review. Such applications are one way the community has sought legal mechanisms to denounce violations of their constitutional rights.

In these cases, the Constitutional Court still accepts such petitions, although many expressed that the requests are "unacceptable", and for some has passed the innovative verdicts of "conditionally constitutional" or "conditionally unconstitutional". Through these two variants of the decision, the Constitutional Court declares that a provision of the law does not violate the constitution but requires that state institutions, in the implementation of such a provision, pay attention to the interpretation of the Constitutional Court on the constitutionality of provisions of the Act.

Mr. Vice President,

Esteemed Participants,

Ladies and gentlemen,

This international symposium is to be attended by delegates of Constitutional Courts from 17 countries from various regions in the world and one international organization (Venice Commission). The presence of these delegates makes this symposium a valuable arena of give and take, especially for exchanging opinions and solutions to the challenges of promoting the protection of the constitutional rights of citizens in each country. Hopefully, this international symposium will bring benefit to us all.

Before I finish, I would specifically like to thank the Vice President of the Republic of Indonesia, who has honoured the Constitutional Court of the Republic of Indonesia and the symposium delegates by taking the time to give a keynote speech, and simultaneously open this international symposium.

Finally, to all the delegates and participants of the symposium, I hope you enjoy this symposium.

Thank you.

Wassalamu'alaikum warahmatullahi wabarakaatuh.

MAHKAMAH KONSTITUSI
REPUBLIK INDONESIA

ISCC 2015
INTERNATIONAL SYMPOSIUM ON
CONSTITUTIONAL COMPLAINT

SPEECH
VICE PRESIDENT OF THE REPUBLIC OF INDONESIA
AT THE OPENING OF
INTERNATIONAL SYMPOSIUM ON CONSTITUTIONAL COMPLAINT
15th August, 2015

Assalamu ‘alaikum Warahmatullahi Wabarakatuh

Good morning and best wishes.

- Honourable Mr. Chairman of the Constitutional Court;
- Honourable Mr. Chairman of the Assembly and the Chairman of the Supreme Court of Indonesia;
- Honourable Heads of the Constitutional Courts and the Supreme Courts from overseas;
- Participants of this symposium,

First, I would like to welcome you to Jakarta. On this occasion, I would like to wish a happy 12th anniversary to the Constitutional Court of the Republic of Indonesia, who has played an important role over the years. Indeed, as I have seen, the Constitutional Court of the Republic of Indonesia has been very busy and has done much work to meet the expectations of the public through Judicial Review. This must mean that Indonesia has too many laws, that they need so many changes.

The Indonesian Constitution, in the 70 years since it was first written, has undergone four changes. When we first achieved Independence, the constitution was very short at just 37 paragraphs, but it has played a very important role in the founding of this nation. Then in 1949, when Indonesia became a federal state, The Unitary State of Indonesia, we transformed the Constitution into the Constitution of the Unitary State of Indonesia. Upon becoming a united

state, we implemented a temporary Constitution before, In 1959, by Presidential Decree we returned to the Constitution of 1945. Finally, after the reformation, we amended the Constitution to its current state.

In truth, I did not intend to deliver the keynote speech today, because this topic needs to be explained in depth, and for that, of course, there are the experts. The President and Vice President must know about many things, but only a little about each. On the other hand, a justice nows only about a few things, but knows them very well. That is why I shall stick to congratulations and talk about Indonesia's experience in managing its laws.

Why have so many laws been petitioned for Judicial Review? The first reason is very simple. Legislation is produced by Parliament. Parliament is composed of members of political parties. Of all the legislation that Parliament produces, most are focused on political reasons or generated by politicians who think of the immediate interests. Thus, there are many things that are not in accordance with the constitutional way of thinking. That's why it is the task of the Constitutional Court to alter, amend or annul those laws that are not in accordance with the constitution.

That's why I often say that the Constitutional Court is a very powerful institution in this country. Legislation created and adopted by 560 members of the House can brought down by just nine justices in the Constitutional Court. That is the consequence of the power of the Constitutional Court. Thus, the Chief Justice and the Constitutional Court Justices must possess very deep knowledge about the constitution and the law; people with great wisdom, a wealth of experience and a strong ability to see problems clearly. This is in contrast to the House, which sees problems from a political angle and in light of the needs of the day, at the present time.

In Indonesia, there are many cases of judicial review, perhaps more than any other. It is the same with the Supreme Court. In Indonesia, everything is petitioned, appealed, or brought for judicial review whenever something is disliked. Of course in time, certain limitations will be applied so that only cases that are truly contrary to the Constitution are brought to the Court..

Today, the discussion is about Constitutional Complaint. Many things are clear, such as practises or rights that are not contained in the statute, but also some things lie in grey areas, so that it can be difficult to know how to assess whether something is contrary to the constitution. Thus far, these things have mostly been reported to KOMNASHAM, the National Commission on Human Rights.

But we know KOMNASHAM does not have the final decision, mostly only recommendations. Thus, with Constitutional Complaint, the issue of human rights, and the rights of citizens, can be accommodated and carried out to a high level of competence by Constitutional Court. But, of course, there must be limitations first of what can be deliberated or tried in the Constitutional Court. What matters can be considered under Constitutional Complaint. Because if not, then the authority is very broad, and many petitions will be submitted.

In Indonesia, the Constitutional Court also adjudicates election disputes. And as usual, no matter by how far elections are won or lost, they are still disputed. So many want to try their luck. Of course there must be rules for what is accepted by the Constitutional Court and what is not.

In December there are 269 upcoming elections in Indonesia. If even just half of these are petitioned, it means that 120 petitions must be tried within 45 days. I believe the justices will have to sleep at the office to finish them all. The justices need to maintain good health, else they might well faint at trial. Therefore, in addition to fit and proper knowledge, perhaps there should also be a test of health for the Justices, especially in the face of elections like this. That is our hope.

What we need from the Symposium are *lessons learned*, the exchange of advice and ideas, however different our countries' laws may be. Implementation of constitutional complaint also varies. Regarding human rights, of course we should all agree, as human rights are universal. However, practice is affected by situation. Thus the legislation, situations and culture of each region, of each country is different.

That is why I would like to express my appreciation for this symposium. Each country can learn what has been implemented, what has worked, what has to be done in obedience of the constitution. There are important matters of concern developing as times change. The first is democracy. All want hope for a more open democracy. Of course this is related to the constitution, because there is no democracy without adhering to the constitution.

Also important is human rights. In everything, human rights plays an important role. And then there are environmental issues. Environmental issues are now of major interest to the whole world. Finally, of course, the freedom of the press and so on.

These are the things that form the basis of the complaints within the constitution. The extent to which these things become citizens' rights will determine the complaints brought to the Constitutional Court. It is the Court that must judge whether such practices or rights are in accordance with the constitution.

Again, I would like to express my congratulations for your presence at this symposium. I would also like to congratulate Mr. Arief Hidayat on being given the role of President of the Association of Asian Constitutional Courts and Equivalent Institutions.

Hopefully this will be a valuable activity in our efforts to implement a positive and constitutional system in our country.

Once again, thank you. And with a prayer, "Bismillahirahmanirrahim", I officially open this symposium.

Thank you,

Wassalamu alaikum Warahmatullah Wabarakatuh.

VERBATIM OF SYMPOSIUM

SESSION I

VERBATIM

INTERNATIONAL SYMPOSIUM ON CONSTITUTIONAL COMPLAINT SESSION ONE

Saturday, August 15th, 2015

(14.25—17.00)

Fairmont Hotel, Jakarta-Indonesia.

Constitutional Complaint as an Instrument for Protecting Fundamental Rights of Citizen.

Moderator: Amzulian Rifai **(**Dean of the Law Faculty, Sriwijaya University)

MC

Let us begin the first session with the theme on Constitutional Complaint as an Instrument for Protecting Fundamental Rights of the Citizens. This session will be moderated by Prof. Amzullian Rifai, Dean of the Law Faculty of Sriwijaya University. There will be four speakers. First speaker is Dr. I. Dewa Gede Palguna, S.H., M.H., Justice of the Constitutional Court of the Republic of Indonesia. Second, Mr. Amarsanaa Jugnee, Chief Justice of the Constitutional Court of Mongolia. Speaker three, Mr. Nurak Marpraneet, President of the Constitutional Court of the Kingdom of Thailand, and Speaker Four is Mr. Gianni Buquicchio, President of the Venice Commission.

MODERATOR
AMZULIAN RIFAI

Good afternoon.

MC

Now, I will hand over to Prof. Amzulian to moderate this session. Please, Professor.

MODERATOR
AMZULIAN RIFAI

Thank you very much. Assalamulaikum Wr. Wb. Good afternoon.

Honorable Chief Justices, President of the Constitutional Court, speakers, panelists, ladies and gentlemen. Welcome to the first session of the International Symposium on Constitutional Complaints with sub-topic of Constitutional Complaints as Instrument of Protecting Fundamental Rights of Citizens. I hope we enjoy our last night welcome party with Indonesian dance and I believe that there are at least three reasons why this session is important. Firstly, because we will have excellent speakers and panelists who come from different legal jurisdictions to share their knowledge and experiences. Secondly, it is the fact the constitutional awareness increases in many countries through the development of Constitutional Courts. The Constitutional Court of Republic of Indonesia, for example, has become a crucial institution in protecting citizens' rights and educating its citizens on their constitution. Thirdly, through this session, we will have the opportunity to learn from other countries on how the concept of implementation of constitutional complaint, in order to protect fundamental rights of citizens. Protection of fundamental rights is included in determining global rule of law--law index. It also guarantees in the ICCPR—International Components on Civil and Political Rights, especially in article 16. If we look at the global rule of law index, which is a portrait of the rule of of law index which a portrait of the rule of law each country by providing score and ranking organized among the factors of a government's fundamental rights and civil justice.

Ladies and gentlemen before asking for the speakers to present their papers, please let me inform you how we get through this session. This session will last for two hours and 25 minutes. Each of three speakers will have a 10-minute presentation and then we will have a 20-minute coffee break. The session will resume at…, after that with 5-minute presentation from the panelists. We will have 3, excuse me, we will have 4 speakers, and speaker 1 will be Dr. I DEWA GEDE PALGUNA. He is Justice of the Constitutional Court of the Republic of Indonesia. I would like to start with the first speaker… Mr, Dr. I Dewa Gede Palguna, the time is yours.

SPEAKER 1

I DEWA GEDE PALGUNA

(JUSTICE OF THE CONSTITUTIONAL COURT OF THE REPUBLIC OF INDONESIA)

Thank you Mr. Chairman, Your Honorable Chief Justice and justices from the participating symposium. Ladies and Gentlemen, considering the 10-minute time available to me to present my presentation, I would like to try to make my presentation as effective as possible… already… my paper is already short, so thank you again.

Good afternoon. When we are talking about the constitutional court of the Republic of Indonesia and we are trying to look back to the history of the establishment of the international, the constitutional court, we know that the idea to establish the court was almost entirely based on the consideration that there is no more law inconsistent with the constitution in the future.

Why such constitution is the only or entire base to constitute the constitutional court is because of our past experience during the reign of the New Order Regime, which many considered that there were many legal instruments especially laws that were considered to be inconsistent with the constitution. So, when we are looking back to the debate during the formulating the jurisdiction of the constitutional court during the amendment process of the Indonesian Constitution, or the *Undang Undang Dasar 1945* in *Bahasa Indonesia*, Indonesian Language, we see that there was no intense and thorough debate or deliberation concerning the issue on constitutional complaints.

Indeed, there was a single party that implicitly proposed that the would-be established court should be given the competence to adjudicate the constitutional complaints. That is the Indonesian Democratic Party for Struggle or PDI P that implicitly proposed to give the would-be court the competence to adjudicate cases… constitution-based cases, or *gugatan berdasarkan/ menurut Undang-Undang Dasar* as in Bahasa Indonesia, but there was no follow-up… no follow-up… there was no further deliberation. Indeed also, during the process of amendment especially when deliberating the jurisdiction of the court, *Pah Satu* in Bahasa Indonesia or the first Ad hoc committee whose task was preparing the draft of the amendment of the constitution invited many justices from Germany, Thailand, South Africa and South Korea,whose countries the Constitutional Court has the competence to decide cases on constitutional complaint but again there is no further step, or no follow up step, no further deliberation.

If we try to look back to examine the records during the deliberation of *PAH 1* session, or the first Ad hoc Committee Session, we found no explanation, no formal explanation or no clear information why there was no such deliberation as to the constitutional complaint case. But according to the, then, Chairman of the first ad hoc committee Pak Jacob Tobing who is present today with us, there are two main reasons; firstly there was a fear that given that considering the competence to adjudicate cases on Constitutional Complaint was a brand new mechanism. While it is already agreed that the composition of the Constitutional Court that would be established, will consist only by 9 Justices, there was a fear of a case load because when we heard the experience of Germany, there are at least 6,000 cases annually.

And the second reason, there was also fear of a potential overlapping between the judiciary power itself and between the judiciary and other state institutions. So I think it is reasonable enough to understand why the competence to adjudicate cases on constitutional complaint was not given to the Constitutional Court of the Republic of Indonesia. But Ladies and Gentlemen, having no power or competence to decide cases on Constitutional Complaint doesn't mean that there is no case, there is no such case. It was even since the very beginning of the very existence of the court, there have already been cases of constitutional complaint.

2003 was the first, between quotation, complaint launched by a practitioner here, I'm sorry I forgot his name, Main bin Rinan, a citizen if I'm not mistaken from Kalimantan, maybe Central Kalimantan – a province of Indonesia, and there are many others. So the question should be, "Is there any possible way? Any possible alternative?", Of course, beside amending again the constitution which is actually so complicated and I said, I mention in my presentation, a hard war battle considering the social condition of the country especially recently. So we must think about the other alternatives.

So I propose here, there are at least 2 alternatives by setting aside the possibility of amending the constitution again. The first alternative I propose here is a legislative interpretation, what I mean by legislative interpretation here, is when the legislature amending or even establishing a new court or I mean a new law concerning the Constitutional Court, the legislative itself gives a formal interpretation on the term judicial review, all review law against the constitution, because such definition is not clearly or even not mentioned in the constitution, especially in the Article 24 paragraphs one and two of the Indonesian constitution.

The constitution only says that constitutional court shall have the competence to adjudicate cases of the review law against the constitution. But there is no definition, there is no scope, what does it mean by review law against the constitution. So, the legislature may have, theoretically speaking, may have the power to make an "extended interpretation," the meaning of the judicial

review itself, to cover the case of constitutional complaint. The theoretical basis of this proposal is that the two mechanisms, judicial review and constitutional complaint, are derived from the same principal, the same idea, the constitutional review.

The only difference is while the judicial review deals with the problem of constitutionality of legal norm, the constitutional complaint deals with the constitutionality of state or public official acts or omission. They lead to the same direction, that is, the protection of citizens' constitutional rights. And secondly, by judicial interpretation, but, I here mentioned in my presentation: it should be treated only as additional or subsidiary means, or subsidiary alternative, because it is very limited. Judicial interpretation can only be used as long as or as far as the concrete case itself involves the connection with some norm of law.

So it doesn't directly solve the problem of the complaint itself, the object of the complaint itself. So, that's why here in my presentation I give my preference to the first alternative. I think my time is almost over. Thank you Mister Chairman. That was my short presentation. Thank you again.

MODERATOR

AMZULIAN RIFAI

Thank you very much, Justice Dr. Gede Palguna. The important point I think you make is that Indonesia is in an ongoing effort to have constitutional complaint. With challenges that you mentioned, I think that these two challenges: one is the case load will increase significantly and the second is the view of potential, maybe a case, among the state institutions, I think that is a very important point. Well, we'll move to the second speaker, Mister Amarsanaa Jugnee, Chief of Justice of the Constitutional Court of Mongolia. Please, Sir.

SPEAKER 2

AMARSANAA JUGNEE

(CHIEF JUSTICE OF THE CONSTITUTIONAL COURT OF MONGOLIA)

Thank you, Mister Chairman. Honorable Chief Justice of The Constitutional Court of Indonesia, honorable presidents, judges, distinguished guests, first of all on behalf of The Constitutional Court of Mongolia I would like to extend my heartful congratulations for The Constitutional Court of Indonesia for its twelfth year anniversary.

I would like to also express my deepest appreciation to The Constitutional Court of Indonesia for hosting this symposium on the very important topic of Constitution Complaint and to all the speakers and distinguished guests. The main mission of the rule of law is to ensure that all individuals, state and authorities respect the human rights and fundamental freedom in the social and legal environment. This mission will not be completed by only declaring to protect their Constitution. However, it will be better satisfied by creating an independent constitutional review mechanism. Otherwise, the Constitution will be mere written norms and cannot fully serve its duty of an authentic protection of human rights.

Following the historical transition of Mongolia to democracy, in 1992, the country adopted its new Democratic Constitution which enshrined contemporary, universally accepted human rights norms and constituted the basis for the rule of law and democratic state structure.

This Constitution also established the Constitutional Court of Mongolia with a purpose of reviewing the constitutionality of actions and decisions of the authorities which exercise the branches of powers and to limit their powers in order to ensure the constitutional rights of the citizens.

According to the Constitution and the Law on the Constitutional Court of Mongolia, the Constitutional Court of Mongolia has jurisdiction over constitutionality of decisions made by the Parliament, President and Government and the General Electoral Committee of Mongolia, particularly, statutes, treaties and other legal acts adopted by the Parliament, presidential decrees, resolutions adopted by the Government and decisions made by the General Electoral committee regarding referendum and parliamentary or presidential election. It is given exclusive power to invalidate abovementioned acts if they are found to be breaching the Constitution of Mongolia.

The Constitutional Court must examine and settle constitutional disputes at the request of the Parliament, the President, the Prime Minister, the Supreme Court and the Prosecutor General. The Constitutional Court also has discretion on whether to initiate constitutional proceedings on the basis of individual claims. In countries where constitutional review is exercised by constitutional courts, the natural persons are mainly not entitled to submit a claim to the Constitutional Court unless his/her right is personally and immediately infringed, but in the case of Mongolia, there is no such limitation. The broad right of the citizens to apply for a constitutional review for all issues which fall under the Constitutional Court's jurisdiction is the distinctive attribute of the Constitutional Court of Mongolia.

The individual claims exist to the Constitutional Court of Mongolia can be classified into two types. If a citizen considers that his/her legitimate interests and individual rights are violated personally, he or she may file a complaint to the Constitutional Court. In other side, citizens

can also submit a claim to the Constitutional Court with a purpose of protecting public and state interests about issues related to the state authority even he or she is not directly affected by relevant actions and decisions of that authority. Furthermore, foreign nationals officially residing in Mongolia are also entitled to this right equally as Mongolian citizens.

Since the establishment of the Constitutional Court of Mongolia in 1992, knowledge of citizens about the Constitutional Court of Mongolia has been constantly improving and the amount of the claims for constitutional review increasing.

Between 1992 to the end of 2014, The Constitutional Court of Mongolia has received and deliberated around 2000 claims. In the first years of its operation, it received about 20 claims annually, but today this number has increased to two to three complaints every day. It is also observed that the quality of the constitutional claims has improved in terms of reasoning and profoundness of the legal argument.

If we analyze the contents of the claims submitted to the Constitutional Court of Mongolia in this period, 50 to 60 percent is related to the constitutionality of laws and other decisions adopted by the Parliament; 10 to 20 percent is related to the constitutionality of decisions by the President, the Government and the General Electoral Committee; and 15 to 20 percent is related to the impeachment of high ranking state officials. It has to be mentioned that only 10 percent of all claims made to the Constitutional Court have passed the preliminary screening stage and transferred to the Constitutional Court's oral hearing. For the rest of the claims, the Constitutional Court considered that they were not admissible because the issue did not possess the character of constitutional dispute or they fell under the jurisdiction of other authorities rather than the Constitutional Court. In such cases, the member of the Constitutional Court issues a formal decision about refusing to start a constitutional proceeding or decides to transfer the application to the relevant authorities for appropriate recourse respectively.

In the last 23 years, the Constitutional Court of Mongolia adopted around 140 decisions which determined breaches of the Constitution. Specifically, 70 provisions of the 35 different articles of the Constitution have been found to be breached. To be clearer, Article 16 about Human Rights and Fundamental Freedoms of the Constitution have been breached 40 times and the Article 14 about the equality have been breached for 20 times, so one can possibly make a conclusion that these are the most commonly breached provisions of the Constitution.

Now, I would like to proceed to some later cases of the Constitutional Court of Mongolia which contribute to the protection of human rights in our country. The provision was made in 2014 after a deliberation of the complaint made by a Mongolian citizen whose constitutional rights have been personally affected by a provision of the criminal procedure court of Mongolia.

Article 334.4 of criminal procedure court regulated that in case the accused or the victim or the acquitted considers that their first instance court breaches the criminal procedure court or miss appealed, the criminal court will be deciding the guilt of the accused or the sentence. They should appeal to the higher court only through their attorney—it means not by themselves. The claims personally had been in conflict or the accused claims by their first instance or he could not appeal because of his lack of means to pay for a legal counsel who raises the service fee by unexpected amount just before the expiry of the time for appeal. You could not appeal by yourself because of the reload regulating the trail caught the decision in final.

The constitution court of Mongolia established that the statement in the provisional criminal procedures code which said they accused that recommend they acquainted, shall appeal on the throw of the attorney was unconstitutional because it failed. They usually accepted their appeal right such as the right to defend oneself, the right to appeal, and the right to have access to the court. This statement was revealed on January 13, 2014. This case was started to open the claim made by citizen who thought a constitutional review of the statute on behalf of the public interest. They challenged the constitutionality of the new law on the establishment of the court which was adopted by the parliament of Mongolia in January 2014.

According to the previous law until 2014, the way the General Court for each Major Administrative unit of Mongolia which have jurisdiction our civilian criminal matters in that area. But the new law established one civil court and one criminal court for only three districts or provinces. They claimed recently in their arguments that the new law infringed the fundamental rights of the citizens to have access to courts by using the number of courts seriously. The defendant, Parliament of Mongolia argued that the new regulation was intended to cut unnecessary costs so-called administration increase the confidence of the Court by specializing in seeing law in criminal matters.

The Constitutional Court of Mongolia decided that the new law on the establishment of Court was unconstitutional because it clearly went against today's structure of judicial system determined by the constitution. They said if approving the argument of the claim, the courts also established that the new law infringed their right to appeal, right to be present during trial, and the right to have legal consul because their distance to the court was extremely increasing for some businesses in the whole regions of Mongolia and made it very difficult for them to have access to Courts.

In legal series, they increased the work or load of the Court also increased the citizen's right to have trail within reasonable time. The law in the establishment of the court because they came invalid this July 2015, about 2 month after the final decision of the Constitutional

Court. The parliament of Mongolia adopted another law on the establishment of Court in June 19, 2015 which seemingly complete with the constitution term about repeat the unconstitutional content of the previous law. Because they only made some minor changes by including the word "district" in just name of the courts but, there was not really different regarding the location of other factors.

I must note that this case is very complex one and today I'll try to simplify as much as possible for your consideration. Today it is globally accepted that the constitutional courts or similar institutions are essential form of guarantee for protection of human rights and fundamental freedom in democratic societies. I firmly, I believe that we, the Judges of the Constitutional Courts and Equivalent Institutions, will honorably keep this public trust and continue contributing to the promotion of human rights protection in the world.

Thank you very much for your attention.

MODERATOR

AMZULIAN RIFAI

Thank you very much, Sir, Chief Justice of the Constitutional Court of Mongolia.

Now, we move on to Speaker 3, Mr. Nurak Marpraneet, the President of the Constitutional Court of the Kingdom of Thailand. Please.

SPEAKER 3

NURAK MARPRANEET

(PRESIDENT OF THE CONSTITUTIONAL COURT OF THE KINGDOM OF THAILAND)

The President of the Constitutional Courts, the Chief Justices of the Asian Region, Honorable Delegates, Ladies and Gentlemen,

On behalf of the Constitutional Court of Thailand, I would like to express my sincere gratitude to the Constitutional Court of Indonesia for extending to myself to attend the AACC meeting and this international symposium, which also marks the 12th anniversary of the Constitutional Court of the Republic of Indonesia. I send my gratitude for the Republic of Indonesia.

I would like to begin the discussion on this topic of this meeting that is the constitutional complaints as an essential instrument for protection of the fundamental rights of the people. I intend to do so by referring to the Constitution of the Kingdom of Thailand 2007, a document of great significance and relevance to the protection of rights and liberties by direct action of the people, known as the rights of filing the constitutional complaints through the Constitutional Court. Even if the rights and liberties have quoted the Constitutional Complaints. Even if Constitution has been repealed, section 25 of the interim Constitution 2014 provided for an establishment of the jurisdiction of the Constitution Court to review provision of laws from being contrary to or inconsistent with the Constitution. In addition to the constitutionality review of laws, the Constitutional Court remains the last resource for protecting the fundamental rights of the people.

Today, presentation is comprised of three sections. The first is introduction and the conception of the framework of constitutional complaints. The second, conditions in exercising individual rights to file an application with the Thai Constitutional Court. And lastly, the conclusion.

For the first section of my presentation, I wish to address the brief introduction and conceptual framework on the issue of constitutional complaints in the Thai legal system. The 2007 Constitution was the first Constitution allowing the ordinary people to file a direct application for a Constitutional Court's ruling on the grounds that their fundamental rights and liberties recognized by the Constitution have been violated, known as, "the constitutional complaints." These constitutional complaints are one of the essential legal instruments to help protecting and safeguarding rights and liberties of individuals. Such constitutional complaints arise from two principles, as follows:

The first principle is a direct application of all exercisers of the state powers for protection of rights and liberties. This primary principle enables the people to assert the right to file an action directly in the Constitutional Court. In other words, prior to invoking an argument on any act of state agency which constitutes and infringement of constitutionally guaranteed rights and liberties of the people, the provisions of Constitution shall stipulate that such state agencies must be bound by fundamental rights and liberties of the people.

The second is the right to seek judicial relief for violation of individual rights and liberties. The judicial relief proceeding is vital and requires adherence to the democratic sovereignty and the rule of law. This means that any ordinary people whose rights or liberties recognized by the Constitution are violated have the right to file a constitutional complaint to the Court. This is because an exercise of state agencies or state officials' powers raises constitutionality.

Next, I would like to discuss the further on requirements and conditions in exercising constitutional complaint, petitions to the Constitutional Court. In practice, limitations for handling of constitutional complaints must be applied in order to minimize overburdening cases submitted to the Constitutional Court. With respect to an increase in access of the people to the Constitutional Court, section 212 of the 2007 Constitution stated three requirements, as follows:

The first requirement was that an applicant must be the person whose rights and liberties recognized under the Constitution had been violated.

The second requirement was that an application must be filed in the Constitutional Court for a ruling that "a particular provision of law" was contrary to or inconsistent with the Constitution.

And thirdly, this must be a case where all other remedies have been exhausted. Adhering to the principle of subsidiary, the constitutional complaint was only susceptible.

From the foregoing presentation, I may summarize that all laws only referred to the laws that have been enacted by the legislature rather than extending to executive or judiciary acts. Nevertheless, this constitutional complaint reflected an important task of the Constitutional Court in ensuring the actual realization of fundamental rights of the people, and not just by recognition of the black letters of the constitutional provisions. Likewise, various democratic countries place greater emphasis on development of the constitutional rights by means of constitutional complaints mechanism. It could be said that the Constitutional Courts have roles in fundamental rights protection are therefore essential to the strengthening of democracy under the rule of law. The Constitutional Court of Thailand appreciates the significance of and remains committed to this cause, which in turn would enable the Constitutional Court to perform its duties as its guardian of the Constitution and the protector of people's fundamental rights.

It is essential for the CC to protect the human rights and it depends on the rule of law. The Constitutional Court of Thailand fully appreciates the significance of and remains committed to this cause. This in turn will enable the Constitutional Court to perform its duties as the guardian of the Constitution.

At the final phrase is the purpose of the Draft Constitution. The Constitutional Draft Committee has prepared new Draft Constitution with the great substance lying in promoting and protecting rights and liberties of the people, providing for an exercise of individual's

right of the constitutional complaints to the Constitutional Court. This can assure the essence of the Constitutional Court's role in relation to the protection of rights and liberties of the people as being recognized by previous Constitution.

Lastly, I would like to once again thank you all for your attention. Thank you.

SPEAKER 4

GIANNI BUQUICCHIO

(PRESIDENT OF THE VENICE COMMISSION)

The President of the Constitutional Court of the Republic of Indonesia, Chairman Amzulian, Honorable Presidents and Judges, Ladies and Gentlemen.

It is a great pleasure for me to be here in Jakarta today, at this important International Symposium on the Constitutional Complaint, organised on the occasion of the 12th anniversary of the Constitutional Court of the Republic of Indonesia.

Before I broach the topic of the Constitutional Complaint, let me briefly introduce you to the work of the Venice Commission. The Venice Commission is an independent advisory body of the pan-European organisation called the Council of Europe. Its work consists of assisting its member and co-operating states to improve their constitutions, their legislation and the functioning of their democratic institutions.

Membership in the Venice Commission is not restricted to European states, but extends to non-European countries, which can become full members. A number of states in Asia, Africa and in America have indeed done so. The independence of the members of the Venice Commission is essential to the work that we carry out, notably when providing tailored advice to states that request it, in the form of opinions on draft laws or constitutions.

The members of the Venice Commission provide advice on the basis of our Common Constitutional Heritage and – to the extent possible – try to take into account legal traditions and the history of the state concerned. In order to be able to do so, the Venice Commission has developed a method of dialogue with its partners.

For the members of the Venice Commission, it is essential not to give advice on the basis of abstract legal texts, but to discuss the issues raised with all the stakeholders. The Venice Commission has – from the outset – underlined the importance of exchanging information and ideas between Constitutional Courts and Courts with equivalent jurisdiction.

In order to foster this, the Venice Commission has established co-operation with a number of regional or language-based groups of constitutional courts: in Europe, Asia, Africa, Ibero-America, in French and Portuguese speaking countries, and, of course, the Association of Asian Constitutional Courts and Equivalent Institutions which held its Board Meeting here in Jakarta, yesterday.

In pursuing its goal of uniting these groups and their members, the Venice Commission has organised *the World Conference on Constitutional Justice* for the first time, in Cape Town, South Africa in 2009 and then in Rio de Janeiro, Brazil in 2011 and Seoul, Republic of Korea in September 2014. The next Congress of the World Conference will take place in September 2017 in Vilnius, the capital of Lithuania.

The World Conference on Constitutional Justice unites regional or language-based groups of Constitutional Courts and has already 96 member courts. The main purpose of the World Conference is to facilitate judicial dialogue between constitutional judges on a global scale.

We believe that the exchange of information and ideas that takes place among judges from various continents in the World Conference furthers reflection on arguments, which promote the basic goals inherent to national constitutions. Even if these texts often differ substantially, discussion on the underlying constitutional concepts unites constitutional judges from various parts of the world, committed to promoting constitutionality in their own country.

A major task of the World Conference is also to support the independence of its member Courts. This is why, since 2011, each congress deals with this topic. The World Conference is ready to stand up for its members when they come under undue pressure from other State powers. I am therefore proud that many Asian Constitutional Courts including the Constitutional Court of Indonesia are full members of the World Conference.

Dear colleagues,

I would like now to talk to you about the importance of the Constitutional Complaints before the Constitutional Court or the Court with equivalent jurisdiction.

Individual access to the Constitutional Court and notably the Constitutional Complaint is a topic that is very dear to the Venice Commission which is strongly support the introduction of this type of procedure before the Constitutional Courts. For the protection of Human Rights, the role of the Constitutional Court is crucial. States, for the most parts, secure the protection of human rights through their constitution, and since the Constitutional Court is known as the guarantor of the Constitution protecting constitutionally guaranteed rights, it is important that this Court be able to carry out its tasks effectively.

Introducing full individual access to the Constitutional Court is increasingly recognized as an essential element of human rights protection on the national level. In Europe, the effectiveness of this type of access procedure was confirmed by the European Court of Human Rights Statistics, which showed that the countries which had introduced the full individual complaints procedure have a lower number of cases before the Strasbourg Court than those that had not.

This was also confirmed by a study that the Venice Commission undertook in 2010 on individual access to the Constitutional Justice, covering the various forms of access in over fifty countries with the aim of analyzing the merits of the various systems that exist. There is a further difference and aspect to consider in individual access, which affect the efficiency of individual complaint procedures, notably whether it is a normative constitutional complaint or a full constitutional complaint. And a normative constitutional complaint gives the individual the right to file a complaint before the Constitutional Court, but only against the breach of his or her fundamental rights based on the unconstitutionality of a law. A full constitutional complaint, on the other hand, can be directed against an unconstitutional judgment of ordinary tribunals of the Supreme Court, even if the applicable law is constitution. However, the Constitutional Court is not a fourth instance. It does not deal with the merits of the case; it only examines its constitutionality. The full constitutional complaint is, therefore the most comprehensive individual access to constitutional justice, and for this reason Venice Commission considers it to be the best means of protecting individual rights.

It is however true that opening the doors of the Constitutional Court to full individual complaints can dramatically increase the caseload of the Court. But, the Venice Commission is convinced that a balance can be found to ensure individual access to constitutional justice and at the same time not overburden the Court. This can be achieved, for instance, by introducing requirements or conditions in order to filter applications and to ensure that the Court is not overburdened by, notably, abusive or vexatious complaints.

A full individual complaints procedure is all the more necessary in regions where there is no regional Human Rights Court, as it is the case – regrettably – in Asia. 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 at its 3rd Congress hosted by the Constitutional Court of the Republic of Korea. Given the heterogeneity of Asia, the establishment of such a Court cannot be a pan-Asian effort.

Nevertheless, like-minded countries which countries which are interested in an effective protection of human rights, like Indonesia and others present here today, could join in such an endeavor.

Ladies and Gentlemen,

I would like to end my presentation by strongly encouraging Indonesia to consider introducing a full individual complaints procedure to the Constitutional Court in order to ensure that every effort is made to guarantee constitutional rights in your country.

Thank you very much for your attention.

MODERATOR

AMZULIAN RIFAI

Thank you. Ladies and gentlemen, we already have four speakers that presented their paper. We are going to have other four panelists who will respond to the speakers and maybe also to share their ideas and experiences. But before that, we have, according to schedule, we have 20 minutes break. And I think, let us have coffee break for 20 minutes. Thank you.

ADJOURNED TIME: 15.23

RECONVENED TIME: 15.45

MODERATOR

AMZULIAN RIFAI

Thank you very much. Can I please invite our speakers?

Ladies and gentlemen.

What happened? I'm going to explain to the audience that for the next session we are going to have four panelists. The four panelists will respond or share the experience, delivered from their seats. That's what the instructions from the committee. Five-minute response. After the response, if we still have time, then I'm going to give the floor for response, comment, questions, or anything related to our topic for this session.

Well, let me start with this session. We will have four panelists. I would like to introduce the four panelists.

- Panelist 1, Mr. Tun Arifin bin Zakaria, the Chief Justice of the Federal Court of Malaysia.
- Panelist 2, Mrs. Maria Lourdes Sereno, Chief Justice of the Supreme Court of the Philippines.
- Panelist 3, Mr. Buritash Mustafayev, Deputy Chairman of the Constitutional Court of the Republic of Uzbekistan.
- Panelist 4, Mr. Bui Ngoc Hoa, Deputy Chief Justice of Supreme People's Court of the Socialist Republic of Vietnam. Panelist 4, the presenter will present his paper or his comment in Vietnamese.

We are going to have our panelist 1, Mr. Tun Arifin bin Zakaria, and please be aware, and I apologize, it's only a five-minute response. I'm sorry for that. And please, Mr. Tun Arifin bin Zakaria, the time is yours. Thank you.

PANELIST 1

TUN ARIFIN BIN ZAKARIA

(CHIEF JUSTICE OF THE FEDERAL COURT OF MALAYSIA)

Thank you, Mr. Chairman.

I'm deeply honored and I consider it a privilege to be here and to give my view with regard to this important topic that is Constitutional Complaint as a Protection of Human Rights, as an Instrument of Protecting Human Rights.

First of all, I wish to congratulate all the four participants or speakers early on for their clear deliberation, clear of the position of the respective countries, and also from the Venice Conference - Venice Commission, Mr. Giani for his elaboration on the function of the Venice Commission and also on his views on the Constitutional Complaint. Well, the position in Malaysia is like what ours is from our constitution, there is a clear provision as to how constitutional complaint can be made to the court, and it is not necessarily direct to the Federal Court, which is our constitutional court. But you can go to the High Court, and the matters can be referred by way of reference from the Local High Court direct to the Federal Court on any constitutional issues.

What is important for me to mention is in our constitution, there is a clear provision, in article 4, for instance, we state that the constitution is the pre-supreme law of the Federation and any law passed after *Merdeka* Day, or after Independence which is inconsistent with the constitution shall to the extent of the consistency will be void. With that provision, we may say that there must be an authority who will decide as to the validity of law. If any law at all after the *Merdeka* Day or the Independence Day, or after the coming into force of the constitution is inconsistent with the constitutions if it is past after the constitution was implemented, then it will be void what have been issued. For those laws which were already in the existence prior to the constitutions, then we can modify those laws to make adaptations to make it modified to such extend to bring in conformity with the constitutions that is provided in in our article 162. So, we have article 1 part 2 of the constitutions which contains article 5 to 13 which deal with fundamental liberties which are equivalent to what we call, normally called, human rights provisions. These deal with the liberty of the persons against slavery and forced labors, protections against retrospective criminal laws, equality before the law, and Article 8

prohibitions of banishment and freedom of movement, freedom of speech, and assembly in association, freedom of religions and so forth. These are enshrined provisions and constitutions which protect human rights or fundamental liberty as we call them. And any breaches of the fundamental liberties can be challenged in court directly by persons – by the complainer, who has suffered or who grieved by the state authority or by any person at all. Similarly, for example, the liberty of a person, we have the writ of *habeas corpus* which is peculiar writ or just specialized writ to get liberty of persons which is to challenge any illegal detention of person by anybody at all not necessarily government authority, it can be anybody at all. There we can ask for writ of *habeas corpus* to be issued by the court. We have specific writ under our reasons, for example we have the application to challenge complaints. Constitutions complaints can be lost by way of judicial review which is under our Order 53 of the rule of the court and that together with the court adjudicator and a specific relief act, and we also have declaratory power which has come forth by our constitutions. And as for election cases, we go by way of election partition. These are matters or modes of procedure as how challenge can be launched by public or by anybody at all on constitutionality of any act of any organs of the government.

Judicial review is a very broad power by the court which constitutes under the judicial review we have what we call writ of statutory rights, writ of co-guarantor, mandamus. Mandamus is an order to compare the performance of duty imposed by law. And the mandamus may be granted to direct authority which just decline jurisdiction to exercise, each jurisdiction. And we have for example, in the case of the Minister of Finance and Sabah Batujasa, where the state government, judgment has been obtained against the state government, but the state government refused to pay the money despite the judgment was given, delivered by court, they refused to pay. Pay up to satisfy the judgment. The matter came up before the federal court which I was the panel. And we directed the state government; we issued the order of mandamus against the government to pay up on the judgment some. So, we have various procedures related to particular breach. And for example, prohibition in an order to prevent public authority from proceeding without jurisdiction, it's a special writ, or writ of prohibition. Those are essentially the provisions in the constitutions.

Apart from that, we have Article 128 of our constitution which set up clearly. 128 of our constitution conversed jurisdiction on the Federal Court to the exclusion on any other court have jurisdiction to determine in accordance with any rules of the court relating to the exercise such jurisdiction on any question whether a law made by Parliament or by Legislature of the state is invalid on the ground that it makes provisions with respect to a matter, with respect to which Parliament or the Legislature has no power or be dispute on any other questions between states or between the federation and the state. This is the exclusive jurisdiction. This jurisdiction can be exercised by way of reference from the High Court or can be brought directly to the federal court but must be with leave of the court.

There is a special procedures relating to this, so when I look at the Indonesian Constitution in the 24 C which is very brief, just as the speaker said, Mr. Justice of the Constitutional Court of Indonesia says is very brief. The Constitutional Court has the authority to educate at the first and for instance, the judgment of which is final to review laws against the Constitution. It is a very general provision but somehow rather, I think the Indonesian Constitutional Court has meant this within that limited to expand the jurisdiction and I must congratulate them for. And of course you have jurisdiction in regards to general election as well, similarly with our federal court. And I was ahead side of the Mongolian Constitution. I must congratulate the Mongolian government because their constitution is very brief, very detailed, and I am quite impressed with their constitution here. It is more or less draft on the same manner as in Malaysia in many ways and there are entrance rights, specific provisions on Human Rights as well. But it has gone beyond that to even given jurisdiction to the court to entertain challenge on the agreement entered into between states and by the state whether it is constitutional or not. And another important aspect of this Mongolian Constitution is if there is any breach, they can take the court on its own initiative, can take the action and it is not necessary for any party to bring the matter to the court. The court itself can take the initiative to challenge the ruling on the conceptionality of any breaches of constitution. That's my understanding of the Mongolian constitution which I think is very broad and very healthy in that sense. And I'm sure the Mongolian Constitutional Court is one of the most powerful courts in the world. And as for the Thai Constitution, I must congratulate the Thai presenters as well for the presentation they made which I think is very comprehensive but because of the limited time and I'm constrained not to make any comment at that moment. So thank you very much.

MODERATOR

AMZULIAN RIFAI

Thank you very much, Chief. It was excellent comment I think. Very useful. I think two points from the Malaysian point of view that under Malaysian system that fundamental rights are guaranteed by the constitution and secondly, I think complaint of fundamental right through federal court. That's my understanding.

And for your information, although Indonesian Constitution has briefly in relation to Human Rights, but we also have Human Right Act that is really clear in making the points of the values of Human Rights, I think, under the Act of the Parliament.

Well ladies and Gentlemen, now we move to second panelist, Ms. Maria Lourdes P.A Sereno, Chief Justice of Supreme Court of the Philippines. Please Ma'am.

PANELIST 2

MARIA LOURDES P.A. SERENO

(CHIEF JUSTICE OF THE SUPREME COURT OF THE PHILIPPINES)

Thank you Sir for this privilege to now deliver my response to the four very excellent papers which were presented to us this afternoon. Now, however, the Chief Justice of Malaysia outdoes me because he's immediately able to have a comparative presentation between his jurisdiction and that of the other countries, but allow me to share what I can from the constitutional history of the Philippines and so I will be delivering a short response in title of Constitutional Design, Individual Complaints and The Supreme Court of The Philippines.

The constitutional design for the judiciary in The Philippines allows a court to address individual complaints based not only on the causes of action in civil or criminal cases but also on constitutional questions that affect individual as well as collective rights. While The Philippines Supreme Court which stands at the epic of the judiciary 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.

Two of the Supreme Court's greatest powers would be the power of judicial review and the power to make rules and regulations, to protect and enforce constitutional and human rights. Related to the first power of judicial review, would be the broad and extraordinary grant of authority to the courts, to determine the existence of grief abuse of discretion on the part of any branch, agency or instrumentality of the government by the 1987 Constitution. This came about after the people power of revolution

Now, the history of constitutionalism and judicial review in the Philippines first gained definition in 1936 in the historic case of Angara versus electoral commission. When it first defined the elements of judicial review, by expressly adopting the American model first explicated in Marbury versus Madison, which states our decision in state, the constitution has blocked knock with deft strokes and in bold lines allotment of power to the executive, the legislative and the judicial department of the government. The overlapping and interlacing of functions and duties between the several departments, however, sometimes makes it hard to say just where the one leaves off and the other begins. In terms of social disquietude or political excitement, the great landmarks of the constitution are apt to be forgotten or marred if not entirely to be obliterated.

In case of conflict, the judicial department is the only constitutional organ which could be called the Pan to determine the proper allocation of powers between the civil departments and among the integral or constituent units thereof. To recall, in 1803 Marbury versus Madison, first

explained the notion of judicial review and that it is the province of the court to say what the law is. Those who apply the rule to particular cases must expand and interpret that rule. And if two lost conflict with each other, the court must decide on the operation of each. With the constitution as the epic, the judicial, the judicially, definitely has the power to exercise part of the function of constitutional court.

The 1973 and 1987 constitutions gave the power of judicial review not only to the Supreme Court but also to all courts, although it is only Supreme Court decisions that form part of the law of the land.

The broad discretion granted to the court to address the constitutional question in so far as it pertains, allows the courts, including the lower courts in the Philippines to address particularly the question of individual complaints or what you call constitutional complaints. This is done to a range of individual access point to the court's power of judicial review. All of which are sourced from judge-made decisions or rules promulgated by the court. Among these would be the exceptions to the direct injury requirement in relation to an individual standing to bring a constitutional question before the courts, such as the exception of transcendental public importance of the notion of the tax payer suit.

Now on constitutionalization of individual access, while the 1902 Organic Act declared that the bill of rights which was entrained in US constitution was to be extended to the inhabitants of the Philippines islands, it had to wait for the Supreme Court to state the application of the bill of rights in relation to the judicial remedies.

In 1919, in Ruby versus Provincial Board, the court determined the characterization of people and the personal liberty of an individual in relation to the act of the legislature. The court determine the right of an individual in relation to the state. In 1967, the court determined the right of an individual operator of a hotel chain to disagree with a municipal ordinance imposing requirement on him in relation to how he operates his hotel. For these two cases what is constitutionally important for this forum is that the court assumes jurisdiction over the complaints and adopted an approach for constitutional review.

We also have been trying in the declaration of principle article 2 of the constitution certain principles that emphasize the importance of constitutionalism. Section 11 states "the State values the dignity of every human person and guarantees full respect for human rights". Article 2 section 14 "the State recognizes the role of women in nation building and should ensure the fundamental equality before the law of women and men. Article 3 section 11 which is not a traditionally part of the bill of rights in human nation before, now guarantees free access to the

court and quasi-judicial bodies and adequate legal assistance shall not be denied to any person by reason of poverty. Of course, we have a long enumeration of what is contained in a bill of rights article including rights that have been newly defined by jurisprudence. And, we go by the principle "*Ubi jus ibi remedium*" "where there is a right there is a remedy".

Thus, in our constitutional order, as long as a right can be located, access to the court is guaranteed. The exceptions to the standing requirement, the recognition of taxpayer suits, the availability of jurisprudence that recognizes the right of an individual to have his or her rights to define, in relation to the state, by resorting to the court, as ways by which individual's access to the judiciary is ensured and, in a way, constitutionalized.

Current individual remedies, right now, include some of very extraordinary rules that have been recently promulgated. As I earlier said, one of the most important powers given to the Supreme Court under the 1970 – 87 constitution is to define rules to protect the fundamental rights of the individuals. Pursuant to this power, the Supreme Court has come up with not only the heaviest corpus rules that has been existing since 1964, but extraordinary rules allowing greater access to individual complaints through immediate restraint of government authorities. For instance, we have issued the reads of Amparo, the reads of Habies Data, the read of Kalikasan and allied environmental reads, and the reads relating to law against violence, against women and children.

All of these have immediate restraining reads and protective orders. Thank you.

MODERATOR

AMZULIAN RIVAI

Thank you very much, Chief Justice of the Supreme Court of the Philippines. Please be aware that we have 5 minutes response. I will go to Panelist 3, Mr. Buritas Mustafayev, Deputy Chairman of the Constitutional Court of the Republic of Uzbekistan. Please, Sir. Time is yours.

PANELIST 3

BURITASH MUSTAFAYEV

(DEPUTY CHAIRMAN OF THE CONSTITUTIONAL COURT OF THE REPUBLIC OF UZBEKISTAN)

And with regards to the human rights and the fundamental rights, but before I start, I would like to congratulate the Constitutional Court of the Republic of Indonesia and the Indonesian People for its 70th Independence commemoration. So, I would like to discuss about

the effectiveness of constitutional complaints for the protection of human rights. In this regards, I would like to share with you some of the experiences of the Uzbekistan Constitutional Court.

The Republic of Uzbekistan, we give very high importance to the democratization process of our country, our government, our court, and our judicial system, including continuous democratization and liberalization of the judicial system in order to promote human rights and ensure the constitutional rights of the citizen. We see it as our priority in modernization and democratization. After our independence, we have a very deep concept in the deliberation of the judicial system and we see this as an important element.

Another thing that we also do is the reform of the court in order for the court to exercise its full rights, the independency of the court from other state organs and powers and also pressures from other powers, including pressures from the government, like what happened in the past. We also believe in promotion and protection of human rights up to the highest level and we want to comply with the international standard. And for this very reason, we established the Constitutional Court as well as the Civil and also Criminal Court. So, we reformed the court control system, so that we can guarantee the constitutional rights of the people. So, we want to make sure that the rights are fulfilled by the Republic of Uzbekistan. The Constitutional Court of Uzbekistan justices are appointed by the President, Senate, and the Parliament and the structure consists of a Chief Justice, Deputy Chief Justices and Justices, including Karakalpakstan.

So, it is actually the Commission of Acts and Regulations. We have the authority to review the constitution of Uzbekistan, the legislation against the constitution of Uzbekistan—the decisions made by the Parliament and the government of Uzbekistan and also the decisions and legislations issued by the local governments.

So, the attorney general's office of Uzbekistan also maintains the protection and promotion of human rights and also works hard to ensure there is no breach or infringement to the constitution. And, we put our priority into human rights and we always refer to the principles of human rights in every issue of legislation. We also want to guarantee that the Constitutional Court works independently without any pressure based on the principle of equality, based on the Article 19 on Judicial Review. The President of Uzbekistan and the speaker of the Legislative Chamber of Uzbekistan and also the President of the Senate of Uzbekistan, and also the Head of Karakalpakstan. Region are parts of this decision making process, including quarter of the Legislative Chamber.

So, we can also add to this Counsel, the Head of Supreme Court, and the Head of the Constitutional Court. The complaint has to be approved by at least three justices before it can be heard by Uzbekistan Constitutional Court. So, of course we do not have full individual

complaint mechanism for constitutional complaint, but we also allow citizens to submit their complaints, including non-governmental organizations. They cannot submit direct complaints, but they can submit their complaints through relevant government agencies.

However we also realize that time always change and democratization process will continue to happen. And what we need to do is we need to always try to refine our constitution and our law and we believe that we cannot to this just with one effort. This will be a long and ongoing process. Therefore, we want to learn from experiences of our counterparts, and in this opportunity, I would like to take this opportunity to congratulate Indonesia for its Independence, and we want to thank Indonesia for inviting us to this International Symposium.

MODERATOR

AMZULIAN RIVAI

Before I continue with the last panelist, I would like to inform to all participants about the questions and answers session for the participants, to accommodate four of five questions. Now, allow me to ask the fourth panelist, the representative of the representative of the Chief Justice of the Constitutional Court of the Republic of Vietnam.

PANELIST 4

BUI NGOC HOA

(DEPUTY CHIEF JUSTICE OF SUPREME PEOPLE'S COURT OF THE SOCIALIST REPUBLIC OF VIETNAM)

Thank you Mr. Chairman, Honorable Chief Justice of the Constitutional Court the Republic of Indonesia.

Ladies and Gentlemen. Firstly, on behalf of the Supreme Court of Vietnam, I would like to express our sincere time the Hon. Chief Justice of the Constitutional Court of Indonesia for hosting this Symposium. I would like to greet Hon. Justices, Ladies and Gentlemen, best health and success.

As we all know, The Constitution is the most basic law with the highest value and other laws in the system must be consistent with the Constitutional provision. Therefore, in a certain law system, the Constitution is the highest legal document and any legal document which is unconstitutional must be declared void and must be suspended. I understand from other speakers, the challenges in having a mechanism and procedure for filing constitutional complaints. In order to ensure the supremacy of the Constitution, we need to have a very effective mechanism for

constitutional protection. In Vietnam, it is provided in our Constitution 1946 which was revised in 1959, 1980, 1992, and 2013. Vietnam has not yet had a Constitutional Court. However, the protection of the Constitution and the protection of basic rights of citizen have been well secured in Vietnam under different mechanisms.

Firstly, we have the law on supervision by the National Assembly. The law on the promulgation of legal normative document provides procedures for reviewing drop legal normative documents which have the size of being a constitution. And the law committee of the National Assembly is the agency in charge for constitutional protection, and it has a function of reviewing drop law of the news before being submitted to the National Assembly for its approval. The government of Vietnam has scrutinized and handled legal normative documents which have the size of being contrary to the law. And, Ministry of Justice is accountable to the government in performing the function of state management in reviewing legal normative document.

And secondly, in accordance with law of Vietnam on the citizens, members of people council, members of National Assembly as civil servant have the right to make requests and proposes to competent state agency to review and handle action and legal normative documents which have the size of being unconstitutional totally.

The new constitution 2013 of Vietnam provides specific provision on the roles and function of the Supreme People's Court of Vietnam. The Supreme Court is the adjudication agency exercised to this right. And, Article 112 of Constitution 2013 provides that the Supreme Court has the function of protecting justice, protecting human rights, protecting socialism, and legitimate rights and interests of the people, organization, and agency. And in the process of adjudication, if the Court finds any legal document or unconstitutional document, the Court may declare such document to be void. And, when the constitution is revised, other laws must be revised accordingly.

In Vietnam, we have a new constitution 2013 which provides a lot of new regulations and provisions on human rights and citizen rights. For example, Chapter 2 of our new constitution provides 36 articles on human rights and citizen rights and that is the key content and direction in the entire constitution of Vietnam. The new Constitution 2013 in Vietnam requires other laws to be revised to ensure the basic rights of citizens. In that connection, Vietnam is now revising a number of important courts including the criminal court, civil court, criminal procedure court, civil procedure court, administrative procedure court for example.

In conclusion, given the specific condition of Vietnam, we have not yet had the Constitutional Court. However, based on the competency of the state agency basing on the function and task that will be having power in the constitution protection. Thank you for the attention.

I have briefly introduced the regulation on the constitution of protection in Vietnam in general and protection of human rights, citizen rights in Vietnam in particular. And, I look forward to our Q and A session to learn and experience in this regard. Thank you for the attention.

MODERATOR

AMZULIAN RIFAI

Thank you very much sir, Deputy Chief Justice Supreme People's Court of the Socialist Republic of Vietnam. Now, we are going to have question time. But before that, I'm really aware that those who is present here is expert on constitutional law. That's why I'm going to make a rule for response. First, please mention your name and, secondly, respond to whom you respond to, if any. And thirdly, please be aware of our very limited time. And I give opportunity to four people to give response. Can anybody help with the mike? Yes, can anybody help?

DELEGATION FROM INDONESIA

HARJONO

Thank you, Mr. Chairman. Well, I would like to know, especially the practicing of the Mongolian Constitutional Court dealing with constitutional complaint. As far as I understand, according to this paper, that Mongolia Constitutional Court is not only open for the judicial review from parliament, president, and the other state organizations. But the one thing that I'm interested is, in your case, I don't understand whether the case is an example of the constitutional complaint or that's not a constitutional complaint.

As you mentioned, according to the Mongolian criminal procedures, that to go to appeal for the decision must have a legal advisor or legal consultant. So, when a citizen goes to a constitutional court and the Constitutional Court decides that every citizen has a right to appeal to high court without what we called consultant, like that. My question is, do you have a case that although the law is not strike down because it is against constitution but the decision of the government is considered to be unconditional. In your case, it is the law that straight on to be against the constitution. But the problem that I want to know is: do you have a decision from the Constitutional Court that your decision is decided that your government against the constitution in your action, but not the law itself. So, the constitutional court does not decide that the law against the constitution but the constitutional court decides that your action, the government action, is against the constitution. Thank you for your information.

MODERATOR

AMZULIAN RIFAI

Thank you. Second response, please, yes.

DELEGATION FROM INDONESIA

M. ARSYAD SANUSI

Assalamualaikum wr wb. Bapak Prof. Amzulian Rifai as the moderator, Distinguished Panelists, Distinguished Presenters. Allow me to ask my question in Bahasa Indonesia. Mr. Chair, please allow me to pose this question in Indonesian language. I have several notes; first, the definition given by Victor Cornelia, Constitutional Complaint is a complaint submitted to the Constitutional Court by individual citizens, who felt that their fundamental rights or their constitutional rights are being violated by Public Officials. In the practices in different countries as presented by our Presenters and our Panelists, one of the weaknesses of the Constitutional Complaint Mechanism is that the complaint or the submission can only be heard and reviewed by the Constitutional Court, and liberated by the Constitutional Court if all other legal measures have been exhausted; and all efforts to give remedy or to prevent the repeating Constitutional Infringement has been taken. Therefore, Constitutional Complaint is a process to find Justice which is very long and winding.

The question is "Will Constitutional Complaint be a mere eutophia because the mechanism of Constitutional Complaint seemingly far from simple judicial principle, accessible, and affordable. If Indonesia already has Special Court, which is a Human Rights Court; Do you still think the mechanism of Constitutional Complaint is more effective and efficient compared to the Human Rights Court, especially if we talk about gross Violation of Human Right Cases. I use Bahasa Indonesia, because I am afraid it will be misunderstood if I use English. So these are my questions, because I see that the Constitutional Complaint Mechanism is actually too long and winding. It is actually a very difficult way to get protection of fundamental and basic human rights. Thank you and greetings.

MODERATOR

AMZULIAN RIFAI

And for your information, both were former Justice of Constitutional Court of the Republic of Indonesia. And now, I will give the opportunity from my left, to respond. Yes, please. Can you mention your name and the institution you are from?

DELEGATION FROM INDONESIA

IWAN SATRIAWAN

Thank you very much, Mr. Chairman. I will address my question to Justice Palguna. I think it is interesting presentation when you recommend two approaches in overcoming the problems of this issue. You proposed two; First is Legislative Interpretation and the second is Judicial Interpretation.

But, allow me to have different opinion, Justice Palguna. In my opinion, I have two approaches in settling this issue to accomodate the Constitutional Complaint. The first is Amendment of the Constitutions. Because if we propose the Legislative Interpretation, it could be challenged again by the people; so it is not settled yet. So, therefore, I prefer to propose the Amendment of Constitution.

The second is, why doesn't the Court have a little bit bravery to do what we call is a Case Law Approach to accomodate the issue of the Constitutional Complaint, because as far as I know in particular cases our constitutional court also accommodates to try to do a breakthrough in responding to the legal issue, the constitutional issue of the country. Thank you very much, Mr. Chairman.

MODERATOR

AMZULIAN RIFAI

Thank you. Excellent. Final question? Yes, please.

DELEGATION FROM INDONESIA
BRAWIJAYA UNIVERSITY-MALANG

Okay. Thank you. Assalamualaikum Warahmatullah. Brawijaya University, East Java, Malang. So that it will be well understood, I will use Bahasa Indonesia. I would like to ask about what Justice Palguna mentioned about the situation in Indonesian Constitutional Court.

I have a big question with regards to Constitutional Complaints especially with regards to its description. Because I have different understanding about Constitutional Complaint, because I also hope that, aside from constitutional complaint, we also have Constitutional Report.

I really appreciate what the Chief Justice from Mongolia mentioned. It seems like they have accommodated both Constitutional Complaint and Report. So, we believe that we always have to pursue the rights and protect the rights of citizens. And the tool to accommodate and to protect that is the Constitution, and who is the guardian of the Constitution? It's the Constitutional Court. So, even though the authority of the Constitutional Court in Indonesia is different from the authority of the Constitutional Court of Mongolia or Thailand, because until now Indonesia has not included Constitutional Complaint as the authority of the Constitutional Court. But there is no mention that says that the Constitutional Complaint is not the authority of the Constitutional Court either. So, I also wish that in the future we can have a Constitutional Law Report authority. So, maybe in the future the Indonesian Constitutional Court's decision is not only final and binding but the Constitutional Court can also give recommendation the People Consultative Assembly to amend the Constitution.

In many international conferences, we often heard about state crimes, the crimes committed by the State and crimes committed by the Government based on Constitution. So, if we have accommodated both, then we can have a follow-up action so that the rights of citizens, community, and public can also be protected. So, in the future there will be no impunity to the state, the crimes committed by the state, and the basic reference will be Constitutions. So, I hope that we can listen to the experience from Mongolia because this has also been agreed by Malaysia and Thailand. So I would like to ask you what about the crimes committed by the state which actually breach the Constitution. So, in this case, the Constitutional Court does not only able to hear, but also to provide a follow up recommendations.

MODERATOR

AMZULIAN RIFAI

Justice Palguna, I give time for you to respond to the question.

SPEAKER 1

I DEWA GEDE PALGUNA

(JUSTICE OF THE CONSTITUTIONAL COURT OF THE REPUBLIC OF INDONESIA)

Yes, thank you very much, Mr. Chairman, and thank you My Pal, Pak Iwan Satriawan from Yogyakarta. Yes, I can agree with your disagreement to my proposal. But as far as a Case Law Approach is concerned, taking into consideration to the Legal System here in force in Indonesia, and our Civil Law Tradition in our mind, a case law approach if it is practiced in Indonesia,

especially in our constitutional court, it is, as I mentioned in my short presentation, my paper, it is very limited because we have only approach to such complaints as far as that complaint has a connection with a norm of a law that makes the complaint exist or the background of the complaint to sue the ruling of the constitutional court. So maybe a case law approach is much more suitable in the common law system, may be like in, maybe partly in Malaysia, or in the Philippines, or may be in the, what is so-called within the tradition of starry this tradition.

Here in Indonesia, we are strictly limited by our law of procedures and the way the court should adjudicate cases. It is including in interpreting cases, especially constitutional cases. So it has actually been done by the court, but it is very limited as I said. And the last question by Mr. Agus: I can understand what you just said, but as I said in my paper, that we have to employ innovations, if we want to be realistic, is that if we want to have an amendment for the 1945 constitution, it will be impossible procedurally and technically it would be complicated. So that's why I like to propose on the legislative interpretation, oh, I haven't addressed one of the questions that was raised, that there will be review on the extensive interpretation of judicial or extended judicial review to address also constitutional complaints. But that's actually the easiest way rather than having an amendment to our constitution.

So let me go back to the last issue whether it is possible or not the constitutional court is granted a competence on certain case that the ruling is not final and binding. I have difficulties to imagine the situation because we always use the Article 24 C of 1945 Constitution as the basis. It is said that the constitutional court decision is final and binding in the Paragraph 1. For the paragraph 2, it was issued once, but it's just for their opinion, whether their opinion is right or wrong. But for the impeachment process, it is actually the authority of the People's Representative Assembly. So, if there is a constitutional court that is not legally final and binding, to my knowledge, one of the characteristics of the constitutional court is that final and binding nature so that everyone can look to that characteristics on the constitutional court decision if there is another preceding to be imposed. I don't know whether other countries have such experience. But to my knowledge, no countries have such mechanism.

So, to my senior, Mr. Arsan, since it may not be clear I want to also address this question whether it will be just a utopia. It might seem like a utopia, but if you compare that to other countries' experiences, that is not the case. So it will heavily depend on how the mechanism is. It is stated that a constitutional complaint is the last effort when all of the resources have experienced deadlock or there is no other way of resolving the situation or legal remedy has been exhausted. But on certain cases it could be direct, just like what happened in Germany.

If a law which is related directly to individual rights so that person without waiting for other legal remedies, they can automatically challenge a particular law. But, there is one thing that is related directly to that particular rights, for example, there is a certain condition where that condition is applied to one individual and it is prohibited for that person to take on an official position so that person can actually question the law. On the human right court, let's not forget for the human rights court it's actually only applied to the criminal cases.

For this case is not only for any violation of constitutional rights. So, anything that relates to the constitutional rights. So, that's actually the distinction here. So, when it comes to the violation of the constitutional rights of the citizens, if it is considered as a human rights violation or gross human right violation, then it is the decision of the authority or the competence of the Human Rights Courts to try to adjudicate. But, if it is the violation of the constitutional rights of the citizens that is non-criminal cases, then it is actually the authority of the Constitutional Court and it is under the constitutional complaint definition.

MODERATOR

AMZULIAN RIFAI

Thank you Mr. Palaguna, any comment?

SPEAKER 2

AMARSANAA JUGNEE

(CHIEF JUSTICE OF THE CONSTITUTIONAL COURT OF MONGOLIA)

I will ask for your question shortly. I will be spoken in Mongolian, our translator will translate.

TRANSLATOR:

Please be patient, it will be translated consecutively. We do not have simultaneous Mongolian-English interpretation; it will be interpreted consecutively. Please be patient.

SPEAKER 2

AMARSANAA JUGNEE

(CHIEF JUSTICE OF THE CONSTITUTIONAL COURT OF MONGOLIA)

Thank you very much for your question. In the first place, I have to note that individual access to the Constitutional Court of Mongolia is divided into two categories. The first one is if the citizen considers that his or her legitimate interest is affected personally and immediately,

he or she can file a constitutional complaint to the Constitutional Court of Mongolia and we call it complaint.

And, the second one is it has more general nature, if the citizen files or submits claim to the Constitutional Court on behalf of the public interests, under the issue which falls under the Constitutional Court jurisdiction. And, most of the claims Constitutional Court of Mongolia receives are about the unconstitutional statutes.

And last, the second most common cases are related to human rights which are stated in the article 16 after the Constitutional Court of Mongolia. And, I also have to note that we face certain challenges and problems with the execution of the constitution of the Constitutional Court of Mongolia, because, for example the Constitutional Court issues the decision that the members of the parliament has breached their constitution, and according to the constitution the parliament has to consider the issue of impeachment upon the conclusion of Constitutional Court and parliament sometimes refuses to consider the issue. Thank you. Thank you very much.

SPEAKER 4

MR GIANNI BUQUICCHIO

(PRESIDENT OF VENICE COMMISSION)

Thank you Mr. Chairman. I didn't receive any question but I would like to stress some points after this very interesting discussion. I'm dealing with the constitutional justice since the Fall of the Berlin Wall in 1989, with the dissolution of the Soviet Union and I can testify the immense progress, the impressive progress that has been made in the field of constitutional justice since then. The last 25 years really have been a new development of the constitutional justice worldwide, I would say, not only in Europe, not only in America, South Africa, Asia, etc., everywhere.

Since, I would say, 10 years ago, the Venice Commission has started to insist very much with the Constitutional Court and especially with the Parliament because it says the judiciary questions to introduce the direct access by the individual to the Constitutional Court. And, we've been followed because many courts in Europe but also in Africa and in other continents have amended the constitutions and introduced the Constitutional Complaints.

One of the last was Turkey with the Constitutional Amendment adopted in 2010, and they were and everybody was worried about the burden which could come from the Constitutional Court of Turkey. But, they prepared, the court prepared very carefully for two years and now is dealing with the amount of new requests very well. I would say I am a little bit of egoistic

because your success is also the success of the European Court of Human Rights because the Turkish's cases before the Human Rights Court is settled are decreasing very much recently. So, this is why I insist on you in order to consider introducing a full Constitutional Complaint to the Constitutional Court. This is very important for the protection of the fundamental rights but also for the public in general. So, go on, go ahead, and follow the others.

The Venice Commission is at your complete and full disposal because we have an amount, a big amount of information, comparative studies, etc., on the experiences of many countries. Of course, each country is different from another. But from these rich materials, you can choose the best system which could be perfect for you. So, we are at your disposal. Don't hesitate to call on us. We are there for this reason. Thank you very much.

MODERATOR

AMZULIAN RIFAI

Thank you. I understand that you still have many questions and responses but we are running out of time. But, before that, I think not only the speakers, the panelists, and the participants, but also I, the moderator, would like to thank the Constitutional Court of Indonesia.

I have many reasons to love our Constitutional Court. Firstly, the judges are humble, wise, and friendly. I think it is important for me to mention this.

Secondly, our Constitutional Court supervises and has excellent cooperation with the Law Schools all over the country, both private and state universities. I think this is very important.

Thirdly, our Constitutional Court gives opportunities to all, if not most, maybe, lecturers all over the countries. We learn from our court. You see, our moderators, we have three moderators. This is the first one and all moderators come from outside Jakarta. I think this is important because every day, like, I, myself, I come from Palembang, that takes a 45-minute flight from Jakarta. Although I graduated from an Australian Law School but I haven't spoken in English for more than five years, maybe so I think this is a very important exercise for me. Thank you for our judges and Constitutional Court of the Republic of Indonesia.

I would like to make a closing remark in conclusion for this session. Some important points of this session, I think: First, constitutional complaint as a complaint to the constitutional court by individuals who feels their fundamental rights or constitutional rights have been violated by public officials. There are numerous differences in the implementation of the institutional complain mechanisms in different countries. Secondly, there are lessons learned from some countries. Indonesia, for example, the Constitutional Court only deals with the conformity

between constitutional complaint objects and the conditions where the assessment of legal issues and other facts remain under the authority of General Court. However, for Indonesia, it is clear for the Constitutional Court other need to dealing with constitutional complaint. However, it will need constitutional amendments to solve the issue of constitutional complaint and it is a hard work battle both politically and under the procedure form amending the constitution.

From Mongolia, lesson learned that transition of Mongolia in 1992 and the constitutional court of Mongolia has jurisdiction over the decisions made by the parliament, president and government and the general liaison committee of Mongolia. It is interesting, citizens, foreign nationals, and stateless persons can submit claims to constitutional court aimed to protect public and state interests even he or she not directly affected by relevant actions and decisions of the authority. From Thailand, lesson learned I think arises from, constitutional complaints in Thailand arise from, two principles. First principle is a direct applicability of all exercises of state powers for protection of right and liberties. Second principle is the right to seek judicial relief for violations of individual rights and liberty.

Ladies and gentleman, this is the end of our session. My apologies for imperfect conduct in leading this session. I have done my best, and hopefully we can meet again in the future. Let's give a big applause for our speakers, panelists, and for the excellent audience. Thank you very much.

SESSION II

Sunday, August 16th, 2015

(10.19—12:15)

Fairmont Hotel, Jakarta-Indonesia.

SESSION TWO
COMPARATIVE PERSPECTIVES ON CONSTITUTIONAL COMPLAINT

Moderator: Dr. Muchammad Ali Safa'at, S.H., M.H.

(Deputy Dean of the Law Faculty of Brawijaya University)

MC

Firstly, Mr. Zuhlu Arslan, President of The Constitutional Court of The Republic of Turkey. Second, Mr. Mourad Medelci, President of the Constitutional Council of the People's Democratic Republic of Algeria. Third, Mr. Jeyhun Garajayev, Judge of the Constitutional Court of the Republic of Azerbaijan. I would like to invite our speakers to the stage.

I would like to give the floor to our moderator, Mr. Muchammad Ali Safa'at.

MODERATOR
MUCHAMMAD ALI SAFA'AT

Assalamualaikum wr. wb. Good morning Ladies and Gentlemen, distinguished participants of International Symposium on Constitutional Complaint in celebration of the 12th anniversary of the Constitutional Court of Republic of Indonesia, welcome to this session, the first session of the second day of the International Seminar. My name is Muchammad Ali Safa'at. It is an honor to be a part of this symposium and I'm glad to moderate this session. In this session, based on the term of reference, speakers and panelists are expected to provide general explanation on the Rules and Provisions of Constitutional Complaint from the perspective of each country. The focus of the discussion in this subtopic includes the background of the establishment of constitutional complaint mechanism, access and object of constitutional complaint, filter of

constitutional complaint case, time limit of constitutional complaint petition, exhaustion of remedies, process and stage of court hearing, the deadline of deciding on cases, and the legal consequence of the verdicts. I genuinely hope that this second session of the symposium will bring different and new perspectives to share since the speakers and panelists today come from the different countries. And today we will have presentation from three speakers and two panelists on the topic of Comparative Perspective on Constitutional Complaint. And based on the program prepared by the committee, actually we have coffee break time at 11:00, but I think it's better if we skip this time because from the experience yesterday, it's rather difficult to get back the audience to the room after the coffee break. But of course, the committee have provided coffee at 11:00, and if the participants want to get the coffee, (they) can get out to the room and bring back to this room.

So, let me name all of the speakers today. The first speaker is Mr. Zühtü Arslan, President of the Constitutional Court of the Republic of Turkey. The second speaker is Mr. Mourad Medelci, President of the Constitutional Council of the People's Democratic Republic of Algeria. And the third is Mr. Jeyhun Garajayev, Judge of the Constitutional Court of the Republic of Azerbaijan. And also let me name our panelists. The first panelist is Mrs. Anar Zhailganova, Judge of the Constitutional Council of the Republic of Kazakhstan. The second is Mr. Deolindo dos Santos, Judge Counselor of the Court of Appeal of Timor Leste. I will briefly notify the rules in this session. First, each speaker will be allocated about ten minutes to present their paper and five minutes for each panelist. Second, we will have time for questions and answers, and I hope the questions will be clear and relevant to the presentation. I will allocate some questions in regards with time. And for the first presentation I will give the opportunity to Mr. Zuhtu Arslan, President of the Court of the Republic of Turkey. Mr. Zuhtu Arslan, the time is yours.

SPEAKER 1
ZUHTÜ ARSAN (PRESIDENT OF THE CONSTITUTIONAL COURT OF THE REPUBLIC OF TURKEY)

Thank you Mr. Chairman. Good morning everybody, distinguished Chief Justices, and Justices of all Constitutional Courts and Equivalent Institutions, distinguished participants. Ladies and Gentlemen,

Before starting my presentation, I would like to thank once more to the Chief Justice of the Indonesian Constitutional Court, Professor Arief Hidayat, and his distinguished colleagues for their warm hospitality to this meeting of Board of Members and Symposium on Constitutional Complaint. I'd like also to congratulate the Constitutional Court of Indonesia on their 12th anniversary.

The main purpose of my presentation is to explore the central role of constitutional complaint in protecting human rights in Turkey. I will do my best to summarize three year's experience of the Turkish Constitutional Court in conducting or implementing constitutional complaints within ten minutes. I see it is almost impossible to explain in detail every aspect of this experience, but I will try to give you a rough idea about what's going on in Turkey concerning constitutional complaint.

Let me start with observing that three-year experience of Turkish Constitutional Court in the field of constitutional complaint has proved that constitutional complaint is an effective instrument for protecting basic rights and liberties. Constitutional Complaint provided to Turkish Constitutional Court with a great opportunity to adopt a right-based paradigm. This is a kind of shift of paradigms. The constitutional complaint played at all in shifting the basic paradigm of Turkish Constitutional Court. It used to adopt a kind of ideology-based approach to the rights and liberties of the individuals. That means, our Court used to give certain priority to the interest of the state and its official ideology *vis a vis* individual rights and liberties. But after the adoption of the constitutional complaint, the Court has started to adopt a right-based approach. That means giving certain priority to individual rights and liberties *vis a vis* the state and its basic ideology.

The institution of constitutional complaint was introduced to the Turk's legal system in 2010 through a constitutional amendment. The amended Article 148 of the Constitution states that every body may apply to the Constitutional Court within allegation that in your/his/her constitutional basic rights and freedoms within the scope of the European for national human rights has been violated by public authority. Like Germany and Spain, Turkey also excludes certain social and economic cries from the scope of constitutional complaint. And the practical aim of introducing constitutional complaint into the Turk's legal system was to reduce the number of applications against Turkey before the European Court of Human Rights, and this practical aim seems to be realized to average extend.

It must be noted that the number of pending applications in Strasbourg concerning Turkey was 20,000 at the end of 2011, but this number is now about 9,000. So as the President of this commission Mr. Bucchio indicated yesterday constitutional complaint in Turkey played a very important role in reducing the number of applications against Turkey before the European Court of Human Rights. That is a great achievement in part of Constitutional complaint. However, the other side of the coin is a little different, a bit different because since September 2012 when the Turkish Constitutional Court started to receive constitutional complaints, about 45,000 applications have been lodged to the Turkish Constitutional Court and more than 19,000 of

these applications are still pending. That means Turkish Constitutional Court so far declared inadmissible or strike out about 25,000 applications. That's again a great achievement on the part of Turkish Constitutional Court. Within the period of almost 3 years, our court has sections and plenaries 820 violation judgments. And the bulk of these violation judgments namely more than 80% of them are related to the right of free trial, especially the length of proceedings. And this indicates that we have certain structural problems in terms of violation of rights to fair trial. The court also found violation 56 cases right of property in 26 cases and freedom of expressions in 18 cases. We can find the detail of these violation judgments in my paper which was distributed to you yesterday. And this states that the main purpose of the Turkish s Constitutional Court concerning constitutional complaint who is to lay down the basic principles and standards for protecting rights and liberties by referring to the case law of the Strasbourg Courts.

Now let me mention some of these basic principles and standards adopted by the Turkish Constitutional Court. First of all, the Court interprets this conditional legality for prescription by law in a very strict manner to protect better rights and liberties.

As the case in most constitutions throughout the world, Turkish Constitutional Court also stipulates that rights may be restricted by law that is the act of parliament. The law means the act of parliament. In famous Twitter and You-Tube cases where the applicants argue that the ban on this size was contrary to the constitution. The third Constitutional Court declared that the restrictions were not prescribed by law. And therefore, the applicants' freedom of expressions was violated. In these cases, in Twitter and You-Tube cases, the Court also made clear its approach to the admissibility condition of exhaustion of all remedies. The Court indicated that the condition of exhausting all legal remedies before launching a Constitutional Complaint shouldn't be understood in absolute terms. The remedies to be exhausted must be effective to provide a reasonable chance of success to remove all alleged violations. The Court then declared that the applicants were admissible on the ground that the proceedings before the administrative court did not provide a reasonable chance of success. On the contrary, the failures and indeed reluctance of the authorities to lift the bans on Twitter and YouTube, despite a stay of execution decision delivered by the Ankara Administrative Court was the main reason for the admissibility. The Turkish Constitutional Court stated that the uncertainty as to lifting the ban affected the freedom of expression of millions of people. And the court also emphasized the importance of internet in the contemporary democratic societies. And the court reached the conclusion that there were violations of freedom of expression of applicants.

Now I want to mention briefly about another famous case which is called Headscarf Case in Turkey. In headscarf case, the applicant was a female lawyer who claimed that the

prevention of participation in court hearings with headscarf violated her freedom of religion alongside other rights. The court of first instance, a civil court, stated that a lawyer wearing headscarf couldn't possibly participate in hearings, because headscarf was found in conflict with the principle of secularism by Turkish Constitutional Court as well as the European Court of Human Rights. Our court ruled that intervention in applicant's freedom of belief had no legal basis required by Article 13 of the Constitution. The court reached the conclusion that intervention in question violated the applicant's freedom of religion as well as her right to equality. That means, our court found this intervention is the restriction of the applicant's freedom of religion as a discriminatory treatment. And this is the only case in which our court so far found a violation of right to equality or a violation of prohibition of discrimination.

In cases concerning right to respect privacy, freedom of expression and freedom of peaceful assembly and association, Turkish Constitutional Court adopted also a rights-based approach to the criteria of necessity of a democratic society and to the principal of proportionality. As I said, Turkish Constitutional Court intended to the condition of legality in a very liberal sense and more strict sense to protect rights and liberties. It's a kind of precondition for respecting rights and liberties. But, you won't if any intervention restriction on any rights as prescribed by law, this restriction must also be necessary in a democratic society and this intervention must be proportionate to the legitimate aims of, for instance, providing public interest or prevention of crimes.

Two very recent judgments will reveal the rights-based approach of the Turkish Constitutional Court to these conceptions or conditions. In one of these cases, the applicant was a well-known journalist and sentenced to imprisonment for insulting the members of parliament in a newspaper article. In what we call the Bekir Coskun Case, the court found the violation of freedom of expression of the applicant. In another case, the applicant was a radiation oncologist, he was a medical doctor and he published a press release criticizing the quality of drinking water provided by the Ankara Metropolitan Municipality. The applicant had to pay compensation to the mayor of Ankara for insulting, or allegedly insulting him. On both judgments, the Turkish Constitutional Court has emphasized the importance of freedom of expression in every democratic society and the court declared that freedom of expression is one of the basic pillars of democratic society. So, freedom of expression may and must be restricted under certain circumstances under compelling reasons. And part of that again in the case of Strasbourg Court, our court also stressed that limits of acceptable criticism are wider as regards to politicians and public officials than as regards to the private individuals. And in these two cases and other similar cases our court found a violation of freedom of expressions because of the limit of time I will not go into details of other cases, but as I said you can find it in my written paper.

In conclusion, I would say that two main basic conclusions may be drawn from our relatively short experience of implementing constitutional complaint.

First of all, despite all the difficulties and problems, constitutional complaint plays a very important role and function in improving, enhancing the standard of rights and freedom in our country, and indeed in the transformation of the constitutional court and even the whole judicial system.

Secondly, violation judgments generally with the remedy of re-trial, of and or compensation, created an inevitable increase in the number of applications. The expression of becoming a victim of his own success is also now applicable to Turk's constitutional court. But, benefiting from the experiences of other courts, especially the European Court of Human Rights, we are constantly reforming our filtering system in order to make the constitutional complaint system much more effective.

I will conclude by saying that it is too early to say that the experience of Turkish Constitutional Court in the field of constitutional complaint is a success story, but I can say that we are at the moment in the right direction.

Thank you very much for your attention.

MODERATOR
MUCHAMMAD ALI SAFA'AT

Thank you Mr. Arsan, and I think we learned important thing, especially the shift from ideological paradigm to right-based paradigm from Turkey's constitutional court.

For the second speaker, I invite Mr. Mourad Medelci, President of the Constitutional Court of the People's Democratic Republic of Algiers. Mr. Mourad, the floor is yours.

SPEAKER 2
MOURAD MEDELCI
(PRESIDENT OF THE CONSTITUTIONAL COURT OF THE PEOPLE DEMOCRATIC REPUBLIC OF ALGIERS)

(First, the speaker speaks Arabic and then continued on using French: Needs proper translation and transcribing in the language used by the speaker to deliver his message).

… Previously, several speakers who have mentioned the same thing in the previous discussions. First of all, we need to pay attention to two things*:* first of all, to look into the

basic of fundamental rights with regards to the complaints lodged. That varies greatly from country to country. Secondly, the approach for basic cases and the tendency of the fundamental approaches, also from our institution for better protection.

Now, allow me to explain the experience of our country. The Constitutional Council deals with two things that I mentioned, to respect the constitution by controlling the law, in the framework of the law. However, the Constitutional Council also plays a control in overseeing the presidential and parliamentary election. The Constitutional Council is expected to resolve electoral disputes before a final and binding ruling.

In the legislative election, the law says that every candidate or political party has the right to file a challenge within 48 hours after the conclusion of the election. In the presidential election, the candidates, the representatives or voters in the case of a referendum, have the right to challenge the results of the election to the Constitutional Council. For example, in the legislative election of 2012, the Constitutional Council received 167 complaints, and after studying and examining them, we found 12 cases that have to do with the distribution of seats, and in the presidential election on April 17 2014, the Constitutional Council received 94 complaints. And you have to note that the rulings, the decisions of the Constitutional Council are final, and there is no appeal that can be made against them as stated in Article 54 of the Constitutional Council Guidelines.

The complaints should guarantee the constitutional rights to vote and to be elected as guaranteed by Article 50 of our Constitution. The Constitutional Council also considers the complaints and we have had experiences in strengthening our own competence to carry out amendments or changes of the law in the future including this year. The evaluations made on our Constitutional Council have shown us the development and importance of the need to consolidate operational mechanism. In relation to that, they have to do with two types of formulations, the adaption for the mechanism for filing the complaints, the need for information to be provided to the citizens, and in this case, the formulation or the formalization of complaints as its stance in Algeria has been noted down at the general election commission after the result has been announced. Their effort is made to reduce the risks of having two separate complaints. As we have seen in Algeria this year, there is direct access to the constitutional council, and the majority of the parliament to obtain this legal disposition. Secondly, it is to open the opportunity for citizens to review the law after meeting some requirements as we have seen that it can happen in other countries, such as Turkey. It is also at to our experience. Our challenges, the challenges that we face is to do our tasks, do our job correctly, leaning on the constitution. And I would like to say thanks to the representatives of other countries for sharing their experiences. Surely, this symposium is an opportunity for us to assert our interests to strengthen the cooperation between

the many Council Courts and equivalent institutions. And we would like to convey our thanks to the Consultation Court of Indonesia for the ability to invite us to be here in this beautiful country and the city of Jakarta. Thank you for your attention.

MODERATOR
MUCHAMMAD ALI SAFA'AT

The development of the authority of Constitutional Council of Algeria, Constitutional Complaint, especially through the authority to decide on Judicial Review and decide on election dispute in Algeria.

We move forward for the thirds speaker; I invite Mr. Jeyhun Garajayev, Judge on the Constitutional Court of The Republic of Azerbaijan to give presentation. Mr. Garajayev, time is yours.

SPEAKER 3
JEYHUN GARAJAYEV (JUDGE ON THE CONSTITUTIONAL COURT OF THE RUPUBLIC OF AZERBAIJAN)

Honorable ladies and gentlemen, in this opportunity allow me to extend our thanks to the Constitutional Court of Indonesia. We would like to inform the participants of this symposium for the development of our institution in Azerbaijan. And, with your permission, we'll talk about the recent development of that institution in our country, and the development of the approach that we have based on individual rights.

A constitution deals with the limitation of the authority of the state and the development can be roughly divided into four phases. The first is the phase before the First World War which is the development of the limitation of the absolute power, the emergence of the written constitution, learning from the experience of the American Revolution, limiting the role of the crown and Australia and Canada as well. The second phase covers the period between the two World Wars. This is marked by the elevation of social rights at the Constitutional Level. Germany, Czechoslovakia, Ireland and Mexico and The Soviet Union experience the same thing, The third phase starts after the Second World War, after the 1940s until 1980's, where the Colonial System fell, as given a lot of benefits to more than 130 countries to adopt their own constitutions, including Indonesia in 1949. There is the Socialist Constitution of Bulgaria, Hungary, and Vietnam. The fourth face begins in 1996 with the emergence of some countries which refused the Soviet Constitutions; and all of the former Soviet countries have adopted their own constitutions, and they included the limitation of the power of the States, the authority of

the States and the guarantee of individual rights, and civil society in general. The constitutions usually include these two things, and constitutionalism in the world is understood as a political and legal phenomenon that guarantees and limits the power of the states. This is dynamic and permanent and significantly influences the legal awareness of its people. (With) the supremacy of the constitutionalism then erodes the illegal legalism, and constitutional provision become parts of the dynamic of lives. Therefore, it should be noted that Constitutionalism is based on the principle of human rights against the public authority.

Therefore, we all know that (*unclear speech*) condition where the State or the State Agency acts in contradiction to constitutions in the first case the parliament can interpret the constitution that causes ambiguity. In the second case where there is no ambiguity, because it is in line with the constitution when it is implemented by the Executives Power, then it is used by it in such a way that causes doubts constitutionally of the law. Therefore, the main function of the Constitutional Review is to reduce this ambiguity by permanent constitutional values. The universality of the constitution guarantees individual rights, even though it has norms, based on the basic norms, it also contains universal values such as what has been expanded first in Europe, which is Human Rights and fundamental freedoms of individual human beings, and we need integral approach to understand universality of law enforcement.

The same issue is also faced by all of the Constitutional Courts, but this is more difficult, where human right is concerned. This creates a distortion to the acceptance of constitutionalism. So, it is not important to accept one and then distort the value of the constitutionalism that is also important. I need to underline that the main task of the Constitutional Court is to maintain, preserve, and protect Human Rights and freedoms. Therefore, the right to lodge a complaint to the Constitutional Court must be acknowledged as fully Human Rights.

To look at the experience of Azerbaijan, the establishment of Constitutional Court in Azerbaijan, was then after the referendum in the Constitution in 1995, and its main task is to build an effective legal protection of constitutional court in 1997. And since 1998, the Constitutional Court has started to function; to become operational.

In our Constitutions, we have the right for every person to lodge a complaint to the Constitutional Court including if the Ombudsman has to do so. Therefore, the right to file a complaint to the Constitutional Court is the right of every person. Every person or individual people, legal persons, citizens, and non-citizens as well.

In the development as we've seen, in 2002, there was an amendment regarding the Constitutional Court, and in 2003, we've adopted a new procedure of framework and an additional mechanism to protect individual's rights. Therefore, we can also say here that individual complaint in our country continues to grow in number and also in variety. We have

had filtering processes. In the last semester of 2015, we have issued 327 rulings and among them, 117 were done based on Constitutional Complaint, which is 35% of all solutions. And if you consider that 70% of the rulings had been made by the Supreme Court, 25 of them are based on Court request, 15% from the Ombudsman. It means that we have many, we have ruled out many cases based on the individual rights. The statistical numbers is 5-10% of all the complaints annually. But this is a large number for constitutional complaint. The practice also covers property, ownership, family, and industrial relations. So, we also address many different aspects. Many different aspects of social life are also addressed. What we seek is social justice. This is something that we need to enforce and achieve for our people. When the constitutional complaint is received, we have to impose certain requirements. After the exhaustion of remedies then, within (6 months) certain number of days after the ruling of the Supreme Court, the decision of the Supreme Court can be annulled by Constitutional Court. Therefore, the ruling of the Supreme Court can be invalidated, and can be annulled. However, we only look at concrete cases of constitutional violations and it's required to note that the abstract control of the authority of the state and the authority of violation to human rights is made, is the authority of the court and the impeachment and in our constitutional court, we do not consider evidence. We are the main authority to interpret the constitutional rights. And we have close relationship with the Venice commission and the European Court of Human Rights. The Venice Commission has been established. And the Constitutional Court of European Countries, based on their request, can receive from their colleagues, and based on their position and similar cases are available in practice. An effective cooperation in this practice is proven. Another legal requirement is that in constitutional complaint, we have to rectify first violation can also to be filed to constitutional court. The constitutional court is a subsidiary agency and will only consider constitutional cases. So the abstract control that is carried out is based on the complaints, other violations, the ombudsman. And the institutional court has the task to preserve the legal system from distortions. To close, I would like to make a small comparative study with regards to the constitutional court systems looking at what the practice of other countries in Russia, Germany, Switzerland, Azerbaijan, constitutional complaint can be filed by individual people, and when we talk about people or person, it's every person, including legal persons and corporations, however, for municipalities that is the implementer of public authority. It is not always that the Constitutional Court is linked to that. First of foreign countries, the object of the Constitutional Complaint might include executive actions, laws, and regulations. The technical requirements deal with the deadline, the use of language, staff's duty. So, all of the important requirements considered when the link and legislative framework, and filing a Constitutional Complaint to the Constitutional Court must be considered before the task of the Constitutional Court can be more harmonious with the provision of the Constitution, and the establishment

of a general practice of law that is based on the constitution. Therefore, this category can be identified quickly, or constitutional conflicts can be identified sooner.

To close, I would like to join with the opinion of Gianni Buquicchio that mentioned the importance of Constitutional Courts.

MODERATOR
MUCHAMMAD ALI SAFA'AT

I think it's the relation between Supreme Court and Constitutional Court. All the previous speakers have been delivered their presentations. And now, we have two Panelists who will add information and response concerning rule and provision of Constitutional Complaints. And, the Committee allocated five minutes for each Panelist. I invite the first Panelist, Mrs. Anar Zhailganova, Judge of the Constitutional Council of the Republic of Kazakhstan. Mrs. Zhailganova, the time is yours.

PANELIST 1
ANAR ZHAILGANOVA (THE REPUBLIC OF KAZAKHSTAN)

Thank you very much.

The Chairman, Participants, and guests,

The Delegation of the Republic of Kazakhstan, on behalf of the Chairman of the Constitutional Council, Mr. Igor Rogov, would like to express gratitude to the Constitutional Court of Indonesia for organizing and holding at the highest level the meeting of the Asian Association of the Constitutional Courts and Equivalent Institutions in the International Symposium. I would like to congratulate with the anniversary of the Constitutional Court of Indonesia and the Independence Day, and to wish all success in the productive work.

Kazakhstan is the only ex-Soviet state with the Constitutional Supervision is carried out by specially established non juridical state body. Its establishment is associated with the Constitution of the Republic of Kazakhstan, adopted on 30th of August 1995 which its 20th anniversary will be celebrated this month.

The Constitution safeguards to the absolute right of everyone to juridical protection of rights and freedoms. Everyone has the right to seek protection of his rights in a court, and also to file a complaint against decisions made in actions taken infringing individual rights and freedoms.

The Constitutional Council of the Republic of Kazakhstan is a state body since February 1996 empowered to infer the supremacy of the Constitution. The power of the Constitutional Council is determined by the constitutional law of the Constitutional Council of the Republic of Kazakhstan. Pursuant to Article 72 of the Constitution and Article 17 of the constitutional law is empowered to decide on the correctness of conducting the elections of the President of the Republic (*unclear voice*) of parliament, and conducting an all nation referendum in case of dispute.

Consider the laws adopted by parliament with respect to their compliance, with the constitution of the republic before they are signed by the president.

Consider a decision adopted by the parliament in each chamber to their compliance with the constitution of the republic.

Consider the international treaties of the republic with respect to their compliance with the constitution before they are ratified.

Officially interpret the standard of the constitution.

The Constitutional Council carries out the preliminary constitutional supervision on law adopted by the parliament before it's signed by the president and all the international treaties are ratified. The subsequent of constitutional supervision is conducted on law of the submission of the national court.

According to article 78 of the constitution, the court has no right to apply laws and other regulatory legal acts infringing of the right and liberties of an individual and the citizen established by the constitution. When a court finds that a law or other regulatory legal act subject to application infringes of the rights and liberties of an individual and the citizen, legal proceedings is suspended and proposed to declare that law is unconstitutional is submitted to the Constitutional Council. All national court, including court of appeal and the Supreme Court are entitled to submit their proposals for declaring a law unconstitutional.

The Constitutional Council's powers, its statutes, and mandatory power of its decisions interplay with the legislative, executive, and judicial branches allows for rights and freedoms to be safe guarded. Besides, the protection of human rights and freedoms constantly enhances in Kazakhstan. For instance, the national scheme, a hundred definite steps, has become a next step to promote human rights and freedoms. This scheme fuses the rule of law, enhances instruments protecting rights of individuals, national companies, and foreign investors. The analysis of the constitutional supervision of states demonstrates that a state chooses its own route of the

constitutional development and mechanism of human rights protection depended on traditions, world view, the level of legal consciousness of each citizen's mentality, and so on. This makes difference; however, we're all united to promote an advance protection of human rights and the rule of law. Thanks for attention.

MODERATOR
MUCHAMMAD ALI SAFA'AT

Thank you very much, Mrs. Zhailganova. And last but not least, I invite Mr. Deolindo dos Santos, Judge Counselor of the Court of Appeal of Timor Leste to give speech. Mr. dos Santos, time is yours.

PANELIST 2
DEOLINDO DOS SANTOS (JUDGE COUNSELOR OF THE COURT OF APPEAL OF TIMOR LESTE)

Thank you very much for Mr. Chairman.

Dear President of the Constitutional Court of Indonesia, Hon. Chief Justices, judges, and all participants in this symposium. Timor-Leste is a democratic, sovereign, independent and unitary State based on the rule of law. It became the first new sovereign State of the twenty-first century, and the third millennium recognizes principle of separation of powers according to the constitution, article 1 number 69 of our constitution.

Honorable participants, in Timor-Leste judicial system not exist in constitutional court is (*unclear voice*) and the Supreme Court of Justice is the highest court of law and guarantor of the uniform enforcement of the law and has jurisdiction throughout the national territory. And it (is) also incumbent on the Supreme Court of Justice to administer justice on material on constitutional case and natural election or election natural.

On constitutional matters, the Supreme Court has the competence as following:

a. To review and declare unconstitutionality and illegality of the normative and legislative acts by the organ of the States.
b. To provide an anticipatory verification of the legality and constitutionality of the statutes of referenda.
c. To verify cases of unconstitutionality by omission.

d. To rule, as a venue of appeal, on the suppression of norms considered unconstitutional by the court of instance, article 126 of our constitution.

Honorable participants, in respect to the point a, b, and c that I pointed above, normally the Supreme Court of Justice of Timor-Leste make abstract review unconstitutionality.

The abstract review only shall be requested by The President of Republic, The Speaker of National Parliament, The Prosecutor General, based on the refusal by the courts, in three concrete cases, to apply a statute deemed unconstitutionality, The Prime Minister, One fifth of the member of National Parliament, and then the last one is Ombudsmen. It means that individual can't request abstract review on unconstitutionality, (article 150 and 151 of Timor-Leste constitution.

Distinguished participants, point d that I pointed is an appeal on unconstitutionality in respect to the principle that the court shall not apply rules that contravene to the constitution of the Republic of Timor-Leste or the principles that contain therein, article 120 of our constitution. Therefore, article 152 of Constitution of the Republic of Timor-Leste (is) established as the following:

1. The Supreme Court of Justice has jurisdiction to hear appeal against any of the following court decisions:
   a. Decisions refusing to apply a legal rule on the grounds of unconstitutionality;
   b. Decisions applying a legal rule the constitutionality of which was challenged during the proceedings.
2. An appeal under paragraph 1.b. (may) be brought only by the party who raised the question of unconstitutionality.
3. The regime for filing appeals shall be regulated by law.

The article 152 of Timor-Leste Constitution provides opportunity for the individual or collective like accused, public prosecutor in criminal case, all participants in civil case and administrative case to file constitutional complaint by the appeal to the Supreme Court when decision of the court at the first instance violates the fundamental rights and constitutional rights of the citizens, or the parties at the process.

Honorable participants, procedures to file constitutional complaint or appeal to the Supreme Court at this moment, based on the Criminal Procedure (Code), Civil Procedure Code, and Administrative Procedure Code.

The decision of the Supreme Court of Justice of Timor-Leste shall not be appealable. It means that no appeal more for the decision. It means that file finalization. It means there shall

be general binding effect on processes of the abstract and the concrete monitory when dealing with unconstitutionality, article 153 of the constitution.

To conclude, I just want to point out that Timor Leste as a new country our judicial system is very open to learning from the other countries which the systems are already complete including the constitutional complaints issues.

Finally, on behalf of the Timor Leste delegation, I would like to thank Honorable President of Constitutional Court of Indonesia who invited us to this very important symposium. I would like to extend my heartfelt congratulations to the Constitutional Court of Indonesia for their 12 years of anniversary. Thank you very much for your time.

MODERATOR
MUCHAMMAD ALI SAFA'AT

Thank you, Mr. Dos Santos. Distinguished participants, Ladies and Gentlemen, we have already got much knowledge and information concerning constitutional complaints from many perspective delivered by the speakers and the panelists. Now, it's time for questions and answers. Actually we have time until 12.15, but because I skip the time for coffee break, maybe we can stop earlier. I give back your right to the time, but of course the committee has already provided coffee and tea if you want, just outside the room.

And for the questions and answer time, please give the question clear and relevant to the presentation. And please, before you say your questions or response, introduce your name and institution. And for the first term, I invite four questions from the floor. Please, two from my left row and two from my right row. I never hear the woman from the floor. Yes, Ibu Armi Wulan and Mr. Sulardi, Justice Palguna, and then, I am sorry, Sir. The ladies again. Please, Mrs. Armi Wulan.

ACADEMIC FROM THE UNIVERSITY OF SURABAYA
HESTI ARMIWULAN

Thank you, allow me to introduce myself. I am Hesti Armi Wulan. I am an academic from the University of Surabaya. I am former Head of the National Human Right Commission from 2007-2010. My first question is addressed to the first speaker. I have three questions that I

would like to pose. First of all, it is presented that the Constitutional Court Republic of Turkey has ruled on several occasions cases based on constitutional complaints. My question is, are those rulings and decisions only rules that there has been a violation of constitutional rights or do you also set up the steps that different state agencies have to take to remedy that violation?

My second question, in our constitution, the Constitution of the Republic of Indonesia 1945, we have Article 28i, Paragraph 5 which stipulates that to uphold a democratic and to protect human right in this democratic country. Then, the human rights of citizens must be guaranteed in the law. My question is that not further elaborated in a lower law? And maybe this mandates the parliament to issue laws implementing regulations that guarantee human rights as protected in the constitution.

My third question, I know that in Turkey you have sort of like our National Human Rights Commission. Your National Commission of Human Rights, now my question is "What is the role of your National Human Rights Commission in dealing with Human Rights violations in your country?" And that is my question to you and I have also a question to Judge of the Constitutional Court of Azerbaijan. He said that is your adoption of cases complaint mechanism is also to guarantee social justice. My question is regarding State Finances, if you receive a lot of revenue from taxes and the usage of that revenue is considered to not be in the best interest of the people, have there been any complaints but individual people saying that how you disburse of fund or use of fund is not for the best interest of the people. Thank you.

MODERATOR
MUCHAMMAD ALI SAFA'AT

I think I have decided.

ACADEMIC
SULARTI

Thank you to Mister Moderator. May peace be with you. Good Morning. I am Sularti from Department of Law, University of Malang. I would like to say that the experiences of the Constitutional Court of especially Algeria, Turkey and Azerbaijan are very interesting and valuable particularly their experiences of dealing with constitutional complaints. I'm impressed by how you consider a lot of human rights of your citizens. My questions is whether you also give the opportunity for complaints to be filed for alleged violations not by the actions of state agencies but by their inaction or by omission, for example cases of lack of development by the government in housing or transportation that they claimed to have violated their constitutional rights. Thank you.

CONSTITUTIONAL COURT OF INDONESIA
I DEWA GEDE PALGUNA

Thank you Mr. Chairman, your honorable guests. I would like to address my question to your Honorable The Chief Justice of Turkey. It is interesting to note here that your constitution directly refers to the Human Rights Court of Europe, European Human Rights Convention I mean. Sorry. So I would like ask you two questions. Firstly, suppose that a Turkey citizen failed to have his or her complaint upheld by the Constitutional Court of Turkey, is there any possibility to resort to the European court of Human Rights of the same case? That's the first question and the secondly, considering that the Turkey refer to rights and freedom within the scope of the European Convention of Human Rights, does it mean that Turkey apply or recognize the principles of direct effect or direct applicability of the European Convention in this case the Human Rights Convention? Thank you very much.

Thank you. The last question, yes please, the lady from the back.

I'm sorry, Sir. It's for the lady behind you.

PADJAJARAN UNIVERSITY

(*Unclear voice*) From Padjajaran University. I want to ask. Since yesterday, we talked about constitutional complaint and we know that the constitutional court has power of constitutional complaint and review of the law. So, we talked about two different things. My question is: "What is the distinctive character of constitutional complaints?" because I feel an interchangeable definition since yesterday. That hen we complain about our rights in the legislative act, the name is review, or judicial review or constitutional review. But, in my opinion, when we talk about constitutional complaint, the pressure point is on object of review, not from the subject. Because since yesterday, the constitutional review, the interpreter interpreted that the constitutional complaint is an individual complaint. So, when individual complaint on the legislative act, the name in Indonesia is Constitutional Review or Judicial Review. So, I think we have to be clear on the definition and the distinctive character about the Constitutional Complaint. And, what is your opinion about the distinctive character of constitutional complaints. Thank you.

MODERATOR
MUCHAMMAD ALI SAFA'AT

Okay, thank you. And all of the questions I can divide into two categories, the first is very general, to all of the speakers. And then, the second is specific, to certain speakers, for example for Turkey and Azerbaijan. So, I'll give time for the first speaker, Mr. Arslan, to give the answer or response, to the question from the floor. Time is yours.

SPEAKER 1
ZUHTU ARSLAN (PRESIDENT OF THE CONSTITUTIONAL COURT OF THE REPUBLIC OF TURKEY)

Thank you, Mister Chairman.

Concerning the first question, from a lady there, from an Academia, I'm sorry I forget your name. The question was whether Turkey has other institutions protecting rights and liberties in Turkey.

Yes, we do have other institutions, such as Ombudsman and National Human Rights Commission. These institutions also have the power to receive a petition from individual and institution in terms of violation of certain rights and liberties. We have also Ethic Commission to deal with the corruption issues or complaints or others and mistreatment of individuals by public authorities. But all these organs are, in a way, just administrative organs. They are not judicially powered organs. I mean, their decisions are not binding judicially. Of course their decisions are advisory, and have certain implications for the protection of rights and liberties. But they are different from the decisions given from the constitutional complaints to the constitutional court, because the decisions of the Constitutional Court of Turkey are legally binding on the legislature, executive and other branches of judiciary. So, this is the most powerful judicial organ in Turkey. Yes, we do have other institutions to elevate the question of protecting rights and liberties.

As to the second question, from University of Malang, whether the individual constitutional complaint also includes an omission and inactivity of public authorities, yes, in usual may also launch constitutional complaint on the ground that public authorities omitted or dissected on certain grounds, but I must say again that the scope of constitutional complaint in Turkey is restricted only to the certain rights and liberties. It certainly excludes some social and economic rights and liberties.

The third question was about direct reference of the Turk's constitution to the European Convention on Human Rights. Yes, if someone failed to get a conclusion of success, to get a successful result from the Turk's Constitutional Court, may also appeal to the European Court of Human Rights, but the Strasbourg Court has repeatedly emphasized that before launching an application to the European Court of Human Rights, someone in Turkey must go to the Constitutional Court first, so the Constitutional Court of Turkey, with the power of receiving constitutional complaint, has been an effective legal remedy to be exhausted before launching an application to the Strasbourg Court. But this doesn't mean that someone, an individual, may not appeal to the Strasbourg Court after he or she exhausted the legal remedy of constitutional complaint before the Constitutional Court of Turkey.

And the second question was about direct effect of European Convention on Human Rights in the Turk's legal system. Yes, perhaps Turkish constitution is the only constitution which explicitly refers to the European Convention on Human Rights. Article 48 of the constitution clearly states as a basic criteria of the European Convention on Human Rights, but we have also article 90 of the Turkish constitution which gives a certain priority to the International Human Rights Conventions *vis a vis* the national law. And the provisions of the European Convention on Human Rights is directly applicable before the Turkish Courts, Judicial Bodies, including the Turkish Constitutional Court, I mean, the courts—like other courts in Turkey—has the power to directly apply the European Convention on Human Rights in cases of constitutional complaint. But, we generally don't need to directly apply the convention because almost every right and liberty, not almost actually, every right and liberty are protected under the European Convention on Human Rights, are also protected under the Turkish Constitution. So, we directly apply the Turkish constitution and we interpret the constitutional rights and liberties, and by doing so, we also directly apply the rights and liberties stipulated in the convention.

And the last question was a rather theoretical question of the distinctive characters of constitutional complaint. Well, for me the distinctive character of the constitutional complaint is its individual nature. In terms of Turkish practice, I would say that the Turk's Constitutional Court has two main powers. First, to reveal the constitutionality of laws in abstract and concrete applications but not everybody may appeal to the Constitutional Court on the ground that any law is not compatible with the Constitution. But, when it comes to the constitution complaints, anybody, any legal and real person may appeal to church of the Constitutional Council court on the ground that his/her or relevant institutions' rights and liberties are violated. So, the constitutional complaint provides every individual, whether they are citizens or not the opportunity to lodge any application on the ground that their rights and liberties are violated. Thank you very much.

MODERATOR
MUCHAMMAD ALI SAFA'AT

Thank you, Mr. Arslan. Next, I'll invite Mr. Medelci to give a response to the question from the floor. Time is yours.

SPEAKER 2
MOURAD MEDELCI (PRESIDENT OF THE CONSTITUTIONAL COUNCIL OF THE PEOPLE'S DEMOCRATIC REPUBLIC OF ALGERIA)

As a very important question has been addressed to me, then, I would try my best to respond to it. My response is that I'd like to state clearly that all citizens of Algeria *are entitled to* exercise their rights in this matter. Until now, the system has been going well and complaints filed to the Constitutional Courts are something that we often see and there are a great number of them that we have seen. In the future, if those complaints are about law, then, they will be brought to the Constitutional Council to be considered. At this moment, there is no opportunity to bring them directly to Constitutional Council or the opportunity for individual citizens to file complaints. But they can file complaints to the Supreme Court, instead. And the Supreme Court has to consider those complaints.

The general issue this morning has been the tasks or the roles or the oversight, and this is done by more than one institution, for example the National Assembly that also acts as an oversight to the government. Are they succeeding in this matter? They are able to evaluate, and summon even, different members of the government, officials, call them individually to give accounts, to answer to the parliament as they are responsible for certain things *to the public*. There are also different commissions, the National Anti-corruption Commission for example, there is a national commission on human rights. And their report to the President directly, and this National Human Rights Commission, they publish recommendation as well to avoid violations in the future. There are also some constitutional processes on their way in Algeria. Some of them will come into effect next week, and others, later this year. There is an amendment for example, on the National Human Rights Commission. They are established and protected by law, so the constitution explicitly mentions the commission. And, there are…we are also seeking to expedite the existing processes and to expand the control over the role of the states and related to citizens 'rights. As was previously mentioned, there are some challenges, and every country needs to try to overcome those difficulties. And we have seen or heard some ways other countries have tried to do that, to manage that including, for example, traffic congestion like setting up cameras and other ways. Thank you.

MODERATOR
MUCHAMMAD ALI SAFA'AT

Concerning that the constitutional council of the Azerbaijan, it's to make sure of the fulfillment of the social justice. And, is there any case concerning the state budget that is not fully used to fulfill the social justice. And also please respond to the other general questions, Mr. Garajayev, time is yours.

SPEAKER 3
JEYHUN GARAJAYEV (JUDGE OF THE CONSTITUTIONAL COURT OF THE REPUBLIC OF AZERBAIJAN)

I would like to respond to the question of social justice. It is a relevant issue. And until the third congress in the future, it would be good to have this team also incorporated in our discussion. Social justice is indeed a relevant issue. I remember the presentation of our colleague from the Netherland. The mechanism should be strong since they are passive body, and they are not implementers of the law. And, it is the law that provides how budged expand. It also has to do with the financial capacity of the state. European countries are also careful to address this, because some countries are not so optimistic if I may say so, because the fulfilment of Social Justice of the people in one country depends a lot on the financial strength of that country. There are also some issues, such as; payment of pensionS and the issue is the equality of the category because veterans usually have better pension.

At that time, the Constitutional Court expounds on this idea on the value of equality. For what is happening now in Germany, where the pension is being reduced. And Germany is a developed country that has high retirement package. They are doing that , so what I'm saying is that, the performance of rights of the citizens depend greatly on the financial capacity of that country. We have stated that Azerbaijan would like to pursue this further, but apparently we need to be more careful, such as: when we had devaluation; there were some groups of society who did not approve of this. But, at the time they filed a Constitutional Complaint based on the devaluation of the national currency. This case was also resolved by the Constitutional Court of Azerbaijan.

The Constitutional Court considers the rulings of other courts. And the Constitutional Court has the obligation to make sure that its rulings comply with the Constitution of the Country. The Constitutional Court has a task to protect the Constitution and to ensure that constitutionalism is applied, including, in terms of the protection of individual rights. For

Constitutional Control, this means that all the highest Constitutional Organs, they have to work in harmony, and in compliance with the constitution to avoid any violation.

Thank you for your attention.

MODERATOR
MUCHAMMAD ALI SAFA'AT

(*Unclear voice*) fifteen minutes and maybe we can open two responses or questions from the floor, please. Yes, from this row, then from my right's row. Please, from this row, Mister… And please, because we have the limit for time, please mention for the speakers.

SPEAKER

Okay, thank you for all of speakers, straight forward to the core issue, related to the protection for fundamental human rights in the private sector. Because if you look at Indonesia and other third world countries, we have huge and massive natural resources but in the exploitation of the natural resources, they have many problems in the contract, particularly in the private sector contracts, and it contains what we call the black clausal that may damage and threat the fundamental rights of people.

So, what is the rule, and what we call the existence, rule and protection from the Constitutional Court in order to avoid the deprivation of the fundamental rights of the people to their constitutional rights? Maybe, do you have experience in your countries, for all speakers, particularly for protecting the natural resources which is part of the fundamental rights of people for example in accessing good environment. That's the issue: how to protect the fundamental rights of people from the private sectors that contain black clausal in their contracts. Thank you.

MODERATOR
MUCHAMMAD ALI SAFA'AT

Thank you. The second from my right. Okay.

DELEGATE FROM INDONESIA
H. M. ARSYAD SANUSI

Bismillahirrohmanirrohiim, assalamualaikum Warahmatullahi Wabarokatuh

Good morning, may peace be with you, Mister Moderator, Dr Muchammad Ali Safa'at. After listening to what has been presented by all the speakers from Turkey, Algeria, Azerbaijan, and the panelists from Kazakhstan, Chile and East Timor, Timor Leste, allow me to pose a question. From all of the speakers and the panelists, I haven't heard an explanation on how the guarantee for the execution of the ruling of the Constitutional Court, for Constitutional Complaint cases, excuse me. We know that the rulings, the decisions of the Constitutional Court are self-executing and non-self-executing. There are two types of rulings. At least that's what we have here in Indonesia in our Constitutional Court. What I would like to hear from you is that how do you execute your rulings? Even though your rulings are binding, what if an organ challenged by a practitioner would not abide by the ruling issued by the Constitutional Court? What would you do then? Thank you.

MODERATOR
MUCHAMMAD ALI SAFA'AT

For all of the speakers, first, concerning the protection of the constitutional rights of the people, concerning the natural resources, and then the second is the execution or the enforcement of the Constitutional Complaint's decisions. And the first time, I invite Mr. Arslan, the time is yours.

SPEAKER 1
ZÜHTÜ ARSLAN (PRESIDENT OF THE CONSTITUTIONAL COURT OF THE REPUBLIC OF TURKEY)

There are two very good questions. Concerning the first one, the Turk's constitutional court does not explicitly mention the right to natural resources. I told the people (the right) to natural resources, but we have certain provisions protecting the right to environment. This is generally considered as the third generation rights and liberties. But there is a tendency that the right to environment must be part and partial of the basic right to life. And in Turkish Constitutional Court Case Law we also refer to the right to environment as a part of the fundamental right to life, because individuals are entitled to live in a peaceful and clean environment. So, is that a constitutional right? But it is not within the scope of constitutional complaints directly. Therefore, we don't have so far any decision concerning the right to natural resource. But we have some decisions emphasizing the importance of living in a clean and healthy environment. So, I guess, in the future, we will have certain judgment and case law concerning the right to natural resources. But at this moment, given the fact that we have only three-year experience

in the field of constitutional complaints without any direct judgment concerning the right to natural resources. And for the second question is concerning the execution of the rulings of the constitutional court in the field of constitutional complaints, that is again a very vital question asked on a rare occasion. I must first of all say that the decisions or judgments of the Turkish constitutional courts on the constitutional complaints are legally and constitutionally binding on every legal and real persons and every state organ, and I can say that almost all of the decisions are so far delivered by the Turk constitutional court, have been executed by the executive. This is a very important advantage for the Turkish Constitutional Court. I mean the courts in Turkey are the court executive, especially execute the decisions and demand the decision of the Turkish Constitutional Courts. We don't have any significant problem in terms of executing the decisions of the constitutional courts. I must also say that the national courts in Turkey have much more willingness to implement the decisions of the Turkish Constitutional Court rather than implementing or executing the judgment of the European Court of female rights. I would give you the example of what we call the surname case. In Turkey we have a provisioning the Turkey civil court saying that a woman can get her maiden name after marriage but alongside with her husband's surname. So she cannot take her maiden name after marriage alone and the staff record on many occasions found a violation of right to respect family, life or private life. But in Turkey after these violation judgments, the courts continued to implement the Turkish civil court, despite the clear judgments of the European court of human rights. But, once the Turkish Constitutional Court has found a violation of the right to privacy on the same ground, the courts in Turkey at every level started to implement the decisions of the Turkish Constitutional Court. So, that's a clear example of directly executing the decisions of our judgments of the Turkish Constitutional Court. And as I said this is a very big advantage on the part of implementing constitutional complaints and decisions in Turkey.

Thank you very much.

MODERATOR
MUCHAMMAD ALI SAFA'AT

Thank you, Mr. Arslan. And please give a brief answer, Mr. Medelci. The time is yours, Sir.

SPEAKER 2
MOURAD MEDELCI (PRESIDENT OF THE CONSTITUTIONAL COUNCIL OF THE PEOPLE DEMOCRATIC REPUBLIC OF ALGERIA)

To respond to the question, within the authority of the Constitutional Council, we have to know the scope of what we can do, because other agencies are also equipped with the authority to protect national resources. In Algeria, there are some laws, legal provisions that protect the

right in question, for example critical national resources such as land. We, in Algeria, we use land to provide food for our people. Therefore, any land that can serve that function should be preserved and they are protected by law. Some decisions must be taken by high authority if it has to do with the rights of the public with regards to the use of the land. We are considering amendments to be done, including the inclusion of the right to a good environment, should be considered as a human right. It is the right to clean the environment and that right should be included in the law. With regards to the execution of a decision of the constitutional court, that has been explained previously in cases of constitutional complaints, it's been explained before that we don't have mechanism to receive complaints from individual people, but we do have role on the constitutionality. However, for things that we have no experience, we would like to listen and learn from the other colleagues. With regards of the execution, if the petition is approved whether we are dealing with an action or the law or a provision and the law, we worked with the government in this case to enforce the rulings. There are different processes to deal with laws and provisions that are ruled unconstitutional. However, we feel that we can gain a lot from the experiences shared here today. At this time, there are things that the council still cannot do and I think there are things that we can follow up on from this symposium as we also have followed up on the meetings of the Venice Commission. Thank you.

MODERATOR
MUCHAMMAD ALI SAFA'AT

Thank you and next speaker, Judge of the Constitutional Court of the Republic of Azerbaijan, Mr. Garajayev. Mr. Garajayev, time is yours.

SPEAKER 3
JEYHUN GARAJAYEV (JUDGE OF THE CONTITUTIONAL COURT OF THE REPUBLIC OF AZERBAIJAN)

We will talk about the protection of the environment. Protection of the environment is a new right. Something that can be addressed by the administrative court perhaps, and we don't look into factual by factual or plan by plan, but I think this requires an action to be filed at a lower level court first, perhaps for example, the request to seize the operation to close a plant. Land also is a similar issue. Azerbaijan is an independent country. And if a private corporation is seeking exploitation in our country, oil, for example, a contract must be made beforehand. And it is possible that like in Germany, the Constitutional Court seized the construction of a nuclear power plant which was half-done since they found that the construction project would cause some damages in laws on part of the public. So, cases like that can be filed by the Constitutional Court. With regards to the ruling decision s of the Constitutional Court, the

rulings can be seen as being on the same status as constitutional provisions. The Constitutional Court, for instance, it would be easy for the Constitutional Court to rule and to disregard rulings of other courts and to rule differently. It would be more difficult if we request that they provide some recommendations to the government, to the national or the local government as it happens in Constitutional Court in Azerbaijan where many people have referred to the Constitutional Court, thinking that they can annul different laws.

MODERATOR
MUCHAMMAD ALI SAFA'AT

Ladies and Gentlemen, finally we are in the end of this session. And please allow me to read a very brief abstract conclusion. The first, all of the courts put the protection of the Constitutional Rights as the main important function. And second, besides constitutional complaint as a certain mechanism, actually we can understand constitutional complaint in broader sense. That means the effort to protect constitutional rights in many ways, for example through judicial review mechanism and also through the authority to decide on the result of the election. And I thank you to all of our speakers today, and also for panelists, and also for the active participation of the distinguished participants. Please allow me to close this session. *Assalamualaikum Warahmatullahi Wabarokatu*. Can we give applause to all of us?

MC

Ladies and Gentlemen, we have come to the end of session two and we would like to inform you that session three will begin at two o'clock this afternoon. Lunch is provided in Spectrum Room on the second floor and enjoy your lunch. Thank you.

Sunday, August 16th, 2015

(14:20 – 15:45)

Fairmont Hotel, Jakarta-Indonesia.

SESSION III

SESSION THREE
PROBLEMS AND CHALLENGES IN DEALING WITH CONSTITUTIONAL COMPLAINT CASES

Dr. Zainul Daulay, S.H., M.H.
(Dean of the Law Faculty of Andalas University)

Ladies and Gentlemen, now we will continue our presentations in session 3 and I would like to invite our moderator, Mr. Zainul Daulay, dean of the law faculty of Andalas University. And we have two speakers here, firstly, Mr. Mikhail I. Kleandrov, Judge of the Constitutional Court of the Russian Federation; secondly, Mr. Mukambet Kasymaliev, President of the Constitutional Chamber of Kyrgyz Republic. Please come to the stage, our Excellencies.

And I would like to give the floor to our moderator, Dr. Zainul Daulay. Please.

MODERATOR
DR. ZAINUL DAULAY

Thank you.

Assalamu'alaikum Wr. Wb.

Honorable delegates and Ladies and Gentlemen, this session is the last session we are going to talk about the problems and challenges in dealing with constitutional complaints cases. In these last sessions, we are going to discuss about some issues and challenges passed by the Constitutional court of various countries implementing the authority of constitutional complaint mechanism. Some of the problems are the overburdening cases submitted to the constitutional court, potential on institutional conflicts and the lack suffered from the organizational structure and experts.

Ladies and gentlemen, the third speaker is Mr. Mikhail Kleandrov. He is the judge of constitutional court of Russian Federation. He is also a professor of law.

And the second speaker is Mr. Mukambet Kasymaliev, President of Constitutional Chamber of Kyrgyz Republic. Ladies and gentlemen, we invite Mr. Mikhail Kleandrov to deliver his speech. And it is yours, the time.

SPEAKER 1

FROM THE RUSSIAN FEDERATION
MIKHAIL KLEANDROV

Thank you Mr. Moderator, as I mentioned earlier and as mentioned by previous speakers, I would like to congratulate Prof. Arief Hidayat, and the judges of Indonesian Constitutional Court, the Secretary General of the Indonesian Constitutional Court and also the researchers and all legal practitioners in Indonesia for the twelfth anniversary of the Indonesian Constitutional Court and also for your Independence Day which will be celebrated tomorrow.

In the context of the problems and challenges, I think it will be very interesting to share the experience of the Federation of Russia Constitutional Court. My paper is under the theme about the institution of constitutional complaint in the Federation of Russia. And I will read it out. Individual complaint of citizen on violation of his fundamental rights and legitimate interest has been initially admissible at the Constitutional Court of Russia from the very foundation of the court. It was stipulated as early as in the law of RFSSR on the 6th of May at that time it was considered as constitutional review of the law enforcement practice on the Constitutional Court of the Russian Soviet Federative Socialist Republic. After the renowned event of October 1993 which was halted in a temporary suspension of the activity of the constitutional court of Russia for 1.5 years and after the adoption of the new constitution of the Russian Federation on 12 December 1993 pursuant of section 4 of article 1- 5 of the letter particularly of the constitutional court of the RF began to review constitutionality of the law applied in a concrete case–in accordance with the respective federal law. The Federal Constitutional Law of 21 July 1994 "On the Constitutional Court of the Russian Federation," was amended seven times. The named law contains a particular Chapter VII (*transcriber note: the paper stated XII, the interpreter said VII*) named "Consideration of cases on the constitutionality of laws upon complaints on violation of constitutional rights and freedoms of citizens."

From the moment when the law came into force it was assumed that it would be either citizens of the RFSSR or the Russian Federation, or foreign citizens, as well as persons without citizenship who would apply to the Constitutional Court with complaints on violation of their constitutional rights and freedoms. However, the Constitutional Court itself by a number of its own judgments has expanded this list. As a result, the associations of citizens are also entitled to apply with constitutional complaints, including religious organizations, joint-stock companies, partnership companies, limited liability companies, state-owned enterprises, municipal entities, national minorities, national-cultural autonomies and structures thereof acting on federal and regional levels.

Taking into consideration that among those entitled to apply to the Constitutional Court of the Russian Federation in favor of citizens are the Ombudsman, which he does on the average 6-7 times per year, and the Prosecutor General of the Russian Federation, which he has not done yet, it is obvious that in the Russian Federation a rather wide range of subjects is entitled to apply to the Constitutional Court of the Russian Federation with complaints on violation of constitutional rights, freedoms and interests, either directly, or indirectly. From about 20 thousand complaints and other applications submitted to the Constitutional Court annually, the share of constitutional complaints of citizens is sufficiently higher than 90 percent.

And, obviously, within this stream of complaints and applications there are a lot of those declared by the Constitutional Court inadmissible; mainly – due to their non-constitutional nature, and due to that the issues addressed therein are subject to be resolved and are virtually resolved by other judicial bodies, or due to that a citizen applies to the Constitutional Court not in relation to violation of his rights and freedoms, but in defense of a certain public interest that he comprehends in a specific way. At the present time, since 2010 the Constitutional Court of the Russian Federation does not consider complaints if the contested law is only subjected to application in a concrete case. Currently, the law stipulates some extra filters for the constitutional complaints of citizens which allow the constitutional court to devote its main attention to those cases which concern violations of genuine constitutional rights and freedoms of citizens.

Among the other problems of the constitutional justice mechanism in Russia the non-systematicity thereof should be mentioned. In the case is that Russia is a federative state, and the constitutional justice is not limited to only the Constitutional Court. It is carried out, as well, within the limits of their own discretion, by constitutional and statutory courts of the constituent entities of the Russian Federation; these are the courts of regional level, which amount to 18. Whereas, in Russia there are 85 constituent entities of the Federation; and they don't constitute any system with the Constitutional Court, neither in organizational, nor in institutional, nor in instantional sense.

Each has its own legal basis for the organization and procedural activity. In 32 entities of the Russian Federation where such court has not been created, their constitutional statutes stipulate certain rules regarding such courts a sufficient share of those entities with regard to this issue has special regional laws on such courts.

Periodically, the issue of reasonability of empowering the Constitutional Court of the Russian Federation to review final judgments of constitutional courts of the Entities of the RF is

raised in the Upper Chamber of the Federal Parliament of Russia and in legislative bodies of the constituent entities of the Russian Federation. Thus, the deputies of the Legislative Assembly of St. Petersburg made such a proposal in late 2011, alleging as a reason that implementation thereof would let to provide for the conformity with the Constitution of the Russian Federation of the case-law of constitutional courts of entities of the Russian Federation, and would establish an additional mechanism to provide legal safeguarding of the Constitution. The Lower Chamber of the Federal Parliament did not give support to this proposal; however, there are other suggestions in this regard.

In fact, the existing asymmetry of the situation, when in a quarter of entities of the Russian Federation, such courts have been created and are functioning, and in three quarters – not currently, this issue is solely a prerogative power of an entity of the Russian Federation, does not anyhow promotes any measures of perfection of constitutional justice.

Moreover, the procedural law that actually governed about constitution. The constitutional court, the presence of institutional complete of Russian Federation, it is actually believed that the principal issues cannot be implemented in the legal system.

In this situation, I believe, following the example of justice of the peace system, it is at least necessary to adopt a decision on creation of constitutional statutory courts in all the entities of the Russian Federation by means of a federal law; nevertheless, to provide all entities of the Russian Federation with wide discretionary powers – with respect to organizational resources and others, to enshrine in the said federal law if it is found reasonable – of a two-instance constitutional justice power, or, which is even better, to enact a stand-alone federal law on constitutional and statutory justice, which would regulate the constitutional procedure legal relationships both on the federal level and in the entities of the Russian Federation. Considering even not federative state where such laws exist, the presence of the institute of a constitutional complaint of citizens in the Russian Federation significantly intensifies legal defense of the fundamental rights and freedom of citizens, promotes significance thereof. It is fair to say, that the availability of such an institute to a large extent determines the reason of existence of the Constitutional Court and, on the contrary, the absence thereof would significantly devaluate the constitutional justice in Russia, would decrease the level of constitutional protection of fundamental rights and freedoms of human and citizen.

The legislation, as well as the adjudication practice of the Constitutional Court of the Russian Federation concerning consideration of complaints of citizens on violation of their fundamental rights and freedoms, is on that level which bears evidence of that they will comply with international standards for constitutional justice, if and when such standards are

elaborated. However, with no doubts, in our country, there are certain peculiarities concerning the conditions. Thank you

MODERATOR
DR. ZAINUL DAULAY S.H., MH.

Thank you very much, Mr Kleandrov for sharing your presentation to solve the problems and challenges dealing with constitutional complaints in your country.

The next speaker is Mr. Mukambet Kasymaliev, the President of the Constitutional Chamber of the Kyrgyz Republic. Time is yours.

SPEAKER 2
FROM KYRGYZ REPUBLIC
MR. MUKAMBET KASYMALIEV

I would like to personally congratulate Mr. Arief for the 12th anniversary of the Indonesian Constitutional Court and for the 70th anniversary of the Indonesian independence. My paper is related on the topic we have in today's discussion, which is constitutional complaints. Based on the Kyrgyz law, there is a model of abstract control for constitutional complaints. Every person has the right to challenge the constitutionality of a law and other normative legal act in case he/she believes that these acts violate rights and freedoms in the recognized Constitution.

It should be emphasized that the legislation of our country gives the citizens the right to direct appeal to the Constitutional Chamber of the Kyrgyz Republic. It should be noted that the constitutional complaint mechanism in the Kyrgyz Republic provided by the constitution and the legislator is simplified to a minimum. However, despite this, the Constitutional Chamber is faced with problems of appropriate submission. Many applications have been received by the *Ombudsman* and others. However, the most have come from civilian citizens. We have an abstract model of control where every person can file a complaint even if the violation has occurred not to their own constitutional rights but they feel that there is something wrong with the rights of others. Statistics shows about 51 percent of the received applications were refused. At the same, the highest percentage of the refusal has been on appeals received from citizens. The main reason is the petition filling to make a requirement. The petitions, the complaints have to meet the requirements provided in the constitutional law of the Kyrgyz Republic.

We, in accordance to the law, grounds for the considerations of the case shall be the uncertain discovered in the respect of concordance with the Constitutional Law or other

normative regulatory act. The complaint of citizen must contain substances of uncertainty in respect of concordance with constitutional of the law provisions. Without substances of such uncertainty, the complaint of the citizens may be recognized invalid.

The circumstances on which the party bases its claims as well as evidence, confirming the fact presented by the party. The opinion of the applicants in the respect to the matter of question as well as the legal substances with reference relevant norms of the constitutions. There are also stipulations in practice when the complaint raises the questions not about the constitutionality of provision of the law, but about amendment of current provisions of the law or filling a gap in the law that is the competence of the legislature. A situation where a large share of refusal to accept the proceedings are the complaints received from the citizens can be explained by the following the reasons: lack of legal knowledge among citizens, among admissible criteria, shortage of highly qualified experts, the constitutionalists the lack in the universities, comprehensive training system of qualified lawyers or attorneys, the constitutionalists, legal nihilism, in the general population.

A key issue in this situation is the problem of legal education of the population due to geographical location of Kyrgyzstan, the majority of our population lives in remote mountainous area where there is no internet and other information and communication tools. Most citizens know little about the means to defend their legitimate interest in the Chamber. They do not understand the procedure of constitutional jurisdiction. They are unable to hire a qualified lawyer whose services are not cheap these days. All of these are resulted in an increase in a number of refusals for admission of the complaints.

Naturally, the Constitutional Chamber does not consider civil administrative criminal and other category of cases. This is a sole responsibility of Court of General Jurisdiction. Judicial Acts which are based on provisions of law or other normative regulatory acts which are declared unconstitutional shall be revised by the Court, which adopted such acts in each concrete case based on the appeal of the citizens whose rights and freedom were affected. In order to overcome the above problems and challenges related to the constitutional complaint, the Constitutional Chamber develop unimplemented system of electronic appeal of citizens, regularly conduct trainings, seminars and workshops for representatives of civil society on procedure of citizen complaint to the authority of the constitutional control, organize summer school of constitutionalism for NGOs, academia, government, the media and lawyers. Of course the Constitutional Chamber does not consider civil and criminal cases because it’s the authority of the General Court. The Reform legal action and based on norms can be revised by the Court. And we also train and inform to the people so that they understand about the highest level institutions in our country. We send out memos containing all the requirements to submit

a complaint to ensure the transparency of constitutional procedures.

And, when we try a case, we always invite media representatives and we also inform them about the case considered. We give the opportunity to take pictures and video, and we also disseminate the procedures on how to file a complaint to the Constitutional Chamber. And, we also provide an example of video clip on how to submit a complaint on the procedures for the filing of the Constitutional Complaints to the Constitutional Chamber which clearly affected the rules and procedures. During trainings and summer schools of constitutionalism, we draw attention of the Head of the higher education institutions on detailed trainings of students on the rules and procedures for handling complaints to the Constitutional Chamber, and representatives of legal communities to improve the level of qualifications of lawyers, providing legal service to the citizens regarding the appeals to the authorities of the constitutional control of the Kyrgyz Republic.

The need to increase public confidence is defined as one of the strategic directions of the Constitutional Chamber in especially developed and approved development strategy for 2015-2020, strengthening the citizens' trust to the Constitutional Chamber, and increasing the transparency of its activities. A clear and coordinated sequence of staffs on information and communication, attraction with public institutions, and all interested parties are important steps to eradicate the difficulties and problems related to the Constitutional Complaints.

Once again, I would like to thank everyone and especially the Chief Justice, Mr. Arifin Hidayat, and all the participants for their participation in this International Symposium. Thank you for your attention.

MODERATOR
DR. ZAINUL DAULAY S.H., MH.

… And actually we have two panelists that will give their speeches here. The first one is Mrs. Hla Myo Nwe, member of Constitutional Tribunal of the Republic Union of Myanmar. Time is yours.

PANELIST 1 FROM MYANMAR
HLA MYO NWE

Hon. Chief Justice of the Constitutional Court of the Republic of Indonesia,

Hon. Delegates,

Hon. Judges,

Hon. Moderator, Dr. Zainul,

And Hon. Speakers,

Very good afternoon. We are very pleased to meet the distinguished participants, Delegates from member states of judicial (03:38), and representatives of relevant institutions and regional organizations from other regions.

First of all, I would like to express our special thanks to the Chief Justice of the Constitutional Court of the Republic of Indonesia, and President of the Association of Asian Constitutional Courts and Equivalent Institutions, His Excellency, Arief Hidayat, to extend the kind invitation to International Symposium on Constitutional Tribunal of the Union of Myanmar, and to extend a warm welcome and hospitality to the delegation.

We also would like to convey our heartiest congratulations to the Constitutional Court of the Republic of Indonesia for successful occasion of its 12th anniversary. It is our pleasure and privilege to have an opportunity to brief all of you about the Constitutional Tribunal of the Union of Myanmar. We are the very new institution. It was established only on 30th March 2011, and the authority and organizational structure is regulated by the constitution. Session three to do of the constitution provides functions, and the duties of the Constitution Tribunal. The Tribunal is authorized to examine the conformity between the constitution and the laws elected by the legislative authorities to interpret the provisions of the constitution to decide constitutional disputes between parliaments, regions or states or self-administered areas and to check the activities of the executive authorities.

The president, speakers of the national parliament or union parliament, the chief justice of the union Supreme Court, the chairperson of the union election commission, chief ministers of region of states, and speakers of regional, parliament or state parliament are entitled to submit the case to the Tribunal. Apart from those entitled to present the case, the authorization and the function within the normal judicial system of the Constitutional Tribunal is not available for submission by other persons, individuals or organizations on constitutional complaints.

According to the provisions of section 322, our tribunal has the power to decide the issues whether the acts or laws made by authorities concerned are in conformity with the constitution. In other words, the Tribunal shall have to decide the constitutionality of the laws and actions done by authorities, but the Tribunal has no authority to deal to the right complaint of the individuals. There is no doubt that the constitutional complaint represents an instrument for protection of the basic rights and freedoms of citizens, although the scope of authority which educates constitutional complaint does not fall within the function of the Constitution Tribunal. However, if there was an allegation that the defendant was convicted under representative law,

which was alleged to be contradict with the constitution, then this case shall be referred to the constitutional tribunal through the Supreme Court, together with the recommendation of the chief justice.

Section 17 of the law of the constitutional tribunal provides that if there arises a dispute relating to the question of the constitutionality of any law during the hearing of case by any court, the State Court shall see the proceedings and shall refer this case to the Tribunal. The decision of the constitutional tribunal shall be applied to all cases with respect to similar disputes. The right to constitution remedies was authorized to the Supreme Court, since 1947 under the all constitution of the union of the Burma. The Supreme Court shall have the power to issue directions and the nature of *Habeas Corpus*, mandamus prohibition, and special writ appropriate to the rights guaranteed in the state constitution. Except in times of invasion, rebellion, insurrection or grave emergency, no citizens shall be deemed redressed by to process of law to any actionable wrong doings to or suffered by him.

The constitutional complaint was re-introduced into the Myanmar legal system only in 2008 under present constitution. The authority is given to the Union's Supreme Court. The citizens normally apply the writs when they feel that the regular traditional procedures for protection of their rights are exhausted. The individual citizen who feels that their fundamental rights has been breached due to the decision made by judicial or administrative authorities is permitted to file a complaint to the Supreme Court by meanings of applied writs under Section 378 of the constitution. They may take resolution and remedies from the Union Supreme Court instead of the Constitutional Tribunal. Based on the rules of procedure, the Supreme Court is the main body which deliberates and renders a decision regarding individual complaints with regards to constitutional rights. When all other legal avenues have been exhausted, the constitutional complaints can be submitted, thus providing another legal recourse. The constitutional complaints are the last recourse with the protection of constitutional rights and fundamental rights can be requested. Citizens normally apply writs only after normal judicial procedures for protection of the rights are exhausted. The use of constitutional complaints for protection should be available only for the fundamental rights guaranteed in the Constitution of the Republic of the Union of Myanmar in order to develop remedies from the claims from the outside. The method of work and procedures of the Supreme Court are regulated within the rules of procedures of the Court. Under these rules of procedures, in cases of Writ Application Complaint, a Preliminary Hearing is to be held and is to be assessed by the Preliminary Judgment Board which composed of two or three justices, led by the Chief Justice.

By these rules, the Writ Application Complaint filed by individuals are obliged to be present

immediately for Preliminary Assessment or the petitions are to be conducted or decided by the Final Decision Board. The process for the Application of the Constitutional Complaint by an individual is separated from other general legal issues.

The Tribunal always upholds the Principles of the Constitutions Protection and Development of the Constitutional Rights and protects the fundamental rights of citizens. Within the framework of the its competency, it is the task of all Constitutional Court including the Myanmar Constitutional Tribunal to ensure Constitutional Rights are to be protected.

Although, there are diversity of Jurisdiction, the consensus is all Constitutional Courts contribute to protect and can remedy the Constitutional Rights. The Myanmar Delegations formerly believe that we may get valuable resources through these discussions.

The Myanmar Constitutional Tribunal wants to take an opportunity to learn from other countries that face complicated problems while implementing this mechanism. Indeed, one of the most interesting aspects of this symposium, that it provides the delegates with the opportunity to learn from the wisdom and insights of distinguished from a number of countries in Asia and other International and Regional Organizations from other regions. Constitutional Courts Councils and all Equivalent Institutions from Asia and other regions need its commitment and precautions to enhance the protection of Constitutional Rights.

Thank you very much. And sorry for my very unpleasant voice as I caught serious cold since last night. Thank you for giving me the attention.

MODERATOR
DR. ZAINUL DAULAY, S.H, M.H

Thank you very much, Mrs. Hla from Myanmar.

And the last Panelist is Mr. Khalil Rahman Motawakkel, Secretary General of ICOIC of Afghanistan. The time is yours.

PANELIST 4 FROM AFGHANISTAN
MR. KHALIL RAHMAN MOTAWAKKEL

Thank you very much. First of all, I would like to deliver my special message to His Excellency Chief Justice of the Constitutional Court of Indonesia, and that is *Selamat Ulang*

Tahun Mahkamah Konstitusi Indonesia (Happy Anniversary to the Constitutional Court of Indonesia).

Excellencies and Honorables.

It is a pleasure for me being a participant of this important International Symposium on the Constitutional Complaint Mechanism. Based on the agenda, I have been asked to discuss the Challenges facing the Constitutional Complaint Mechanism given the existing time frame, I am confident that I cannot cover all challenges as well as will not be able to give detailed information on the subject matter. However, I will try my best to offer a list of few challenges that can be explored individually later on. Please note that the examples brought in are by chance not by default.

The first challenge that can be identified is the power relationship between the Supreme Court and the Constitutional Court and the Equivalent Institutions. Clearly speaking, a kind of conflict over jurisdiction, one example is from Afghanistan. The Constitution of Afghanistan do not allow any law under any circumstances to exclude any case from the jurisdictions of the Supreme Court and submitted to any other institutions including the Afghanistan Independent Commission for constitutions oversight. Therefore, the Afghanistan Independent Commission for Constitution oversight cannot take any case of constitution violation until the constitution of the country is amended. The authority; and the authority is not given to the Commission and questioned. Certainly, given the recognition of the institution, the amendment requires time and challenge, and resources. In this respect, a secondary legislation cannot resolve the power relation between these two separate institutions.

The other challenge can be posed by question. Do people want to file their case into the Constitutional Court and oppose conflict country? Certainly. to answer to this question we need to do and examine the public perception of the court in a post-conflict country. An example was sufficient. In a post-conflict country, the public perception of the court is not very positive, unfortunately. People consider the court as one of the most corrupt institutions in the country. According to the Asia Foundation Survey conducted in 2013, the level of public confidence in the Judiciary and Court is 43 % out of 100. People think that 33 % of corruption in the country arises from interaction with Judiciary and Court. Given this perception, people prefer to refer to informal Justice and Institution for their dispute resolution. Thus, I am thinking that alongside with the operationalization of this concept, there is a need to restore the citizen's trust to public court.

As I explained earlier, in most of conflict affected countries and post-conflict countries, for

example Afghanistan, many people refer for their dispute resolution to the informal justice. The question may arise here, about the nexus between the formal and informal justice, or plainly speaking, restorative justice and constitutional justice. Today we are discussing a very important topic, and at the same time there are a number of large international development agencies that they are placing their efforts and enhancing their capacity of informal justice in post-conflict countries. For clarification, informal justice and institutions are informal platforms for dispute resolutions such as local councils, Jurgas, Syuras in my country.

In 2013, in Afghanistan, according to the survey that I named, 36% of the cases have been taken to the informal justice and institutions. Only 27% of the formal justice of the cases has been taken to the formal justice and institutions. The fairness of informal justice and institutions has been measured 81% while the formal justice and institutions measured 70%. This existence can negatively impact the operationalization of the Constitutional Complaint mission, particularly in a post-conflict country. Therefore, I suggest that there is a need to share our concept with international development agencies present in post-conflict countries so that we should think upon building a kind of relationship between restorative justice and constitutional justice.

The final challenge and maybe the powerful one, is the cultural and political barriers, and the contradiction within the constitution of a post-conflict country as a national policy. Let me give you an example. Article 3 of the Constitution of Afghanistan articulates no law shall counter vein the tenets and provisions of the holy religion of Islam in Afghanistan. Article 7 of the same Constitution says in obliges the state to observe the United Nations Charter and Human Rights Declaration. No reservation has been taken into consideration. This is a contradiction between two articles within one constitution. Certainly the contradiction, for example on freedom of religion, it is extremely explicit, meaning that, one of the challenges facing the concept that we are discussing today is we need to identify or lack of identification of the rights to be determined and to be protected. And in Republic of Turkey for example, some acts of public power are exempted from the scope of individual applications as summarized by a journal article. Basically direct individual applications against legislative acts and regulatory administrative acts are prohibited, quoted by Article 149 Public Constitutions. Therefore what I think is that the long side of the operationalization of the concept in question there is a need to work on culture and political development. Thank you very much. *Terima kasih*.

MODERATOR
DR. ZAINUL DAULAY, S.H, M.H

Thank you very much Mr. Motawakkel.

Ladies and gentlemen, the next session is we come to a discussion or a Question and

Answer session. However, I offer you that before giving questions and answers, I think it is better for us to have a coffee break first because it is a hard session. We are going to talk about problems and challenges. OK.

(pause)

Honorable delegates,

Distinguished participants,

Ladies and Gentlemen,

We are coming to question-and-answer session. Actually we have much time to discuss these issues, problems and challenges in dealing with constitutional complaint cases. I invite four persons to deliver questions. The first one is Slamet Effendi Yusuf. And then *Ibu*, the lady in my right hand… and then, what else?

Okay, the first one, please Bapak Effendi Yusuf. The time is yours.

QUESTION 1
BP. SLAMET EFFENDI YUSUF
(BY INTERPRETER)

Thank you and may peace be upon us.

Good afternoon, I am Slamet Effendi Yusuf from the Constitutional Forum. The Constitutional Forum is a collective established by the former Consultative Assembly members who were involved in the Constitutional Amendments. I would like to ask a question that might be relevant and important with regards to constitutional complaint.

The basic issue with constitutional complaint is the issue of protection, enrichment, and appreciation of human rights. There have been many issues which have come up since yesterday, but I would like to ask one particular, a question of a particular issue which is the rights of citizenship. In many different declarations of human rights in different covenants, conventions of human rights, and different laws and regulations of human rights, we can see the right to citizenship is part of human rights. That's why there should not be any stateless person, no condition that should let a person be stateless, be without any citizenship.

Allow me in this opportunity, with all the respect, to ask this question to all of the speakers, especially for Myanmar. As I understand that Myanmar has a law of citizenship based on the same principle as Indonesia, for us before 2006 our citizenship law is based on ethnicity. A person is a citizen is in Aboriginal Indonesian and other people who have been neutralized. But

now, that term has been interpreted differently. Now it means a person who has been, since their birth, in Indonesia is not accepted any other citizenship out of their own volition. So, the citizenship now is based on law. In Myanmar, the citizenship law explicitly mentions the ethnic groups to which citizenship is confirmed or is granted, thus in that ethnic group. That's why in, if there is an ethnic group that is not explicitly named, they cannot be a citizen. I'm referring to the Rohinga case. My question to you all, what about all these stateless people? Can they file a constitutional complaint? Can we find in Myanmar, people applying or filing these complaints where they are not recognized as citizens. We would like to obtain a comment from the lady, the delegate from Myanmar about this matter. How can there be an ethnic group in a country will be left stateless? I am sorry if you find my question offensive, but I am really curious. Thank you

MODERATOR
DR. ZAINUL DAULAY, S.H, M.H

Ya, Ibu…….

QUESTION 2
SUNNY UMMUL FIRDAUS

Thank you for the opportunity.

My name is Sunny Ummul Firdaus from Association of Lecturers of Procedural Law, the Indonesian Constitutional Court (APHAMKA).

My questions are for two speakers. I think implementation about constitutional complaints has some problems. In Germany, as one of the countries in continental Europe, to implement constitutional complaints mechanism, the willing of the constitutional complaints was not charged and not an obligation accompanied by a lawyer. In the period of 1951 – 2005, there were 157,233 registered petitions to the federal constitutional court. Of that number, 151,424 were classes as constitutional complaints. However, only 3,699 petitions or 2.5 percent were successful. For example, of a well-known case, when the Moslem community in Germany to apply for constitutional complaints because of the ban of the slaughter of animals by animal protection act, Moslem community feel objected to the ban because it is considered contrary to the freedom to practice religion. Islamic teaching actually requires *halal* slaughter animal before eating. The Federal Constitutional Court granted the petition to the consideration of the freedom of religion guaranteed by the constitution. Meanwhile, the ban of the slaughter of animal is only governed by rule under the constitution.

My question for two speakers, what percentage of the number of the case granted about

the constitutional complaints in your country? And how is the mechanism of the execution? Because we think execution is the problem for implementation constitutional complaints. Thank you very much.

MODERATOR
DR. ZAINUL DAULAY, S.H, M.H

Okay, thank you. And, I invite the other...okay…please refer your question and please address to all speakers or somebody.

QUESTION 3
HERDIANSYAH HAMZAH

Thank you, Mr. Chairman. My name is Hediansyah Hamzah. I am from Mulawarman University, Samarinda, East Borneo or East Kalimantan, Indonesia.

I have a simple question for Mr. Mikhail Kleandrov, Judge of the Constitutional Court of the Russian Federation.

In 2004, Judge of the Constitutional Court of the Republic of Indonesia, Mr. Rizal Marzuki says that based on empirical that go to Constitutional Court of Republic of Indonesia which most of questions about treatment of Government officials.

The question is treatment of Government official not only at the central level but also at the regional level. So, my question is: how is your constitutional court territorial model in Russian Federation? In your country does every federation state have the constitutional court? And the second question is, should be, I need your suggestion about Indonesian, "Should our country not only have the constitutional court at the central level but also at this regional or local level?" Thank you.

MODERATOR
DR. ZAINUL DAULAY, S.H, M.H

Thank you.

Any participant who would like to deliver the question?

Ok, I think…ya… this is the time to respond some questions that was addressed to some speakers and also to the panelists. I give the first time to Mr. Kleandrov. This is yours.

SPEAKER 1
MIKHAIL KLEANDROV

I do not understand about the Constitutional system in Indonesia, can you please? I do not really understand about the question either. So if possible you can specify your question. If you can repeat your question, it would be great. Please repeat your question; please repeat the question that was directed to me. Please repeat.

QUESTION 3
HERDIANSYAH HAMZAH

That is a simple question. I would like to ask about territorial court model in Russian Federation. The question is "How is constitutional territorial court model in Russian?" Is there any federal state in Russia have constitutional court? This is the first question. And the second question, I want a suggestion for Indonesian constitutional court model, "Should our country not only have constitutional court at the central level but also at the regional or local level?" Thank you.

REPLY FROM SPEAKER 1
MIKHAIL KLEANDROV

Very interesting question.

But as I said earlier from 85 entities, or territorial entities, in Russia we only have 16 constitutional courts. From 24 years of the history of the establishment of our constitutional court, in which we have like constitutional or territorial court in some regions and then they open it, they close it. So basically 70 % of the regions or the territorial entities do not have the constitutional court.

In our constitution, all subjects of federations are equal, even though they have different names. But basically, in the case of the constitutional courts, we have constitutional court of international level and subnational level. So, in our entities, if the entity is actually in the form of a republic, then they usually have constitutional court. But if it is in the form of a territory, then not. Usually they refer the cases to St Petersburg or to Moscow because the function of the constitutional court is to review legislation, the constitutionality of the legislation, in this case. So, the local constitutional court or the territorial constitutional court is actually tasked to review

the local cases, so that the case won't have to be referred to the National Constitutional Court, and including to test or to review the constitutionality of the local legislation. And some of these local constitutional courts work really well, for instance in Tatarstan. But some also work not very well. And we always have debate on whether or not we need to establish constitutional court in the region. They always argue about the budget, because the budget will not be assumed by the Federal Government. And we also know that some countries have international tribunal, so now we are also considering the Republic of Buryatia, a federal court. Usually, the national constitutional court is not satisfied with the verdict or the judgment produced by the local court. And there are many ways to minimize the budget, which is actually to minimize the number of judges. In some local constitutional courts, they only have three judges without any adequate budget. And sometimes the judges are actually retired and when these judges reach the retirement, there is no new replacement judges serving in that constitutional court. So, we in the national parliament often question the local territories in this regard. But, of course, we can't liquidate or dissolve the local constitutional court, because based on our law, if we dissolve a court, then we need to actually devolve the authority of that court to other courts. And this is the case of a region called Buriace. But this situation may also happen in other federal states, federal country, for instance, like in Germany, they also have constitutional court. They have like local or territorial federal court in one state. They have state constitutional court in one state, but not in other state. So if a constitutional right of a citizen of a certain state is being violated, then they can actually submit or lodge their complaint to the local constitutional court. But, if there is no constitutional court in that region, in order to protect the fundamental rights and freedom, that citizen can lodge the complaint to the general court. It can be the first level or second level court, but their case will not be reviewed based on the constitution or against the constitution but based on the general law and the state administration system as civil or criminal case. So, protection of human rights is really important. Thus, in our constitution it is also very clear that our population is free to choose whatever they want to decide and as far as it is within the limit of our jurisdiction. So, we have made some papers, some studies and debates about this. We have also very heated debate on whether or not we need to have a local constitutional court or not. Now, if you ask about what you should do in Indonesia, I don't even know about the situation in Indonesia, so I cannot make any appropriate suggestion, but who should be tasked to address this question. If you want to, you can actually compare with our system. You can find many resources on the Internet, many papers and studies about how we address this conundrum. This is a very interesting problem. Thank you.

MODERATOR

DR. ZAINUL DAULAY, S.H., M.H.

I would like to give a chance to respond the questions to Mr. Kasymaliev.

REPLY FROM
MR. MUKAMBET KASYMALIEV

The question is, how many has been resolved in our country from 100% of constitutional complaints, roughly 50% have been regarded to not be acceptable because they have not met with the requirements according to the rules or the procedures, or they did not follow the stipulations of our own law. However, if the citizens would redo their application then we can reconsider. Of course, there are positive and negative decisions.

We can conclude that from 50% of the cases that we hear, 10% receives satisfactory results. So, the decisions or the judgments that we produce are satisfactory to those who can make the complaints. So, basically we will rule whether or not the law is constitutional or unconstitutional. And we believe that 10% is quite a good number and the Constitutional Court of the Kyrgyz Republic when we produced a ruling that a law is unconstitutional, the law will be annulled immediately. Thank you for the question. If you have any other questions, please.

MODERATOR
DR. ZAINUL DAULAY, S.H, M.H.

So, Mrs. Hla Myo New, if you have a response to the question, please.

REPLY FROM
MRS. HLA MYO NEW

Thank you, Mr. Moderator.

Thank you for the question that is directed to us.

Actually, I'm very pleased to answer this question because this is a very controversial problem; especially, we are facing a lot of accusations and a lot of attacks on this point.
Firstly, I want to make a very clear point that those people in question are not included in the Myanmar national races. They are not among the ethnic groups. But, I don't want to make any argument on the term. I'm not a historian and I cannot argue on the very controversial term, but my personal view is the term is not very important but the important point is that the Myanmar Government, the Myanmar people, we do not deny the rights of those people in question. Once they have to prove, we do not deny their rights but they must prove that they have resided in Myanmar for generations.

Nobody or no NGOs, or no historians, or even no UN organizations, refugee organizations, they cannot guarantee that these people have resided in Myanmar for generations, but a very important point is that they must accept the verification process set by our citizenship law. No single country in the world would accept the people in question if they cannot prove, without any sound proof that they have resided or have lived in Myanmar for many years by generations. They must meet the requirements set by our citizenship law. Those persons in question are among the persons who are the holders of the temporary identity cards. We call them, in the short form, white cards. These white cards are in the draft of the National Referendum Law. So, these people are to be the holders of the temporary identity cards issued under the 1951 Residence of Permanent Registration Rules, Rule 2.

Under this 1951 Rules, holding of these temporary cards is only allowed for a fixed period of time and is issued in lieu of the national identity cards. The Immigration and Manpower Ministry presented that under the 1951 of this Permanent Registration Rule that the temporary identity cards, the white cards were issued to:

A. Those who reside in the territory of the Republic of the Union of Myanmar without any identification or identity card;
B. Those who remain to be scrutinized as citizens by law;
C. Those who remain to be scrutinized as citizens due to lack of holding any supportive or relevant documents; and
D. Those who are not entitled to hold foreign registration cards under the 1948 Foreign Registration Rules.

So, it is quite obvious that these temporary identity cards were issued solely to certify that they resided in the territory of Myanmar. Final notification on the 11th February 2015, the President of Myanmar ordered the expiration of the temporary identity cards. Under this notification, the temporary identity cards issued to those who resided in Myanmar under the 48 Registration Act will be expired on the 21st of March 2015 and the holders of the temporary cards have to surrender their cards by the latest May 2015. So it is not worthy that under the president notification, validity of the temporary cards are expired, and they have no legal validity, of no legal face, no legal force. So that we are of the view that the holders of this temporary card persons who remain to be scrutinized as citizens and the legal status of those persons have not been verified or confirmed. For all these reasons the government advice all the

persons who hold this white cards to be surrendered and we are under the very heavy obligation to scrutinize all these identity cards and those people who resided in Myanmar for generations, will, we cannot deny their rights. We will accept them as our own citizens, but they must meet the requirements. But, for your information, they refused to follow the procedures set by the law for verification. So, we are trying to cooperate with the UN organizations for the refugees, because first of all, Myanmar is the only country. We want to settle this issue permanently. We want those people who are Myanmar citizens; we want to give them Myanmar citizens. We want to guarantee their rights. But, they must fulfill their obligations under the law. This is my question. My question is totally constrained on the law basis. Thank you very much.

MODERATOR
DR. ZAINUL DAULAY, S.H, M.H

Thank you very much.

Mr. Mutawwakel I'm sorry, I apologize, because of the time, I do not give you a chance to give your answer.

Honorable delegates, distinguished participants, Ladies and Gentlemen, because of the time, I think we have to finish this session on 16:00 p.m. So, I would like to give the…remarks of our discussion in this last session.

The first one, the presence of institute of Constitutional Complaint intensifies legal defense of the fundamental rights and freedom of citizens in some countries. However, as we have discussed that there are many differences in regulations and implementation of Constitutional Complaint. Third, some important steps could be taken to eradicate the problems and challenges in dealing with Constitutional Complaint namely strengthening the citizen trust to Constitutional Court, increasing the transparency of its activities and dialogs between Constitutional Judges and the Judges of Ordinary Court. The last one, I would like to thank you very much for your participation in this last session, and I would like to say Asslamuálaikum Wr. Wb.

FAREWELL DINNER

MAHKAMAH KONSTITUSI
REPUBLIK INDONESIA

INTERNATIONAL SYMPOSIUM ON
CONSTITUTIONAL COMPLAINT

REPORT BY
SECRETARY GENERAL OF THE CONSTITUTIONAL COURT OF THE REPUBLIC OF INDONESIA
JANEDJRI M. GAFFAR

In the name of God, the most merciful, the most compassionate.

Peace be with you and may God give you His Mercy and His Blessings. *Waalaikumsalam*.

Good evening and may be peace be upon you all. Your Excellency, the Chief Justice of the Constitutional Court of the Republic of Indonesia, Professor Arief Hidayat, and the Deputy Chief Justice, and Justices of the Constitutional Court of Indonesia and Spouses, His Excellency Chief Justice and Justices from other friendly countries' Constitutional Courts, Participants of the Symposium, His Excellency the Minister of Public Works and People Housing, Bapak Basuki Hadi Mulyono , the Deputy Chief Justice of the Indonesian Supreme Court, Bapak M. Saleh, the Deputy Chief Justice of the Judicial Committee, Bapak Abas Said, Excellences Ambassadors of Friendly countries, Honorable Distinguished Ladies and Gentlemen, Participants of the Symposium.

Distinguished Ladies and Gentlemen.

Let us extend our gratitude to God the Almighty, because of His Blessings and Grace, all of us can be here to attend the series of events in this international symposium on Constitutional Complaint up until tonight. This International Symposium is organized by the Constitutional Court of the Republic of Indonesia in its capacity as the President of the Association of Asian Constitutional Courts and Equivalent institutions and, also to commemorate the 12th anniversary of the Constitutional Court of the Republic of Indonesia. His Excellency Chief Justice of the Constitutional Court of the Republic of Indonesia and Distinguished Ladies and Gentlemen, the international symposium on Constitutional Complaint that was officially opened by the Vice President of the Republic of Indonesia, His Excellency Muhammad Jusuf Kalla on the 15th of August 2015 was attended by delegations from seventeen countries plus one international

organization, the Venice Commission. Aside from that, this international symposium is also attended by the representatives from state institutions, government agencies, academicians from the law faculties from different universities in Indonesia, association of procedural and constitutional justice lecturers in Indonesia, and some legal experts from different countries including from Australia, from the Netherlands, and from Malaysia.

For the last two days, the Delegates have been discussing about various issues regarding constitutional complaints, the philosophical and theoretical aspects, the normative aspects, and also the practical and empirical aspects in their respective countries. In that discussion, it was emerged that all countries put constitutional rights as their main priority and orientation that should be protected. That protection is implemented through different legal measures, especially the ones that fall under the authority of the Constitutional Court.

One of the mechanisms is the constitutional complaint. But there are some countries that are not implementing the mechanisms of constitutional complaint as special mechanism. But they implemented through other authorities owned by the Constitutional Court. But in essence, the aim is to protect the constitutional rights of the citizens.

The options of the mechanism in different countries are their answer to the challenges facing their countries, and we hope that this symposium can provide comprehensive understanding on the importance of constitutional complaint. And also, through this symposium, it is expected that we will become aware and able to anticipate challenges related to cases of constitutional complaints faced by several countries.

For the Constitutional Court of the Republic of Indonesia, which is not explicitly mandated to hear and try constitutional complaint cases by our Constitution 1945. Often times, we face real cases that essentially have constitutional complaints nuance.

This symposium provides really fruitful benefit and we can learn from best practices from different countries. The whole process of this symposium and the papers are compiled into the proceeding of this international symposium that will be distributed to all participants of this symposium tomorrow morning, Monday, 17th August 2015. And, we hope that this international symposium can provide valuable inputs for all stakeholders, especially Constitutional Courts and other Equivalent Institutions from the participating countries. So, as to build, develop, and materialize constitutional democratic country which requires protection of human rights and constitutional rights of the citizens.

Your Excellency Chief Justice of the Constitutional Court,

Distinguished ladies and gentlemen,

Aside from organizing the International Symposium, as the President of the AACC, the Constitutional Court of the Republic of Indonesia also organized the meeting of the Secretary Generals of the AACC and the meeting of the Board of Members of the AACC on 13th and 14th August 2015 respectively.

In the Board of Members Meeting, we decided upon several important issues including the discourse to establish a Permanent Secretariat for the Association of Asian Constitutional Courts and Equivalent Institutions. The Board of Members Meeting has given the mandate to the Secretary General of the Constitutional Court of the Republic of Indonesia to prepare a working paper which includes a comprehensive study on the plan to establish the Permanent Secretariat for the Association for Asian Constitutional Courts and Equivalent Institutions.

Therefore, we, on behalf of our institutions would like to declare our readiness to implement the mandate given to the Board of Members Meeting to the best extend possible. That working paper will be prepared very soon and will be presented to the Secretary Generals of the AACC members to get their inputs and responses, and the compilation of their inputs and responses will be deliberated later in the next Secretary General Meeting which will be held, God willing, at the end of February 2015.

The result of the Secretary General Meeting will be then reported back to the Board of Members Meeting in 2016, in April 2016, to be studied, deliberated and to inform their decision making process. We hope that the Association of Asian Constitutional Courts and Equivalent Institutions will be more active in organizing different activities and events and to promote participation among members. And we also would like to convey that the Constitutional Court of the Republic of Indonesia will organize a short course on Constitutional Law at the end of November 2015. We would like to invite all the members of the AACC and the participants of the Symposium to attend that short course. And we also would like to invite delegations from all member countries of the AACC and the participants of the symposium to send their paper, to send their articles to the International Journal published by the Indonesian Constitutional Court. We hope that these activities can enrich the AACC activities. We hope that this can actually enrich the programs implemented by the events and activities implemented by the Constitutional Court of Turkey and Republic of Korea.

Excellency Chief Justice, we realize that the success of the organization of this International Symposium is not only determined by our preparation as the organizing committee, but also due to the participation of all the Symposium's participants. That's why we would like to thank and extend our highest appreciation to all the participants of this Symposium for their commitment and cooperation during the organization of this International Symposium.

In this opportunity, I also would like to convey that tomorrow morning on the 17th of August 2015, August 17th is the Independence Day of Indonesia, and tomorrow we will commemorate the 70th Anniversary. And, it will be an honor and pleasure to all of us if all heads of delegations are willing to attend the Flag Ceremony to commemorate our independence in the Presidential Palace which will be led by our President, President Joko Widodo tomorrow morning at 9 AM. And after that Flag Ceremony, we would like to invite all delegates and participants of the symposium to come to the Constitutional Court Building to visit the Constitutional History Center, which records the constitutional history of the Republic of Indonesia and the development of the Constitutional Court of Indonesia in different form of media. No one is perfect because only God is perfect, thus we believe that, this symposium also has its own shortcoming. Therefore, if there is any shortcoming or mistakes, we genuinely and sincerely would like to apologize.

To Chief Justices and justices and delegations from friendly countries we wish you a safe trip home and hopefully your trip home will be an enjoyable one. Please send our regards to your family, colleagues and people of your respective countries. Hopefully, we can meet again in future events. Thank you for your attention and greetings.

REMARKS

BY PRESIDENT OF VENICE COMMISION,

GIANNI BUQUICCHIO

Ladies and gentlemen, first of all, let me express my sadness for the recent information I have received concerning an Indonesian plane with 54 persons and some children on board who disappeared this afternoon. We hope and I hope strongly that many people will be safe from this accident.

Dear friends,

I would like also to express my warmest thanks to the President of the Constitutional Courts of Indonesia, Mr. Hidayat, for the excellent organization of this symposium and for the generous hospitality which we received during these two days here in Jakarta. My thanks go also to all the judges of the Constitutional Court of Indonesia, and to the staff of the court and in particular, to Dewi Savitri, your liaison officer with Venice Commissions and to Raffael Adrian who helped me during these two days here in Jakarta.

As you know, long speeches move the chairs; short speeches move the heart, so I will try to be short because we have many speeches during these two days. And I would like to tell you that yesterday evening at dinner, I shared some views with one of the participants and we talked about the usefulness of this kind of event. How much substance, how much information remains in our minds after a symposium of this kind. Of course, this is from one participant to the other one, but I could tell you that during these 2 days I was sitting next to Khalil Motawakkel from Afghanistan, Gianni Buquicchio, Venice Commission, GBCKM know alphabetical reasons to be side by side. But why they put us side by side? According to Khalil probably because we are in the same suit. Turkish made dark suit copied probably from an Italian brand, my suit, but we are almost the same. A kind like a uniform and I can testify that Khalil Mutawakkel followed all the interventions which were presented yesterday and

today. And even a walk on the internet searching for information from the Venice Commission concerning the constitutional complaint. So, I think that these kinds of event are quite useful.

A good friend of mine, the president of the Constitutional Court of central Eastern European countries, I will not say his name nor the country was used to tell me when we met in this kind of occasion. This is the moving circus with all elephants and lions which have always pleasure to meet together and indeed it is very important to meet again friends to make new friendships with new persons walking in the same fields than yours. And indeed when I started dealing with the constitutional justice in the frame of Venice Commission I am talking of the early 1990s exactly, more exactly May 1990 I had a dream. I had a dream that I hope that one day we could establish a common room for constitutional justice where judges from different courts and countries could meet to discuss together common issues and problems. This dream has become a reality because until some years ago the only contacts for the official visits from one court to another one but I would say since 15 years this kind of event- a multilateral event with many courts participating, is becoming more useful and more widespread. This contributes of course to what is called the dialog of judges--dialog between yourselves concerning common problems and common issues. The constitutional court is the best guarantor- the only guarantor of the constitution and also of the Human Rights protection. The full individual access to the constitutional court is increasingly great, recognized as an essential element for the protection of human rights. Constitutional Complaint which was discussed during these two days is all the more necessary especially in regions where there is no human rights court like in Asia, regrettably. And I hope very much that one day such a court, such human rights court for Asia will be established.

What's next? I think that, although recognized in our symposium has been very useful and productive, I agree, I fully agree with Murad Medelcy, the President of Constitutional Council of Algeria that we need to go more in depth and this is only the first step of a profound reflection on these kinds of problems. There are many other issues concerning the constitutional complaint which should be analyzed and I hope that soon we'll have other gatherings between us, in order to discuss this very important topic. So, I told you that I would be brief. I can conclude my speech. Thank you again, the Constitutional Court of Indonesia and also, the interpreters who helped us for understanding each other during these two days.

Selamat ulang tahun Mahkamah Konstitusi Republik Indonesia.

REMARKS BY DELEGATES REPRESENTATIVE,
PRESIDENT OF THE CONSTITUTIONAL COURT OF
THE REPUBLIC OF TURKEY,
ZUHTU ARSLAN

Honorable Chief Justice of the Indonesian Constitutional Court, and the President of the AACC, Chief Justices of different Constitutional Courts from around the world,

Justices, Ladies and Gentlemen,

I'd like to also express my sadness about the missing Indonesian flight. I hope you can hear good news.

Ladies and gentlemen,

About four or five months ago, Professor Arief Hidayat and Mrs. Hidayat came to Turkey and kindly visited our Court. At that time, we met for the first time, and we actually became real friends. He kindly invited us to visit Indonesia and to participate in this wonderful event. And I'm very happy to be here and actually to keep my promise of coming to Jakarta. I want to also speak very shortly, because I'm not as experienced as Mr. Buquicchio, and I would say that we have had, so far, wonderful meetings, most meetings of Board of Members of the AACC and the Symposium on Constitutional Complaint were really successful, very fruitful, and very stimulating organization. We had very good debates and fruitful decisions taken.

I would like to thank the Chief Justice of the Constitutional Court of Indonesia, Deputy Chief Justices of the Court, and Justices of this Court as well as the Secretary General and other staff of the Constitutional Court of Indonesia for their warm hospitality.

I am really, we actually - I would like to speak on behalf of my wife and my delegates - we are really happy to be here, to be among you, and to meet new friends, colleagues, so I'd like to also congratulate the Constitutional Court of Indonesia on their 12th anniversary. Let me also

congratulate the people of Indonesia on their 70th Anniversary of Independence. I hope we can meet again in the future

I hope we can meet again in future organizations at the latest perhaps in Bali next year. I wish you healthy and happy days. Enjoy your dinner. But, farewell dinners are always a bit sentimental for all of us because we are leaving Jakarta, and let me finish by saying

Selamat Malam.

MAHKAMAH KONSTITUSI
REPUBLIK INDONESIA

INTERNATIONAL SYMPOSIUM ON
CONSTITUTIONAL COMPLAINT

CLOSING REMARKS BY CHIEF JUSTICE OF THE CONSTITUTIONAL OF THE REPUBLIC OF THE INDONESIA

ARIEF HIDAYAT

Bismillahhirrahmannirrahim. Before I begin, the Honorable Chief Justice of Constitutional Court of Turkey has expressed his sadness of the tragedy of the falling of the plane. I would like to invite all of you to take a moment of silence and pray according to your convictions for the passengers of the plane to be given the best opportunity to be rescued by God Almighty. A moment of silence!

Thank you. May peace be upon us all. Distinguished guests of the Constitutional Court, Minister for Public Works of the Republic of Indonesia, show me, that we may see you and get to know you. The participants and friends of the Constitutional Courts and Equivalent Institutions ... I would like to invite you (the Minister) to rise. This is the Indonesian Minister of Public Works. And then the second, Deputy Chief Justice of the Supreme Court. Mr. Muhammad Saleh, and next, Deputy Chair of the Judicial Commission. There is a guest and friend of mine who then was with me in amending the constitution, Mr. Slamet Effendi Yusuf. We participated together. This is a figure of an Indonesian Moslem organization, *Nahdlatul Ulama*, Honorable Chair President Chief Justices of Constitutional Courts and equivalent institutions from various countries present here. We have heard Hon. Judge Arslan from Turkey and representative from the Venice commission; I would like to extend my thanks for your remarks. His Excellency and Hon. Judges from friendly countries as well as fellow judges from the Indonesian Constitutional Court, my seniors, former Constitutional Justices, the first batch, and the second batch are also present here this evening.

Ladies and gentlemen.

First of all let us give our praises and thanks to God Almighty for His blessings and mercy and grace, so that we can be here all gather together in good health. Even though in the past two days or even three days, some members of the delegations were already present here. Also, for the board of members meeting, we're all still in good health. It is truly an honor for me to be here again amongst the participants of the symposium in tonight's, this evening's event, also celebrating the 12th anniversary of the constitutional court.

Ladies and gentlemen and guests.

The international symposium was organized, was concluded well and in orderly manner. I feel relieved and deserving of some joy due to this. Therefore, I would like to express my gratitude to all of the delegations which participated actively and contributed their opinions, various views, providing invaluable feedback to the success of this international symposium. I truly believe that an international symposium such as this provides great benefit to strengthen the accomplishment of the purpose of the protection of human rights and constitutional rights of citizens, domestically in each of our countries and also at international, regional level of cooperation as was mentioned by the representative from the Venice Commission.

This symposium is over. However, this does not mean that our task has ended. The end of this symposium marks the beginning for us to undertake greater endeavors. The Constitutional Courts and Equivalent Institutions in carrying out its mandate to protect human rights and for us there have been many important significant lessons that we've drawn from this two day symposium. One of them is that the limitation of the authority of the Constitutional Court is, in the end, the most fundamental and critical for the Constitutional Court to protect the constitutional rights of the Indonesian citizens for we need to address it in a wise and appropriate manner. Ladies and Gentlemen, Honorable Guests, I believe that the practice and the experience of our respective countries with regards to the process and mechanism of the Constitutional Complaints. The first, from one to the other, but all of them rest on the same point, which is the spirit and our seriousness to fight for democratic Rule of Law. There are some countries which have adopted and implemented the mechanism of Constitutional Complaint. The intensity and practice is considered solid and developed. They are established, however, there are countries which in their application of this mechanism are considered young. They are still looking for references. Other Constitutional Complaint is only a matter of discourse. This includes, of course, the Indonesian Constitutional Court. These of course require more inputs, views and more in-depth study. This symposium has enabled a very constructive interaction among countries with heterogeneous characters, in sharing views, in discussions; we have made the symposium one that is more open, lively, and beneficial.

Ladies and Gentlemen, the conclusion of the symposium will hopefully establish wider

network cooperation, a more effective one, between the similar institutions, building on the same foundation which is the respect of Human Rights, and citizens' Constitutional Rights. The cooperation that we've enjoyed herewith can continue to be cultivated and enhanced as was mentioned by the President of the Venice Commission. I hope to see a continual cooperation of this network within the organization of the AACC and even outside of that. It is intended that we all can strengthen further the principles of democracy and the rule of law. We should follow up on this with concrete steps to improve our institutional capacity and the capacity of our human resources. We realize completely that the challenge to the enforcement of a constitutional democracy especially the fulfillment and the perfection of constitutional rights will become even more complex, as we move forward to the future, and for this eventuality that we should prepare ourselves to be able to tackle all the challenges more appropriately and more wisely.

Ladies and Gentlemen, Honorable Guests, I should express at this moment as was also reported by the Secretary General of the Constitutional Court and the Board of Members Meeting of the AACC which was held on Thursday and Friday have approved new members; the Republic of Kyrgyz and Myanmar. I would like to see the Constitutional Chamber of the Republic of Kyrgyzstan to rise. (*applause*). And the President of the Constitutional Tribunal of Myanmar to also rise. To the Constitutional Chamber of the Supreme Court of Kurdistan and the Constitutional Tribunal of Myanmar, I bid you welcome in the AACC Symposium. In addition, the Board of Members' meeting has approved that the third congress of AACC will be held on April 25th-28th, 2016 in Nusa Dua, Bali, with the theme of the Promotion and Protection of the Citizen's Constitutional Rights. I hope that all of the members of the AACC can attend and participate in that very honorable meeting. We will discuss further as was reported by the Secretary General, the theme, and whether it is required for us to establish a permanent secretariat for AACC. An important thing related to that is that the Constitutional Court of the Republic of Indonesia, we invite, we're open to your support and input, so that the working papers that have been mandated to the Indonesian Constitutional Court to be written can be done in a satisfactory manner. The Board of Members' meeting of the AACC was an important step to fulfill the objective of the AACC.

Ladies and gentlemen, distinguished guests,

To conclude, praise be to God for the organization of this series of events to mark the anniversary of the Constitutional Court of the Republic of Indonesia as well as the International Symposium on Constitutional Complaint.

Again I thank all of the delegation. I give you my highest appreciation for contributing to

the success of all the activities. I also hope that you can continue to support and send your best wishes to the Indonesian Constitutional Court so that after celebrating its 12th anniversary, we can continue to be excellent in carrying out its constitutional duties.

To the participants of the symposium and to the members of the AACC, who will be going back to your respective countries, I bid you farewell, hope you will arrive safely, and we'll see you again. May you greet your loved ones and continue to serve your peoples and your countries successfully. Hope that Jakarta has left an impression, a good one. Perhaps we can see each other again at an even better opportunity. May God Almighty continue to facilitate your endeavours and blesses us in every manner. Thank you and may peace be upon us all.

SUMMARY REPORT

MAHKAMAH KONSTITUSI
REPUBLIK INDONESIA

INTERNATIONAL SYMPOSIUM ON
CONSTITUTIONAL COMPLAINT

SUMMARY
INTERNATIONAL SYMPOSISUM ON CONSTITUTIONAL COMPLAINT

Jakarta, 15–16th August 2015

OPENING

1. The International Symposium on Constitutional Complaint was held in Jakarta, Indonesia from 15th to 16th August, 2015. The Symposium was officially opened by the Vice President of Indonesia, H.E. Yusuf Kalla, at the Presidential Palace on Saturday, 15th August 2015. In attendance were approximately 200 participants representing various stakeholders, both national and international, including heads and members of delegation from 11 of the 14 members of the Association of Asian Constitutional Courts and Equivalent Institutions, representatives of Indonesian state organisations and non-state organisations and academics from various universities in Indonesia.

2. This Symposium was aimed at initiating discussions and feedbacks from relevant stakeholders on the main theme of the symposium, namely, Constitutional Complaint, and several sub-topics: 1. Constitutional Complaint as an Instrument for Protecting Fundamental Rights of Citizens; 2. Comparative Perspectives on Constitutional Complaint; 3. Problems and Challenges in Dealing with Constitutional Complaint Cases.

FIRST DAY OF SYMPOSIUM (15th August 2015)
Constitutional Complaint as an Instrument for Protecting Fundamental Rights of Citizens

First Session

3. The first session of the first day of the symposium was moderated by Prof. Amzulian Rifai, SH., LL.M., Ph. D., Dean of the Faculty of Law of Sriwijaya University. The speakers for the first session were Dr I Dewa Gede Palaguna, Justice of the Indonesian Constitutional Court; Mr. Amarsanaa Jugnee, Chief Justice of the Constitutional Court of Mongolia; Mr. Nurak Marpraneet, President of Constitutional Court of the Kingdom of Thailand; and Mr. Gianni Buquicchio, President of the Venice Commission. The Panelists were chief justices from Malaysia, Mr. Tun Arifin Zakaria; the Philippines, Mrs. Maria Lourdes P.A. Sereno; Vietnam, Mr. Bui Ngoc Hoa; and Deputy Chairman of Constitutional Court of the Republic of Uzbekistan, Mr. Buritash Mustafayev.

4. The first Speaker, Dr I Dewa Gede Palaguna explained the history of the establishment of the Constitutional Court or *Mahkamah Konstitusi* ("MK"). He elaborated on the reasoning behind the proposal to establish the body and the circumstances surrounding the competence to adjudicate constitutional complaint cases. He underlined some of the challenges facing the implementation of Constitutional Complaint, including, among others possible overload of complaint cases and potential overlapping of power between the Judiciary and other branches of the government. The speaker also discussed two alternative solutions for implementing Constitutional Complaint: legislative interpretation and judicial interpretation. Legislative interpretation deals with new laws concerning the constitution or the review of laws against the constitution (article 24 paragraphs 1 and 2) whereby the legislature may be given the power to define the meaning of judicial review itself. Judicial Interpretation is subsidiary and can only be used as far as the case itself involves some violation of normative of law.

5. The second Speaker, Mr. Amarsanaa Jugnee, described best practices of constitutional court in Mongolia in handling constitutional cases. He also stated that independent review is necessary as it provides authentic protection of human rights. The Mongolian experience showed that the Constitutional Court of Mongolia needed to be given exclusive power to invalidate any action that contradicts with the constitution of Mongolia. The Constitutional court of Mongolia is also able to deal with individual complaints and broader issues in relation with citizens' rights, which is not limited to certain rights or certain violations of rights. He informed that, although the number is decreasing every year, the constitutional

court of Mongolia has deliberated more than 2000 complaints to date. From the cases handled, it was found that there were still a number of laws breaching the constitution of Mongolia. One example of such a case that is being handled by the Mongolian Constitutional Court currently is the introduction of new laws by the parliament on the establishment of new courts, which infringed on constitutional rights of the citizens, including the right to appeal, and thus was deemed unconstitutional and was tried as a constitutional complaint case.

6. The third Speaker, Mr. Nurak Marpraneet, stated that the right of constitutional complaint is acknowledged under the 2007 Constitution of Thailand and that it arises from two principles: the first is that all state organs are bound to respect people's rights and liberties, and therefore their decisions can be challenged before the Constitutional Court if they are deemed to violate people's basic rights; the Second is the fundamental right to seek judicial relief for violation of individual rights and liberties. He also mentioned that there are three requirements for the admissibility of constitutional complaints, which are i) that the applicant must be the person whose rights and liberties have been violated; ii) that the complaint must seek a ruling that determines a particular provision of law contrary to or inconsistent with the Constitution; iii) constitutional complaint can only be filed once all other remedies have been exhausted. He emphasized that the 2007 Constitution imposed certain restrictions for individuals in exercising constitutional complaint. In his final remarks, he stated that currently the Constitutional Drafting Committee is preparing a new draft with an expanded substance aimed at allowing a greater protection of rights and liberties of the Thai people.

7. The fourth Speaker, Mr. Gianni Buquicchio, began by introducing the work of the Venice Commission. In his presentation, he stated that the Commission provided opinions and advice to its members and co-operating states to improve their constitutions, their legislation and the functioning of their democratic institutions. Membership to the Venice Commission is not restricted to European states, but extends to non-European countries, which can become full members. A number of states in Asia, Africa and in Latin America have indeed become members of the Commission. Mr. Buquicchio stated that the constitutional court plays an important role in protecting the rights of citizens at the national level. He also emphasised that every citizen should have the right to filing complaints on the unconstitutionality of laws; the constitutional court does not need to fixate on the merit of the cases but rather only on the constitutionality elements of the complaints, and thus the cases that are filed in the courts should not overburden the court. He also recommended convening a world conference on constitutional justice and the establishment of a regional human rights court for Asia. To this end, it is vital that like-minded countries in Asia commit themselves

to such an endeavor. The speaker also recommended that Indonesia provide unimpeded individual access to constitutional complaint. In closing, he reiterated the Commission's readiness to assist willing countries in fully implementing constitutional complaint in their domestic legal systems.

Second Session

8. Mr. Tun Arifin Zakaria, Chief Justice from Malaysia elaborated the clear provision for constitutional complaint in the Malaysian constitution, as it is the Supreme Law since independence. Any laws made post-independence that contradict the Supreme Law are deemed unconstitutional, while any laws made prior to independence can be modified. He stated that the constitution of Malaysia had fundamental liberties or guarantee of human rights as stipulated in the Malaysian constitution. Any violation could be challenged by the public or anybody in the high court. The Malaysian court also has special application procedures for constitutional complaints allowing them to be brought to the high court under its authority to conduct judicial review or filed directly to the Federal Court. He then commended the Indonesian Constitutional Court for being able to handle the complaints from citizens despite that fact that the provision on constitutional complaint in Indonesia's constitution was not explicit. With regards to Mongolia's constitution, the panelist highlighted that the constitutional authority of Mongolia's constitutional court can receive inter-state complaints.

9. Mrs. Maria Lourdes, Chief Justice of the Phillipines began by introducing the historical development of the role of the Philippine Constitutional Court in addressing the matter surrounding judicial review as well as the consitutional mandate to uphold the protection of human rights. The development of constitutional and judicial review in the Philippines gained its first great definition in 1936, when elements of judicial review were initially addressed. In relation to the judicial review mandate, there is an extraordinary branch of authority to the Court to determine discretions as stipulated under its 1987 constitution. Moreover, should a conflict arise, the judicial department is the only constitutional organ authorised to determine the proper allocation of power. The 1973 and 1987 Constitution provided the power to conduct judicial review not only to the Supreme Court but to all courts. The inception granted the Court to address constitutional questions and allows courts, including lower courts, to address individual or constitutional complaints. In the constitutional order of the Philippines, the enjoyment of access to rights are also complemented by the access to courts.

10. Mr. Mustafayev, Deputy Chairman from the Constitutional Court of the Republic of Uzbekistan informed that Uzbekistan has not yet adopted the mechanism of constitutional complaint. Nonetheless, he echoed the views of other countries that constitutional complaint as a form of access to constitutional justice was an effective and efficient tool for the protection of citizen's fundamental freedoms. Therefore Uzbekistan will carefully study the experience and practice of other countries to implement constitutional complaint. At the moment, the Constitutional Court of Uzbekistan may only consider matters regarding the constitution that are introduced by eligible entities, among others, the parliament, the president, the speaker of the legislative chamber, the chairman of the senate, and legislative body of Karakalpakstan. Matters may also be introduced by the initiative of at least three judges of the Constitutional Court. The Speaker from Uzbekistan invited colleagues form various constitutional courts to the International Conference in commemoration of the 20th anniversary of the Constitutional Court of Uzbekistan, which will take place in Tashkent, on 21–22nd October, 2015.

11. Mr. Bui Ngoc Hoa, Chief Justice from Vietnam recalled the importance of and effective mechanism for the constitutional protection in order to guarantee the supremacy and validity of the constitution. Despite the non-existence of a constitutional court, there are several mechanisms that can ensure the protection of the constitution in general and protection of basic rights of citizens in particular, including: (1) the procedure of review of draft legal normative documents by the Law Committee of the National Assembly before being submitted to the National Assembly. The documents shall also be scrutinized by the Government, in this case, the Minister for Justice. (2) Citizens, members of People's Council and civil servants have the right to make requests for review the documents deemed unconstitutional. (3) Any revision of the constitution shall be followed with the revision of other related legal normative documents. For example, the new Constitution of 2013 included new provisions on basic human rights. This was then followed by the revision of a number of key laws including the Criminal Code, Criminal Procedure Code, Civil Code, Civil Procedure Code, and Administrative Procedural Code. In conclusion, the role of the constitutional court in protecting the constitution and basic rights of citizens, given the specific characteristics of Vietnam, is taken by competent state agencies.

Question and Answers Session

12. During the questions and answers session, participants raised, among others, the following points:
    a. The importance of establishing a mechanism to exercise citizen's right to appeal with regards to constitutional complaints;

b. The weaknesses of constitutional complaint as a last remedy, i.e. complicated and long judicial process;
c. The possibility of establishing a regional court that can address constitutional complaint;
d. Constitutional amendments would be required in countries which do not have express and explicit constitutional provisions on constitutional complaint;
e. The possibility for using constitutional complaint to adjudicate any allegation of a state's wrongful act;
f. The need for alternative solutions to constitutional complaint, such as constitutional report to give recommendation or advice to the constitutional court.

Closing

13. As stated by the Moderator of this Session, Constitutional complaint is a complaint by individuals who deem that their constitutional rights have been violated by acts of governments. Furthermore, he stated that this Meeting served as an appropriate venue for Indonesia to learn how other countries applied constitutional complaint. In Mongolia, for instance, there is a unique complaint mechanism whereby foreign nationals and stateless persons are allowed to file constitutional complaints.

14. The First Day of this Symposium was conducted in an interactive and constructive manner. The active participation of participants reflected the importance for this issue to be further elaborated in the future.

SECOND DAY OF SYMPOSIUM (16th August 2015)

Comparative Perspectives on Constitutional Complaint

First Session

1. The first session of the second day of the symposium under the subtopic "Comparative Perspectives on Constitutional Complaint" was moderated by Dr. Muchammad Ali Safa'at, S.H., M.H., Deputy Dean of the Law Faculty of Brawijaya. The speakers for the first session were Mr. Zühtü Arslan, President of the Constitutional Court of the Republic of Turkey; Mr. Mourad Medelci, President of the Constitutional Council of the People's Democratic Republic of Algeria and Mr. Jeyhun Garajayev, Judge of the Constitutional Court of the Republic of Azerbaijan.

2. The first presenter of the second day, Mr. Zuhtu Arslan, President of the Constitutional Court of the Republic of Turkey, started with the role that constitutional court of Turkey plays in facilitating constitutional complaint. The presenter began with an observation on the effectiveness of constitutional complaint as an instrument to protect human rights and to adopt a rights-based paradigm. This means a shifting in the basic paradigm of the constitutional court from focusing on official ideology to a more rights-based approach. On one side, the constitutional complaint mechanism reduces the number of complaints directed to the European Court of Human rights. However, on the other side of the coin, the Turkish constitutional court was overloaded with complaints; within a period of 3 years, the court had delivered 821 judgments, mainly on cases involving the violation on the right to fair trial, freedom of expression cases, freedom of assembly, and the right not to be discriminated. The main purpose of the complaint mechanism in the court is, therefore, to introduce basic principles and standards to protect rights and liberties. The court also stipulates that the complainer should exhaust all domestic remedies with a good chance of success before launching a constitutional complaint.

3. The President of the Constitutional Council of Algeria began his presentation by highlighting the different aspects related to constitutional appeal. As deliberated throughout the symposium, there is the common goal among constitutional courts from different countries that is to conduct judicial or constitutional review. To that end, the Algerian constitutional council holds the role to enforce the respect of the Constitution through the review of constitutionality within the framework of hierarchy of norms. The Constitutional Council also ensures the legality of referendum, election of the President, as well as the parliamentary

elections by examining appeals. In this regard, the decision of the Constitutional Court is final and binding. However, it is also important to note that currently the competence to decide on appeals is limited on the object, time and its proceeding. Currently, Algeria has already prepared a preliminary draft of a constitutional revision in order to accommodate direct referral to the council by the parliamentary minority, who may challenge a law provision deemed unconstitutional. Also, the constitutional council may allow defendants to appeal to the Council, when appropriate.

4. Mr. Jeyhun Garajayev from Azerbaijan emphasized on the importance of institutionalizing the constitutional complaint to the constitutional court, the development of Azerbaijan Constitutional Court, and the problem of the mechanism of Constitutional Court in the protection of human rights and freedom. The development of the Azerbaijan constitution can be divided into 4 stages: (1) the rise of the idea of limiting absolute power at the end of the 1st World War; (2) The leveling up of social rights during the period between 1st and 2nd World War; (3) the collapse of colonial system after the 2nd World War until 1980; and (4) The adoption of independent constitutions by all post-Soviet countries following the collapse of USSR. In this regard, global constitutionalism is understood as a political and legal phenomenon in restricting the power of the government that is built on the protection of human rights to guarantee the liberty of its citizens. Since the main task of constitutional review is to protect the constitution, constitutional justice has to be implemented through an effective mechanism that guarantees both the constitution and the individual liberty. In this case, the decision on which individual has the ability to file Constitutional complaint is important. In Azerbaijan the amendment of Constitution in 1995 was important in building an effective legal protection, followed by the adoption of Law on Constitutional Court in 1997. However, the law does not contain procedures for complaint by citizens until 2003, including the Ombudsman rights in Constitutional Court, legal entities and, municipalities. This represents the growth of constitutional justice in Azerbaijan. The goal is to seek constitutional justice. The main problem of this is limiting the complaint to only concrete constitutional cases. It should be noted that the Constitutional Court does not consider the factual circumstances and does not assess the evidence. The task of the Constitutional Court is a single interpretation of the nature and content of the constitutional right. In this part, Constitutional Court of Azerbaijan closely cooperates with the Venice Commission. The Constitutional Court has the task of preserve legality of the constitution. There are also some technical requirements imposed on constitutional complaints such as deadlines, complaint form, stamp duty, the language and so on. All these criteria are important to consider when establishing a legislative framework filing constitutional complaint with the Constitutional Courts to ensure the harmony between the regulation and the practice of the

law and to quickly identify the problem. In conclusion, the speaker stressed the importance of granting the right of constitutional courts to deal with constitutional complaint.

Second Session

5. The Panelists for the second session of the second day of the symposium under the subtopic "Comparative Perspectives on Constitutional Complaint" were Mrs. Anar Zhailganova, Judge of the Constitutional Council of the Republic of Kazakhstan and Mr. Deolindo dos Santos, Judge Counselor of the Court of Appeal of Timor Leste.

6. Ms. Anar Zhailganova, Member of the Constitutional Council of the Republic of Kazakhstan, explained that pursuant to the Constitution of the Republic of Kazakhstan constitutional supervision is carried out by a specially established non juridical state body, the Constitutional Council of the Republic of Kazakhstan. The powers of the Constitutional Council are, among others to i) decide on the correctness of conducting the elections of the President of the Republic, deputies of the Parliament, and conducting an all-nation referendum, in case of dispute; ii) consider laws adopted by Parliament with respect to their compliance with the Constitution of the Republic before they are signed by the President; iii) consider the decisions adopted by the Parliament and its Chambers to their compliance with the Constitution of the Republic; iv) consider international treaties of the Republic with respect to their compliance with the Constitution of the Republic; officially interpret the standards of the constitution. Furthermore the Constitutional Council's powers, its status, mandatory power of decisions, interplay with legislative, executive and judicial branches allows for rights and freedoms to be safeguarded. In Kazakhstan, a one hundred definite steps program is the next stage in enhancing and promoting human rights and freedoms. In conclusion, the panelist stated that analyzing constitutional supervision of states demonstrates that a state chooses its own route to constitutional development and that human rights mechanisms depend on traditions, world-view, and the level of legal consciousness of citizens.

7. On his comment to the speakers, Judge Counselor Deolindo dos Santos of the Supreme Court of Justice of Timor Leste started by giving brief presentation on the structure, functions and authority of the Supreme Court of Justice. He explained that there is no constitutional court within the Timor Leste's judicial system. Nevertheless, the Supreme Court of Justice has the authority and maintains the power to conduct judicial review on the constitutionality of laws or acts of organs of state. An interesting feature of Timor Leste's Constitution is the authority it grants the Supreme Court of Justice to verify and rule cases

regarding unconstitutionality by omission. The Supreme Court can adjudicate appeals only against the following types of decisions: decision that overrules the application of a particular rule on the grounds of unconstitutionality and decisions on a particular rule which is deemed constitutional but was challenged during court proceedings.

Question and Answers Session

8. During the questions and answers session, participants raised, among others, the following points:

    a. Limited access to constitutional complaint.
    b. The role of constitutional courts in relation to the sharing of power with other branches of government, namely the legislative branch.
    c. The role of NHRI in advancing constitutional complaints.
    d. Negligence or inaction by state organizations as violation of constitutional rights.
    e. The relation between the jurisdiction of the European Human Rights Court and Turkey's Constitutional Court.
    f. The difference in definition between constitutional complaint and judicial review.
    g. Constitutional courts' roles in addressing the deprivation of the rights of the people particularly with regards to access to environment and exploitation of natural resources.
    h. Guarantee and process of the execution of constitutional court decisions or ruling.

Closing

9. In closing, the moderator stated that a key function that is performed by almost all constitutional courts is the protection of fundamental rights of every individual.

10. Also, constitutional complaint, aside from being a specific mechanism, can also be understood in a broader spectrum together with other means of protecting people's rights such as judicial review and the resolution of general election disputes.

Problems and Challenges in Dealing with Constitutional Complaint Cases

First Session

11. The second session of the second day of the symposium under the subtopic "Problems and Challenges in Dealing with Constitutional Complaint Cases" was moderated by Dr. Zainul Daulay, S.H., M.H., Dean of the Law Faculty of Andalas University. The speakers for the first session were Mr. Mikhail Kleandrov, Judge of the Constitutional Court of the Russian Federation and Mr. Mukambet Kasymaliev, President of the Constitutional Chamber of the Kyrgyz Republic.

12. Mr. Mikhail Kleandrov, Judge of the Constitutional Court of the Russian Federation began his presentation by mentioning the problems and challenges in the experience of the Russian constitutional court. He stated that the individual right to launch a complaint as a citizen of the Russian Federation on the violation of fundamental rights is a right that is considered the very foundation of the Court. The Federal Constitutional Law of 21 July 1994 No. 1-FKZ "On the Constitutional Court of the Russian Federation", contains, in particular Chapter XII named "Consideration of cases on the constitutionality of laws upon complaints on violation of constitutional rights and freedoms of citizens" stipulating that citizens of the Russian Federation, foreign citizens, as well as persons without citizenship and other subjects of the law can make complaints to the Constitutional Court if there is a violation of their constitutional rights and freedoms. The problems and challenges faced by the constitutional court of the Russian in federation are 1) the existence of a great number of cases being directed to the constitutional court though many are declared inadmissible for constitutional complaint as they did not touch on the constitutionality aspects, 2) the overlapping of jurisdiction between the federal constitutional court and the constitutional and statutory courts of each constituent entity (16 constituent courts) of the Russian Federation since each has its own legal basis of organization and procedural activity and 3) the existence of certain peculiarities concerning the constitutional justice procedure, particularly for submitting a claim and contesting specific types of legal acts.

13. The President of the Constitutional Chamber of Kyrgyzstan stated that based on its constitutional law, every person has the right to challenge the constitutionality of law or other normative laws when it is believed that certain acts have violated the rights and freedom of the people. In doing so, the legislation allows every citizen to submit direct appeal to the Constitutional Chamber on matters directly affecting their constitutional rights. However, the Chamber also faces problems with regard to the proper submission

of a complaint by its citizens in which from statistical data, 51.06% of the applications received were invalid. This is due to the lack of substance within their application to address the uncertainty of certain legislations or constitutions. It is important to note that an application shall consist of claim or evidence supporting their claims and opinion of the applicant on the questioned legal substance. Moreover, the large number of invalid complaints can be due to lack of legal knowledge among citizens, shortage of experts, lack of comprehensive training systems of qualified lawyers and attorneys, as well as legal education for the people. Therefore, the Constitutional Chamber has developed and implemented a system of electronic appeal of citizens; regularly conduct training seminars, and organising summer schools on constitutionalism for various actors and societies; transparent, open and accessible information of the Chamber's activities; and provisions of information regarding procedures and requirements for application submission. This serves as the effort to eradicate difficulties within the process of submitting constitutional complaint.

Second Session

14. The Panelists for the second session of the second day of the symposium under the subtopic "Problems and Challenges in Dealing with Constitutional Complaint Cases" were Mrs. Hla Myo New, Member of the Constitutional Tribunal of the Republic Union of Myanmar and Mr. Khalil Rahman Motawakkel, Secretary General of the ICOIC of Afghanistan.

15. The first panelist from Myanmar, Mrs. Hla Myo New, briefed on the development of Constitutional Court of Myanmar. The Court was very new, established on March 2011. The Constitutional Court of is authorized to examine the Constitution as well as to check on the constitutionality of a law. However, the right to appeal to the Constitutional Court of Myanmar is limited to the functions of the Head of General Election Commission and Regional Representative of Myanmar, as written in the Constitution. The Constitutional Court has the right to determine the constitutionality of government institutions but not individuals. Thus, the authority does not cover constitutional complaint. However, in case of questions of individual rights violation to the Constitution, an individual might appeal to the Supreme Court. And if the case raises questions regarding the Constitution, the case might be referred to the Constitutional Court. In the application of constitutional justice, this principle may be applied except in the case of emergency or insurgency. The authority may be transferred to the Constitutional Court only if the case has been introduced in every legal procedure available. Based on the Law, the Constitutional Court is the last resort for any individual case related to the violation of its fundamental rights and freedoms. This also is

only limited to the rights included within the Constitution. Myanmar continuously upholds the principle of constitution and protection of fundamental rights. To this end, Myanmar is eager to learn from the experience of other countries to develop its constitutional system.

16. The panelist from Afghanistan, Mr. Khalil Rahman Motawakkel began with the challenges faced by the constitutional complaint mechanism in Afghanistan. The first is the strain on power relations between the sovereign court and the constitutional court due to the contradictory stipulation of the constitution, and hence amendment is deemed necessary. The second is concerning public perception as the people see the constitutional courts and judiciary as corrupt institutions and hence the public prefer informal justice systems and institutions and as such, Afghanistan needs to restore public trust especially as a post-conflict country and find a synergy between restorative and constitutional justice. The third is cultural and political and thus, Afghanistan needs to first develop condusive cultural and political environment.

Question and Answer Session

17. During the questions and answers session, participants raised, among others, the following points:
    a. The role of constitutional courts in dealing with existence of provisions and laws that prohibit religious practices.
    b. The right to be recognized as a citizen and the problems of statelessness.
    c. The relation between constitutional courts at the federal, regional and local levels.

Closing

18. The Moderator concluded that the presence of constitutional complaint is required to ensure the protection of individual rights and freedoms. However, the implementation of constitutional justice has many differences among countries.

19. He further reiterated that there are several steps that can be taken to strengthen the implementation of constitutional justice, such as: (1) strengthening citizens' trust, (2) increasing the transparency of constitutional process, and (3) fostering dialogue between the citizens and the legal institutions.

Jakarta, 15th – 16th August 2015

ANNEX I
PAPERS

SESSION I

OVERCOMING CONSTITUTIONAL OBSTACLES IN DEALING WITH CONSTITUTIONAL COMPLAINT ISSUES: Indonesia's experience*

I D.G. Palguna**

A Brief Historical Background

The competence to decide cases on constitutional complaint is not included in the jurisdiction of Indonesia's Constitutional Court, the restrictions of which stipulated in Article 24C paragraph (1) and (2) of the Indonesian Constitution (known as the 1945 Constitution or UUD 1945 – as it is commonly abbreviated in *Bahasa Indonesia*, the Indonesian language). Historically speaking, constitutional complaint was not an issue intensely and thoroughly discussed during the amendment process of the Indonesian Constitution. Indeed, while they unanimously agreed to – to adopt the establishment of a constitutional court at the time of the amendment, not one of the 11 factions comprising the People's Consultative Assembly (or the *Majelis Permusyawaratan Rakyat*, MPR), who had the constitutional power to amend the UUD 1945, through their representatives in PAH I MPR's working body[1], expressly suggested to give the proposed court the competence of deciding cases on constitutional complaint.

The initial idea for adopting the establishment of a constitutional court was almost entirely based on the consideration that, in the future, there would be no law inconsistent with or contrary to the Constitution (the UUD 1945) – something that was deemed to be common practice during the decades-long reign of the New Order regime. The only faction that even

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* Presented at *the International Symposium on Constitutional Complaint*, held in Jakarta, August 15-16, 2015.

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1 PAH I was an abbreviation, in Bahasa Indonesia, of Panitia Ad Hoc I or Ad Hoc Committee I. The ad hoc committee was part of the Indonesia's People Consultative Assembly (MPR)'s Working Body whom specifically assigned to preparing the UUD 1945's amendment draft.

so much implied a proposal to grant the Constitutional Court the competence to decide cases on "constitutional complaint" was the Indonesian Democratic Party of Struggle (PDIP). As a part of its concluding statement in the PAH I's 41th plenary session, PDIP proposed that the constitutional court should also be given the competence to adjudicate "Constitution-based lawsuits" (*gugatan berdasarkan Undang-Undang Dasar*) along with other competences, such as to review the constitutionality of law as well as all subordinate regulations, to give the ruling on the dissolution of a political party, to decide disputes between the central and local governments, etc.[2] By "Constitution-based lawsuit", PDIP meant a concrete case initiated by an individual citizen with an allegation that there has been some violation of constitutional right(s) given by the Constitution.[3] There was, unfortunately, neither further discussion nor any follow up concerning the issue.

Indeed, a session was also held by PAH I during the deliberation of UUD 1945's amendment, when drafting articles concerning the jurisdiction of the Indonesia's Constitutional Court, in which PAH I invited justices from Germany, South Korea, Thailand, and South Africa – counties whose constitutional courts had the power to decide cases on constitutional complaint – for a brain storming discussion. During the session, there were hours of sharing experience and interesting discussion among the invited justices and members of PAH I but, again, there no further follow up deliberation concerning the issue in the remaining sessions of PAH I even until it completed its task in 2002.

Examination of PAH I's records during the deliberation of UUD 1945's amendment shows no clear and "official" explanation for why the issue of constitutional complaint failed to materialize. However, according to Jakob Tobing, then chairman of PAH I, there were two main reasons. Firstly, there was a fear of unmanageable case-load if the proposed constitutional court was also empowered with competence to decide cases of constitutional complaints. Secondly, because it was a brand-new mechanism, there was concern that the introduction of such a new mechanism might trigger a potential overlapping with other courts within the general jurisdiction.[4] In short, the final draft concerning the jurisdiction of the Constitutional Court, which was unanimously agreed upon by the MPR's plenary session, was that which is now stipulated in Article 24C paragraphs (1) and (2) of UUD 1945 stating that the Constitutional Court, whose verdict shall be final and binding, shall have the competence to decide cases on the review of the constitutionality of laws, disputes concerning authorities among state institutions whose authorities are given by the Constitution, dissolution of political parties,

2 For further details, see Sekretariat Jenderal MPR RI, "Risalah Rapat ke-41 Panitia Ad Hoc I Badan Pekerja MPR 2000", Thursday, June 8, 2000, pp. 24-25.

3 Interview with Jakob Tobing in the sideline of a national seminar on constitutional complaint jointly organized by the Indonesia's Constitutional Court and the Faculty of Law, Udayana University, held in Denpasar, December 12, 2009. Jakob Tobing was also a representative from PDIP faction in the MPR during the process of UUD 1945 amendment.

4 *Ibid*.

disputes concerning the result of general elections, and shall be obliged to give decision on a House's opinion that the President and/or Vice President has allegedly committed crime(s) as described in the Constitution and/or they are no longer meet the requirements to be President and/or Vice President.

Recent Developments

Having no constitutional power to adjudicate cases on constitutional complaint does not necessarily mean that there are no such cases brought before Indonesia's Constitutional Court. On the contrary, even since its very existence, there were dozens of individual citizens who sought the Court's rulings on cases which were substantially 'constitutional complaints' in nature. Those cases were brought before the Court, mostly, in the forms of judicial review. Such attempts were understandable because according to the law of procedure applied for judicial review, which has been in force since the establishment of the Court, an individual citizen is admitted to have a standing before the Court to directly challenge a law which is considered to have infringed the citizen's constitutional right(s).

Article 51 paragraph (1) of Law on Constitutional Court states that parties who have standing to submit a petition for judicial review of a law shall be those who deem their constitutional right(s) and/or authority(s) to has have been infringed upon by an enforced law, i.e. (1) individual citizen of Indonesia (including a group of Indonesian citizens who have interests in common), (2) communities practicing traditional law in so far as it remains in existence and in conformity with social development and the principle of the Unitary State of the Republic of Indonesia, and recognized by laws, (3) legal entities (private or public), and (4) state institutions. Hence, when an individual citizen deems that his or her constitutional right(s) has been violated by some public official's act (or omission), the individual citizen then submits a petition for judicial review against some provision of a particular law – arguing that the provision in question is the legal basis of such act (or omission). Accordingly, the petitioner then asks the Court to hand down a ruling stating that the provision in question is unconstitutional and has no legally binding power.

For instance, in 2003, a citizen named Main bin Rinan and friends submitted a petition before the Court asking for the annulment of ruling in a Supreme Court's case review that they deemed had violated their constitutional rights. At the same time, the petitioners also asked the Court to rule that Article 67 of Law Number 14, 1985 on Supreme Court, which gives the Supreme Court authority to review a case, was unconstitutional. The Court ruled that the petition was inadmissible because it was beyond its jurisdiction to review a Supreme Court verdict.[5]

[5] See the Constitutional Court verdict Number 16/PUU-I/2003.

In 2004, another petition was submitted by a man named Raden Prabowo who claimed that there were several court verdicts that were inconsistent one another so as to cause violation to his constitutional rights. Substantially, it was clear that the petitioner wanted the Court to hand down its verdict ruling that those inconsistent court verdicts should be declared null and void. It turned out, however, that the petitioner claimed these inconsistencies were caused by Article 16 of Law Number 4, 2004, on Judicial Power. The Court ruled that the inconsistent court rulings referred to by the petitioner had no relation with the constitutionality of Article 16 of Law Number 4, 2004, which was the legal basis of the court in question to adjudicate cases. Meanwhile, as to issue on the inconsistent court verdicts itself, it was deemed beyond the competence of the Court. The Court thus declared the case inadmissible.[6]

There were also petitions against the Government decision concerning the implementation of a *haj* quota,[7] the replacement in use of the term "Tionghoa" with "Cina" to refer to Indonesian citizens of Chinese descent by *Kabinet Ampera* Circular Number SE.06/Pres.Kab/6/1967, dated June 28, 1967,[8] the bail-out of a bank through Government Regulation in lieu of Law Number 4, 2008,[9] and many others. With all these instances, it is clear that the competence of the Court to adjudicate cases on constitutional complaint has become an urgent and undeniable need.

In Search of a Way Out

Taking into account the previous description, question arises: apart from amending the UUD 1945 (again), especially Article 24C paragraphs (1) and (2) which regulate the jurisdiction of the Court, is there any legally suitable way to deal with the issue of constitutional complaint? Searching for way out through the amendment of UUD 1945 is here set aside because, as far as the current socio-political condition of Indonesia is concerned, such a way out is unlikely to meet the urgent need to deal with the issue. Article 37 of UUD 1945, concerning procedures for amending the Constitution, says:

(1) A proposal for amendment to the articles of the Constitution can be set out in an agenda for a session of the People's Consultative Assembly if submitted by at least 1/3 of the sum of the members of the People's Consultative Assembly.

(2) Every proposal to amend articles of the Constitution shall be submitted in writing and clearly indicate the part proposed for amendment and the reason thereof.

(3) In order to amend articles of the Constitution, a session of the People's Consultative Assembly shall be attended by at least 2/3 of the sum of the members of the People's Consultative Assembly.

6 See the Constitutional Court verdict Number 61/PUU-II/2004.
7 See the Constitutional Court verdict Number 51/PUU-VIII/2010.
8 See the Constitutional Court verdict Number 24/PUU-VIII/2010.
9 See the Constitutional Court verdict Number 145/PUU-VII/2009.

(4) The resolution to amend articles of the Constitution shall be conducted by the approval of at least fifty percent plus one of the whole members of the People's Consultative Assembly.

(5) …..

It is clear enough that, in the long run, constitutional amendment is indeed the best and, of course, the most constitutional way to solve the issue on constitutional complaint. But, as UUD 1945's Article 37 shows, such a solution is procedurally complicated – not to mention that, considering the current atmosphere, it seems to be a politically hard-won "battle". Hence, a more modest – but legally acceptable – alternative must be found.

From a theoretical perspective, there are two possible alternatives. The first alternative is by way of legislative interpretation and the second is through judicial interpretation. Legislative interpretation means that the legislature makes a formal interpretation of a certain provision of the Law on Constitutional Court (i.e. Law Number 24, 2003 as amended by Law Number 8, 2011 – hereinafter referred to as LCC) in such a way so as to cover the Court's competence to decide cases on constitutional complaint. LCC is the implementation of Article 24C of the UUD 1945 that regulates the Constitutional Court.

To be more concrete, since Article 24C paragraph (1) of UUD 1945 gives no explanation on the meaning or scope concerning the competence of the Court to "review laws against the Constitution", then it is legally acceptable if the legislature, when amending the LCC, gives a formal interpretation by including constitutional complaint into the scope covered by the phrase "review laws against the Constitution". The theoretical basis of such an (extended) interpretation can be explained, in short, as follows: both judicial review and constitutional complaint are derived from the same idea that is constitutional review. The difference is that while judicial review deals with issues concerning the constitutionality of legal norms, constitutional complaint deals with issues concerning the constitutionality of acts or omissions (of state or public officials). The two mechanisms lead to the same direction that is the protection of citizens' constitutional rights, which is considered to be one of the inherent conditions constituting a constitutional democratic state.

Meanwhile, the second alternative, the judicial interpretation, refers to the role of the judiciary, i.e. the Constitutional Court. As far as Indonesia's Constitutional Court is concerned, this alternative has, partly and limitedly, been practiced for years. There have been many rulings of the Court that declared that some provisions of a law (or parts of it) were conditionally constitutional or conditionally unconstitutional, should the provisions of law in question be interpreted in such a way by certain state or public officials so as to caused violations to citizen's constitutional right(s) in concrete cases. But it is important to note that dealing with constitutional complaint cases through judicial interpretation is very limiting. Firstly,

this approach can be used only for cases where the citizen's constitutional rights violation or infringement by certain state or public official's acts (or omissions) involve a legal norm that has been mistakenly understood or interpreted by the state or public official in question. Secondly, the Court's ruling is not directed at the constitutionality or unconstitutionality of the state or public official's act (or omission) in question but, instead, at a certain legal norm by stating that if the norm is interpreted in a certain way in a certain condition then the law is unconstitutional (or constitutional).

In other words, the second alternative cannot incorporate all kind of complaints and cannot directly solve the essence of a complaint itself but only its cause, i.e. a norm of a particular law that has been misunderstood or misinterpreted by a certain state or public official. Accordingly, preference should be given to the first alternative. While the latter can be considered and applied as a subsidiary or an additional option.

Jakarta, August 15, 2015

INTERNATIONAL SYMPOSIUM ON CONSTITUTIONAL COMPLAINT 2015

The Constitutional Complaint In Mongolia And Some Cases Of The Constitutional Court Of Mongolia

Dear President of the Constitutional Court of Indonesia,

Dear Presidents and judges,

Esteemed guests,

First of all, on behalf of the Constitutional Court of Mongolia, I would like to extend my heartfelt congratulations to the Constitutional Court of Indonesia for 12 years of its anniversary.

I would like to also express my deepest appreciations to the Constitutional Court of Indonesia for hosting this symposium on the very important topic of constitutional complaint and to all the speakers and esteemed guests.

Today I have prepared to speak about the special characters of the constitutional complaint in Mongolia and about some new cases which have been decided in the Constitutional Court of Mongolia.

The main mission of the rule of law is to ensure that all individuals, state and authorities respect the human rights and fundamental freedoms in the social and legal environment. This mission will not be completed by only declaring to protect them in the Constitution. However, it will be better satisfied by creating an independent constitutional review mechanism. Otherwise, the Constitution will be mere written norms and cannot fully serve its duty of an authentic protection of human rights.

Following the historical transition of Mongolia to democracy, in 1992, the country adopted its new Democratic Constitution which enshrined contemporary, universally accepted human rights norms and constituted the basis for the rule of law and democratic state structure.

This Constitution also established the Constitutional Court of Mongolia with a purpose of reviewing the constitutionality of actions and decisions of the authorities which exercise the branches of powers and to limit their powers in order to ensure the constitutional rights of the citizens.

The Article 64 of the Constitution of Mongolia states that "The Constitutional Court shall be an organ exercising supreme supervision over the implementation of the Constitution, making judgment on the violation of its provisions and resolving constitutional disputes. It shall be the guarantee for the strict observance of the Constitution." It is also stipulated in the Article 8.1 of the Law on the Constitutional Court of Mongolia that "The Constitutional Court shall exercise its supreme supervision over the implementation of the Constitution through rendering conclusions on the disputes specified in this Article and through settling disputes specified in the second clause of this Article."

According to the Constitution and the Law on the Constitutional Court of Mongolia, the Constitutional Court of Mongolia has jurisdiction over constitutionality of decisions made by the Parliament, President and Government and the General Electoral Committee of Mongolia, particularly, statutes, treaties and other legal acts adopted by the Parliament, presidential decrees, resolutions adopted by the Government and decisions made by the General Electoral committee regarding referendum and parliamentary or presidential election. It is given exclusive power to invalidate abovementioned acts if they are found to be breaching the Constitution of Mongolia. It also has a competence to establish and submit to the Parliament conclusions about whether there is a reason for impeachment of the high ranking state officials, namely, the President, the Chairman and members of the Parliament, the Prime Minister, the members of the Government, the Chief Justice of the Supreme Court and the Prosecutor General on grounds of violation of the Constitution and other laws by their actions, decisions or conduct.

Jurisdictions of general and special court and as well as the jurisdiction of the Constitutional Courts in some countries are determined in the law by general content of the legal disputes. But in case of Mongolia, the jurisdiction of the Constitutional Court is strictly determined as a definite list in the Constitution and other laws. This regulation amounts to the restriction of the expansion of its jurisdiction, furthermore the perfect implementation of constitutional complaint mechanism. Given that the powers of the Constitutional Court are strictly determined by the Constitution, currently there isn't any possible way to expand the jurisdiction of the

Constitutional Court by improving the organic law on the Constitutional Court and the its procedure law. This challenge can be resolved only by amending the Constitution.

The Constitutional Court must examine and settle constitutional disputes at the request of the Parliament, the President, the Prime Minister, the Supreme Court and the Prosecutor General. The Constitutional Court has discretion on whether to initiate constitutional proceedings on the basis of claims it received from citizens. In countries where constitutional review is exercised by constitutional courts, the natural persons are mainly not entitled to submit a claim to the Constitutional Court unless his/her right is personally and immediately infringed, but in the case of Mongolia, there is no such limitation. The broad right of the citizens to apply for a constitutional review for all issues which fall under the Constitutional Court's jurisdiction is the distinctive attribute of the Constitutional Court of Mongolia.

The claims made by citizens to the Constitutional Court of Mongolia can be classified into 2 types. If a citizen considers that his/her legitimate interests and individual rights are violated personally, he/she may file a complaint to the Constitutional court. In other side, citizens can also submit a claim to the Constitutional Court with a purpose of protecting public and state interests about issues related to the state authority even he/she is not directly and genuinely affected by relevant actions and decisions of that authority. Furthermore, foreign nationals and stateless persons officially residing in Mongolia are also entitled to this right equally as Mongolian citizens.

Since the establishment of the Constitutional Court of Mongolia in 1992, the public's knowledge about the Constitutional Court of Mongolia has been constantly improving and the amount of the claims for constitutional review has been gradually increasing.

Between 1992 to the end of 2014, the Constitutional Court of Mongolia has received and deliberated around 2000 claims. In the first years of its operation, it received about 20 claims annually, but today this number has increased to 2 to 3 complaints every day. It is also observed that the quality of the constitutional claims has improved in terms of reasoning and profoundness of the legal argument.

If we analyze the contents of the claims submitted to the Constitutional Court of Mongolia in this period, 50-60 percent is related to constitutionality of laws and other decisions adopted by the Parliament; 10-20 percent is related to the constitutionality of decisions by the President, the Government and the General Electoral Committee; and 15-20 percent is related to the impeachment of high ranking state officials namely, the President, the Chairman and members of the Parliament, the Prime Minister, members of the Government, Chief Justice of the Supreme court and the General Prosecutor.

It has to be mentioned that only 10 percent of all claims made to the Constitutional Court have passed the preliminary screening stage and transferred to the Constitutional Court's oral hearing. For the rest of the claims, the Constitutional Court considered that they were not admissible because the issue did not possess the character of constitutional dispute or they fell under the jurisdiction of other authorities rather than the Constitutional Court. In such cases, the member of the Constitutional Court /judge/ issues a formal decision about refusing to start a constitutional proceeding /in 45 percent of the cases/ or decides to transfer the application to the relevant authorities for appropriate recourse /in 30 percent of the cases/ respectively.

In the last 23 years, the Constitutional Court of Mongolia adopted around 140 decisions which determined breaches of the Constitution. Specifically, 71 provisions of 35 different articles of the Constitution have been found to be breached. To be more clear, Article 16 /about human rights and fundamental freedoms/ of the Constitution have been breached 40 times and the Article 14 /about the equality/ have been breached for 20 times, so one can possibly make a conclusion that these are the most commonly breached provisions of the Constitution.

Now I would like to proceed to some latest cases of the Constitutional Court of Mongolia which contributed to the protection of human rights in our country.

The first decision was made in 2014 after deliberation of the complaint by a Mongolian citizen, whose constitutional rights have been personally affected by a provision of the Criminal procedure Code of Mongolia.

Article 334.4 of Criminal Procedure Code regulated that in case the accused, victim or the acquitted considers that the first instance court breached the Criminal procedure code or misapplied the Criminal code when deciding the guilt of the accused or the sentence, they should appeal to the higher court only through their attorney, it means not by themselves. The claimant personally had been convicted of a serious crime by the first instance court and he could not appeal because of his lack of means to pay for a legal counsel who raised the service fee by unexpected amount just before the expiry of the time for appeal. He could not appeal by himself because of the relevant regulation and the trial court decision became final.

The Constitutional Court of Mongolia established that the statement in the provision of the Criminal Procedure Code which said "the accused, the victim and the acquitted … shall appeal only through their attorney" was unconstitutional because it violated the universally accepted fair trial rights such as the right to defend oneself, right to appeal and the right to have access to a court. This statement was repealed since January 15th of the 2015.

Next case was started upon the claim made by a citizen who sought a constitutional review of a statute on behalf of the public interests. He challenged the constitutionality of the new Law on Establishment of the courts which was adopted by the Parliament of Mongolia in January 2014. According to the previous law until 2014, there were general courts for each major administrative units of Mongolia which had jurisdiction over civil and criminal matters in that area. But the new law established one civil court and one criminal court for every three districts or provinces. The claimant reasoned in his argument that the new law infringed the fundamental rights of the citizens to have access to courts by reducing the number of courts seriously. The defendant, Parliament of Mongolia argued that the new regulation was intended to cut unnecessary costs of court administration and to increase the competence of the courts by specializing in civil or criminal matters.

According to the Article 48.1 of the Constitution of Mongolia the judicial system of Mongolia shall consist of the Supreme Court, province and capital city courts, soum, intersoum and district courts. /Soum is the smaller administrative unit within the provinces./ The main issue at question was the interpretation of the statement "district court". After studying the minutes of session of the People's Great Assembly of Mongolia which adopted the Constitution in 1992, the Constitutional Court found out that the lawmakers used the term "district court" as a separate court in each district in order to facilitate the access to courts and avoid the establishment of circuit courts.

The Constitutional Court of Mongolia decided that the new law on the Establishment of courts was unconstitutional because it clearly went against the structure of the judicial system determined by the Constitution. Besides approving the arguments of the claimant, the Court also established that the new law infringed the right to appeal, right to be present during trial and right to have legal counsel because the distance to the courts was extremely increased for some citizens in the isolated regions of Mongolia and made it very difficult for them to have access to courts and legal services. The increased work overload of the courts also infringed citizen's right to have trial within reasonable time. The Law on the establishment of Courts became invalid since the July 1st of the 2015, about 6 months after the final decision of the Constitutional Court.

But the Parliament of Mongolia adopted another Law on establishment of courts in June 19th, 2015 which seemingly complied with the Constitutional terms but repeated the unconstitutional content of the previous law. Because they only made some minor changes by including the word "district" in the name of the courts and but there wasn't real difference regarding the location and other factors.

I must note that this case is a very complex one and today I tried to simplify it as much as possible for your consideration.

Today, it is globally accepted that the Constitutional Courts or similar institutions are the essential form of guarantee for protection of human rights and fundamental freedoms in democratic societies. I firmly believe that, we, the Judges of the Constitutional Courts and equivalent institutions will honorably keep this public trust and continue contributing to the promotion of human rights protection in the world.

Thank you very much for your attention.

INTERNATIONAL SYMPOSIUM ON CONSTITUTIONAL COMPLAINT 2015

Speech
His Excellency Mr. Nurak Marpraneet,
President of the Constitutional Court of the Kingdom of Thailand
Presented at the Board of Members Meeting
and the International Symposium
The Association of Asian Constitutional Courts and Equivalent Institutions on "Constitutional Complaints"
at Jakarta, Republic of Indonesia
between 14th – 17th August 2015

President of Constitutional Courts and Heads of Equivalent Institutions of the Asian Region,

Honorable Delegates,

Ladies and Gentlemen

On behalf of the Constitutional Court of Thailand, I would like to express my sincere gratitude to the Constitutional Court of Indonesia for extending to myself and Justices of the Constitutional Court of Thailand invitations to attend the Board of Members Meeting of the Association of Asian Constitutional Courts and Equivalent Institutions (AACC) and this international symposium, which also marks the 12th Anniversary of the Constitutional Court of the Republic of Indonesia. I am deeply appreciative of the generosity bestowed upon us,

and in particular, an opportunity to attend the National Ceremony in commemorating the Independence Day of the Republic of Indonesia on August 17th 2015, at the Presidential Palace in Jakarta.

President of Constitutional Courts and Heads of Equivalent Institutions of the Asian Region,

Honorable Delegates,

Ladies and Gentlemen

I would like to begin with a discussion on the topic of this meeting, that is, the constitutional complaint as an essential instrument for protection of the fundamental rights of the people. I intend to do so by referring to the Constitution of the Kingdom of Thailand 2007, a document of great significance and relevance to the protection of rights and liberties by direct action of the people, also known as, the rights of filing the constitutional complaints through the Constitutional Court. Even if the 2007 Constitution had been repealed, section 45 of the interim Constitution 2014 provided for and establishment of the jurisdiction of the Constitution Court to review provisions of laws from being contrary to or inconsistent with the Constitution. In addition to the constitutionality review of laws, the Constitutional Court remains the last resource for protecting the fundamental rights of the people. Today presentation is comprised of three main sections namely a brief introduction and conceptual frameworks of constitutional complaints, requirements and conditions in exercising individual right to file an application with the Thai Constitutional Court and lastly a conclusion.

For the first section of my presentation, I wish to address the brief introduction and conceptual frameworks on the issue of constitutional complaints in the Thai legal system. The 2007 Constitution was the first Constitution allowing the ordinary people to file a direct application for a Constitutional Court's ruling on the grounds that their fundamental rights and liberties recognized by the Constitution have been violated, known as, "the constitutional complaints." These constitutional complaints are one of the essential legal instruments to help protecting and safeguarding rights and liberties of individuals. Such constitutional complaints arise from the two principles, as follows:

The first principle is a direct applicability of all exercisers of state powers for protection of rights and liberties. This primary principle enables the people to assert the right to file an action directly in the Constitutional Court. In other words, prior to invoking an argument on

any act of state agencies which constitutes an infringement of constitutionally guaranteed rights and liberties of the people, the provisions of Constitution shall stipulate that such state agencies must be bound by fundamental rights and liberties of the people.

The second principle is the right to seek judicial relief for violation of individual rights and liberties. The judicial relief proceeding is vital and requires adherence to the democratic sovereignty and the rule of law. This means that any ordinary people whose rights or liberties recognized by the Constitution are violated have the right to file a constitutional complaint to the Court. This is because an exercise of state agencies or state officials' powers raises constitutionality issue as it is contrary to or inconsistent with the Constitution.

It is thus said that the constitutional complaints as a specific legal mechanism for protection of fundamental rights and liberties had been enshrined in the 2007 Constitution by way of the two following reasons:

The first reason was that the 2007 Constitution provided protection and binding effect on all exercises of state powers. This was found in section 27 which stated that "rights and liberties recognized under this Constitution, expressly or impliedly or by ruling of the Constitutional Court are protected and directly binding on the National Assembly, the Council of Ministers, the Courts, including constitutional organs and state agencies in the enactment of laws, enforcement of laws and interpretation of laws."

The second reason was that an individual's right of the constitutional complaint was considered as a key mechanism for safeguarding rights and liberties as an additional channel, which was more effective than an establishment of organizations or other state agencies. Moreover, as a judicial review body, the Constitutional Court has been entrusted with functions of adjudicating constitutional cases, which must be carried out with due regard to justice and for the sake of public interests.

For the aforementioned reasons, the constitutional complaints were introduced in respect of provisions of the law which infringed constitutionally protected rights. This was deemed as a grant of a direct right to file an action in the Constitutional Court, in particular, it also reflected a concrete Constitutional Court's role in the constitutionality review of laws so as to prevent contrariness or inconsistencies with the Constitution

Next, I would like to discuss further on

requirements and conditions in exercising constitutional complaint petitions to the Constitutional Court. In practice, limitations for handling of constitutional complaints must

be applied in order to minimize overburdening cases submitted to the Constitutional Court. With respect to an increase in access of the people to the Constitutional Court, section 212 of the 2007 Constitution stated three specific admissibility requirements, as follows:

The first requirement was that an applicant must be the person whose rights and liberties recognized under the Constitution had been violated. The word "person" included both natural and juristic persons. The applicant could address a case to the Constitutional Court only for the protection of his/her own fundamental rights, which thereby excluded the possibility that the complaint could be applied for the protection of others. Additionally, the applicant must be of the opinion that a provision of law was contrary to or inconsistent with the Constitution and that there had not yet been a ruling of the Constitutional Court in relation to such a provision.

The second requirement was that an application must be filed in the Constitutional Court for a ruling that "a particular provision of law" was contrary to or inconsistent with the Constitution. This also included that such a provision of law was particularly related to an infringement of the rights and liberties as prescribed by the Constitution. In essence, the Constitutional Court has set a precedent that a provision of law must be enacted by the legislature.

And thirdly, this must be a case where all other remedies had been exhausted. Adhering to the principle of subsidiary, the constitutional complaint was only admissible if all legal remedies for protection of the rights and liberties before the regular courts (the Courts of Justice, the Administrative Courts and the Military Courts), the Ombudsman or the National Human Rights Commission had fully been exhausted. It was only where individual was not able to exercise rights through any of those channels that a right to file an application with the Constitutional Court arose.

From the foregoing presentation, I may summarize that the 2007 Constitution imposed certain restrictions in exercising the individual's right of the constitutional complaint, that is, the provision of laws only referred to the laws that have been enacted by the legislature rather than extending to executive or judiciary acts. Nonetheless, this constitutional complaint reflected an important task of the Constitutional Court in ensuring the actual realization of fundamental rights of the people, and not just by recognition of the black letters of the constitutional provisions. Likewise, various democratic countries place greater emphasis on development of the constitutional rights by means of constitutional complaints mechanism. It could be said that the Constitutional Courts' roles in fundamental rights protection are therefore essential to the strengthening of democracy under the rule of law. The Constitutional

Court of Thailand fully appreciates the significance of and remains committed to this cause, which in turn would enable the Constitutional Court to perform its duties as the guardian of the Constitution and the protector of people's fundamental rights.

At the final phrase of proposing the Draft Constitution, the Constitutional Drafting Committee has prepared this new Draft Constitution with the great substance lying in promoting and protecting rights and liberties of the people, providing for an exercise of individual's right of the constitutional complaints to the Constitutional Court. This can assure an essence of the Constitutional Court's role in relation to the protection of rights and liberties of the people as being recognized by the previous Constitution.

Lastly, I would like to once again thank you all for your attention. Thank you.

INTERNATIONAL SYMPOSIUM ON CONSTITUTIONAL COMPLAINT

International Symposium "Constitutional Complaint" 12th Anniversary of the Constitutional Court of the Republic of Indonesia

Jakarta, Indonesia

15-17 August 2015

Presentation by Gianni Buquicchio, President of the Venice Commission

"Constitutional Complaint as an Instrument for Protecting Fundamental Rights of Citizen"

Mr President of the Constitutional Court,

Honourable Presidents and Judges,

Ladies and Gentlemen,

It is a great pleasure for me to be here in Jakarta today, at this important International Symposium on the Constitutional Complaint, organised on the occasion of the 12th anniversary of the Constitutional Court of the Republic of Indonesia.

Before I broach the topic of the *"Constitutional Complaint as an instrument for protecting the fundamental rights of citizens*", let me briefly introduce you to the work of the Venice Commission, of which I am the President.

Venice Commission

The Venice Commission is an independent advisory body of the pan-European organisation called the Council of Europe.

Its work consists of assisting its member and co-operating states to improve their constitutions, their legislation and the functioning of their democratic institutions.

Membership in the Venice Commission is not restricted to European states, but extends to non-European countries, which can become full members. A number of states in Asia, Africa and in Latin America have indeed done so.

The independence of the members of the Venice Commission is essential to the work that we carry out, notably when providing tailored advice to states that request it, in the form of opinions on draft laws.

The members of the Venice Commission provide advice on the basis of our Common Constitutional Heritage and – to the extent possible – try to take into account legal traditions and the history of the state concerned.

In order to be able to do so, the Venice Commission has developed a method of dialogue with its partners.

For the members of the Venice Commission, it is essential not to give advice on the basis of abstract legal texts, but to discuss the issues raised with all the stakeholders.

This ensures that we obtain a clearer and wider picture of the problem in question – as well as be able to address the issues raised in a helpful and constructive manner.

The Venice Commission has – from the outset – underlined the importance of exchanging information and ideas between Constitutional Courts and Courts with equivalent jurisdiction.

World Conference on Constitutional Justice

In order to foster this, the Venice Commission has established co-operation with a number of regional or language-based groups of constitutional courts:

in Europe,

in Asia,

in Africa,

in Ibero-America,

in French and Portuguese speaking countries, and, of course, the Association of Asian Constitutional Courts and Equivalent Institutions which held its Board meeting here in Jakarta yesterday.

In pursuing its goal of uniting these groups and their members, the Venice Commission has organised a Congress of "the World Conference on Constitutional Justice" for the first time, in Cape Town, South Africa in 2009.

This first congress was followed by another in Rio de Janeiro, Brazil in 2011 and a third Congress in Seoul, Republic of Korea in 2014. The next Congress will take place in September 2017 in Vilnius, the capital of Lithuania.

The World Conference on Constitutional Justice unites regional or language-based groups of Constitutional Courts and has already 96 member Courts.

The main purpose of the World Conference is to facilitate judicial dialogue between constitutional judges on a global scale.

We believe that the exchange of information and ideas that takes place between judges from various parts of the world in the World Conference furthers reflection on arguments, which promote the basic goals inherent to national constitutions.

Even if these texts often differ substantially, discussion on the underlying constitutional concepts unites constitutional judges from various parts of the world, committed to promoting constitutionality in their own country.

A major task of the World Conference is also to support the independence of its member Courts. This is why, since 2011, each congress deals with this topic.

The World Conference is ready to stand up for its members when they come under undue pressure from other State powers.

I am therefore proud that many Asian Constitutional Courts, including the Constitutional Court of Indonesia, are full members of the World Conference.

The constitutional complaint

Ladies and Gentlemen,

I would now like to talk to you about the importance of the constitutional complaint before the Constitutional Court or a court with equivalent jurisdiction.

Individual access to the Constitutional Court and, notably, the constitutional complaint is a topic that is very dear to the Venice Commission, which strongly supports the introduction of this type of procedure before the Constitutional Courts.

For the protection of human rights, the role of the Constitutional Court is crucial.

States, for the most part, secure the protection of human rights through their constitutions and, since the Constitutional Court is known as the guarantor of the constitution - protecting constitutionally guaranteed rights - it is important that this Court be able to carry out its task effectively.

Introducing full individual access to the Constitutional Court is increasingly recognised as an essential element of human rights protection on the national level.

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 a full individual complaints procedure have a lower number of cases before the Strasbourg Court than those that had not.

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 over 50 countries, with the aim of analysing the merits of the various systems that exist.

There is a further difference and aspect to consider in individual access, which affects the efficiency of individual complaints procedures – notably whether it is a *normative constitutional complaint* or a *full constitutional complaint*.

A 'normative' constitutional complaint gives the individual the right to file a complaint before the Constitutional Court, but only against a breach of his or her fundamental rights based on the unconstitutionality of a law.

A full constitutional complaint, on the other hand, can be directed against an unconstitutional judgement of the Supreme Court, even if the applicable law is constitutional.

However, the Constitutional Court is not a "fourth instance". It does not deal with the merits of the case, it only examines its constitutionality.

The full constitutional complaint is, therefore, the most comprehensive individual access to constitutional justice and, for this reason, the Venice Commission considers it to be the best means of protecting individual rights.

It is, however, true that opening the doors of the Constitutional Court to full individual complaints can dramatically increase the caseload of the Court.

But, the Venice Commission is convinced that a balance can be found to ensure individual access to constitutional justice and at the same time not overburden the Court.

This can be achieved, for instance, by introducing requirements or conditions in order to filter applications and to ensure that the Court is not overburdened by, notably, abusive or vexatious complaints.

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

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 at its 3rd Congress hosted by the Constitutional Court of the Republic of Korea.

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

Ladies and Gentlemen,

I would like to end my presentation by strongly encouraging Indonesia to consider introducing a full individual complaints procedure to the Constitutional Court in order to ensure that every effort is made to guarantee constitutional rights in your country.

Thank you for your attention.

INTERNATIONAL SYMPOSIUM ON CONSTITUTIONAL COMPLAINT 2015

Presentation by Deputy Chairman of the Constitutional Court of the Republic of Uzbekistan B.Mustafaev in panel discussions at the International Symposium on 15-16 August 2015, Jakarta

Dear ladies and gentlemen!

First of all, I would like to thank the Constitutional Court of the Republic of Indonesia for hosting this international symposium at the highest level, and to congratulate with the 12th Anniversary and wish success in their important work of ensuring the supremacy of the Constitution and protection of human rights and freedoms.

As already stated by the previous speakers, the constitutional complaint as a form of access to constitutional justice is certainly an efficient and effective tool for the protection of fundamental human rights and freedoms.

In this regard, I would like to share with you some experiences of the Constitutional Court of the Republic of Uzbekistan on this issue.

A great attention in Uzbekistan is paid to the country's modernization and democratization of state power and administration, including the democratization of the judicial system. Therefore, consistent democratization and liberalization of judicial-legal system, aimed at protection of human rights and provision of rule of the Constitution, were identified as a key priority of the democratic renewal of the country.

During the years of independence, Uzbekistan has had a new concept of deep reform and liberalization of the judicial system as an essential component of the formation of the rule of law. The complex organizational and legal measures aimed at the consistent strengthening of the judiciary, ensuring the independence and autonomy of the court, its transformation from a

body of instruments of repression and punitive apparatus in the past into a truly independent institution of the state, designed to reliably protect and defend human rights and freedoms.

The main objective of the reform – improving the efficiency of the judiciary in protecting human rights, bringing it to a level that would be consistent with international standards. Thus was formed the Constitutional Court, the civil courts, criminal courts, and commercial courts. Reforms to democratize also involve improving the judicial control, aimed at ensuring the supremacy of the Constitution. Implementation of the constitutional review was determined as the main task of the Constitutional Court.

The powers of the Constitutional Court established by the Constitution of the Republic of Uzbekistan and the Law "On the Constitutional Court ".

The Constitutional Court is elected by the President of the Republic of Uzbekistan by upper house of parliament (the Senate of the Oliy Majlis) consisting of a chairman, deputy chairman and five members of the Constitutional Court, including the judge of the Republic of Karakalpakstan. Thus, there are seven judges at the Constitutional Court.

The Constitutional Court considers the cases on the constitutionality of the acts of the legislative and executive powers, that is, determines the compliance with the Constitution of the laws of the Republic of Uzbekistan, decisions of the Oliy Majlis, decrees of the President of the Republic, resolutions of the government and local authorities, international treaty and other obligations of the Republic of Uzbekistan, as well as supervises the constitutionality and legality of orders and other acts of the Prosecutor General.

Protecting human rights and freedoms by the Constitutional Court also carried out by the official interpretation of provisions of the Constitution and laws of the Republic of Uzbekistan and the introduction of draft bills into the parliament. The Constitutional Court is committed primarily to the priority of human rights and freedoms that should act as the main reference legislation and law enforcement practice. The activities of the Constitutional Court is based on the principles of commitment to the Constitution, independence, collegiality, transparency, impartiality, and equality of rights of judges.

In accordance with Article 19 of the Law "On the Constitutional Court of the Republic of Uzbekistan" the right to introduce matters to the Constitutional Court have the chambers of parliament, the President of the Republic of Uzbekistan, the Speaker of the Legislative Chamber, the Chairman of the Senate, legislative body of Karakalpakstan, a group of MPs – at least one-fourth of the total number of deputies of the Legislative Chamber of Oliy Majlis, a group of senators – not less than one-fourth of the total number of members of the Senate, Chairman of the Supreme Court, the Chairman of the Supreme Economic Court and the Prosecutor General

of the Republic of Uzbekistan. Matters can be introduced by the initiative of at least three judges of the Constitutional Court.

As it is clear from this provision in our country the institution of the constitutional complaint does not exist, and the circle of persons eligible to apply to the Constitutional Court is limited. But it should be noted that in practice often matters are introduced by the judges of the Constitutional Court on the basis of complaints of citizens, non-governmental organizations, governmental agencies and their officials. This means that although the citizens themselves cannot initiate constitutional proceedings, they may do so indirectly – through eligible entities.

Of course, we understand that life does not stand still, poses more and more problems in the democratization of state power and governance, including democratization of constitutional justice, and that we must improve our legislation on constitutional proceedings. We also understand that this cannot be done in one fell swoop, but gradually. Therefore, we will carefully study the experience and practice of our partners to implement the institution of the constitutional complaint.

I take this opportunity once again to express gratitude to the organizers and hope to meet the colleagues at an international conference in commemoration of the 20th anniversary of the Constitutional Court of Uzbekistan, which will take place October 21-22, 2015 in Tashkent.

Thank you for attention!

INTERNATIONAL SYMPOSIUM ON CONSTITUTIONAL COMPLAINT 2015

Presentation by Deputy Chief Justice of the Supreme People's Court of Vietnam Session one: Constitutional complaint as an instrument for protecting fundamental rights of citizens Saturday, 15 August 2015

Honorable Chief Justice of the Constitutional Court of the Republic of Indonesia,

Ladies and gentlemen,

On behalf of the Supreme People's Court of Vietnam, I would like to express our sincere thanks to Honorable Chief Justice of the Constitutional Court of the Republic of Indonesia for hosting and inviting us to this Symposium. I would like to wish Honorable Chief Justice and all of distinguished guests health and happiness. I wish the Symposium the most successful!

Ladies and gentlemen,

As we all know, the constitution is the basic law with the supreme legal value, other legal normative documents enacted shall be strictly consistent with constitutional provisions. Therefore, in a system of legal documents, if there is any documents contrary to the constitution (unconstitutional) shall have to be abolished and the implementation of such legal documents must be suspended.

In order to guarantee the supremacy and validity of the constitution, there must be an effective mechanism for the constitutional protection. In Vietnam, the constitutional protection has been consistently and specifically provided in the Constitution 1946, Constitution 1959, Constitution 1980, Constitution 1992 and the new Constitution 2013. Given the particular conditions of our country, Vietnam has not yet established the constitutional court. However,

the protection of the constitution in general and protection of basic rights of citizens in particular have been well secured under different mechanisms including:

Firstly, the procedure for reviewing draft legal normative documents which have signs of being unconstitutional or contrary to the laws is stipulated in the Law on supervisory activities of the National Assembly, and the Law on the promulgation of legal normative documents. Accordingly, the Law Committee of the National Assembly is the specialized agency in charge for the constitutional protection; it has the function of guaranteeing the constitutionality, legality and consistency of the legal system by reviewing draft laws, ordinances before they are submitted to the National Assembly and the National Assembly's Standing Committee for their approval. The Government shall scrutinize and handle legal normative documents which have signs of being contrary to the laws. The Ministry of Justice shall be accountable to the Government in performing the function of state management in scrutinizing legal normative documents; assisting the Prime Minister in scrutinizing and handling legal documents issued by the Ministries and ministerial-level agencies which have signs of being contrary to the laws.

Secondly, in accordance with the current legal normative documents, all the citizens, members of the People's Council, deputies of the National Assembly and civil servants shall have the right to make requests, proposals to competent state agencies and persons in the state apparatus to review and handle actions and legal normative documents which have the signs of being unconstitutional. For example:

In order to control the traffic congestion and traffic accidents, the Ministry of Public Security has issued the Circular No. 02/2003/TT-BCA dated 13 Jan 2003 according to which "every person shall only be allow to register a motorcycle". In nature, this provision has restricted citizens' right of ownership of assets, unlimited of quantity and value, which is contrary to Article 58 of the Constitution of 1992. Many people disagree and request such provision to be abrogated. The National Assembly's Standing Committee, though its supervision on the promulgation of legal normative documents, has recommended the abolishment of such provision. The Ministry of Public Security, in this case, has finally agreed.

Thirdly, given the supremacy of the constitution, once the constitution is revised, other legal normative documents must be revised accordingly. The new Constitution 2013 of Vietnam which took its effects from 1 January 2014 introduces many new provisions on basic rights of citizens. Chapter II of the Constitution 2013 on human rights and basic rights and obligations of citizens include 36 Articles among the total 120 Articles of the Constitution. The protection of human rights, basic rights and obligations of citizens is the key content and vision in the entire Constitution of Vietnam. With the new Constitution 2013, many different codes of Vietnam need to be revised to ensure their consistency with constitutional provisions, particularly in

guaranteeing basic rights of citizens. In that connection, Vietnam is currently revising a number of important laws including the Criminal Code, Criminal Procedure Code, Civil Code, Civil Procedure Code, Administrative Procedural Code.

In conclusion, given the specific characteristics of Vietnam, we have not yet had the Constitutional Court. Instead, competent state agencies, basing on their functions and tasks, shall be involved in the protection of constitution, protection of basic rights of citizens provided for by the constitution.

Ladies and gentlemen,

I have briefly introduced, in general, regulations on the protection of the constitution's supremacy as well as the protection of citizens' basic rights. I look forward to learning your experiences in this regard.

Thank you.

SESSION II

INTERNATIONAL SYMPOSIUM ON CONSTITUTIONAL COMPLAINT

CONSTITUTIONAL COMPLAINT AS AN INSTRUMENT FOR PROTECTING BASIC RIGHTS: THE CASE OF TURKEY[1*]

Zühtü Arslan[2**]

The main purpose of this presentation is to explore the role of constitutional complaint in protecting human rights in Turkey. Three years experience of the Turkish Constitutional Court (TCC)in this field has proved that constitutional complaint is an effective instrument for protecting constitutional rights and liberties. The constitutional complaint mechanism provided an unprecedented opportunity for the Court to shift its long practiced "ideology-based" paradigm towards a "rights-based" paradigm.

However the success of the TCC in dealing with constitutional complaint cases does not rule out the possibility that it may become a victim of its own success. I must tell you at the very beginning that the increasing number of individual applications poses a great challenge for the TCC.

The paper will consist of two parts. In the first part, I will provide some factual and statistical data with a view of presenting a general picture of constitutional complaint in Turkey. The second part will deal with the emerging case-law of the TCC in the field of constitutional complaint.

I. SOME FACTUAL AND STATISTICAL INFORMATION

The institution of constitutional complaint was introduced into the Turkish legal system in 2010 through a constitutional amendment. The amended article 148 of the Constitution states

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1* Prepared to be presented at the *International Symposium on Constitutional Complaint*, Jakarta, 15-17 August 2015. Please do not cite without permission of the author.

2** Chief Justice of the Turkish Constitutional Court. zuhtu.arslan@anayasa.gov.tr

that "*everybody may apply to the Constitutional Court with an allegation that any of his or her constitutonal basic rights and freedoms, within the scope of the European Convention of Human Rights, has been violated by public authority*."

The Turkish Constitution clearly restricts constitutional complaint to the rights and liberties which are protected at the same time by the Strasbourg Convention. Like Germany and Spain, Turkey also excludes certain social and economic rights from the scope of constitutional complaint.

One of the reasons for introducing constitutional complaint was to reduce the number of applications aganist Turkey before the European Court of Humun Rights. Three years experience has revealed that this practical aim was realised to a great extent. While the number of pending applications against Turkey before the Strasbourg Court was about 20.000 at the end of 2011, this number was reduced to nine thousand (9000) as of 30 June 2015.[3]

The TCC started to receive individual applications as of 23rd September 2012. Until now about forty five thousand (45 000) applications have been lodged, more than ninety thousand (19 000) of which are still pending. Within the period of about three years, the TCC (as Sections and Plenary) delivered 821 violation judgments. The bulk of these judgments (644, %81) are related to the right to fair trial especially the length of proceedings. Given the fact that more than eighty percent (85%) of violations of right to a fair trial are related to right to trial within a reasonable time, the role of the structural problems in the violation of fundamental rights and freedoms becomes clear.

The Court also found a violation of the right to personal liberty and security in 56 cases (%7); the union rights in 29 cases (%4); the right to property in 26 cases (%3); and freedom of expression in 18 cases (%2). The other subjects of violation judgments are the rights to life, protection of physical and mental integrity of individuals, right to respect privacy, right to political participation, and freedom of religion.

Table 1: Subject matter of violation judgments (2012-2015)

Rights and Freedoms (Articles of the Constitution)	Number of violations
Right to life (Art. 17)	11
Prohibition of torture and ill-treatment (Art. 17)	4
Protection of physical and mental integrity (Art. 17)	3
Right to personal liberty and security (Art. 19)	56

[3] See http://www.echr.coe.int/Documents/Stats_pending_month_2015_BIL.pdf. The role of consttitutional complaint in this decrease may be seen by looking at annual number of applications before the Strasbourg Court. While the number of annual applications was about 9000, it was about 3500 in 2013, and 1589 in 2014.

Right to Fair Trial (Art. 36)	644
Principles concerning crime and punishment (Art. 38)	7
Right to respect for private and family life (Art. 20)	6
Freedom of correspondence (Art. 22)	5
Freedom of Religion (Art. 24)	2
Freedom of expression (Art. 26, 28)	18
Right to property (Art. 35)	26
Freedom of assembly and association (Art. 34, 51, 54, 68)	32
Right to be elected (Art. 67)	6
Prohibition of discrimination (Art. 10)	1
TOTAL	821

The primary aim of the TCC in constitutional complaint at this level is to lay down the basic principles and standards for protecting rights. That is why the Court has not yet invoked the admissibility criteria of constitutional significance, which proved to be an effective means of filtering.The TCC has so far engaged in determining the borderlines of the constitutional rights and liberties with a special reference to the jurisprudence of the European Court of Human Rights.

II. EXAMPLES OF RIGHTS-BASED APPROACH OF THE TCC

Now let me briefly explain the rights-based approach of the Turkish Constitutional Court by looking at some essential judgments in the field of constitutional complaint. It would be useful to classify these judgments into three groups, namely the judgments concerning (a) the condition of legality, (b) right to personal liberty and to fair trial, and (c) necessity in a democratic society and principle of proportionality.

1. Interpreting the condition of "legality"

The Turkish Constitution, like most constitutions, stipulates that constitutional rights may be restricted only by an act of parliament (Art. 13). In other words, there must be a legal basis to restrict rights and liberties.

In its first decisions, the TCC strictly interpreted and applied the legality (lawfulness) condition for the maximum period of detention. Article 102 (2) of the Criminal Procedure Law states that in serious crimes the period of detention must be extended to five years maximum. The criminal courts used to interpret the term five years as applicable to each crime allegedly committed by the applicants. This meant in practice those who were arrested for multiple crimes would be kept in custody for years and years.

The Constitutional Court declared that this interpretation of relevant article of the Criminal Procedure Law was not compatible with the right to personal liberty, which requires in principle the trial without detention. The TCC concluded that since five years statutory limitation must be applied to each detainee irrespective of the number of crimes allegedly committed, the period exceeding five years constituted a violation of the right to personal liberty protected by Article 19 of the Turkish Constitution.[4]

I would like to briefly mention about the surname case in which the TCC has pragmatically resolved the conflict between its own decisions and in a way avoided an incompatibility with the judgments of the Strasbourg Court. Article 187 of the Turkish Civil Code stipulates that "woman takes the surname of her husband; however, she may also bear her maiden name before her husband's surname..." In 2011 the TCC as plenary reviewed the constitutionality of this provision and found it constitutional.[5]

Two years later, the same issue came before the TCC through individual application. This time the TCC found a violation of the right to preserve and develop one's spiritual being by invoking Article 90 of the Constitution which gives certain primacy and priority to the international human rights agreements over national laws. Accordingly, in case of conflict between international human rights treaties and national laws the former prevails.

Referring to the relevant judgments of the European Court of Human Rights[6] and Article 16 of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), the TCC argued that the court of first instance should have taken into account these provisions of international conventions, rather than contravening provision of Civil Code, to settle the concrete conflict.[7] The Court therefore reached the conclusion that the intervention in the spiritual integrity of the applicant as protected under article 17 of the Constitution was not prescribed by law.

In famous Twitter case, where the applicant lodged an individual application directly to the TCC, the Court first examined the question of admissibility. The Constitution and the Law on Constitutional Court explicitly provide that all legal remedies must be exhausted before launching a constitutional complaint.

The TCC held that as a rule all legal remedies available must be exhausted before lodging a constitutional complaint. The Court also clarified that legal remedies must

4 See *Murat Narman*, Application No: 2012/1137, 2/7/2013;*Cemalettin Metin*, Application No: 2013/776, 20/3/2014.

5 TCC, E. 2009/85, K. 2011/49, 10/3/2011.

6 See *Ünal Tekeli v. Turkey*, Application No: 29865/96, 16/11/2004; *Leventoğlu Abdulkadiroğlu v. Turkey*, Application No: 7971/07, 28/5/2013; *Tuncer Güneş v. Turkey*, Application No: 26268/08, 3/10/2013; *Tanbay Tülen v. Turkey*, Application No: 38249/09, 10/12/2013.

7 *Sevim Akat Eşki*, Application No: 2013/2187, 19/12/2013.

be effective and capable to remove violations of certain rights. Under exceptional circumstances where the urgent action is necessary to halt possible breaches of rights and liberties, the individual application may be declared admissible by avoiding the condition of exhaustion of other legal remedies.

The Court then declared the application admissible on the ground that the administrative courts did not provide a reasonable chance of success. On the contrary, the failure and indeed reluctance of the authorities to lift the ban on Twitter despite a stay of execution decision delivered by Ankara Administrative Court was the main reason for the admissibility. The TCC stated that the uncertainty as to lifting the ban affected the freedom of expression of millions of people.[8]

As to the merit of the case, the TCC found a violation of freedom of expression on the basis that the act of total blocking of the Twitter was not prescribed by law. The Court clearly indicated that the relevant law did not authorise the administrative body (The Presidency of Telecommunication and Communication) to completely block access to Internet site like twitter without a judicial decision.[9]

In Youtube judgment, the Court as Plenary, also found a violation of freedom of expression on the ground that the intervention was not prescribed by law. Referring to the judgment of the Strasbourg Court in the case of *Yıldırım v. Turkey,* the TCC this time questioned the quality of the law and stated that the law constraining rights and liberties must have the character of certainty and foreseeability. The Court declared that the relevant provisions of the Internet Law failed to meet the condition of certainty and foreseeability.[10]

In both judgments the Court also states that Internet and social media play a crucial role in democratic societies as an extensive and efficient means for freedom of expression.

In headscarf case, the applicant was a female lawyer who claimed that the prevention of participation in court hearings with headscarf violated her freedom of religion alongside other rights. By taking an interim decision, the civil court has decided to adjourn hearings and ordered the plaintiff to hire another lawyer. The court, in its reasoned decision, stated that a lawyer wearing headscarf could not possibly participate in hearings, because headscarf was found in conflict with the principle of secularism by the European Court of Human Rights and the Turkish Constitutional Court.[11]

8 *Yaman Akdeniz and others*, Application No: 2014/3986, 2/4/2014, par.26.

9 *Yaman Akdeniz and others*, par.49.

10 *Youtube Llc Corporation Company and others* (Plenary), Application No: 2014/4705, 28/5/2014, par.56-57.

11 *Tuğba Arslan* (Plenary), Application No: 2014/256, 25/6/2014.

The TCC first determined the existence of an intervention in the applicant's freedom of religion. In answering the question whether the intervention was prescribed by law, the Court clarified the meaning of "law" (*Kanun*) as the act of parliament. In headscarf case, the Court declared that the intervention in applicant's freedom of belief had no statutory basis required by Article 13 of the Constitution according to which rights may be restricted only by parliamentary statute. The is different from the flexible conception of "law" in Article 9 of the the European Convention on Human Rights which has been interpreted to include the administrative regulations, judge made law as well as the acts of parliament.

The Court points out that there is no law preventing female lawyers from wearing headscarf in courtrooms. On the contrary, the Council of State invalidated the relevant part of "rules of profession" created by the Union of Bar Associations with a view of banning the headscarf for female lawyers. The TCC reached the conclusion that the intervention in question violated the applicant's freedom of religion, because it was not prescribed by law.

The TCC's interpretation of the term "law" as indicated in headscarf judgment is almost identical with the understandings of the German Constitutional Court. In its *Ludin* case of 1995, which involved the compatibility of headscarf ban for teachers with the German Constitution, the German Constitutional Court of Germany declared that any constitutional right must be restricted by law in its formal sense. Since the intervention in the applicant's freedom of religion was not prescribed by legislation, there was a breach of constitution.[12]

However, these judgments are different in their substance. The German Constitutional Court made it clear that "if the legislator, as part of its educational policy regarding the relationship of religion and state, decided to ban the wearing of the hijab in schools this would be an acceptable limitation of the freedom of religion and would not be inconsistent with Art. 9 of the European Convention on Human Rights."[13] On the contrary, the TCC was of the opinion that irrespective of its statutory basis the different treatment of the applicant also violated Article 10 of the Constitution which requires the state organs and officials, including judges, to treat everybody equally.[14]

2. Right to personal liberty and Right to Fair Trial

In a number of cases where the applicants were MP's in prison, the TCC emphasized the importance of the right to political participation and right to represent people in democracies. The Court held that the detention of the applicants prevented them from

12 2 BvR 1436/02, 24 September 2003.

13 2 BvR 1436/02, 24 September 2003, par.66.

14 *Tuğba Arslan*, par. 152.

using their rights as elected MP's to represent their electorates and participate in the works of the parliament for a long time. Drawing also attention to the possibility of judicial control system, which was applicable to the applicants as an alternative to the detention, the TCC ruled that the restrictions on applicants' political rights were not proportinate and therefore not necessary in a democratic society.[15]

The TCC also found a violation of the right to *habeas corpus* in a case where the applicant who was the former Chief of Army, claimed that he was prevented from challenging the verdict of the trail court before the appeal court within a reasonable time. The TCC held that the applicant was prevented from using his *habeas corpus* right effectively, simply because the trial court, a) rejected the request of release without examining it, and b) has not completed writing its detailed verdict with reasons for more than seven months.[16]

In *Balyoz* (sledgehammer) case, 230 applicants who were convicted for plotting a military coup to topple the government, claimed that their rights to fair trial were violated. The TCC first decided to merge all applicants.

The Court found a violation of the right to fair trial on two grounds. First, the Court considered the right to a reasoned judgment and the principle of equality of arms. The defendants insistently argued that some digital evidences were manipulated and distorted and that so many expert reports proved scientifically these manipulations and distortions. They also requested the trial court to appoint experts in order to determine whether the digital evidences were original or distorted. The requests of defendants were rejected by the Special Criminal Court which relied on the expert reports taken by the Public Prosecutor during the period of criminal investigation. In its detailed verdict the trial court explained that some digital documents were updated possibly by the applicants in order to defend themselves in case of failure of the *coup d'état* they planned and attempted.[17]

The TCC ruled that the trial court failed to explain reasonably and convincingly the allegation of contradictions concerning the digital evidences leading to a violation of the right to a reasoned decision. The TCC also held that the denial of the trial court to appoint an expert whose report might have a great impact on determining the final decision, constituted a violation of the principle of equality of arms which requires that the prosecution and defense must have equal procedural opportunities.[18]

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15 *Mustafa Ali Balbay*, Application No: 2012/1272, 4/12/2013; *Gülser Yıldırım*, Application No: 2013/9894, 2/1/2014; *İbrahim Ayhan*, Application No: 2013/9895, 2/1/2014; *Faysal Sarıyıldız*, Application No: 2014/9, 3/1/2014; *Kemal Aktaş and Selma Irmak*, Application No: 2014/85, 3/1/2014.

16 *Mehmet İlker Başbuğ* (Plenary), Application No: 2014/912, 6/3/2014.

17 *Sencer Başat and others* (The Plenary), Application No: 2013/7800, 18/6/2014, par. 54.

18 *Sencer Başat and others*, par. 71.

Secondly, the TCC found a violation of the right to adversarial trial and the right to obtain the attendance and examination of witnesses. The trial court rejected the request of the defendants to call for the former chief of staff and the commander of land forces as witnesses, because they wouldn't change the result of the trial. However, in its detailed verdict the trial court stated that the applicants' plan to overthrow the government was not realized because among other things the Chief of Staff and the Commander of the Land Forces of the time stood against and eventually attempted to prevent this coup.[19]

The TCC points out that the recognition of the role of these officials in preventing the alleged coup indicates that their explanations constitute a kind of evidence that may perfectly influence the result of the trial. Therefore, the denial of these officials as witnesses led to a violation of not only the rights of the applicants to obtain the attendance and examination of witnesses on their behalf, but also their rights to adversarial trial.[20]

3. Interpreting "Democratic Society" and Applying "Proportionality"

3.1. Right to respect privacy

On several occasions, the TCC has emphasised the importance of the right to respect privacy guaranteed under Article 20 of the Constitution. The Court found a violation in a case where the applicant was a public servant working as a prison officer and was fired from her job after her sexually explicit video was broadcasted on internet sites. The TCC held that the right to privacy of public officers might be restricted to maintain discipline and public order. However, these restrictions must be proportionate to the legitimate aims. For the Court, such a harsh administrative measure as firing the applicant will likely cause devastating effect on her future life. Therefore the TCC found a violation of the right to respect privacy on the ground that the intervention was not proportionate to the legitimate aims concerned.[21]

In another case, the applicant, who was a lawyer, claimed that the trial court's use of a classified report containing personal information about him as an evident in the process of prosecution and trial would violate his right to respect privacy. The TCC agreed that the trail court's use of such a confidential report, prepared by intelligent service, would make certain information and opinions on the applicant public, and therefore breach his right to respect privacy.[22]

19 *Sencer Başat and others*, par. 83-84.

20 *Sencer Başat and others*, par. 90.

21 Application No: 2013/1614, 3/4/2014.

22 *Ercan Kanar*, Application No: 2013/533, 9/1/2014, par. 20, 21.

3.2. Freedom of Expression

Referring to the jurisprudence of the Strasbourg Court, the TCC has consistently pointed out that freedom of expression constitutes one of the basic pillars of democratic society. Therefore in order to restrict freedom of expression, public authorities must convincingly present the existence of pressing social need, in other words compelling reasons for such restrictions.

In *Öcalan* case, the applicant asserted that his freedom of expression was violated, because the book entitled "*Kurdistan Revolution Manifesto*", originally written as part of his application to the European Court of Human Rights, was confiscated and destroyed by the state authorities. In its confiscation decision, the judge ruled that the map of Kurdistan at the cover page, the identity of the writer as the leader of the PKK, and finally the content of certain pages indicated that the book was written to propagate the terrorist organization.[23]

The Turkish Constitutional Court, sitting as Plenary, examined each argument of the confiscation order in details. For the Court, the cover-page, the identity of the writer and certain pages of the book that seem to incite to violence must not be taken in isolation. On the contrary, the message and aim of the book must be evaluated as a whole. Although, some pages of the book are really disturbing or even shocking certain part of society, the bulk of the book is about the critical and historical analysis of so-called "Kurdish problem". The author, among other things, calls for the recognition of "Kurdish reality" and for peaceful solution of the problem without recourse to armed resistance.[24]

The Court noted that comparing with other means of mass communication the applicant's book, aiming to indoctrinate the changing ideology of the PKK, speaks to a limited group of people.[25] It also pointed out that the copies of the book were destroyed despite the fact that there was no judicial decision in this regard.[26] Having emphasized the importance of freedom of expression and press in a democratic society, the Court has reached the conclusion that the confiscation of the book concerned was not proportionate with the legitimate aim of protecting national security and public order.

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23 *Abdullah Öcalan* (The Plenary), Application No: 2013/409, 25/6/2014.

24 *Abdullah Öcalan*, par. 102.

25 *Abdullah Öcalan*, par. 106.

26 *Abdullah Öcalan,* par. 112.

In *Bekir Coşkun* case, where the applicant was a journalist and sentenced to imprisonment for insulting the members of parliament, the Court has reiterated that freedom of expression for real and legal entities includes all forms of expression such as political, artistic, academic or commercial opinions and convictions. The Court ruled that "classifying an opinion expressed or disseminated as either *"worthy- worthless"* or *"useful-useless"* regarding its content amounts to a subjective judgment, and that trying to determine the area of freedom of expression based on these evaluations may lead to arbitrary limitation of this freedom." According to the Court, freedom of expression also includes freedom of expressing and disseminating opinions that are considered 'worthless' or 'useless' by others.[27]

There is no doubt that freedom of expression largely guarantees the freedom of individual to criticise thoughts and opinions of public authorities who are expected to tolerate even harsh criticisms. In Court's opinion, freedom of political expression deserves more protection, simply because it is *"the core principle of all democratic systems"*.[28]

The Court has also taken up the issue of whether the fact that verdict about the applicant was postponed might render the intervention as acceptable and proportionate to the legitimate aim pursued. The TCC responded this question negatively by stating that the possibility of being subject to sanctions in future may create a chilling effect on writers who may refrain from expressing their opinions or press activities.[29] The Court reached the conclusion that the restriction on the applicant's freedom of expression and freedom of the press for the purpose of the *"protection of the reputation"* was not necessary in a democratic society.

In a most recent judgment, the TCC has once again pointed out that the limits of acceptable criticism are wider as regards politicians and public officials such as a metropolitan mayor than as regards private individuals.[30] In this case, the applicant as a radiation oncologist published a press release criticising the quality of drinking water provided by Ankara Metropolitan Municipality. He was sentenced to pay 750 TL compensation for insulting the metropolitan mayor. The court of first instance stated that the applicant's expressions reached beyond criticism of the mayor, because there was no scientific certainty as to the quality of drinking water.[31]

27 *Bekir Coşkun* (Plenary), Application No: 2014/12151, 4/6/2015, par. 36.

28 *Bekir Coşkun,* par. 64.

29 *Bekir Coşkun,* par. 70.

30 *Ali Rıza Üçer(2)* (Plenary), Application No: 2013/8598, 2/7/2015, par.61.

31 *Ali Rıza Üçer(2),* par. 13, 58.

The TCC rejected this argument by clarifying that the requirement of scientific certainty as a criteria to participate in a public debate would make such participation impossible. It is therefore incompatible with the requirements of open society.[32]

3.3 Freedom of peaceful assembly and demonstration

In a recent case, where the applicant was taken into custody and eventually sentenced to five months imprisonment for breaching the law on assembly and demonstration, the TCC declared that the significance of freedom of expression in a democratic and pluralist society is also valid for the right to organise peaceful meetings and demonstrations. According to the Court, the right to organise meetings and demonstrations guarantees the emergence, protection and dissemination of different opinions, which is essential in the development of pluralist democracies.[33]

The Court noted that the group including the applicant gathered in front of the US Embassy located in an area one kilometre away from Turkish Grand National Assembly (TGNA) without making any notifications forty-eight hours in advance under Article 10 of the Law numbered 2911 and in defiance of Article 22 of the same Law. However, the Court argued that even though the practice of such a security zone could be deemed reasonable for ensuring the order of functioning and security of TGNA, this legal reason couldn't justify by itself every intervention in a peaceful meeting and demonstration. Therefore, these reasons for intervention should be *"relevant and sufficient"* within the framework of concrete circumstances of the case.[34]

The Court ruled that the intervention, which was ending the press statement participated by the applicant on the grounds that it is contrary to law and sentencing him to imprisonment due to this act, was not *"necessary in a democratic society"* and *"proportional"* despite the decision of postponement of the verdict.[35]

III. CONCLUSION

A number of conclusions can be drawn from the relatively short experience of the TCC in the field of individual constitutional complaint.

First of all, the practice of constitutional complaint proved that it has been an effective means for protecting rights and liberties. Despite all the difficulties and problems, constitutional

32 *Ali Rıza Üçer(2)*, par. 59.

33 *Osman Erbil*, Application No: 2013/2394, 25/3/2015, par. 45.

34 *Osman Erbil*, par. 66.

35 *Osman Erbil*, par. 73.

complaint plays a very important role in improving the standards of rights and freedoms in our country and in the transformation of the Constitutional Court and, perhaps, the whole judicial system. Indeed, all above mentioned judgments ruled by our Court with a "rights-based" approach serve to improve the standards of human rights in our country.

Secondly, the enduring and sustainable success in constitutional complaint depends partly on the ability of the Court to adopt and operate an effective filter system and to set the standards for protecting rights in line with the case-law of the Strasbourg Court.

Thirdly, the future of the constitutional complaint system depends also on the effective functioning of legal system as a whole.This is so because the principle of subsidiarity of the constitutional complaintrequires other courts to deal with violation claims before any application in this regard is lodged with the TCC. We must continuously remind the principle of subsidiarity and convey the message that the TCC is not a super appeal court to resolve all kinds of legal problems.

Finally, it goes without saying that, the ultimate success in protecting constitutional rights depends on fostering and consolidating a rights-based political and legal culture in society. Certainly this takes longer than expected, and therefore requires more work and patience.

INTERNATIONAL SYMPOSIUM ON
CONSTITUTIONAL COMPLAINT

CONSTITUTIONAL COUNCIL OF ALGERIA

The President:
Mourad MEDELCI

Mister President, Dear Friend, Excellences, Ladies and Gentlemen,

Tank you for the excellent organization set up by the Constitutional court of Indonesia, our work will be conducted in a very encouraging way.

The Constitutional council of my country is happy to bring its contribution to this extremely interesting debate about the different aspects related to the constitutional appeal.

Naturally, our institutions, which have the same common goal; i.e. the review of constitutionality, have reached advanced stages of organization as attested clearly by the excellent contributions recorded within the framework of our debate. Our organization falls within two very clear trends:

- The first one is about the diversity of statutes, and notably in comparison with the systems of institutional referral more or less wide, depending on the country;
- The second one is a reconciliation trend about the fundamental questions and our institutions' vocation to widen their field of competence in order to protect the constitutional rights through constitutional review.

Allow me, in the light of the Algerian experience to deliver to your attention the following:

The Algerian constitutional council falls within the noted trends. Its main role is to secure the respect of the Constitution through the review of constitutionality within the framework of the hierarchy of norms.

However, our Council ensures also the legality of referendum, the election of the President of the Republic and the parliamentary elections. In this context, it is periodically asked to examine appeals and take decisions as a last resort on elections.

In fact, in the context of parliamentary elections, the law provides that every candidate or political party having presented a list of candidates at these elections have the right to contest the legality of the voting process by appealing simply before the Constitutional Council within forty-eight hours after the announcement of the results. In the case of presidential election, every candidate or its representative, and every elector, in the case of referendum, have the right to contest the legality of the voting process by mentioning their complaints on the official report available in the polling station. An appeal is sent immediately to the Constitutional Council.

As an illustration, during the parliamentary elections that took place in 2012, the Constitutional Council received 167 appeals, after examination, twelve(12) have affected the distribution of seats. Whereas in the presidential elections which were held on 17 April 2014, the Constitutional Council received 94 complaints.

It is worth mentioning that the decision of the Constitutional Council are final and binding on all (Art. 54 of its regulation).

I should mention also that these appeals enable the Council to guarantee the constitutional rights to elect and to be elected, embodied in Art.50 of the Constitution.

Notwithstanding the fact that the competence to sit on appeals is limited in its object, in time and in its proceeding, the Constitutional Council will capitalize this experience probably during the extension of its powers in favor of the next revision of the Constitution.

The assessment recently undertaken by our Council about the condition in which these appeals are dealt with inform us on both the progress made but also the necessity to further strengthening the operational mechanisms.

We should note in this regard particularly the goal related to the reduction of procedural rejections for non-respect of legal and regulatory conditions.

This goal seems clearly linked to two types of expected efforts, namely the regular adaptation of the procedures related to the appeals and, on the other hand, the necessity to better inform the citizens about their content.

This is the case, for instance, of the time related to formalization of the appeals and the consignment thatare recorded directly in Algeria at the polling stations, immediately after the end of the counting operation.

Other types of efforts are the responsibility of political associations, which must instruct their duly authorized representatives in polling stations to guard against the risks of rejections for formal defect.

Two kinds of appeal call our attention:

The first is already contained in the preliminary draft of the constitutional revision foreseen later on this year, paves the way for the direct referral to the council by the parliamentary minority, who may challenge a law provision deemed unconstitutional.

As for the second, it may allow defendants, when appropriate, to appeal to the Council, under specific conditions, just like many other countries.

Naturally, these two kinds of appeal refer to the source of the control device exerted by our institutions.

The challenge is then set up, which is to be prepared to assume these new tasks, and I like to note that Algeria can count on numerous Constitutional courts and have access to their experience. I would like to thank them, in advance, for their willingness to share their expertise that constitute indeed the most important goal of our meeting. Our symposium is an opportunity to be very delighted with and to confirm our commitment to strengthening cooperation between us.

Mister President, Ladies and Gentlemen,

Thank you for your kind attention.

INTERNATIONAL SYMPOSIUM ON CONSTITUTIONAL COMPLAINT

Conseil Constitutionnel – ALGERIE
Le Président : Mourad MEDELCI

Monsieur le Président, Cher Ami, Excellences, Mesdames et Messieurs,

Grâce à l'excellente organisation mise en place par la Cour Constitutionnelle de la République indonésienne, nos travaux se déroulent de façon très encourageante.

Le Conseil constitutionnel de mon pays est heureux d'apporter sa contribution à ce débat, extrêmementintéressant, sur les différents aspects liés au recours constitutionnel.

Bien entendu, nos institutions, qui ont le même objectif générique, c'est-à-dire,le contrôle de constitutionnalité, ont atteint des stades d'organisation avancés, comme le confirment clairement les excellentes interventions enregistrées dans le cadre de notre débat.Cette organisation s'inscrit dans deux tendances très claires :

- La première est celle de la diversité des statuts et, notamment, au regard des systèmes de saisine institutionnelle plus ou moins large, selon les pays ;
- La seconde, est une tendance au rapprochement sur les questions fondamentales et la vocation de nos institutions d'élargir leur champ de compétences pour mieux protéger les droits constitutionnels à travers le recours constitutionnel.

Permettez-moi, à la lumière de l'expériencealgérienne, de livrer àvotre attention ce qui suit:

Le Conseil constitutionnelalgérien s'inscrit, dans les tendances observées.Son rôle principal est de veiller au respect de la Constitution par le contrôle de constitutionnalité dans le cadre de la hiérarchie des normes.

Toutefois, notre Conseil veille aussià la régularité des opérations de referendum, d'élection du Président dela République et des électionslégislatives.

Dans ce cadre, il est périodiquement sollicité pour examiner des recours et prendre des décisions de dernier ressort à l'occasion des consultations électorales.

En effet, dans le cadre des élections législatives, la loi prévoit que tout candidat ou parti politique ayant présenté des listes de candidats à ces élections a le droit de contester la régularité des opérations de vote en introduisant un recours par simple requête déposée au greffe du Conseil constitutionnel dans les quarante-huit (48) heures qui suivent la proclamation des résultats. Dans le cas des élections présidentielles, tout candidat ou son représentant, et tout électeur, dans le cas de referendum, ont le droit de contester la régularité des opérations de vote en faisant mentionner leur réclamation sur le procès-verbal disponible dans le bureau de vote. Un recours est envoyé immédiatement au Conseil constitutionnel.

A titre d'exemple, lors des élections législatives qui se sont déroulées en 2012, le Conseil constitutionnel a reçu167 recours,après examen, douze (12) ont influé sur la répartition des sièges. Quant aux élections présidentielles qui ont eu lieu le 17 avril 2014, le Conseil constitutionnel a reçu94 réclamations.

Il convient de souligner que les décisions du Conseil constitutionnel sont définitives et s'imposent à tous (Art 54 du règlement fixant les règles de fonctionnement du Conseil constitutionnel).

Je dois souligner aussi que ces recours permettent de garantir les droits constitutionnels**d'élire et d'être éligible**, consacrés par l'Art. 50 de la Constitution.Nonobstant le fait que la compétence de siéger sur les recours est limitée dans son objet, dans le temps et dans sa procédure, le Conseil constitutionnel capitalisera cette expérience sans doute lors de l'extension de ses compétences à la faveur de la prochaine révision de la Constitution.

L'évaluation, récemment engagée par notre Conseil, des conditions dans lesquelles ces recours sont traités, nous renseignent à la fois sur les progrès enregistrés mais, également, sur la nécessitéde consolider davantage les mécanismes opérationnels.

Nous noterons, à cet égard en particulier, l'objectif lié à la réduction des rejets de forme pour non-respect des modalités légales et règlementaires.

Cet objectif semble clairement lié à deux types d'efforts attendus, à savoir l'adaptation régulière des procédures liées au recours et, par ailleurs, la nécessité de mieux informer les citoyens sur leur contenu.

Il en est ainsi, par exemple, des délais de formalisation des recours, ainsi que des modalités de leurs consignations qui, en Algérie, sont enregistrés directement au niveau des bureaux de vote et ce, immédiatementaprèsla proclamation desrésultats.

D'autres types d'efforts sont à la charge des associations politiques elles-mêmes, qui doivent instruire leurs représentants dûment mandatés au sein des bureaux de vote afin de se prémunir contre les risques de rejets pour vice de forme.

Deux autres types de recours retiendront notre attention :

Le premier déjà contenu dans l'avant-projet de révision constitutionnelle prévue en Algérie au courant de cette année ouvre la voie à la saisine directe du Conseil par la minorité parlementaire qui pourrait contester une disposition de loi jugée inconstitutionnelle.

Quant au second il pourrait, le cas échéant, permettre aux justiciables de solliciter le recours au Conseil dans des conditions déterminées et ce à l'image de ce qui ce fait dans de nombreux pays.

Bien entendu ces deux types de recours renvoient à l'amont du dispositif de contrôle exercé par nos institutions.

Le défi est alors posé, qui consiste à se préparerà assumer ces nouvelles missions et je me plais de relever que l'Algérie pourra compter sur de nombreuses Cours constitutionnelles et accéderà leurs expériences ; j'aimerais, par avance, les remercier pour leur disponibilité à partager leur savoir-faire qui constitue, à vrai dire, l'objectif le plus important de notre rencontre.

Notre symposium est l'occasion de s'enréjouir et de confirmer notre engagement à renforcer la coopération entre nous.

Monsieur le Président, Mesdames et Messieurs,

Je vous remercie pour votre aimable attention.

Djakarta, le ……

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Конституционная жалоба: понятие и ее значимость на практике Азербайджанской Республики

Уважаемые коллеги!

Дамы и господа!

Воспользуюсь случаем еще раз хочу поблагодарить руководство Конституционного суда Индонезии за теплый прием прекрасную высокую организацию азиатского форума для конституционных судов, а также поздравить индонезийский народ 70-тилетием Дня Независимости.

В своем кратком выступлении постараюсь подчеркнуть **во-первых,** важность института конституционной жалобы для конституционного правосудия, **во-вторых,** проинформировать уважаемых участников симпозиума о процессе развития это института в Азербайджанской Республике и **в третьих** с вашего позволения с учетом интереса стран начинающих применять указанный механизм в своих правовых системах подчеркну некоторые актуальные, проблемные стороны развития института конституционной жалобы в системе защиты прав и свобод человека.

О конституционализме который основывается на приоритете прав личности.

Возникновение Конституции и в целом конституционного права как отрасли права, науки непосредственно связанно с механизмом ограничения государственной власти.

Исторически развитие конституций можно условно разделить на 4 этапа:

1-й этап начинается с конца 18-го века до 1-ой Мировой Войны. Этот этап характеризуется формированием идеи ограничения абсолютной власти, принципа разделения властей и появление первых писанных конституций в США, Франции, а также с приобретением независимости доминионов Британии в Австралии, Канаде и т.д.

2-ой этап охватывает период между двумя мировыми войнами. Он характерен тем что на конституционный уровень выходят социальные права (Германия, Чехословакия, Ирландия, Мексика и даже СССР)

3-й этап начинается после Второй мировой войны до 80-х – распад колониальных систем позволило большому количеству стран примерно 130-ти странам принять Конституции (в том числе и Индонезии 1949 году). Появились социалистические Конституции в Болгарии, Венгрии, Вьетнаме и т.д.

Наконец 4-й этап начался с 90-х и характеризуется распадом СССР и отказом стран от формальной советской конституции. На этом этапе практически все постсоветские страны приняли независимые конституции.

Идея мирового конституционализма связана с ограничением власти основанного на предоставлении свободы личности и в целом институтам гражданского общества. Именно по этой причине в теории права Конституцию признают общественным договором, договором между гражданином и государством. Идея договора заключается в том, что организация государственной власти должна осуществляться по принципу разделения властей, который позволяет сдерживать и ограничивать отдельные ветви власти с целью предоставления правовой свободы институтам гражданского общества.

Конституции практически всех стран содержат в себе две основные категории это государственная власть и правовая свобода. А взаимосвязь этих ценностей и формирует идеологию конституционализма.

Конституционализм в современных правовых системах стран мира понимается как политико-правовое явление, гарантирующее ограничительный характер государственной власти. Конституционализм как перманентно развивающаяся динамическая система наряду с приобретением правовой оболочки, значительно влияет на формирование правового сознания населения. Посредством верховенства конституционализма публичные институты власти становятся доступны гражданам, постепенно исчезает правовой нигилизм, а конституционные положения приобретают живую динамику. Такое взаимоотношение общества и государства делает реальным участие гражданина в управлении государством и актуализирует конституционные институты. В конечном счете, вся политико-правовая система, построенная на фактической Конституции, служит становлению гражданского общества, гарантиям прав и свобод человека и гражданина, обеспечению стабильности конституционного строя и государственной независимости.

Таким образом следует отметить, что конституционализм построен по принципу приоритетности прав человека относительно государственной власти. В этом идея «живой» Конституции.

Сложность государственного управления в современных государствах требует от властей расширения системы государственных органов. Следовательно увеличиваются субъекты нормотворчества. В своей деятельности эти органы должны ориентироваться на конституционные требования. Однако порой цели и задачи, а иногда и не ясное преставление конституционных положений толкают эти субъекты государственного управления на нарушение конституционных положений. Взаимоотношения личности и государства, государственное управление носят многослойный, конституционно-договорной характер и избежать нарушения договора или иначе можно сказать конституционно-правовых коллизий практически невозможно.

Всем нам известный германский конституционалист **Александр Бланкенагель** указывает две ситуации, когда государство или точнее государственные органы действует в разрез с Конституцией. **В первом случае законодатель может конкретизировать Конституцию таким образом, что это будет вызывать конституционно правовые сомнения или противоречия. Во втором случае закон, не вызывающий сомнения в плане соответствия Конституции, может применяться исполнительной властью таким образом, что появится повод для конституционно-правовых сомнений.**

Поэтому основной задачей органов конституционного контроля является рассеивание конституционно-правовых сомнений посредством своих решений и защита конституционных ценностей.

Об универсальности конституционных ценностей которые связанны с приоритетом прав личности.

Конституционные ценности отдельного государства хоть и имеют внутригосударственную нормативность, но они носят в себе также классические универсальные ценности на защите которых к примеру стоит Европейский суд по правам человека.

Европейский суд считает, что принцип «автономности» в подходах к Европейской Конвенции о защите прав человека и основных свобод к отдельным правам человека должен соответственно быть обеспечен единым подходом в понимании сущности конкретного права и универсальностью в правоприменительной практике.

Подобная задача также стоит перед конституционными судами, которые должны обеспечивать единое понимание конституционных требований. Однако здесь ситуация обстоит сложнее. В государствах где функционируют несколько высших судов к примеру Германия, Россия и т.д. избежать расхождений между этими судами практически невозможно. Но это тема другой дискуссии.

Следует признать, когнитивная дивергенция, которая порой наблюдается в постсоветских странах, может негативно повлиять на универсальность прав человека и создать неблагоприятную картину «искаженности» восприятия ценностей конституционализма. Нельзя во имя защиты одной ценности искажать сущность другой не менее значимой конституционной ценности.

Конституционное правосудие следует признать эффективным средством в охране Конституции, в обеспечении регулятивного конституционализма в правой системе и безусловно существенным средством защиты прав личности.

Подчеркивая основную задачу органов конституционного контроля хотел бы еще раз напомнить, что конституционные суды в большей степени служат защите конституционных прав человека нежели организации системы государственной власти, которая опять же исходя из конституционных требований служит развитию и гарантии свободы личности.

Поэтому право человека обращаться в конституционный суд с жалобой является объективной реальностью самого как конституционного правосудия так и в целом отрасли конституционного права.

О становлении института конституционной жалобы в Азербайджане.

В Азербайджанской Республике после принятия на референдуме Конституции 1995 года стала важная задача формирования эффективного правового механизма ее охраны.

1997 году был принят Закон «О Конституционном суде» и с 1998 года функционирует Конституционный суд Азербайджана. Однако этот Закон не содержал порядка обращения граждан в Конституционный суд.

2002 году в период конституционных реформ в Конституцию включили право обращения каждого и в том числе Омбудсаману в Конституционный суд.

2003 году в новой редакции был принят новый Закон «О Конституционном суде» где это право приобрело процессуальные основы и соответственно конституционный суд стал реальным, дополнительным средством защиты прав и свобод личности. В системе защиты прав личности конституционный суд рассматривается не основным средством защиты так орган конституционного правосудия носит субсидиарный характер.

Таким образом в настоящее время правом подачи жалобы в Конституционный суд Азербайджана наделен каждый. Говоря каждый имеется в виду не зависимо от гражданства, либо от его отсутствия: индивид, а также общественная организация, юридические лица, территориальные коллективы граждан (муниципалитеты).

Следует отметить, что в Азербайджане правом подачи обращения по вопросам нарушения прав и свобод человека наделены суды и они достаточно эффективно этим правом пользуются.

По состоянию на конец первой половины 2015 года Пленумом Конституционного суда Азербайджана вынесено 307 Постановлений и 72 определения. 107 Постановлений и 49 определений было принято на основании конституционной жалобы. Это составляет примерно 35% от общих решений. И если учесть, что 17% постановлений вынесено по запросу Верховного суда, 25% по обращению судов и 5% по запросу Омбудсмана, то следует предположить, что около 80% постановлений Конституционного суда в той или иной степени связаны с защитой прав личности.

Статистические данные в отношении рассмотренных дел по конституционным жалобам составляет примерно 5-10 % от числа поданных жалоб в течении года. Это достаточно большой объем рассмотренных дел.

Конституционные жалобы в практике Азербайджанского конституционного правосудия охватывают имущественные отношения, право собственности, семейные, трудовые, налоговые, кредитные правовые отношения.

Законодательство к подаче конституционной жалобы ставит определенные требования:

- после исчерпания всех национальных средств защиты, в течении 6 месяцев со дня вступления в законную силу решения Верховного суда по данному делу;
- в течении 3-х месяцев с момента нарушения права заявителя на обращение в суд.

Следует отметить, что по конституционным жалобам существует лишь конкретный конституционный контроль. Граждане абстрактным контролем в конституционный суд не могут обращаться. Однако в части защиты прав человека правом предоставления запроса и обращения по нормоконтролю в части абстрактного контроля наделены суды, в том числе Верховный суд и Омбудсман.

Таким образом конституционные жалобы в основном поступают на вступившую в законную силу решения Верховного суда. Поэтому законодатель установил некоторые ограничения в каких случаях жалобы на решения Верховного суда могут быть рассмотрены. В ст.34.2 Закона «О конституционном суда» говорится, что конституционные жалобы на решения Верховного суда могут быть рассмотрены:

34.2.1. в случае неприменения судом подлежащего применению нормативно-правового акта;

34.2.2. в случае применения судом не подлежащего применению нормативно-правового акта;

34.2.3. в случае неверного толкования судом нормативно-правового акта.

Следует отметить, что конституционный суд не рассматривает фактические обстоятельства и не дает оценку доказательствам. Задачей конституционного суда является единая интерпретация сущности и содержания конституционного права. В этой части Конституционный суд Азербайджана тесно сотрудничает с Европейским судом по правам человека, Венецианской Комиссией.

В настоящее время успешно действует Венецианский форум созданный Венецианской Комиссией Совета Европы, благодаря которой конституционные суды европейских стран на основании своих запросов могут получать у своих европейских коллег соответствующую их позицию по аналогичным делам имеющимся в их практике. Его эффективное сотрудничество на практике доказана временем.

Следующим законодательным требованием является то, что в конституционной жалобе должны быть обоснованы:

34.7.1. нарушение оспариваемым нормативно-правовым, судебным или муниципальным актом прав и свобод заявителя; (то есть наличие конкретного дела)

34.7.2. полное использование права обжалования судебного акта, отсутствие возможности предотвращения через другие суды нарушения права обращения в суд или причинения тяжелого и непоправимого ущерба.

В практике конституционных судов в отношении предмета конституционной жалобы имеются различные подходы. Это в большей степени зависит от структуры судебной системы страны, видов источник права и других объективных факторов.

Сравнительное исследование института конституционной жалобы в зарубежных странах позволяет систематизировать установленные к жалобам фильтры по некоторым критериям:

По кругу субъектов подаваемых конституционную жалобу. Например, в России, Германии, Швейцарии в том числе в Азербайджане конституционную жалобу может подать каждый. Понятие каждый толкуется достаточно широко имеется в виду каждый субъект наделенный свободой, в том числе муниципалитеты. Однако то, что касается муниципалитетов то здесь конституционная жалоба не должна быть связаны с реализацией публичных функций муниципального органа.

По объекту конституционной жалобы. В зарубежных странах объектом конституционной жалобы выступают нормативные акты, решения судов, действия государственных органов и т д. Следует отметить, что в отдельных европейских странах наблюдается тенденции расширения объектов конституционного контроля (Австрия, Испания, Германия)

По техническим требованиям предъявляемым к конституционным жалобам. Здесь имеется в виду сроки подачи, форма жалобы, госпошлина, язык и т д.

Все эти критерии важно учитывать при установлении законодательных основ подачи конституционных жалоб в конституционные суды. Так как задачей конституционных судов является в большей степени приведение в соответствие нормативных актов Конституции и установление единой практики применения нормы права в соответствии с Конституцией.

В заключении хочется отметить, что следует не забывать, что сама личность является наиболее «чувствительным, уязвимым» субъектом в числе субъектов наделенных правом обращаться в конституционные суды.

Поэтому именно эта категория может оперативно выявить конституционные коллизии, наиболее больше встречающиеся отклонения от конституционных требований, несоответствие нормативных актов конституции и иные конституционные погрешности. Учитывая, что конституционные суды носят достаточно пассивные функции и не могут сами инициировать рассмотрение дел они реально нуждаются в таком важном субъекте как индивид.

Присоединяюсь к мнению авторитетного юриста господина Джанни Буккикио и еще раз подчеркну важность наделения конституционных судов правом рассмотрения конституционных жалоб.

Благодарю за внимание.

ANAR ZHAILGANOVA
MEMBER OF THE COUNSTITUTIONAL COUNCIL OF THE REPUBLIC OF KAZAKHSTAN

Dear chairman, participants and guests! The delegation of the Republic of Kazakhstan on behalf of the Chairman of the Constitutional Council mister Igor Rogov would like to express gratitude to the Constitutional Court of Indonesia for organising and holding at the highest level the meeting of the Asian Association of the Constitutional Courts and Equivalent Institutions and the International Symposium. I would like to congratulate with the anniversary of the Constitutional Court of Indonesia and Independence day and to wish to all success and productive work!

Kazakhstan is the only ex soviet state where the constitutional supervision is carried out by specially established non-juridical state body. Its establishment is associated with the Constitution of the Republic of Kazakhstan adopted on 30th of August 1995 which 20-th Anniversary is celebrating this year.

The Constitution safeguards the absolute right of everyone to juridical protection of rights and freedoms. Everyone has a right to seek protection of his rights in a court and also to fill a complaint against decisions made and actions taken infringing individual`s rights and freedoms.

The Constitutional Council of the Republic of Kazakhstan is the state body since February 1996 empowered to ensure the supremacy of the Constitution.

The powers of the Constitutional Council is determined by the Constitution and by the Constitutional Law on The Constitutional Council of the Republic of Kazakhstan. Pursuant to Article 72 of the Constitution and Article 17 of the Constitutional Law is empowered to:

- decide on the correctness of conducting the elections of the President of the Republic, deputies of Parliament, and conducting an all-nation referendum in case of dispute;

- consider the laws adopted by Parliament with respect to their compliance with the Constitution of the Republic before they are signed by the President;
- consider the decisions adopted by the Parliament and its Chambers to their compliance with the Constitution of the Republic;
- consider the international treaties of the Republic with respect to their compliance with the constitution, before they are ratified;
- officially interpret the standards of the Constitution.

The Constitutional Council carries out the preliminary constitutional supervision on law adopted by the Parliament before it signed by the President and on the international treaties they are ratified. The subsequent constitutional supervision is conducted on law on the submission of the national courts.

According to Article 78 of the Constitution the courts have no right to apply laws and other regulatory legal acts infringing on the rights and liberties of an individual and a citizen established by the Constitution. When a court finds that a law or other regulatory legal act subject to application infringes on the rights and liberties of an individual and a citizen legal proceedings is suspended and a proposal to declare that law is unconstitutional is submitted the Constitutional Council. All national courts, including Court of Appeal and the Supreme Court are entitled to submit their proposals for declaring a law unconstitutional.

The Constitutional Council`s powers, its status, mandatory power of its decisions, interplay with the legislative, executive and judicial branches allows for rights and freedoms to be safeguarded.

Besides, the protection of human rights and freedoms constantly enhances in Kazakhstan. For instance, the National Scheme «100 (a hundred) definite steps» has become an next step forward to promote human rights and freedoms. The Scheme furthers the rule of law, enhances instruments protecting rights of individuals, national companies and foreign investors.

The analysis of the constitutional supervision of states demonstrates that a state chooses its own route of the constitutional development and mechanism of human right`s protection dependant on traditions, worldview, the level of legal consciousness of its citizens, mentality and so on. This makes difference. However, we are all united to promote and advance protection of human rights and the rule of law.

Thanks for attention!

Cases:

1) by Resolution of the Constitutional Council of the Republic of Kazakhstan Number 2 dated February 27, 2008 the establishment of criminal penalty for self mutilation in a prison by the Criminal Code of Kazakhstan declared unconstitutional as self mutilation can be a form of self-expression against infringement of the rights and them protection. In this case, the criminal penalty for self mutilation is inconsistent with the freedom of speech enshrined in Article 20 the Constitution.

2) by Resolution of the Constitutional Council of the Republic of Kazakhstan Number 2 dated April 13, 2012 the detention period starts from factual deprivation of liberty regardless whether the special procedure has been carried out and finishes after 72 hours.

Анар Жаилганова

член Конституционного Совета

Республики Казахстан

Уважаемые председатель, участники и гости симпозиума! Делегация Республики Казахстан от имени Председателя Конституционного Совета г-на Рогова выражает благодарность Конституционному суду Индонезии за организацию и проведение встречи членов Азиатской Ассоциации Конституционных судов и эквивалентных институтов и международного симпозиума на самом высоком уровне. Поздравляем с днем независимости Индонезии, годовщиной образования Конституционного суда Индонезии, желаем всем успехов и плодотворной работы!

Как известно, Казахстан является единственным постсоветским государством, где конституционный контроль осуществляется специально созданным независимым государственным органом, не входящим в традиционную систему судебной власти республики, что закреплено Конституцией Республики Казахстан от 30 августа 1995 года.

В целях защиты интересов личности, Конституция гарантирует право каждого на судебную защиту своих прав и свобод, которое не может быть ограничено ни в каких случаях. Каждый вправе обратиться в суд за защитой и восстановлением нарушенных прав и свобод, а также обжаловать действия и решения, которые повлекли или могут повлечь ущемление прав и свобод человека и гражданина.

Конституционный Совет Республики Казахстан действует с февраля 1996 года, является государственным органом, единственная задача которого – обеспечение верховенства Конституции на всей территории Республики.

Полномочия Конституционного Совета Республики Казахстан определяются Основным законом страны и Конституционным законом «О Конституционном Совете Республики Казахстан». В соответствии со статьей 72 Конституции Казахстана и статьей 17 Конституционного закона «О Конституционном Совете Республики Казахстан» Конституционный Совет:

- решает в случае спора вопрос о правильности проведения выборов Президента республики; выборов депутатов Парламента; республиканского референдума;

- рассматривает на соответствие Конституции до подписания Президентом принятые Парламентом законы; принятые Парламентом и его Палатами (Мажилиса и Сената) постановления; международные договоры Республики до их ратификации;
- дает официальное толкование норм Конституции;
- до принятия Парламентом соответственно решения о досрочном освобождении от должности Президента республики, окончательного решения об отрешении от должности Президента республики дает заключение о соблюдении установленных конституционных процедур.

Конституционное производство по приведенным вопросам может быть возбуждено только по обращениям Президента Республики Казахстан, Председателей Палат Парламента, не менее одной пятой части от общего числа депутатов Парламента, Премьер-Министра.

Рассматривая до подписания Президентом принятые Парламентом законы и до ратификации международные договоры Республики на соответствие их Конституции, Конституционный Совет осуществляет предварительный контроль, а последующий контроль – при проверке конституционности законов и иных нормативных правовых актов по обращениям судов Республики.

В статье 78 нашей Конституции установлено, что суды не вправе применять законы и иные нормативные правовые акты, ущемляющие закрепленные Конституцией права и свободы человека и гражданина. Если суд усмотрит, что закон или иной нормативный правовой акт, подлежащий применению, ущемляет закрепленные Конституцией права и свободы человека и гражданина, он обязан приостановить производство по делу и обратиться в Конституционный Совет с представлением о признании этого акта неконституционным.

В соответствии с данной конституционной нормой в Конституционный Совет обращаются суды Республики всех инстанций: районные и приравненные к ним суды, областные и приравненные к ним суды, рассматривающие дела и споры, как в качестве суда апелляционной и кассационной инстанций, а также Верховный Суд в качестве суда надзорной инстанции.

Таким образом, конституционный контроль в Республике Казахстан является действенным инструментом защиты конституционных прав граждан и человека. Статус и полномочия Конституционного совета, обязательная юридическая сила его решений,

механизм взаимодействия с Президентом, законодательной, исполнительной и судебной ветвями властью обеспечивают реализацию прав и свобод, закрепленных Конституцией.

Вместе с тем, институт защиты прав и свобод в Республике Казахстан постоянно совершенствуется. Национальная программа 2015 года «100 конкретных шагов» по реализации пяти институциональных реформ государства стала очередным шагом в прогрессивном и поступательном движении в реализации конституционного статуса человека и гражданина. В Программе уделено особое внимание обеспечению верховенства права, модернизации механизма защиты прав физических и юридических лиц, в том числе, предпринимателей и иностранных инвесторов.

Следует особо подчеркнуть, что анализ деятельности органов конституционного контроля зарубежных стран показывает, что каждое государство выбрало свой путь конституционного развития, свой механизм защиты конституционных прав и свобод гражда н, в зависимости от устоявшихся традиций, мировоззрения и от уровня правосознания своих граждан, от их менталитета и так далее, - в этом наше различие, но объединяет всех нас одно – это стремление к наилучшей защите прав и свобод человека и к утверждению правового государства.

Спасибо за внимание!

INTERNATIONAL SYMPOSIUM ON CONSTITUTIONAL COMPLAINT

International Symposium on Constitutional Complaint
Comparative Perspectives on Constitutional Complaint
in East-Timor Constitution perspective
Deolindo dos Santos (Judge Counselor)

Dear President of the Constitutional Court of Indonesia.

Honorable Judges and all participants in this symposium, Timor-Leste as a ***democratic, sovereign, independent and unitary State based on the rule of law***, became the first new sovereign State of the twenty-first century and of the third millennium recognizes principle of ***separation of powers*** (articles1, 69 of constitution).

Honorable participants In Timor-Leste judicial system not exist Constitutional its self the Supreme Court of Justice is ***the highest court of law*** and the ***guarantor of uniform enforcement of the law***, and has jurisdiction throughout the national territory;

And it is also incumbent on the Supreme Court of Justice to administer justice on matters of ***constitutional*** (article 124 of the constitution).

On constitutional maters the Supreme Court has competence as following:

a). To review and declare the unconstitutionality and illegality of normative and legislative acts by the organs of the State;

b). To provide an anticipatory verification of the legality and constitutionality of the statutes and referenda;

c). To verify cases of unconstitutionality by omission;

d). To rule, as a venue of appeal, on the suppression of norms considered unconstitutional by the courts of instance, (article 126 of the constitution).

Honorable participants in respect to the point a, b and c that I pointed above, normally the Supreme Court of Timor-Leste make abstract review constitutionality

The abstract review only shall be request by: The President of Republic: The Speaker of National Parliament; The Prosecutor General, based on the refusal by the courts, in three concrete cases, to apply a statute deemed unconstitutional; The Prime Minister; One fifth of the member of National Parliament; Ombudsmen. Its mean that individual can't request abstract review unconstitutionality.

Distinguish participants point that I pointed is an appeals on constitutionality in respect to the principle that the court shall not apply rules that contravene to the constitution of Republic of Timor-Leste or the principles contained therein (article 120 of the constitution).

Therefore, the article 152 of Constitution of Timor-Leste established the following:

1. The Supreme Court of Justice has jurisdiction to hear appeals against any of the following court decisions:
   a) Decisions refusing to apply a legal rule on the grounds of unconstitutionality;
   b) Decisions applying a legal rule the constitutionality of which was challenged during the proceedings.
2. An appeal under paragraph (1) (b) may be brought only by the party who raised the question of unconstitutionality.
3. ***The regime for filing appeals shall be regulated by law,***

The article 152 of Timor-Leste Constitution provides opportunity for individual and collective (accused, public prosecutor in criminal case, all parties in civil and administrative case), to filed constitutional complaints by appeal to the Supreme Court when the decision of Court at the first instance violated the fundamental rights and constitutional rights of the citizen.

Honorable participants as procedural to field constitutional complaint or appeal to the Supreme Court for the moment based on Civil Procedure Code, Criminal Procedure Code and Administrative procedure Code)

The decisions of the Supreme Court of Justice of Republic of Timor-Leste shall ***not be appealable***. They shall have a general binding effect on processes of abstract and concrete monitoring, when dealing with unconstitutionality, (article 153 of the constitution)

To conclude I just want to point out that Timor-Leste as a new country our judicial system is very open to learning from the other countries which system is already developed including constitutional complaint issues.

Finally on behalf of the Timor-Leste delegation I would like to extend my heartfelt congratulation to the Constitutional Court of Indonesia for 12 years of its anniversary.

Thank you very much for your time

SESSION III

INTERNATIONAL SYMPOSIUM ON CONSTITUTIONAL COMPLAINT

INTERNATIONAL SYMPOSIUM ON CONSTITUTIONAL COMPLAINT

Jakarta, Indonesia

15-16 August 2015

INSTITUTE OF CONSTITUTIONAL COMPLAINT OF CITIZENS AT THE CONSTITUTIONAL COURT OF THE RUSSIAN FEDERATION

Mikhail I. Kleandrov

Judge of the Constitutional Court

of the Russian Federation

Professor of Law

An individual complaint of a citizen on violation of his fundamental rights and legitimate interests has been initially admissible at the Constitutional Court of Russia, from the very foundation of the Court. It was stipulated as early as in the Law of the RSFSR of 6 May 1991 No. 1175-1 "On the Constitutional Court of the Russian Soviet Federative Socialist Republic". At that time, it used to be considered within the constitutional review of law enforcement practice.

After the renowned events of October 1993, which resulted in temporary suspension of the activity of the Constitutional Court of Russia for one and a half years, and after the adoption of the new Constitution of the Russian Federation on 12 December 1993, pursuant to Section 4 of Article 125 of the latter, particularly, the Constitutional Court of the RF began to review the constitutionality of a law applied in a concrete case – in accordance with the respective federal law. The Federal Constitutional Law of 21 July 1994 No. 1-FKZ "On the Constitutional Court of the Russian Federation", which was amended seven times since the adoption, occurred to be such a law. The named law contains a particular Chapter XII named "Consideration of cases on the constitutionality of laws upon complaints on violation of constitutional rights and freedoms of citizens".

From the moment when the law came into force it was assumed that it would be either citizens of the RF, or foreign citizens, as well as persons without citizenship who would apply to the Constitutional Court of the RF with complaints on violation of their constitutional rights and freedoms. However, the Constitutional Court of the RF itself by a number of its own judgments has expanded this list, as a result, associations of citizens are also entitled to apply with constitutional complaints, including religious organizations, joint-stock companies, partnership companies, limited liability companies, state-owned enterprises, municipal entities, national minorities, national-cultural autonomies and structures thereof acting on federal and regional levels, etc.

Taking into consideration that among those entitled to apply to the Constitutional Court of the RF in favour of citizens are the Ombudsman (which he does on the average 6-7 times per year) and the Prosecutor General of the RF (which he has not done yet), it is obvious that in the Russian Federation a rather wide range of subjects is entitled to apply to the Constitutional Court of the RF with complaints on violation of constitutional rights, freedoms and interests of citizens, either directly, or indirectly. From about 20 thousand complaints and other applications submitted to the Constitutional Court of the RF annually, the share of constitutional complaints of citizens is sufficiently higher than 90 percent.

And, obviously, within this stream of complaints and applications there are a lot of those declared by the Constitutional Court of the RF inadmissible; mainly – due to their non-constitutional nature, and due to that the issues addressed therein are subject to be resolved and are virtually resolved by other judicial bodies by means of criminal, administrative and civil proceedings, as well as by other law enforcement bodies, or due to that a citizen applies to the Constitutional Court of the RF not in relation to violation of his rights and freedoms, but in defense of a certain public interest that he comprehends in a specific way. At the present time, since 2010 the Constitutional Court of the RF does not consider complaints if the contested law

is only subject to application in a concrete case, currently it has to be applied virtually, provided that it is a judicial case which has been considered by general courts or arbitration courts, and that the court's decision has already come in force.

The law stipulates some extra "filters" for the constitutional complaints of citizens, which allow the Constitutional Court of the RF to devote its main attention to those cases which concern violations of genuine constitutional rights and freedoms of citizens.

Among the other problems of the constitutional justice mechanism in Russia the non-systemacity thereof should be mentioned. The case is that Russia is a federative state, and the constitutional justice is not limited to only the Constitutional Court of the RF. It is carried out, as well, – within the limits of their own discretion – by constitutional and statutory courts of the constituent entities of the RF (these are the courts of regional level), which amount to 18 (whereas, in Russia there are 85 constituent entities of the Federation); and they don't constitute any system with the Constitutional Court of the RF – neither in organizational, nor in institutional, nor in instantional sence. Each has its own legal basis of organization and procedural activity. In 32 entities of the RF, where such courts have not been created, their constitutions and statutes stipulate certain legal rules regarding such courts; a sufficient share of those entities, with regard to this issue, has special regional laws on such courts.

Periodically, the issue of reasonability of empowering the Constitutional Court of the RF to review final judgments of constitutional (statutory) courts of the Entities of the RF is raised in the Upper Chamber of the Federal Parliament of Russia and in legislative (representative) bodies of the constituent entities of the RF. Thus, the deputies of the Legislative Assembly of St. Petersburg made such a proposal in late 2011, alleging as a reason that implementation thereof "would let to provide for the conformity with the Constitution of the RF of the case-law of constitutional (statutory) courts of entities of the RF, and would establish an additional mechanism to provide legal safeguarding of the Constitution of the RF." The Lower Chamber of the Federal Parliament did not give support to this proposal, however, there are other suggestions in this regard.

In fact, the existing asymmetry of the situation, when in a quarter of entities of the RF such courts have been created and are functioning, and in three quarters – not (currently, this issue is solely a prerogative power of an entity of the RF), does not anyhow promotes any measures of perfection of constitutional justice. Moreover,

Section 2 of Article 118 of the Constitution of the RF proclaims constitutional justice as a stand-alone type along with the civil, administrative and criminal whereby the judicial power is being exercised. However, constitutional justice being based on several dozens of legislative acts (procedural rules, which regulate the adjudicatory activity of the Constitutional Court of the

RF and constitutional (statutory) court of the entities of the RF, are mounted in the individual, personalized laws on this courts), which are by no means synchronized between each other, cannot be self-consistent; undoubtedly, such a situation as a matter of principle cannot take place in a two-instance judicial system carrying out constitutional justice.

In this situation, I believe, following the example of justice of the peace system, it is at least necessary: a) to adopt a decision on creation of constitutional (statutory) courts in all the entities of the RF by means of a federal law; b) nevertheless, to provide all the entities of the RF with wide discretionary powers – with respect to organizational, human resources and other issues (but not procedural) – when dealing with the issues of foundation of such courts; c) to enshrine in the said federal law the federal procedural component with adoption – if it's found reasonable – of a two-instance constitutional justice process, or, which is even better, to enact a stand-alone federal law on constitutional and statutory justice, which would regulate the constitutional procedure legal relationships both on the federal level and in the entities of the RF. That reminds of many, even not federative states where such laws exist.

The presence of the institute of a constitutional complaint of citizens in the Russian Federation significantly intensifies legal defense of the fundamental rights and freedoms of citizens, promotes significance thereof. It is fair to say, that the availability of such an institute to a large extent determines the reason of existence of the Constitutional Court of the RF, and, on the contrary, the absence thereof would significantly devaluate the constitutional justice in Russia, would decrease the level of constitutional protection of fundamental rights and freedoms of human and citizen. The legislation, as well as the adjudication practice of the Constitutional Court of the RF concerning consideration of complaints of citizens on violation of their fundamental rights and freedoms, is on that level which bears evidence of that they will comply with international standards for constitutional justice, if and when such standards are elaborated. However, with no doubts, in our country there are certain peculiarities concerning the conditions and the procedure of submitting a claim, concerning the procedure of contesting of specific types of legal acts within the constitutional justice procedure, etc. We also have certain weakness points in this regard, which are determined and eliminated by virtue of the science of jurisprudence.

INTERNATIONAL SYMPOSIUM ON CONSTITUTIONAL COMPLAINT

Le Président

الرئيس

INTERNATIONAL SYMPOSIUM ON CONSTITUTIONAL APPEAL

Jakarta – the Republic of Indonesia
August 15-16, 2015

Constitutional Appeal: A comparative look at the Moroccan experience

Dr. Mohamed Achargui
President of the Constitutional Council of the Kingdom of Morocco

Constitutional Appeal: A comparative look at the Moroccan experience

There is no need to stress that the supremacy of constitution cannot be guaranteed without a constitutional, independent and effective judiciary and that this judiciary cannot be efficient if it is not open to citizens.

Accordingly, the importance of this international symposium, in which we are honored to participate, stems from the importance of its theme which is "Constitutional Appeal," especially that this Appeal implies that citizens can have access to the Constitutional Judiciary, which is one of the most important features of the improvement of contemporary Constitutional Judiciary.

In this regard, I am very pleased to present to you the main characteristics of the Constitutional Appeal in Morocco, but before that I would like to give you a very brief idea about this issue in the constitutional systems of the Arab countries to which my country belongs.

1- Many countries have constitutions which allow their citizens to have recourse to Constitutional Courts, namely Egypt, Bahrain, Kuwait, the United Arab Emirates, Qatar, the Comoros, Jordan, Palestine, Iraq, Yemen, Tunisia and Morocco.

If we have a comparative look at the constitutional judicial systems in these twelve countries from our perspective, i.e. citizens' access to Constitutional Courts, we will note the following:

a- Apart from the Comoros, Kuwait and Yemen, citizens in the other countries appeal to Constitutional Courts indirectly. In other words, they lodge their appeals through ordinary courts.

b- With the exception of the United Arab Emirates which exclusively gives the courts the right to appeal to the Federal Supreme Court in cases tried before them, the constitutional and legislative provisions of the other countries give this right to the courts before which the cases are tried or to the litigants or to both of them.

c- In all mentioned constitutions, the Constitutional Appeal concerns laws as well as regulatory decisions except for Morocco, Tunisia and the Comoros whose constitutions limit the Constitutional Appeal to laws only.

d- Most of the Constitutional Courts in question adopt the rules of the Civil Procedure Code and the judiciary law which are not in conflict with the jurisdiction of the Constitutional Court and the procedures thereof.

e- Some countries, like Kuwait, Egypt, Bahrain, Jordan, Palestine, Qatar and Yemen, have legislations which stipulate also that the appeals against the unconstitutionality of laws submitted to the concerned courts should be "reasonable."

2- After having this brief comparative look at the status of Constitutional Appeal in Arab countries, allow me to give you rapidly the general features of this issue in the Moroccan constitutional system:

First, I would like to point out that the Constitutional Judiciary in Morocco has gone through several stages since the issuance of the first written constitution in 1962 until today, but there is no room for details here. The new constitution issued on July 29, 2011 has introduced deep and comprehensive amendments to the constitutional system of the kingdom. For example, it has enhanced rights and public freedoms, it has strengthened the powers of both the parliament and the government, it has also confirmed the independence of the judiciary and it has created a Constitutional Court which will soon replace the current Constitutional Council and will have broader jurisdiction.

Now concerning the Constitutional Judiciary, especially the issue of Constitutional Appeal which concerns us here, I can say that the Moroccan constitutional system provides for both the unlimited and direct appeal lodged before the unconstitutional bill is passed and the limited and indirect appeal submitted after the unconstitutional bill is adopted.

While the direct appeal lodged before the adoption of the unconstitutional bill is granted only to public authorities (including parliamentary minority), the indirect appeal submitted after the promulgation of the unconstitutional bill is granted to all litigants whose cases are tried before courts. This dual mechanism helps remove unconstitutional cases from the Moroccan legislation.

The Moroccan Constitution has included the individual appeal mechanism in the constitutionality of laws and has assigned the Constitutional Court to look into it pursuant to Chapter 133 which stipulates that "the Constitutional Court shall have jurisdiction over the cases of unconstitutionality that may be raised during the hearing by one of the litigants who might consider that the law applied in the litigation does not respect the rights and freedoms guaranteed by the constitution. An organic law shall define the conditions and procedures for the application of this Chapter."

The organic law, which defines the detailed conditions and procedures for the "Constitutional Appeal" stipulated in Chapter 133, has not yet been issued, but a closer look at the provisions of this Chapter leads to the following conclusions:

a- This Chapter clearly rules out direct individual appeal to the Constitutional Court as this kind of appeal should necessarily be lodged before ordinary courts, as is the case in most of the compared constitutional systems. However, it should be noted here that Moroccan citizens, in their capacity as candidates or voters, have always had the right to appeal directly to the Constitutional Court against the validity of the parliamentary elections. Moreover, the new constitution gives them the right to submit petitions to public authorities and to present other petitions in the field of legislation which may include petitions to change legislative requirements which do not comply with the constitution.

b- Litigants are given the right to appeal individually against the unconstitutionality of a certain law, which means that every party in a lawsuit which is tried before any civil or administrative court, whether he or she is a natural or legal person and whether he or she is a Moroccan citizen or a foreigner, can appeal - through the concerned court - to the Constitutional Court against the unconstitutionality of the said law. It should be recalled that the Moroccan Constitution gives foreigners the right to enjoy "the

fundamental freedoms granted to Moroccans in accordance with the law," including the participation in local elections pursuant to what is stipulated in Chapter 30 of the Moroccan Constitution.

c- The Moroccan Constitution limits the Constitutional Appeal to "the law," excluding the possibility of appealing against the unconstitutionality of administrative decisions, which remain under the jurisdiction of Administrative Courts, and excluding also the possibility of appealing against courts' rulings which remain subject to ordinary court levels that end at the Court of Cassation. Therefore, according to the Moroccan Constitution, the Constitutional Court shall not become a "fourth" level of court.

d- In addition to the above, the constitution lays down two conditions for the appeal against the unconstitutionality of laws: First, the appeal should be lodged against a law which will be applied in the litigation; that is to say, a law which has a direct impact on the outcome of the lawsuit tried before the court of competent jurisdiction. Second, this law should "violate the rights and freedoms guaranteed by the constitution," which means that the possibility of appealing against the unconstitutionality of a law for reasons that concern legislation procedure, jurisdiction or relations between powers is excluded.

e- According to the Constitution, the Constitutional Court's judgments shall be final. In other words, they shall not be subject to any kind of appeal and all public authorities and administrative and judicial bodies shall abide by them. Anyway, the Constitutional Court's decisions shall come into force as of the date on which they are issued, published or delivered. However, concerning the decisions made by the Constitutional Court with regard to the cases of unconstitutionality, it is the Constitutional Court which shall set the starting date of the application of its decision to abrogate the law it judges unconstitutional.

3- These are the major features of the Constitutional Appeal mechanism accorded to Moroccans and foreigners by the Moroccan Constitution, noting that the latter has not answered other questions directly, but has left them to the organic law which is currently in the pipeline.

In addition to some petty procedural issues such as right to counsel and open court... the main challenges that would be facing the Moroccan legislator is particularly how to make sure that the appeal against the unconstitutionality of the law is reasonable and what kind of "selecting" mechanism he or she would adopt for that, and also at which level of court the lawsuit should no longer be heard by the concerned court and referred to the Constitutional Court.

We do not want to anticipate the course of things, but we think that the Moroccan Constitutional Judiciary - like many constitutional courts which have opened their doors to litigants - would face in the next phase a main challenge of how to reconcile the noble goal of "appeals against the unconstitutionality of laws," which is the maintenance of the rights and freedoms guaranteed to everybody by the constitution, with the preservation of an effective constitutional and judicial system that would be capable of curbing some litigants' abuse of this right and which would also ensure that judgments would be pronounced within "a reasonable time" as also stipulated in the constitution.

It seems to us from the well-known experiences, which we will have an idea about through this symposium, that if the legislator wants to adopt the appeal against the unconstitutionality of laws or to improve it if it already exists, he or she should take the following elements into account:

- To avoid, as much as possible, direct appeal to the Constitutional Court, with the exception of appeals relating to the validity of the parliamentary elections;
- To adopt a reasonable and balanced "selection" system;
- To try, as much as possible, not to make the concerned judge a "passive constitutional judge;"
- To take into account the nature and the functioning of Constitutional Courts - which are known for their limited number of members and are composed in most cases of one singe body - when adopting the procedural actions;
- To set a reasonable deadline for the Constitutional Court to decide on the individual appeals submitted to it, giving it the possibility of extending this deadline as often as occasion shall require;
- And to enact the necessary legislative measures to prevent litigants from using the right of appeal just to prolong the litigation before the courts.

Furthermore, channels of dialogue and communication should be kept open between constitutional judges and the judges of ordinary courts, especially the Court of Cassation, in order to avoid "clashes" that do not serve the lofty and noble goals of the Judiciary, in general, and the Constitutional Judiciary, in particular.

ISCC 2015
INTERNATIONAL SYMPOSIUM ON CONSTITUTIONAL COMPLAINT

Problems and Challenges in Dealing with Constitutional Complaint Cases in the Kyrgyz Republic

First of all, it should be noted that according to the Constitution of the Kyrgyz Republic and the Constitutional Law "On the Constitutional Chamber of the Supreme Court of the Kyrgyz Republic", in Kyrgyzstan, reproduced model of abstract control of a constitutional complaint, but it does not exclude a particular (concrete) control. Everyone has the right to challenge the constitutionality of a law or other normative legal act in case he/she believes that these acts violate rights and freedoms recognized in the Constitution.

It should be emphasized that the legislation of our country gives citizens the right of direct appeal to the Constitutional Chamber of the Kyrgyz Republic on matters directly affecting their constitutional rights.

It should be noted that the constitutional complaint mechanism in Kyrgyz Republic, provided by the Constitution and the legislator, is simplified to a minimum. However, despite this, the Constitutional Chamber is faced with problems of proper submission of an application by citizens to the Constitutional Chamber.

Statistics show that 51.06% of the received applications were refused to accept for the proceeding. At the same time, the highest percentage of refusals to accept for the proceeding falls on appeals received from citizens. The main reason for refusal to accept applications for the proceeding is fails requirements of the Constitutional Law "On the Constitutional Chamber" (i.e., consideration of the complaint of the citizen by the Constitutional Chamber is only possible if there is a reason and grounds).

Thus, in accordance with the above-mentioned Constitutional Law, the ground for the consideration of a case shall be an uncertainty discovered in respect of concordance with the Constitution of a law, other normative regulatory act, and an international agreement which has not entered into force for the Kyrgyz Republic or a draft law on amendments to the

Constitution. The complaint of the citizen must contain substantiation for the uncertainty in respect of concordance with the Constitution of a law's provisions. Without substantiation of such uncertainty the complaint of the citizen may be recognized invalid.

According to the General requirements for handling, the complaint should contain the following:

The circumstances, on which the party bases its claim as well as evidence confirming the facts presented by such party;

The opinion of the applicant in respect of the matter questioned as well as its legal substantiation with reference to the relevant norms of the Constitution.

There are also situations in practice when the complaint raises the question not about the constitutionality of the provisions of a law but about amendment of the current provisions of the law or filling a gap in the law, that is the competence of the legislature.

A situation when a large share of refusals to accept for the proceeding are the complaints received from the citizens can be explained by the following reasons:

- Lack of legal knowledge among citizens about the admissibility criteria:
- Shortage of highly qualified experts, constitutionalists;
- The lack in universities of a comprehensive training system of qualified lawyers / attorneys - constitutionalists;
- Legal nihilism in the general population - a key issue in this situation is the problem of legal education of the population. Due to the geographical location of Kyrgyzstan, the majority of our population lives in remote mountain areas, where there is no internet and other information and communication tools. Most citizens know little about the means to defend their legitimate interests in the Chamber; do not understand the procedure of constitutional jurisdiction; unable to hire a qualified lawyer, whose services are not cheap today. The result of all this was an increase in the number of refusals to accept the complaints.

Naturally, the Constitutional Chamber does not consider civil, administrative, criminal and other categories of cases. It is the sole responsibility of courts of general jurisdiction.

Judicial acts which are based on provisions of laws or other normative regulatory acts which were declared unconstitutional shall be revised by the court which adopted such acts in each concrete case based on the appeals of citizens whose rights and freedoms were affected.

In order to overcome the above problems and challenges related to the constitutional complaint, the Constitutional Chamber developed and implemented a system of electronic appeal of citizens; regularly conduct training seminars and workshops for representatives of civil society on Procedure of citizens' complaints to the authority of the constitutional control; organize the summer school of constitutionalism for NGOs, academia, government, the media and lawyers.

One of the priority tasks aimed at addressing the problems associated with the complaints of citizens to the Constitutional Chamber, is to increase the transparency of its activities. The urgency of this task is caused by the state's judicial reform. Public confidence is one of the key factors for the existence, legitimacy and effectiveness of the Constitutional Chamber. We attach great importance and are making great efforts in enhancing the legal awareness of citizens on procedure of citizens' complaints to the supreme body of constitutional review.

The Constitutional Chamber developed the memo with all the necessary information on the procedures and requirements for the complaints. In order to ensure openness, accessibility and transparency of the constitutional proceedings, consideration of the cases in the open meetings of the Constitutional Chamber are held with the invitation of the media, including television, representatives of which are provided the information on the case under consideration, as well as the opportunity to make photo and video.

Also prepared a special video clip on the procedure for filling of the constitutional complaint to the Constitutional Chamber, in which clearly reflected the rules and procedures for the proper completion of documents when applying to the Constitutional Chamber.

During trainings and summer schools of constitutionalism we draw the attention of the heads of higher education institutions on detailed training of students on the rules and procedures for handling complaints to the Constitutional Chamber and representatives of legal communities to improve the level of qualifications of lawyers providing legal services to citizens regarding the appeals to the authority of the constitutional control of the Kyrgyz Republic.

The need to increase public confidence is defined as one of the strategic directions of the Constitutional Chamber in a specially developed and approved Development Strategy of the Constitutional Chamber of the Supreme Court of the Kyrgyz Republic for 2015-2020 years.

Strengthening the citizens' trust to the Constitutional Chamber and increasing the transparency of its activities, a clear and coordinated sequence of steps on information and communication interaction with public institutions and all interested parties are important steps to eradicate the difficulties and problems related to the constitutional complaint.

ANNEX II
LIST OF THE DELEGATES

LIST OF DELEGATION

No	Country	Name	Position
1	Indonesia	Arief Hidayat	Chief Justice
		Anwar Usman	Deputy Chief Justice
		Aswanto	Justice
		I Dewa Gede Palguna	Justice
		Manahan Sitompul	Justice
		Maria Farida Indrati	Justice
		Patrialis Akbar	Justice
		Suhartoyo	Justice
		Wahiduddin Adams	Justice
		Janedjri M. Gaffar	Secretary General
		Kasianur Sidauruk	Registrar
2	Afghanistan	Khalil Rahman Motawakkel	Secretary General
3	Algeria	Mourad Medelci	President
		Bousoltane Mohamed	General Manager of Center for Constitutional Research and Studies
		Abdelkader Aziria	Ambassador
		Hicheme Mostefaoui	Second Secretary of the Embassy
		Akhmad Asyari	Translator
4	Azerbaijan	Jeyhun Garajayev	Judge
		Rauf Guliyev	Secretary General
5	Kazakhstan	Anar Zhailganova	Judge
		Ayan Tashmagambetov	Senior Consultant
6	Kyrgyzstan	Mukambet Kasymaliev	President
		Zhediger Saalaev	Judge
		Kanybek Masalbekov	Head of International Department

7	Malaysia	Arifin Zakaria	Chief Justice
		Ramly Ali	Federal Court Judge
		Roslan Abu Bakar	Registrar
		Mohd. Aizuddin Zolkeply	Head of Corporate and International Relations
		Noorhisham Mohd Jaafar	Special Officer To Chief Justice
8	Mongolia	Amarsanaa Jugnee	Chairman
		Davaadalai Galbaabadraa	Director of General service and Administration Department
		Mandkhai Davaadorj	Officer in charge of international affairs and protocol
9	Myanmar	Hla Myo Nwe	Member of the Tribunal
		Kyin San	Member of the Tribunal
10	The Philippines	Maria Lourdes P. A. Sereno	Chief Justice
		Anna-Li Papa Gombio	Deputy Clerk of Court and Executive Officer (Attorney)
		Ma. Lourdes Oliveros	Chief Justice' Staff Head (Attorney)
		Theodore Te	Assistant Court Administrator and Chief Public Information Officer
11	Republic of Korea	Jin Sung Lee	Justice
		Kook Hee Lim	Deputy Director International Affairs Division
		Ji Eun Choi	Translator
12	Russian Federation	Mikhail Kleandrov	Judge
		Egor Bushev	Legal Officer of the International Department
13	Thailand	Nurak Marpraneet	President
		Punya Udchachon	Secretary General
		Suwacharee Devahastin	Director of Case Work Group 4
		Na Ayuthaya	
		Autchreeya Ananetapong	Director of Constitutional Study

14	Timor Leste	Deolindo dos Santos	Judge Counsellor
		Higino Soares	Director of Human Resources
		Gil Elias da Costa	Staf of Protocol
15	Turkey	Zühtü Arslan	President
		Hamit Yelken	Deputy Secretary General
		Eyüp Turpçuoğlu	Head of Security
16	Uzbekistan	Buritash Mustafayev	Deputy Chairman
17	Vietnam	Bui Ngoc Hoa	Deputy Chief Justice
		Tran Van Thu	Deputy Director of International Cooperation Department
		Tran Manh Hung	Secretarty of Deputy Chief Justice
		Ha Tuan Hiep	Interpreter
18	Venice Commission	Gianni Buquicchio	President

MAHKAMAH KONSTITUSI
REPUBLIK INDONESIA

INTERNATIONAL SYMPOSIUM ON
CONSTITUTIONAL COMPLAINT