

# CONSTITUTIONAL REVIEW AND SEPARATION OF POWERS

Sixth Conference of Asian  
Constitutional Court Judges 2009



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# Constitutional Review and Separation of Powers

**Sixth Conference of Asian Constitutional Court Judges 2009**



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## PREFACE

According to Montesquieu a judge should act as “la bouche qui prononce les paroles de la loi” (the mouth that pronounces the words of the law).

At least nowadays, this citation does not reflect reality, and this is in particular true for constitutional courts or highest courts adjudicating on constitutional matters.

Judgments in constitutional matters are hardly the simple expression of what is written in the law, respectively in the constitution. Instead of just applying the law judges are rather creative themselves, often affecting decisions of governments or parliaments as well as decisions by ordinary courts.

Laws are declared unconstitutional and void, e. g. in the process of constitutional review. Sometimes constitutional organs are even asked to elaborate an act in accordance with the grounds of the respective judgment like in the Lisbon decision<sup>1</sup> of the German Federal Constitutional Court. This affects not only government decisions but also the acting of parliament as the people’s representative.

There is also intervention with the affairs of ordinary courts. They are asked to reconsider their decisions in light of certain constitutional provisions.

This interference is a double-edged sword.

On the one hand there is a necessity to safeguard the constitution against government bodies not complying with this basic document of a state. But on the other hand, given that there are strong constitutional courts, interfering with the affairs of other government bodies, the separation of powers might be at risk and conflicts are more likely to arise.

This is not a “German problem”. Neither is it a European.

Constitutional Courts from all over the world, whether they are old or young institutions, tend to see themselves as the guardians of the constitution, safeguarding it against the other constitutional bodies. And indeed they are.

This book is about the role and the function of Constitutional Courts in general and Asian Constitutional Courts in particular, especially about the relationship

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<sup>1</sup>See BVerfG, 2 BvE 2/08 as of 30/06/2009, [http://www.bverfg.de/entscheidungen/es20090630\\_2bve000208.html](http://www.bverfg.de/entscheidungen/es20090630_2bve000208.html).

between Constitutional Courts and other constitutional organs. The interplay of the respective bodies is of crucial importance as it is not only the subject of the study of constitutional law doctrine, but the courts themselves are also active participants in the shaping of constitutional law.

To illustrate this ambiguity the book includes an assessment of the jurisprudence of the courts as well as a theoretical breakdown of the case-law.

All the articles are papers presented at the 6th Conference of Asian Constitutional Court Judges and Judges from the highest courts of Asian countries. The conference is an annual event and the Konrad-Adenauer-Foundation is honoured to support it since 2003. The support is part of the foundation's Rule of Law Programme Asia that seeks to contribute to strengthening rule-of-law-based legal systems as a core element of democratic statehood in the countries of Asia.

Constitutional courts and highest courts adjudicating on constitutional matters guarantee the constitutional order and citizen's rights. The meetings of Constitutional Judges aim at creating a broad network to further improve the effectiveness of the relevant institutions, providing a forum for the exchange of experiences and reflection.

Since 2005 every conference has had a second big issue on its agenda, besides the particularly chosen subject. This issue is the establishment of a pan-Asian organization of Constitutional Courts and similar institutions. Following the example of the Conference of European Constitutional Courts and comparable organizations from other regions of the world the Asian Courts are also strongly committed to cooperate more closely in exchanging experiences and information about their jurisprudence.

The organization was initiated at the 3rd Conference of Constitutional Judges, held in 2005 in Ulaanbaatar, Mongolia. This year, in 2009, the conference was hosted by the Mongolian Constitutional Court again. There was much of progress to be noted as the Korean Constitutional Court presented the revised Draft statute for the organization.

The presentations and the discussions at the conference made it very clear that constitutional jurisdiction and its impact on other constitutional organs is a crucial issue for the political and legal debate in Asia, too.

The intensity of impact varies depending on the status of the respective national court. An overview of constitutional courts and highest courts in Asian countries leaves us with a rather heterogeneous picture. There are specialised constitutional courts with wide-ranging competences like in Indonesia, Korea, Kyrgyzstan, Mongolia, Thailand and Uzbekistan. Courts in other Countries have a rather limited



jurisdiction like the Constitutional Council in Cambodia. Many countries, especially those where the judicial system is based on common law have no specialised constitutional courts but a Supreme Court rendering judgements in constitutional matters. This is true for Malaysia and the Philippines. What all these courts have in common is that they are institutions established to safeguard the Constitutional order and citizens rights.

But there are differences to what extend they can interfere with competences of other government bodies. There are several reasons for these differences, ranging from the way these courts see themselves, to constraints imposed by their national constitutions, to a simple lack of opportunities to render interfering judgements. The latter is especially true for the younger institutions. In contrast the older specialised constitutional courts took their chances to decide against government or parliament or against ordinary courts. The main reason is the courts' self-image, i.e. as guardians of their respective constitutions. Even without crossing the threshold to open conflict, there is often an underlying power struggle between the courts and the other branches of government. But it must be emphasised once more that the constitutional courts and highest courts are of crucial importance for strengthening and stabilizing the rule of law, promoting constitutional values and safeguarding their application.

So at the end of the day, in order to keep the balance of competences between the constitutional organs, constitutional courts and highest courts have to deal with the difficult task to strike a balance between judicial self-restraint and creative action to safeguard the constitution.

I am very thankful to the presenters in the conference for the timely submission of their papers. Last but not least, I thank my assistant, Ms. Miriam Söhne for carefully editing and formatting all these articles.

Singapore, December 2009  
Clauspeter Hill  
Director  
Rule of Law Programme Asia  
Konrad-Adenauer-Stiftung



JAMSRANGIIN BYAMBADORJ

## **THE CONSTITUTIONAL COURT IS AN IMPORTANT INSTITUTION IN THE MONGOLIAN STATE SYSTEM**

Establishment of an independent court to examine and review disputes concerning violations of the constitution is part of the humanity's most recent history. The world's first constitutional court was established in Austria in 1920 and operates to this day setting an example to other countries. As some researchers named the 20th century the century of constitutional organizations, it is certain that the 21st century will be the century of constitutional courts. Today, many countries in the world have established constitutional courts or other organizations with equivalent functions. These constitutional courts have already set up an effective form of cooperation to improve their operations and enhance mutual learning.

The annual regional conferences of European and Asian Constitutional Courts as well as the first global conference of Constitutional Courts, Constitutional Councils and Supreme Courts resolving Constitutional disputes of 93 countries held in Cape Town, South Africa during 22-24 January of this year serve as proof of such cooperation.

The Constitutional Court of Mongolia initiated the establishment of an association of Asian constitutional courts in 2005 during the 3rd Conference of Asian Constitutional Courts held in Ulaanbaatar, and we are pleased to inform you that we are deeply committed to make our initiative become a reality.

Also I would like to note here that our Court appreciates and supports the initiative put forward by the Venetian Committee of the European Union and Constitutional Courts of other countries to establish a global association of Constitutional Courts and expand the cooperation of such organizations.

In 1990 the People's Great Hural of the People's Republic of Mongolia passed an amendment to the Constitution of 1960 whereby it fundamentally changed the system of state organizations, and provided the legal framework for the establishment of a Constitutional Court. However, a new Constitution was adopted in 1992 before this Constitutional Council could be established. A crucial reason why this council could not be established lies in the lack of understanding of the importance of the Constitutional Council by the members of the People's Great Hural due to the novelty of such an institution in the history of state organizations of the time.

The new Constitution of 1992 which was adopted as the guarantee of the transition to a new system and foundation of a lawful state, granted the establishment of the Constitutional Tsets an independent Constitutional Court similar to those created in other democratic countries with the power to protect and supervise the execution of the Constitution. For the first time in the history of the state system in Mongolia a permanent court has been established with an exclusive capacity to supervise the execution of the Constitution, ensure compliance to its clauses and resolve Constitutional disputes. Soon after the adoption of the new Constitution the permanent Parliament of the time, the State Small Hural passed the Law on the Constitutional Court on the 8th of May 1992 and appointed the first members of the Tsets on the 1st of July of the same year, and thus began the history of our Court. The Constitutional Tsets of Mongolia is a specialised court. This can be seen in the Court's following characteristics:

1. The Constitutional Tsets solely monitors the implementation of the Constitution and resolves disputes relating to the violation of the Constitution. No other court is granted this power.
2. The appointment procedure and tenure of members of the Constitutional Tsets are described in Section 1 of Article 65 of the Constitution as "The Tsets shall consist of 9 members. Members of the Tsets shall be appointed by the State Great Hural for a term of six years upon the nomination of three of them by the State Great Hural, three by the President and the remaining three by the Supreme Court." This shows that not only the Tsets is a specialized court, but also the appointment procedure of its judges is different from that of ordinary judges. It can be said that this appointment procedure sowed the first seeds of the principle of separation of state powers. In other words, the Parliament representing the legislative branch, the President representing the executive branch and the Supreme Court representing the judicial branch all participate in the establishment of the Tsets by proposing candidates to the Tsets membership. However this does not mean that the appointed members of the Tsets will represent these organizations.
3. The Constitutional Tsets resolves disputes relating only to the Constitution. The Constitutional Tsets examines and resolves disputes concerning the compliance to the Constitution of all laws, decrees, other decisions of the State Great Hural and the President, decisions of the Government, international treaties and agreements entered into by Mongolia, public censuses, and decisions of the central election organization pertaining to the parliamentary and presidential elections. In addition, disputes concerning Constitutional violations by the President, the Speaker or members of the State Great Hural, the Prime Minister, members of the Cabinet, Chief Justice of the Supreme Court and the State General Prosecutor are also addressed to the Constitutional Tsets. Violation of the Constitution and other laws by acts and decisions of other state organizations and officials are resolved at the administrative, criminal and civil courts.
4. Dispute resolution of the Constitutional Court is differentiated from other courts through the political and legal nature of its decisions and their implications. The Constitutional Tsets plays an important role in balancing the state powers. An

important principle of a democratic state is establishing the legal environment and implementation mechanisms for mutual dependence, mutual supervision and balanced operation of the legislative, executive and judicial organizations. By establishing the constitutionality of legal acts passed by Parliament and Government and activities of high level state officials, and by subsequently invalidating such acts or parts thereof and presenting the justifications for dismissal of state officials, the judiciary organization limits the power of higher institutions of the state and creates a mechanism for balancing state powers.

Although the Constitution established a structure of the state based on the principle of the separation of powers, the inclusion of the clause “the State Great Hural is the highest organ of State power” in Article of 20 of the Constitution creates considerable misunderstanding. In its original interpretation, this clause of the Constitution declares that Mongolia shall have a parliamentary form of governance, but it does not mean that the State Great Hural shall be above all organizations and officials. Unfortunately, it can be noticed that some members of the State Great Hural may believe that the Parliament has the power to guide and command other state institutions.

The Constitutional Tsets must remain a highly specialised court. The Constitution of Mongolia dictates the necessity for the Constitutional Tsets to be a highly specialised court. The Constitution states that “a member of the Tsets shall be a Mongolian national of forty years of age and experienced in politics and law.” In addition to the usual qualifications expected of judges of other courts, a member of the Tsets is also required to have ample political experience and be familiar with the intricacies of political activities, and to be at least 5 years older than judges of the Supreme Court and at least 15 years older than members of the parliament. A member of the Tsets must be a Mongolian national with a rich civil service experience, professionally qualified and well established in personal standing.

The authority to provide an explanation of Constitutional clauses is vested in the Constitutional Tsets. Section 4 of Article 66 of the Constitution provides that “If the Tsets decides that the laws, decrees and other decisions of the State Great Hural and the President as well as Government decisions and international treaties concluded by Mongolia are incongruous with the Constitution, the laws, decrees, instruments of ratification and decisions in question shall be considered invalid.” This indicates that the State Great Hural must accept the decisions reached by the Tsets and correct the relevant violations of the Constitution.

The Constitutional Court has firmly established its place in the system of the democratic state. It is not a coincidence that the first state organization created under the new Constitution was the Constitutional Tsets. It symbolizes that from the very beginning the Constitutional Court is responsible for ensuring that activities of the State Great Hural, Government and the President, and the laws, decrees and

decisions passed by these institutions are in compliance with the Constitution.

It is a pleasure to note that Mongolia established the Constitutional Tsets during the economically and financially challenging times of the transition, and has taken numerous measures to ensure that the Tsets is able to carry out its duties dictated by the Constitution. In the past 17 years the Tsets has continued to fulfil its duties and earned a firm place in the state system. Moreover, the Tsets succeeded in educating the public of its own role and responsibilities and earned the public's recognition. The attitude toward the Tsets has changed, which can be seen from the continuously increasing number of petitions and notifications addressed to the Tsets from the public.

The operations of the Tsets are based on the Constitution, the Law on the Constitutional Tsets of 1992 and the Law on Constitutional Court Procedure of 1997.

From the time of its establishment in 1992 to this day the Constitutional Tsets has received and resolved thousands of petitions, notifications and requests, and issued 111 judgments and 38 resolutions. Out of these judgments 63 or 56.7 percent of the total confirmed a breach of the Constitution.

91 percent of the Tsets judgments concerned the constitutionality of legal acts and 9 percent concerned a breach of the Constitution by state officials. 80 percent of disputes resolved by the Tsets was related laws and other decisions passed by the State Great Hural, 7.4 percent was related to Government decisions, 1.8 percent-the President's decrees and 1.8 percent-decisions of the General Election Council. The Tsets has resolved 10 disputes related to state officials, out of which 6 cases involved the Speaker or members of the Parliament, 2 cases involved the Prime Minister, and 1 case involved the Chief Justice of the Supreme Court and the State General Prosecutor respectively.

An important element of the Tsets work involves correctly identifying the disputes to be addressed by the Constitutional Tsets. Violations of the Constitution occur on all levels of state organizations, as well as among private enterprises, public organizations and citizens. For many reasons, it is not possible for the Tsets to examine and resolve all of these disputes.

Disputes pertaining to the Tsets were described earlier. Violations of the Constitution and other laws by other state organizations and officials are decided by the administrative, criminal and civil courts. It is believed that this arrangement suits the current situation in Mongolia.

The wording of "shall make and submit judgment to the State Great Hural" in Article 60 of the Constitution has often been misinterpreted by the Parliament and attempts have been made on several occasions to influence the independence of the Constitutional Tsets, with some conflicts still not resolved to this day. Until 2006 it had been customary for a member of the Medium bench session of the Tsets to

present the judgment of the Tssets to the plenary session of the Parliament, and for members of Parliament to ask questions of informative nature only. However, an amendment has been made to the Law on the Procedure of the State Great Hural, according to which the judgments of the Tssets are to be presented to the Standing committee and plenary sessions by the Chairman of the Tssets or his deputy, and the Members of Parliament became accustomed to freely “interrogating” these officials. Constitutional researchers and academics continue to send us their comments and criticisms that this situation defies the principles of democracy and obstructs the independence of the judiciary. Submitting the judgments of the Constitutional Tssets to Parliament does not mean that the State Great Hural is the appellate court of the Constitutional Court, or that Parliament may review the Court’s decision, but the purpose of this step is to provide an opportunity for Parliament to review its unconstitutional decisions, or to correct the unconstitutional decisions made by the President, Government and the central election organization. Unfortunately, instead of reaching an understanding on the issue and correcting the conflict, Parliament often adopts an adversarial attitude in the process of discussing the Court’s judgment.

In the case where the President, Speaker of the Parliament, Prime Minister, members of the Cabinet, Chief Justice of the Supreme Court or the State General Prosecutor have violated the Constitution, the Constitutional Tssets discusses the issue at its Full bench and makes a judgment whether there is legal justification to dismiss the President, Speaker of the Parliament and the Prime Minister, and to terminate the mandate of a member of the Parliament. The Tssets presents its final judgment to the Parliament, and the Parliament should decide whether or not to dismiss the high level state official who has violated the Constitution without discussing the correctness of the Tssets judgment.

In some cases, the State Great Hural has ignored its duties by delaying or even failing to discuss the judgment of the Tssets, thereby violating the basic principles of the Constitution and obstructing the dispute examination and resolution process of the Constitutional Tssets. In order to change this situation, the Tssets has prepared and submitted to the Parliament through a competent authority a draft amendment to the Law on Constitutional Court Procedure. An amendment has been made to this law in June of 2005 which states that “Upon delivery by the Tssets of a judgment constitutionally invalidating a law, decree, other decisions of the State Great Hural, decisions of the Government, international treaties of Mongolia and related articles, these shall be suspended and remain suspended until a final decision is delivered. The Tssets shall determine separately the effective date of such suspension.” This regulation helped remove the above-mentioned conflict, and prevented a situation where unconstitutional decisions could continue to be implemented. However, the Parliament still may fail to discuss the Court’s judgment within the timeframe provided by the law, ignore the judgment to suspend an unconstitutional decision and encourage continuation of an unconstitutional situation.

Specifically, a petition has been received by the Tsets in 2008 from citizen D. Nyamdorj with the following content:

Section 24.7 of Article 24 of the Law on the State Great Hural of 26 January 2006 states that “the sub-committee on the Immunity of Members of Parliament shall comprise four members who have been elected to the Parliament the most number of times, and these members shall review the proposals submitted by relevant bodies and authorities mentioned in this law to suspend or terminate the mandate of a Member of Parliament. They will reach a unanimous conclusion on the issue and present their conclusion to relevant Standing Committees and the plenary session of the State Great Hural.” This implies that if these four members of the sub-committee fail to reach a unanimous decision upon review of the proposals submitted by relevant authorities, this issue cannot be discussed by the Standing committee and the plenary session of the Parliament.

In case if a unanimous decision is not reached, Section 3 of Article 29 of the Constitution which states that “if a question arises that a member of the State Great Hural is involved in a crime, it shall be considered by the session of the State Great Hural to decide on the suspension of his/her mandate” can no longer be executed. Furthermore, the legal justification for discussing the case of a member of the Parliament involved in criminal activities will be obliterated, which can lead to an obvious violation of Section 2 of Article 1 of the Constitution which declares that “the fundamental principles of the activities of the State shall be ensuring ... justice and the rule of law.” In such a situation the Parliament will have become incompetent to reach any decisions whether or not to suspend the mandate of the member in question. The petition also states that this law breaches Section 6 of Article 27 of the Constitution which provides that “The presence of an overwhelming majority of members of the State Great Hural shall be required to consider a session of the State Great Hural and Standing Committee valid, and decisions shall be taken by a majority of all members present.”

Upon receipt of this petition the Court began the process of examining and resolving disputes and reached a judgment at its Medium bench session that this article of the Law on the State Great Hural does not conform to the Constitution. The Court has submitted this judgment number 10 to the State Great Hural.

The Law on Constitutional Court Procedure provides in Section 2 of Article 36 that “The State Great Hural shall settle a judgment of the Tsets within 15 days upon its receipt,” and the Law on the Procedure of the Plenary Session of the State Great Hural provides in Section 32.1.2 of Article 32 that “The Justice and other relevant Standing Committees shall discuss and deliver a decision on the judgment of the Tsets within 7 days of its receipt if the judgment is received during the session of the parliament, or within 5 days from the start of its next session if the judgment is received during the parliamentary recess.” Although the State Great Hural is therefore obligated to respond to the judgment of the Tsets within a



specific timeframe, the plenary session of the Parliament had not yet discussed the Tsets judgment even after 6 months after its receipt because the relevant Standing committees could not discuss the judgment due to a recess taken by the Democratic Party group.

By this inaction the State Great Hural violated the Constitution and other relevant laws. Therefore, according to Section 3 of Article 3 and Section 1.2 of Article 30 of the Law on Constitutional Court Procedure the Tsets has decided by the majority its members to reconsider the dispute to deliver its final judgment. The Full bench session of the Tsets held on the 10th of June 2009 has decided that the phrase "reach a unanimous conclusion" in Section 24.7 of Article 24 of the Law on the State Great Hural of 26 January 2006 which states that "the sub-committee on the Immunity of Members of Parliament shall comprise four members who have been elected to the Parliament the most number of times, and these members shall review the proposals submitted by relevant bodies and authorities mentioned in this law to suspend or terminate the mandate of a Member of Parliament. They will reach a unanimous conclusion on the issue and present their conclusion to relevant Standing Committees and the plenary session" breaches Section 2 of Article 1 of the Constitution which provides that "The fundamental principles of the activities of the State shall be to ensure ... justice... and the rule of law," Section 1 of Article 14 of the Constitution that provides that "all persons lawfully residing within Mongolia are equal before the law and the courts," Section 6 of Article 27 which provides that "The presence of an overwhelming majority of members of the State Great Hural shall be required to consider a session of the State Great Hural and Standing Committee valid, and decisions shall be taken by a majority of all members present," and Section 3 of Article 29 of the Constitution which states that "if a question arises that a member of the State Great Hural is involved in a crime, it shall be considered by the session of the State Great Hural to decide on the suspension of his/her mandate." The Tsets has therefore passed the Resolution number 3 to declare invalid the phrase "reach a unanimous conclusion" in Section 24.7 of Article 24 of the Law on the State Great Hural.

The State Great Hural had on certain occasions failed to remove from other laws of similar nature the legal clauses which the Tsets had previously declared invalid, or restored such clauses in amended versions of the law. For example, the Tsets Resolution number 1 of 2002 had declared invalid a part of the Section 2 of Article 92 of the Law on Resolving Civil Cases in the Court of Law which read that "This does not concern the review hearing of the Supreme Court." However, a similar clause continued to be effective in Section 4 of Article 50 of the Criminal Law. The Tsets Resolution number 2 of 2002 also declared invalid the clause of the Law on Police Organization which stated in Section 2 of Article 17 that "the head of the central policy organization shall approve the procedure on sobering practice upon consultation with the State General Prosecutor" but the same clause has been passed in the amendment to the Law on Police Organization.

There is a strong public interest in whether subjects entitled to initiate Constitutional disputes are able to enjoy their rights, and whether the Constitutional Tsets itself can initiate and discuss disputes. According to the Constitution of Mongolia, the Tsets initiates a dispute of constitutional violations based on petitions and notifications from citizens or upon request from the State Great Hural, the President, the Prime Minister, the Supreme Court and the State General Prosecutor. In other words, the Constitution clearly indicates who may initiate disputes. But, similar to the practice in other countries, Tsets members are clearly prohibited from initiating and resolving disputes in order to maintain the principles of independent and unbiased position of the Constitutional Tsets as a judicial organ.

The right to submit petitions and notifications to the Tsets regarding violations of the Constitution without any special requirements and limitations is reserved not only for citizens of Mongolia, but for all foreign nationals and stateless persons lawfully residing on the territory of Mongolia. This provision sets the Mongolian Tsets apart from Constitutional Courts of some other countries. As a citizen, any individual and official may submit a petition to the Tsets. Often members of the State Great Hural who believe that the laws and resolutions passed by the Parliament violated the Constitution and wish to assert their dissenting opinions submit petitions to the Tsets in their capacity as a citizen.

Unfortunately, due to vastness of the territory, sparse population and underdevelopment of transport and communication sectors, residents of remote areas in Mongolia are not able to enjoy their rights and privileges. It is necessary to develop specific actions to provide them with the same opportunities as residents of the capital city.

I have previously criticised the fact that no request has been made to the Tsets from the time of its establishment by the President, the Parliament, the Prime Minister, the Supreme Court and the State General Prosecutor. In 2005 the Supreme Court made several requests and the State General Prosecutor made one request to the Tsets to initiate a dispute on the violation of the Constitution. These organizations are responsible not only for recognising conflicts with the Constitutions but for prevention of such violations. In the process of resolving disputes by applying relevant laws, judicial courts are often the first to recognise violations of the Constitution. For this reason, Section 3 of Article 50 of the Constitution provides that "The Supreme Court and other courts shall have no right to apply laws that are unconstitutional." This clause indicates the dual responsibility of the Supreme Court to cause an immediate removal of constitutional conflicts.

The President of Mongolia has the right to place a veto within a specific timeframe on such decisions of the State Great Hural which he/she deems unconstitutional. In a number of cases the State Great Hural had refused to accept the President's veto. In such cases, the President has the right to make a request to the Tsets to review

the laws and clauses considered to be in violation of the Constitution.

The Constitutional Tsets can exercise supreme supervision of the Constitution only when it can operate fully independently of any organizations and officials. It must be noted here that the Mongolian state has paid due attention to ensure the independence of the Constitutional Tsets, especially to improve the legal environment for Tsets operations. In this year alone, a new office building of the Constitutional Tsets is being built with budget resources and soon will be ready for occupancy. We believe that this will be an important measure in ensuring the independence of the Constitutional Tsets.

Section 2 of Article 64 of the Constitution provides that when fulfilling its duties, Tsets and its members shall be guided only by the Constitution and they shall be given an opportunity to be independent of any other organization, officials and individuals. Independence of the Tsets and its members is directly linked to their appointment and remuneration, and the power to resolve constitutional disputes free of any outside pressure. The appointment procedure of Tsets members was mentioned earlier in this presentation. Members of the Tsets are appointed only after passing all the requirements of the President, Speaker of the Parliament, members of the State organization and Justice Standing committees, judges of the Supreme Court and finally the Members of Parliament. The reality of the situation is such that re-appointment of a Tsets member becomes especially challenging after the Tsets had passed a decision which did not suit well the interests and opinions of members of the Parliament. In future, the number of subjects involved in the appointment of Tsets members should be reviewed to ensure that the appointment is made by only a few subjects and that the Tsets members may remain as independent of these subjects as possible. Remuneration of Tsets members is relatively high compared to other state officials, and currently we are working to address the issue of 5 non-permanent members of the Tsets in the near future.

In the process of examining constitutional disputes the subjects whose decisions are under Tsets review often attempt to influence members of the Tsets, to slander and insult their reputation through channels of mass media. Unfortunately, we are all aware that this problem is not unique to our court alone.

Although such minor difficulties persist, the Constitutional Court of Mongolia continues to faithfully fulfil its role to protect the Constitution and is poised to work vigorously and justly in the future.

Finally, it is my hope and sincere belief that the cooperation of our organizations will continue to prosper on many levels and be fruitful and rich in content in the years to come.

ARIFIN ZAKARIA

# THE RELATION BETWEEN CONSTITUTIONAL REVIEW ORGANS, GOVERNMENTS AND THE ORDINARY JUDICIARY – MALAYSIAN PERSPECTIVE

## I. Introduction

Malaysia is a federation comprising of 13 states headed by the Yang Di-Pertuan Agong (H.R.H. the King) who is a constitutional monarch. The Yang di-Pertuan Agong acts on the advice of the Cabinet in the exercise of his functions. The system of the Government in Malaysia is closely modelled on that of the Westminster Parliamentary system. Malaysia has a written Constitution that spells out the function of the three branches of the Government namely; the Executive, Legislative and Judiciary. In the United Kingdom where there is no written Constitution, it is the fundamental principal of English Constitutional law that Parliament is supreme that it may do anything it wishes; it can pass any law as it pleases so long as it conforms to the necessary legislative procedure. Unlike in the United Kingdom, in Malaysia, the Federal Constitution is supreme, and not Parliament. This is spelt out in article 4(1) of the Federal Constitution which provides:

## 4. Supreme law of the Federation.

*(1) This Constitution is the supreme law of the Federation and any law passed after Merdeka Day which is inconsistent with this Constitution shall, to the extent of the inconsistency, be void.*

Thus the power of Parliament and likewise the state legislatures is circumscribed by the constitution. The constitution sets out the framework and the principle functions of the organs of government and declares the principles by which those organs operate. The important role of the court or the judiciary is to ensure compliance of the various organs of government to the declared principles.

## II. Organs of Government

I will now briefly discuss organs of government within the context of the Malaysian constitution.

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<sup>1</sup> Article 43(1) of the Federal Constitution.

## 1. The Yang di-Pertuan Agong

The Constitution provides for a 'Supreme Head of the Federation' to be called the Yang di-Pertuan Agong.<sup>2</sup> The Yang di-Pertuan Agong holds office on a rotational basis for a period of five years, and is elected at the Conference of Rulers from amongst the nine Malay Rulers of the states of Perlis, Kedah, Perak, Selangor, Negeri Sembilan, Johor, Pahang, Terengganu and Kelantan.<sup>3</sup>

The constitution provides the Yang di-Pertuan Agong, as the Head of State with specific powers. The Constitution provides that the executive authority of the Federation shall be vested in the Yang di-Pertuan Agong and be exercisable by him or by the Cabinet or any Minister authorized by the Cabinet.<sup>4</sup> However, article 40 of the Constitution provides that the Yang di-Pertuan Agong, in exercising his function (including administrative functions) shall act in accordance with the advice of the Cabinet or of a Minister. The other powers conferred by the Constitution are Legislative powers<sup>5</sup>, the power of pardon, reprieves and respites<sup>6</sup>. He is also the Supreme Commander of the armed forces of the Federation<sup>7</sup>.

## 2. The Executive

Executive power is vested in the Cabinet of Ministers which is appointed by the Yang di-Pertuan Agong<sup>8</sup>. The Yang di-Pertuan Agong first appoints the Prime Minister, a member of the House of Representatives, to preside over the Cabinet. The Prime Minister shall be appointed by a member of the House of Representatives who in his judgment is likely to command the confidence of the majority of the members of that house. Yang di-Pertuan Agong then appoints other ministers from among the members of either house of Parliament<sup>9</sup>. The Cabinet is collectively responsible to Parliament.<sup>10</sup>

## 3. The Legislature

The Legislative authority in Malaysia is vested by the Constitution in Parliament and State Legislative Assemblies. Parliament is defined by Article 44 of the Constitution and consists of the Yang di-Pertuan Agong and two houses namely the Dewan Negara (Senate) and the Dewan Rakyat (House of Representatives). The Senate is composed of elected and appointed members. Each state elects two representatives to the senate. The appointed members are appointed by Yang di-Pertuan Agong. The House of Representative consists of 222 elected members who shall hold office until the dissolution of Parliament. Parliament unless sooner dissolved shall continue for five years from the date of its first meeting.<sup>11</sup>

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<sup>2</sup> *Ibid*, Article 32

<sup>3</sup> *Ibid*, Article 38(2).

<sup>4</sup> *Ibid* Article 39

<sup>5</sup> *Ibid*, Article 66

<sup>6</sup> *Ibid*, Article 42

<sup>7</sup> *Ibid*, Article 41

<sup>8</sup> *Ibid*, Article 43 (1)

<sup>9</sup> *Ibid*, Article 43(2) and

<sup>10</sup> *Ibid*, Article 43(3)

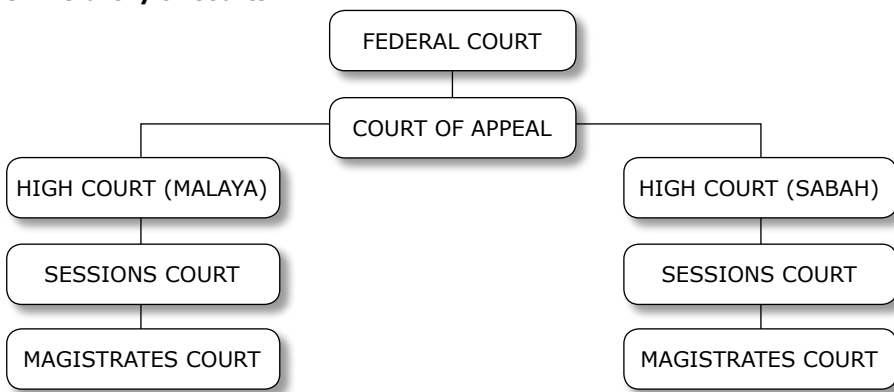
<sup>11</sup> *Ibid* Article 55

#### 4. The Judiciary

The Judiciary is governed by Part IX of the Constitution. It comprises of the Federal Court, The Court of Appeal and two High Courts, one in the states of Malaya and the other in the states of Sabah and Sarawak. The jurisdiction of the courts is controlled by Article 121A which states that the High Courts shall have no jurisdiction in respect of any matter in the Shariah Courts (the courts having jurisdiction over persons professing the religion of Islam). The Federal Court is established under article 121(2) which has the power to determine appeals from decisions of the Court of Appeal, of the High Court or a judge thereof, such original or consultative jurisdiction as is specified in Articles 128 and 130 or such other jurisdiction as may be conferred by or under federal law. Article 121 (1B) provides for the establishment of the Court of Appeal which has jurisdiction to determine appeals from decisions of the High Court or a judge thereof and such other jurisdiction as may be conferred by or under federal law.

Apart from the Federal Court, Court of Appeal and the High Courts (the superior courts), there are also subordinate courts established pursuant to article 121 (1) namely the Sessions Courts and the Magistrates Court.

#### 5. Hierarchy of Courts



#### Federal Court

The Malaysian Judiciary is an extremely important branch of the Malaysian government. Malaysia does not have a Constitutional Court as such but the Federal Court plays a dual role; as the interpreter of the Constitution and also as the highest appellate tribunal. It has the power and duty of adjudicating not only disputes between citizens, but also disputes between citizens and the various organs of the state, and between a state and the Federation or between states; in performing these tasks it can review the constitutionality of legislation and the validity of executive or judicial acts, and has in its armoury a wide variety of weapons, in terms of legal doctrines and remedies, to give practical effect to these powers.

As the final court of appeal on all questions of law, the Federal Court is the final arbiter on the meaning of constitutional provisions. Its jurisdiction is defined in Article 128 of the Federal Constitution.

First it has original jurisdiction, to the exclusion of other courts, to determine any question whether a law made by Parliament or by a State Legislative Assembly is invalid on the ground that it makes law in excess of its powers. It also has jurisdiction over disputes arising between States or between the Federation and a State<sup>12</sup>.

Secondly, it has *appellate* jurisdiction to hear appeals from the Court of Appeal as provided by the Courts of Judicature Act 1964.

Thirdly, *referential* jurisdiction, where, in any proceeding before another court a question arises as to the effect of any provision of the Constitution, to determine the question and remit the case to another court to be disposed of in accordance with the determination.

Fourthly, under Article 130, it has *advisory* jurisdiction, under which the Yang di-Pertuan Agong may refer to it any questions as to the effect of any provision of the Constitution which has arisen or appears to him likely to arise, to pronounce its opinion on any such question. His Majesty has done so only once in the case of "The Government of Malaysia v. Government of the State of Kelantan"<sup>13</sup>. There the Kelantan Government had entered into certain commercial arrangement with a company under which it received a deposit. The Federal Government contended that this tantamount to borrowing contrary to the Constitution. The Federal Court rejected the Federal Government's contention and held that the receipt of the deposit did not amount to borrowing.<sup>14</sup>

### **III. Judicial Control over Administrative Bodies**

In upholding the doctrine of separation of powers, the judiciary has a role to ensure that the administrative bodies act within their allocated authority or jurisdiction. This can be done by way of judicial review. The courts have been conferred powers by the legislation to control and review the decision of administrative bodies. The role of courts is to keep the administrative bodies to act within the ambit of the allocated authority given to them by statutes. Excess or abuse of statutory jurisdiction is quashed as being *ultra vires*<sup>15</sup>. Thus, when a person had been infringed of his or her rights or feels aggrieved by any act or omission of the administrative body,

<sup>12</sup> *Ibid* , Article 128 (1))

<sup>13</sup> [1968] 1 MLJ 129

<sup>14</sup> Since then the definition of "borrow" has been amended by section 8 of the constitution (Amendment)(No. 2) Act 1971, effective from 24.3.1971.

<sup>15</sup> M.P. Jain, *Administrative Law Of Malaysia and Singapore*, 1989, Kuala Lumpur, *Malayan Law Journal*, pp435

they may file an action in court to redress his grievance or vindication of his rights. These powers are conferred on the High Courts. The Federal Court only exercises its appellate jurisdiction. The remedies available under judicial review, *inter alia* are *mandamus*, *certiorari* and *prohibition*.

The power of the High Courts to issue the abovementioned prerogative orders is stipulated in Section 25 of the Court of Judicature Act 1964. It provides that the High Court shall have the additional powers set out in the schedule. The First Schedule states:

*"Prerogative writs*

*Power to issue to any person or authority directions, orders or writs, including writs of the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, or any others, for the enforcement of the rights conferred by Part II of the Constitution, or any of them, or for any purpose."*

An application for Judicial Review is subject to a stringent leave application. The application shall be made promptly and within 40 days from the day when the grounds of application first arose or when the decision was first communicated to the applicant.<sup>16</sup> The applicant must then give notice of the application to the Attorney General's Chambers not less than 3 days before the hearing date.<sup>17</sup> Once leave has been granted by the court, the applicant must within 14 days enter application for hearing and serve to all affected parties the notice and, the statement and all affidavit in support of the leave application<sup>18</sup> where the courts would then proceed with the hearing of the judicial review. The courts will allow an application for judicial review when it is found that an administrative body's decision is tainted with illegality, irrationality and procedural impropriety<sup>19</sup>

### **1. Mandamus**

Mandamus is a high prerogative writ which is issued to some person or body to compel the performance of a public duty.<sup>20</sup> It can be issued to any type of body, quasi-judicial, legislative, administrative and in respect of any type of function. What can be enforced through mandamus is a duty of a public nature, the performance of which is imperative and not optional or discretionary. The power to issue mandamus is spelled out by Section 44 of the Specific Relief Act which provides as follows:

#### **44. Power to order public servants and others to do certain specific acts.**

*(1) A Judge may make an order requiring any specific act to be done or forborne,*

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<sup>16</sup> Order 53 Rule 3(6), Rules of the High Court 1980

<sup>17</sup> *Ibid*, Order 53 Rule 3 (3)

<sup>18</sup> *Ibid*, Order 53 Rule 3

<sup>19</sup> *Minister of Home Affairs, Malaysia v Persatuan Aliran Kesedaran Negara [1990] 1 CLJ 186*

<sup>20</sup> *Osborn's Concise Law Dictionary, 1983, London, Sweet and Maxwell.*



*by any person holding a public office, whether of a permanent or a temporary nature, or by any corporation or any court subordinate to the High Court:*

*Provided that -*

- (a) an application for such an order is made by some person whose property, franchise, or personal right would be injured by the forbearing or doing, as the case may be, of the said specific act;*
  - (b) such doing or forbearing is, under any law for the time being in force, clearly incumbent on the person or court in his or its public character, or on the corporation in its corporate character;*
  - (c) in the opinion of the Judge the doing or forbearing is consonant to right and justice;*
  - (d) the applicant has no other specific and adequate legal remedy; and*
  - (e) the remedy given by the order applied for will be complete.*
- (2) Nothing in this section shall be deemed to authorize a Judge -*
- (a) to make any order binding on the Yang di-Pertuan Agong;*
  - (b) to make any order on any servant of any Government in Malaysia, as such, merely to enforce the satisfaction of a claim upon that Government; or*
  - (c) to make any order which is otherwise expressly excluded by any law for the time being in force.*

In *Minister of Finance, Government of Sabah v Petrojasa Sdn Bhd*<sup>21</sup> the respondent had obtained a monetary judgment at the High Court at Sandakan against the State Government of Sabah. The respondent then applied for and obtained a certificate of judgment sum and order for costs pursuant to s. 33(1) of the Government Proceedings Act 1956 ("GPA"). The party named in the certificate is the State Government of Sabah. As the State Government of Sabah did not make payment as required by the certificate, the respondent filed an ex parte application for leave for judicial review for an order of mandamus against the appellant, the Minister of Finance, Government of Sabah, to pay the judgment sum in accordance with said certificate. Leave was granted. The respondent then filed the substantive application for judicial review for the said order. The High Court dismissed the application. On appeal to the Court of Appeal, the court allowed the appeal of the respondent. The issue before the Federal Court is whether Judicial Review proceedings may be taken against the Minister of Finance, Government of Sabah to compel the payment according to the abovementioned certificate. We granted the order of mandamus to be issued against the Minister of Finance, Sabah. I had the opportunity to state in the judgment of the court:

*" ..... it would appear that under s. 33(4) of the GPA the Government is excluded from the ordinary enforcement procedure but on the other hand by s. 33(3) of the GPA the Government is under a statutory duty to pay the judgment sum as stated in*

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<sup>21</sup> [2008] 5 CLJ 321

*the certificate. This duty to pay under s. 33(3) of the GPA is clearly a statutory duty which is binding on the State Government. The appellant in the present case, as the Minister in charge of financial matters for the State is naturally responsible for the payment of the judgment sum. An order of mandamus may, in the circumstances, be issued to enforce such compliance by the appellant.”*

In the same judgment, I had also made an observation that the Government Proceedings Act 1956 is not to enable the Government to flout the law, it merely provides a special procedure in order to avoid the embarrassment of execution proceedings being taken against the Government.<sup>22</sup>

## **2. Certiorari**

Certiorari is an order by the court quashing the decision which has already been made by an inferior court or administrative tribunal. Certiorari is issued not only to a statutory body but even to a non statutory body which is under a duty to act judicially and to perform a public duty.<sup>23</sup> Once the writ for certiorari is issued by the High Court, the inferior court (or administrative tribunal) is required to produce a certified record of a particular case tried therein. The purpose is to determine whether there have been any irregularities in the proceedings.

## **3. Prohibition**

Prohibition is an order of the High Court to restrain an inferior court or administrative tribunal from exceeding its powers. The difference between certiorari and prohibition is that the former quashes the decision of an inferior court or administrative tribunal after it has delivered its decision whereas the latter is to prevent the bodies from or continue to abuse or acting in excess of its power.

## **4. Habeas Corpus**

Article 5(1) of the Constitution provides that no person shall be deprived of his life or personal liberty save in accordance with law. The order of habeas corpus is used to secure release of a person who has been detained unlawfully. The writ of *habeas corpus* is stipulated in Article 5(2) which provides that “where complaint is made to a High Court or any Judge thereof that a person is being unlawfully detained the court shall inquire into the complaint and, unless satisfied that the detention is lawful, shall order him to be produced before the court and release him”. Section 365 of the Criminal Procedure Code empowers the High Court to release any person who is being detained illegally. Section 365 reads as follows:

### **365. Power of the High Court to make certain orders.**

*The High Court may whenever it thinks it fits direct*  
*(a) that any person who:*

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<sup>22</sup> *Ibid* , para 68

<sup>23</sup> *M.P. Jain ; Ibid* , pp 126

- (i) is detained in any prison within the limits of Malaysia on a warrant of extradition whether under the Extradition Act 1992 [Act 479]; or*
  - (ii) is alleged to be illegally or improperly detained in public or private custody within the limits of Malaysia, be set at liberty;*
- (b) that any defendant in custody under a writ of attachment is brought before the Court to be dealt with according to law.*

Appeal against the decision of the High Court can be lodged to the Federal Court.<sup>24</sup> The procedure of habeas corpus is usually effective in cases whereby a statute permit detention without a trial, for example, the Emergency (Public Order and Prevention of Crime) Ordinance 1969 and the Internal Security Act 1960 if it can be shown that there was procedural non-compliance in the way the detention was ordered. If after the hearing of a habeas corpus proceeding, it is proven that the person is unlawfully detained, the grant of habeas corpus is as of right and not within the discretion of the court.

### **5. Restriction to Judicial Review: The Ouster Clause**

As had been discussed above, the courts in Malaysia, namely the Federal Court and the High Courts have inherent jurisdiction to review the decision of a public body. However this power may be taken away by statute which expressly provides that the decision of the said administrative body is final and conclusive and cannot be challenged in the court of law. These provisions are also known as finality clause or privative clause. An example of the ouster clause can be found in section 33B of the Industrial Relation Act 1967 which states:

#### **33B. Award, decision or order of the Court to the final and conclusive.**

*(1) Subject to this Act and the provisions of section 33A, an award, decision or order of the Court under this Act (including the decision of the Court whether to grant or not to grant an application under section 33A (1)) shall be final and conclusive, and shall not be challenged, appealed against, reviewed, quashed or called in question in any court.*

Another example can be found in the same act, namely in Section 9 of the Industrial Relation Act 1967 regarding the recognition of a trade union which states as follows:

### **9. Claim for recognition**

*(1A) Any dispute arising at any time, whether before or after recognition has been accorded, as to whether any workman or workmen are employed in a managerial, executive, confidential or security capacity may be referred to the Director General by a trade union of workmen or by an employer or by a trade union of employers.*

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<sup>24</sup> Section 374 of the Criminal Procedure Code.

(1B) *The Director General, upon receipt of a reference under subsection (1A), may take such steps or make such enquiries as he may consider necessary or expedient to resolve the matter.*

*[Ins. Act A1322]*

(1C) *Where the matter is not resolved under subsection (1B) the Director General shall notify the Minister.*

*[Ins. Act A1322]*

(1D) *Upon receipt of the notification under subsection (1c), the Minister shall give his decision as to whether any workman or workmen are employed in a managerial, executive, confidential or security capacity and communicate in writing the decision to the trade union of workmen, to the employer and to the trade union of employers concerned.*

**(6) A decision of the Minister under subsection (1D) or (5) shall be final and shall not be questioned in any court**

If the ouster clause is given a literal interpretation, then the power given to the judiciary to control the administrative body of the government will be impeded thus, in some sense rendering the doctrine of separation of powers to no effect. Nevertheless, the courts in Malaysia had given these provisions a more relaxed interpretation whereby it has been allowing application for judicial review despite the existence of the privative clauses when there was an error of law committed by the administrative body while exercising their functions. This can be seen in *Majlis Perbandaran Pulau Pinang V. Syarikat Bekerjasama-Sama Serbaguna Sungai Gelugor Dengan Tanggungan*<sup>25</sup> whereby Edgar Joseph Jr FCJ *said in his judgment:*

*"In our view, therefore, unless there are special circumstances governing a particular case, notwithstanding a privative clause of the "not to be challenged, etc." kind, judicial review will lie to impeach all errors of law made by an administrative body or tribunal and, we would add, of inferior courts. In the words of Lord Denning in Pearlman v. Harrow School (ibid) at p. 70, "No Court or tribunal has any jurisdiction to make an error of law on which the decision in a case depends. If it makes such an error it goes outside its jurisdiction and certiorari will lie to correct it".*

**IV. Judicial Control over the Legislative Body**

The courts in Malaysia had consistently tried to avoid from reviewing the decision of legislative body as it had recognized the sanctity of the latter's proceedings. This is evident from a number of decisions by the Malaysians Courts. In *Fan Yew Teng v Government of Malaysia*<sup>26</sup> where the Plaintiff, a Member of Parliament was convicted for sedition and was fined RM2,000. Deputy Minister of Co-ordination of Public Corporations on 31 October 1975, introduced in the Dewan Ra'ayat (Senate)

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<sup>25</sup> [1999] 3 CLJ 65

<sup>26</sup> [1976] 1 LNS 28

a motion that the question whether by reason of the conviction and sentence the plaintiff had become disqualified for membership of the house be referred to the Committee of Privileges and that the Committee be instructed to report to the House. The motion was passed on 4 November 1975, and the matter was referred to the Committee of Privileges of the Dewan Ra'ayat. The plaintiff then instituted an action for declaration:

- 1) that no question under Art. 53 of the Federal Constitution as to the plaintiff's disqualification for membership of the Dewan Ra'ayat has arisen by the plaintiff's mere conviction and fine of \$2,000 in default six months' imprisonment on 13 January 1975, (vide Selangor Criminal Trial No. 4 of 1974) on a charge under s. 4(1)(c) of the Sedition Act (Revised 1969);
- (2) that the plaintiff has a constitutional right to exhaust his legal right of appeal to the Judicial Committee of the Privy Council and thereafter, if unsuccessful, to apply to His Majesty the Yang Di-Pertuan Agong for a free pardon before any question as to his disqualification can arise under Art. 53 of the Federal Constitution;
- (3) that the Dewan Ra'ayat can only take a decision on the plaintiff's disqualification after he has exhausted his legal right to appeal to the Judicial Committee of the Privy Council and has thereafter unsuccessfully exercised his right to apply to His Majesty the Yang Di-Pertuan Agong for a free pardon;
- (4) that the plaintiff's pending appeal to the Judicial Committee of the Privy Council has rendered the matter sub-judice;
- (5) that under Art. 53 of the Federal Constitution it is the Dewan Ra'ayat alone and no other authority or body which can go into the question relating to the plaintiff's disqualification as a member of the Dewan Ra'ayat.

Chang Min Tat J. while delivering his judgment said:

*"I must necessarily go on to hold that this Court cannot interfere with the right of the Dewan to decide the question of the plaintiff becoming disqualified for membership or the corresponding right to the Dewan under the proviso to Art. 53 to decide, if it be so minded, postponing taking a decision in order to allow for the appeal to be heard or for the plaintiff to make an application for pardon.*

*With respect, I am therefore of the opinion that the reliefs sought by the plaintiff are outside the jurisdiction of the Court."*

Abu Mansor Ali J in *Abd. Ghapur Hj. Salleh V. Tun Datuk Hj. Mohd. Adnan Robert Tyt Yang Di-Pertua Negeri Sabah & Ors.*<sup>27</sup> [1988] 1 CLJ 317 had also taken the same stand. In his written judgment he said:

*"Following this authority I am satisfied that dissolution of the Legislative Assembly of Sabah by the 1st defendant under Article 21(2) of the State Constitution is*

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<sup>27</sup> [1988] 1 CLJ 317

*a Legislative act and not an Executive act and that is consistent with the 1st defendant's position in Sabah Constitution, Article 13 which provides that the Legislature of the State shall consist of the 1st defendant, the Legislative Assembly. If I am right in holding that the act of dissolution is a Legislative act in no way can the Court intervene and that there is therefore no triable issue that there was encroachment."*

In *Loh Kooi Choon v. The Government of Malaya*<sup>28</sup> Raja Azlan Shah FJ (as he then was) speaking for the Federal Court said:

*"The question whether the impugned Act is "harsh and unjust" is a question of policy to be debated and decided by Parliament, and therefore not meant for judicial determination. To sustain it would cut very deeply into the very being of Parliament."*

As discussed above, the courts in Malaysia have not directly reviewed the decision of the legislative body. The cited cases had also illustrated the reluctance of courts to encroach into the Legislative territory. Nevertheless the courts had on numerous occasions indirectly control Parliament and State Legislative by determining the constitutionality of the latter's decision whereby any laws passed by the Parliament or State Legislature which is inconsistent with the Constitution shall, be void<sup>29</sup>. Article 128 of the Federal Constitution states:

**"128. Jurisdiction of Federal Court.**

- (1) *The Federal Court shall, to the exclusion of any other court, have jurisdiction to determine in accordance with any rules of court regulating the exercise of such jurisdiction -*
- (a) *any question whether a law made by Parliament or by the Legislature of a State is invalid on the ground that it makes provision with respect to a matter with respect to which Parliament or, as the case may be, the Legislature of the State has no power to make laws; and*
  - (b) *disputes on any other question between States or between the Federation and any State."*

Suffian LP in *Ah Tian vs Government of Malaysia*<sup>30</sup> said:

*"cl (1) of article 128 provides that only the Federal Court has jurisdiction to determine whether a law made by Parliament or by a State legislature is invalid on the ground that it relates to a matter with respect to which the relevant legislature has no power to make law. This jurisdiction is exclusive to the Federal Court, no other Court has it. This is to ensure that a law may be declared invalid on this very serious ground only after full consideration by the highest Court in land."*

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<sup>28</sup>

<sup>29</sup> *Ibid*, Article 4

<sup>30</sup> [1976] 1 LNS 3

In *Dewan Undangan Negeri Kelantan & Anor. V. Nordin Salleh & Anor*<sup>31</sup> the plaintiffs were elected to the Dewan Undangan Negeri Kelantan (State Legislative Assembly) during the General Elections held on 21 October 1990 and subsequently sworn in as members. On 25 April 1991 the first defendant passed the State Enactment amending the state Constitution which provides that if any member of the State Legislative Assembly who is a member of a political party resigns or is expelled from, or for any reasons whatsoever ceases to be a member of such political party, he shall cease to be a member of the Legislative and his seat shall become vacant.

The plaintiffs then resigned from their party and joined another party. The first defendant passed a resolution pursuant to the impugned legislation that the first and second plaintiffs had ceased to be members of the Dewan Undangan Negeri Kelantan and declared the relevant seats vacant. Abdul Hamid Omar LP when delivering judgment of the court said:

*"In all the circumstances, we have arrived at the unanimous conclusion that the direct and inevitable consequences of Article XXXIA of the Kelantan State Constitution which is designed to enforce party discipline does impose a restriction on the exercise by members of the Legislature of their fundamental right of association guaranteed by Article 10(1)(c) of the Federal Constitution, and that such restriction is not only not protected by Article 10(1)(c) of the Federal Constitution but clearly does not fall within any of the grounds for disqualification specified under s. 6(1) of Part I to the Eight Schedule to the Federal Constitution. Accordingly, we agree with the learned Judge in the Court below though on somewhat different grounds that by virtue of Article 4(1) of the Federal Constitution, Article XXXIA of the Kelantan Constitution is to that extent void."*

However the powers of the courts to review the decision of the legislative body has somewhat been curtailed by the amendment of Article 121 of the Federal Constitution. It is a common belief that the doctrine of separation of powers has always been part and parcel of our constitutional fabric. This has come into question since the amendment to Article 121 in 1988. Therefore, I ask your permission to say a few words on this.

Article 121 prior to the amendment reads as follows:

"Subject to clause (2) the judicial power of the Federation shall be vested in the two High Courts of co-ordinate jurisdiction and status namely –

- (a) One in the States of Malaya, which shall have been known as the High Court in Malaya and shall have its principal registry at such place in the States of Malaya as the Yang Di-Pertuan Agong may determine; and

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<sup>31</sup> [1992] 2 CLJ 1125

(b) One in the States of Sabah and Sarawak, which shall be known as the High Court in Sabah and Sarawak and shall have its principal registry at such place in the States of Sabah and Sarawak as the Yang Di-Pertuan Agong may determine;

and in such inferior courts as may be provided by federal law; and the High Courts and inferior courts shall have such jurisdiction and powers as may be conferred by or under federal law.”

Article 121 after the amendment reads as follows –

“There shall be two High Courts of co-ordinate jurisdiction and status namely –

(a) One in the States of Malaya, which shall have been known as the High Court in Malaya and shall have its principal registry in Kuala Lumpur; and

(b) One in the States of Sabah and Sarawak, which shall be known as the High Court in Sabah and Sarawak and shall have its principal registry at such place in the States of Sabah and Sarawak as the Yang Di-Pertuan Agong may determine;

and such inferior courts as may be provided by federal law; and the High Courts and inferior courts shall have such jurisdiction and powers as may be conferred by or under federal law.”

In October 2007, the Federal Court in the case of *Public Prosecutor v Kok Wah Kuan*<sup>32</sup> held inter alia that the doctrine of separation of powers “is not definite and absolute” in the Constitution. This landmark decision is said to have confirmed the fears expressed in 1988 when Article 121 was amended to remove the judicial power from the courts and the dangers it posed to the system of checks and balances in governmental power. It is contended by some quarters that under the system of constitutional government, the courts are always seen as the protector of the Constitution and will imply into the Constitution the basic fabric of democratic values including the doctrine of separation of powers which distinguishes a democracy from a dictatorship.<sup>33</sup>

Under the new Article 121 it would appear that the judicial power is no longer vested in the Judiciary as the jurisdiction and powers of the courts are limited to those conferred by or under the federal law. If this is so, then the doctrine of separation of powers no longer exists within our Constitution. There are strong arguments that the amendment should be given a restricted interpretation in order to preserve the constitutional order.<sup>34</sup>

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<sup>32</sup> [2007] 6 CLJ 341

<sup>33</sup> *Article on Federal Court decision a blow to democracy by Dato' Param Cumaraswamy*

<sup>34</sup> *See Law, Government and the Constitution in Malaysia by Andrew Harding at page 134.*



This issue came to be considered by the Federal Court in *PP v Kok Wah Kuan* (supra). In that case the accused who was 12 years and 9 months old at the time of the commission of the offence was charged in the High Court for the offence of murder punishable under section 302 of the Penal Code. He was convicted and ordered to be detained during the pleasure of the Yang Di-Pertuan Agong pursuant to section 97(2) of the Child Act 2001. Upon his appeal, the Court of Appeal upheld the conviction but set aside the sentence imposed on him and released him from custody on the sole ground that section 97(2) of the Child Act was unconstitutional. The Public Prosecutor appealed to the Federal Court.

The Court of Appeal held that the doctrine of separation of powers is very much an integral part of the Constitution and any post-Merdeka law that violates this doctrine must be struck down as being unconstitutional. The Court of Appeal applying what it considered settled principles went on to hold that section 97(2) of the Child Act had contravened the doctrine of separation of powers by consigning to the Executive the judicial power to determine the measure of sentence to be served by the accused. By virtue of Article 39 of the Constitution, the executive power of the Federation vests in the Yang Di-Pertuan Agong who, in accordance with Article 40 of the Constitution, must act in accordance with the advice given by the Cabinet.

On appeal the majority of the Federal Court Judges rejected the finding that the amendment to Article 121 was of no effect, ruling that after the amendment, there is no longer any declaration in the Constitution that the judicial power of the Federation vests in the two High Courts. It was therefore no longer necessary to interpret the term “judicial power” and all we now need to do is to look at the federal law to know the jurisdiction and powers of the two High Courts. On that premise, section 97(2) was held not inconsistent with any provision of the Constitution.

Alluding to the Court of Appeal’s finding that section 97(2) had violated the doctrine of separation of powers, Abdul Hamid Mohamad, PCA (who later became the Chief Justice of Malaysia) dismissed the doctrine as a mere political doctrine that is not absolute. Although admitting that the doctrine had influenced the framers of the Constitution, the learned Judge was emphatic that it was not a provision of the Malaysian Constitution and no provision of law can be struck down as being unconstitutional merely because it offended that doctrine. Richard Malanjum, CJ (SS) although agreeing with the majority as to the outcome of the appeal but do not seem to agree with the view of the majority that with the amendment of Article 121 the court in Malaysia can only function in accordance with what has been assigned to them by the federal laws.

The learned Chief Judge firmly rejected the view that the amendment had the effect of removing the doctrines of the separation of powers and the independence of the Judiciary as basic features of the Constitution. This case shows a divergence in approach between the majority and the minority with regard to constitutional

interpretation even though their decision to dismiss the appeal was unanimous. Thus the issue is far from settled.

*In Danaharta Urus Sdn Bhd v Kekatong Sdn Bhd*<sup>35</sup> the Federal Court had the opportunity interpreting Section 72 of the Pengurusan Danaharta Nasional Berhad Act 1998. In that case Kekatong Sdn Bhd applied for an interlocutory injunction against Danaharta Urus Sdn Bhd to restrain it from selling its charged land under the Pengurusan Danaharta Nasional Berhad Act 1998 ('the Act'). The High Court dismissed the application on the ground that there was no serious question to be tried and that s. 72 of the Act barred the court from granting the injunction against the appellant. The respondent appealed to the Court of Appeal ('CA') which held that there were serious questions to be tried and that s. 72 of the Act contravened art. 8(1) of the Federal Constitution ('the Constitution') and was therefore unconstitutional.

The issue before the Federal Court is whether the said section 72 contravenes article 8(1) of the Federal Constitution. Article 8 of the Federal Constitution guarantees for equality among citizens before the law and their equal entitlement for legal protection. For completeness, I append hereunder the provision of Section 72 of the act:

" 72. *Limits on the grant of orders of court.*

*Notwithstanding any law, an order of a court cannot be granted-*

- (a) which stays, restrains or affects the powers of the Corporation, Oversight Committee, Special Administrator or Independent Advisor under this Act;*
- (b) which stays, restrains or affects any action taken, or proposed to be taken, by the Corporation, Oversight Committee, Special Administrator or Independent Advisor under this Act;*
- (c) which compels the Corporation, Oversight Committee, Special Administrator or Independent Advisor to do or perform any act,*

*and any such order, if granted, shall be void and unenforceable and shall not be the subject of any process of execution whether for the purpose of compelling obedience of the order or otherwise."*

The Federal Court in delivering the judgment referred to the Minister's speech while introducing the Bill to the Act in the Parliament and was of the opinion that Parliament's clear intention in enacting the Act was to ensure that the acquisition of non-performing loans by the appellant would ease the pressure upon banks and other financial institutions with the appellant being entrusted with the task, as the nation's Asset Management Company, to take over these bad loans (together with securities, where available) with a view to maximise recovery values. The appellant was thus given three principal duties namely the acquisition of non-performing loans and assets, management of such assets, including by way of the appointment

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<sup>35</sup> [2004] 1 CLJ 701

of Special Administrators to temporarily manage the affairs of corporate borrowers in place of their directors and disposition of the acquired assets. The court further held that the provision of Section 72 “applies to all persons in the same position as the respondent”, thus ruled that the provision is not unconstitutional.

In the recent case of *Jamaluddin bin Mohd Radzi & Ors v Sivakumar a/l Varatharaju Naidu*<sup>36</sup> the applicants had each won a seat in the State Legislative Assembly in the 12th General Election. Later they resigned from their political parties forming the coalition government in the state. The respondent Speaker subsequently received resignation letters pre-signed from the three applicants and declared their seats vacant. However, the Election Commission refused to hold by-elections on the ground that there was an ambiguity as to whether the applicants had resigned voluntarily. The three applicants then filed a suit against the respondent in the High Court praying for a declaration that they were still elected representatives. They then made this application to the Federal Court by way of a direct reference by relying on Art. 63 of the Perak Constitution.

The first question before the Federal Court is whether, on a true interpretation of art. XXXVI (5) (art. 36(5)) of the Perak Constitution read together with s. 12(3) of the Elections Act 1958, the Election Commission is the rightful body which establishes if there is casual vacancy of the State Legislative Assembly seat. For better appreciation the issues at hand, it is pertinent for me set out Article 36(5) of the Perak Constitution:

*“A casual vacancy shall be filled within sixty days from the date on which it is established by the Election Commission that there is a vacancy.”*

Section 12(3) of the Elections Act 1958 reads:

*“In relation to a vacancy which is to be filled at a by-election, a writ shall be issued not earlier than four days and not later than ten days from the date on which it is established by the Election Commission that there is a vacancy.”*

On this point the Federal Court ruled that the Speaker cannot interfere with the constitutional duty of the Election Commission to establish whether there is a casual vacancy or not. The receipt by the Speaker of a letter of resignation purporting to be coming from an assemblyman will not automatically cause that assemblyman’s seat to become vacant. Under Art. 35 of the Perak Constitution, the Speaker’s role is limited to receiving the written resignation letter of the assemblyman and forwarding the same to the Election Commission which will then by its own procedure determine whether a casual vacancy has arisen or not. Once the casual vacancy is established, then it is the duty of the Election Commission to fill the vacancy by holding a by-election.<sup>37</sup>

<sup>36</sup> [2009] 4 MLJ 593

<sup>37</sup> *Ibid*, para 28

The second issue before the court is whether the Speaker enjoys the immunity from due process of law as to the validity of any proceedings in the Assembly as guaranteed under Art 72(1) of the Federal Constitution, the Court opined that the declaration of the vacancies of the seats by the Speaker does not fall within the term "proceedings of the State Legislative Assembly" , thus the immunity from due process of the law as to the validity of any proceedings in the Assembly as guaranteed under Art. 72(1) of the Federal Constitution did not apply in this case.

*YAB Dato' Dr Zambry Abd Kadir & Ors V. YB Sivakumar Varatharaju Naidu; Attorney-General Malaysia (Intervener)*<sup>38</sup> is another case originating from the same state, in this case , the first applicant was sworn in before His Royal Highness the Sultan of Perak as the Menteri Besar of Perak (Chief Minister of Perak) on 6 February 2009, while the second to seventh applicants were sworn in as State Executive Councilors of Perak on 10 February 2009. By a letter dated 11 February 2009, the Assemblyman from Taman Canning complained to the respondent, the Speaker of the State Legislative Assembly of Perak, that the applicants had committed acts of contempt of the State Legislative Assembly. The respondent subsequently issued summonses pursuant to Standing Order 72 of the Standing Orders of the State Assembly of Perak containing the alleged breaches of privilege and a direction against the applicants to attend before the Committee of Privileges ('Committee') on 18 February 2009. The applicants appeared at the appointed time and place as stated in the summons under protest and read out a written objection to the Committee stating that they did not recognise or submit to the jurisdiction of the Committee. On 19 February 2009 the first applicant was served with a letter dated 18 February 2009 stating that the respondent had found him guilty as charged and, in exercising his powers as Speaker, suspended him from attending sessions of the State Legislative Assembly for a period of 18 months. On the same day the second to seventh applicants were also served with letters dated 18 February 2009 stating that the respondent had found them guilty as charged and had suspended them from attending sessions of the State Legislative Assembly for a period of 12 months. The applicants filed an originating summons in the High Court seeking, inter alia, a declaration that the respondent's decision suspending and prohibiting the applicants from attending sessions of the State Legislative Assembly was against the laws of the Constitution of Perak and was accordingly null and void.

The applicant subsequently raised the main issue requiring determination before this court was whether on a true interpretation of Art. XLIV of the Perak State Constitution read together with the Standing Orders of the Legislative Assembly and Legislative Assembly (Privileges) Enactment 1959 and/or all relevant laws, the respondent's decision was ultra vires and, therefore, null and void. The counsel for the respondents raised a preliminary objection by stating that a challenge to his decision as the Speaker of the Legislative Assembly is a challenge to the decision

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<sup>38</sup> [2009] 1 LNS 393

of a public authority and can only be commenced by way of judicial review. The court referring to the judgment of Lord Diplock in *O'Reilly v. Mackman* [1982] 3 All ER 1124 had dismissed the objection and ruled that the challenge of the applicants to their suspensions from the Legislative Assembly was a matter that affected their legal status within the meaning of s. 41 of the Specific Relief Act 1950 ('Act'). They were therefore entitled to seek a declaration of their legal right pursuant to O. 15 r. 16 of the RHC.

The respondents then relied on Art. 72(1) of the Federal Constitution which states:

"72. Privileges of the Legislative Assembly.

(1) The validity of any proceedings in the Legislative Assembly of any State shall not be questioned in any court."

It was argued by the respondents that the issues raised by the applicants were not justiciable. The court opined that Art. 72(1) must be read as being subject to the existence of a power or jurisdiction, be it inherent or expressly provided for, to do whatever that has been done. It is the Federal Court's observation that Article XLIV of the Perak State Constitution read together with the Standing Orders of the Legislative Assembly and the Legislative Assembly (Privileges) Enactment 1959 do not provide for the offence of contempt and the resultant punishment of suspension from attending sessions of the State Legislative Assembly hence the respondent is not protected by Art. 72 (1). In short, the legislature is not immune from judicial scrutiny where it oversteps its powers. (See *The Speaker of the National Assembly v. De Lille MP and Anor* [1999] ZASCA 50)

## **V. Conclusion**

The powers entrusted to the judiciary in Malaysia to act as a balancing force must be exercised with wisdom and restraint. Without wisdom and restraint, the system of checks and balances alone may not prove to be a sufficient safeguard. The courts had on numerous instances, as illustrated by the above stated cases, declined from interfering with the running of other organs of government. In a democratic government like ours, where the constitution is declared to be supreme, it is imperative that all organs of the government must respect the supremacy of the Constitution, with the court being the ultimate interpreter of the same.

TOP SAM

## **THE RELATION BETWEEN CONSTITUTIONAL REVIEW ORGANS, GOVERNMENTS AND THE ORDINARY JUDICIARY – CAMBODIAN PERSPECTIVE**

Before 1947, the system of Constitutional review did not exist in Cambodia. From that date our first Constitution of 1947, which had been amended successively until March 31, 1964, in article 119 provided to the National Assembly the competence to interpret the text of the constitution without mentioning about the control of constitutionality.

The Constitution of 1972 of the Khmer Republic has provided to the Constitutional Court the control of constitutionality. But in spite of its name, this Constitutional Court is independent from the Judiciary.

The Khmer Rouge regime brought the killing of citizens, the destruction of infrastructures and the abandon of the rule of law until the end of 1978. After the liberation of our country from the Pol Pot's regime on January 7, 1979, reconstruction of the Nation in every field as well as the restoration of legislative system started actively.

The 1981 Constitution of the People's Republic of Kampuchea vested the Council of State in its status as the Standing Committee of the National Assembly the right to interpret the law.

From 1989 to September 23, 1993, the Constitution of the State of Cambodia provided to the Permanent Committee of the National Assembly the right to interpret the law. But at that time, the interpretation of the Constitution and Constitutional Review did not exist.

The Constitution of 1993, written by the Constituent Assembly elected under the sponsorship of the United Nations was promulgated on September 24, 1993. The Chapter XII (new) of this Constitution mentioned about the Constitutional Council. Even though, the 1993 Constitution provided for the Constitutional Council, this institution has only been functioning effectively in June 15, 1998.

Article 136 (new) of this Constitution stipulated that, “the Constitutional Council shall have the duty to safeguard the respect of the constitution, interpret the Constitution and the laws adopted by the National Assembly and reviewed completely by the Senate. The Constitutional Council shall have the right to examine and decide on disputes concerning the elections of the members of the National Assembly and the election of the members of the Senate”. This clearly shows that the Constitutional Council which is an institution for Constitutional Review is also competent to rule on petitions relating to the legislative and senatorial elections.

The Constitutional Council has competence either to control the law before its promulgation (a priori) or to control the law after its promulgation (a posteriori).

#### I. Control a priori

- For Organic laws: after their adoption and before their promulgation, Organic laws, Rules of Procedure of the Senate, Rules of Procedure of the National Assembly and their amendments must be forwarded to the Constitutional Council to review their conformity with the Constitution.
- The Laws on the Ratification of Treaties, International Conventions and Ordinary laws, before their promulgation, should be submitted to the Constitutional Council for review upon the request by the King, the Prime Minister, the President of the Senate, ¼ of Senate members, the President of the National Assembly and 1/10 of the Assembly members.

#### II. Control a posteriori

After the law is promulgated, the King, the President of the Senate, the President of the National Assembly, the Prime Minister, one fourth of Senators, one tenth of Assembly members or the Courts could ask the Constitutional Council to examine the constitutionality of that law.

Provisions in any article that are declared to be unconstitutional by the Constitutional Council shall not be promulgated or implemented. The decision of the Constitutional Council is final.

The King shall consult with the Constitutional Council on all proposals to amend the Constitution.

The Constitutional Council is the only competent institution having the authority to nullify any vote by the National Assembly that is contrary to the principle of safeguarding the independence, sovereignty, territorial integrity, and that undermines the political unity or the administrative management of the nation.

Concerning the elections of members of the National Assembly and of members of the Senate, the Constitutional Council has competence to examine and rule on:

1. All recourses lodged by a person or his representative against the decision of the National Election Committee to reject the request related to registration on the

voters list, the absence of the name, the opposition against the registration of the name or the upholding of the name in the voters list of a person considered as not complying with conditions required by the electoral law. (The Constitutional Council shall deal with the above cases within 10 days after receiving the recourse).

2. Any complaint of a political party or of a candidate who contests the decision of the National Election Committee rejecting the recourse concerning the candidacy or the list of registered candidates. (The Constitutional Council shall deal with the above cases within 10 days after receiving the recourse).
3. All complaints or recourses during the electoral campaign. (The Constitutional Council shall deal with the above cases within 10 days after receiving the recourse).
4. Any direct complaint contesting one part or the entire of the electoral result lodged by a person or by a political party participating in the election to contest the provisional results. (The Constitutional Council shall deal with the above cases within 10-20 days after receiving the recourse)
5. Any complaint of a person or a political party who contests the decision of the National Election Committee for rejecting the recourse against the provisional results of an election. (The Constitutional Council shall deal with the above cases within 10-20 days after receiving the recourse)

The decisions of the Constitutional Council are final without recourse. All constitutional bodies must comply with them, too.

As a principle, the Constitutional Council cannot examine any matter on its own initiative. Only the King, the President of the Senate, the President of the National Assembly, the Prime Minister, one fourth of the Senators, one tenth of the members of the National Assembly, or the Court can make a request to the Constitutional Council to examine the constitutionality of a law.

Concerning the relationship between the Constitutional Council and the Prime Minister, the latter can submit his request to the Constitutional Council for:

- the constitutional review of laws, before or after their promulgation.
- the interpretation of the Constitution or the Law.

Decisions of the Constitutional Council shall be conveyed to the King, to the President of the Senate, to the President of the National Assembly, to the Prime Minister and to the President of the Supreme Court. The Prime Minister shall inform all members of Government of those decisions after receiving them.

In general, the Prime Minister has the right to issue a sub-degree, a decision, or a notification inferior to statute law. The Constitutional Council is not competent to examine these acts.

On February 19, 2009, the Prime Minister submitted a request to the Constitutional Council on interpreting articles 17 and 18 of the Law on the Elections of Capital



Council, Provincial Councils, Municipality Councils, District Councils and Khan Councils because the National Election Committee (an independent body which has the competence to organize the election) issued the decision N<sup>o</sup>063/09 NEC dated February 17, 2009 which affects the right of citizens to stand as a candidate for the Council Elections, especially, the basic rights of Civil Servants and Armed Forces. The Constitutional Council' interpretation reads as followed:

- Provision of Article 17 shall be interpreted as all civil servants and armed forces officials who are still holding offices have no right to run for the Council Elections. It also means that the civil servants and armed forces officials, while holding their offices, cannot at the same time run for the Council Elections. The term "Civil Servant" encompasses the Civil Servants of the Legislative, Executive and Judiciary Cadre.
- Provision of Article 18, comprising 3 Paragraphs, shall be interpreted as followed:
  - a/- The Provisions of Paragraph 1 mean that either Civil Servants or Armed Forces officials who wish to run for the Council Elections shall submit an application for a special leave of absence at least seven (7) days before the start of electoral campaign until the day of the official announcement of the poll result. The sentence "application for a special leave of absence at least seven (7) days before the start of the electoral campaigns until the day of the official announcement of the poll result" only means that it is an application for a leave of absence from their work but not an application for resignation from their functions or their positions. The other meaning of these Provisions requires the Civil Servants and Armed Forces officials who wish to stand as candidates for the Council Elections, to apply for a leave of absence from their work in the aforementioned time frame".

b/- The Provisions of Paragraph 2 mean that the elected candidate shall apply to the Ministry or Institution to be released from their duties, for the duration of his/her mandate of the Council. Furthermore during his/her mandate, he/she shall retain his/her rights to promote and also to preserve his/her seniority of function for retirement. If the elected candidate does not wish to serve as the Council Member, he/she shall apply to the National Election Committee to be withdrawn from the Council Electoral name lists. In this case, the concerned person can resume his/her previous position.

c/- The Provisions of Paragraph 3 mean that at the end of his/her mandate as Member of the Council, the concerned person may resume his/her service at the Ministry or Institution of origin, but whether he/she will be able to integrate in his/her previous function or position depends on the decision of the Ministry or Institution: It is no automatic reflex;

Concerning the relationship between the Constitutional Council and the ordinary judiciary, paragraph 1 of article 141(new) of the Constitution stipulates that "After a law is promulgated, the King, the President of the Senate, the President of the

National Assembly, the Prime Minister, one fourth of the Senators, one tenth of the Assembly members or the Courts can request the Constitutional Council to examine the constitutionality of that law.

Citizens shall have the right to contest against the constitutionality of a law through Assembly members or the President of the National Assembly, Senators or the President of the Senate as mentioned in above paragraph”.

Furthermore, a party to a trial, who considers that a law enforced by a court or a decision of an institution violates his fundamental rights and liberties, may raise the unconstitutionality of this law upon the court. The court where it finds that the request is well-founded, shall submit the case to the Supreme Court within 10 days. The Supreme Court shall examine and submit the law to the Constitutional Council in a maximum period of 15 days, except if the request is judged inadmissible. Meanwhile, decisions of the Constitutional Council shall be conveyed to the President of the Supreme Court who shall inform the concerned court.

As an example, His Majesty the King submitted a request to the Constitutional Council to review the constitutionality of article 8 of the Law on Aggravating Circumstances for Felonies. The Constitutional Council ruled on a decision and specified in its motif that in the principle of adjudication, the judge shall not only depend on article 8 of the Law on Aggravating Circumstances for Felonies to prosecute the malefactor but also depend on Law. The term “Law” meant national law including the Constitution, law in effect, and international law recognized by the Kingdom of Cambodia, especially, the Convention on the Rights of the Child.

In conclusion, although the relationship between the Constitutional Council with Government and the Courts seems to be difficult in practice, this institution made its contribution to ensure the regular functioning of the national institutions especially, the principle of separation of powers.

SVETLANA SYDIKOVA

## **THE CONSTITUTIONAL COURT OF KYRGYZSTAN**

As you know, the end of the XX century is marked by the crushing of totalitarianism in the post socialist countries. The Kyrgyz Republic, which I am honoured to represent, is among them.

In Kyrgyzstan as in Mongolia the booming process of forming a free civil society has begun and it has been based on the principles of market economy, democratic and political systems and ideological and political pluralism. Principles, which were declarative before realized and comes true, one of them is the principle of separation of powers.

This principle assumes, that every branch of Government has its own mission. However it does not mean radical separation of powers, but supposes that every branch of Government will possess its power only in a strictly determined field of competence. At the same time there is a complex system of cooperation in the process of exercising public functions, permitting each of them to control each other, at the same time saving their own independency due to the fact that the system of checks and balances is functioning.

The same sharing acts as the necessary condition of resistance of concentration of authority and abuse of power and in the result it is a guarantee of protection and respect of human rights.

It was impossible to implement the principle of separation of powers during the period of Soviet Union, because there was only the rule of the Soviets. And Kyrgyzstan, realized that its Constitution, drafted with serious democratic expectancies must include the doctrine of separation of powers. So it became written law in its Constitution as a basic principle of the constitutional system.

On 14 December 1990, the Kyrgyz Republic as the first country among the states of the former Soviet Union, passed some amending laws to its Constitution and reorganized the system of state governing bodies. At the same time the Constitution inspectorate committee was abolished and the Constitutional Court of the Kyrgyz Republic was established.

At the present time the Constitutional Court consists of 9 judges. Its task is:

- to declare laws and other legal and regulatory acts unconstitutional if they contradict the Constitution;
- to render official interpretations of the norms of the Constitution;
- to render conclusions as to the constitutionality of presidential elections;
- to render conclusions as to the dismissal of the President from office;
- to render conclusions on a draft law amending and supplementing the present Constitution

The competences listed above show that the Constitutional court is considered to serve as a distinctive balance between the legislative and the executive power. The constitutional justice becomes the guarantor of the principle of separation of powers.

Dear participants of the conference, I would like to focus your attention on the relationships between the Constitutional Court and legislative and executive powers.

The relationship between the Constitutional Court and the legislative power grounds on the basis of the principle of separation and independence of activities and interacting with each other only within the limits of law.

For example, the members of Parliament (Jogorku Kenesh) of the Kyrgyz Republic may within the limits of their competences apply to the Constitutional Court for review on a point of law relating to the Constitution. Naturally the question arises, what role the Constitutional Court plays and whether the Constitutional Court has an influence on the legislative process? The Constitutional court has no right of legislative initiative.

The answer to this question lies in the mentioned competences of the Constitutional Court, in particularly of declaring laws and other regulatory acts unconstitutional if they contradict the Constitution. The rule-making process also often takes into consideration standards and principles of International Law.

In such decisions if it is necessary the court points to certain errors in legislation, that should be eliminated. On the other hand the legislative body has some influence on the Constitutional Court, for example in determining its staff structure, in hearing annual reports of the Chair of the Constitutional Court, in containing the number of cases of constitutional review in the country and acting as an applicant for the constitutional review procedure.

The relationship between the Constitutional court of the Kyrgyz Republic and the legislative body has not always been good. Almost for 2 years from 2006 to 2007 the activity of the court was blocked for lack of quorum. For different reasons there was an intentional procrastination of considering the President's submission about

candidates for a judge's position. This experience led to the idea that a retiring judges of the Constitutional Court should hold office until a new judge is elected. This is meant to guarantee the uninterrupted activity of the Constitutional court. The Parliament of the Kyrgyz Republic (Jogorku Kenesh) adopted a resolution concerning the election of 3 judges of the Constitutional Court. That led to incredibility of all members of the Constitutional court of the Kyrgyz Republic. Therefore the Constitutional Court delivered a judgement on these illegal provisions. The judgement dates on 14 of September 2007. The court declared the separate provisions of the Law "On regulations of the Jogorku Kenesh of the Kyrgyz Republic" to be unconstitutional, making it possible twice to change the Constitution without regard to the complex amendment procedure, thereby provoking destabilization of the society. The conflict between the state bodies was settled by the President of the Kyrgyz Republic by dissolution of the Parliament.

The executive branch, from the conception of separation of powers – is the power that executes the laws and realizes it. The fundamental nature and purpose of the executive power is expressed in the particular kind of state activity, in its law enforcement duty. But in contrast to the law enforcement duty of the judiciary (where the execution of law requirement is realizing in preference in negative cases) it is typical for executive power enforcement of positive nature that it is direct execution of legislation requirements for normal working purposes. But for the efficient execution of laws the organizing measures, administrative activities are necessary, it is the main function of the executive branch.

Realizing its constitutional authorities and declaring laws and other legal and regulatory acts unconstitutional, the Constitutional court of the Kyrgyz Republic exercises direct influence on the normative system, at the same time it doesn't deal with creating a new norm, but requires their application in accordance to the letter, meaning and content of the appropriate article of the Constitution of the Kyrgyz Republic and exact understanding and equal applying of the constitutional provisions, on the assumption of the Constitution not only declare high-democratic ideals of the legal state but states as the instrument of its building.

Dear participants and guests of the Conference!

Being in the judicial system, the Constitutional court is actively cooperating with ordinary courts. This cooperation is expressing in different forms. In the case of doubts on local court proceedings, or questions on constitutionality of the law or another legal and regulatory act, on which the decision of the court depends on, in such cases the court, according to the article 90 of the Constitution of the Kyrgyz Republic may direct an inquiry to the Constitutional court.

According to the Constitution of the Kyrgyz Republic the Constitutional court is not meant to review the decisions of the local courts on subject of constitutionality, but can consider the constitutionality of the legal and regulatory acts, which were applied by the local courts for the adjudication on the petition.

In terms of the topic of my report, I'd like to underline the important role of interaction between authorities, implementing the judicial reforms.

Particularly it is necessary to emphasize the role of Parliament and Government in development, adoption and realization of the fundamental regulatory acts in the field of legal justice and judicial proceedings.

Last time by the President's of the Kyrgyz Republic initiative was adopted a number of legislative acts, giving the positive impulse for the further developing and strengthening of the judicial system of the Kyrgyz Republic.

It should be mentioned such laws as: "On the judicial self-government", "On the judge's status", "On constitutional proceedings of the Kyrgyz Republic" and last changes to the Law "On the main principles of the budget law", which must strengthen independence and self-dependency of the judicial branch through the forming and activity of the bodies of the judicial self-government, independent forming of its budget, control on it forming and execution, inadmissibility to sequester of funds, providing for courts on the next budget year.

Dear participants and guests of the conference!

Now I would like to underline the social status of the Constitutional court in the system of separation of power in Kyrgyz Republic. Constitutional control is exercised by the Constitutional court, which is the special court in the field of constitutional control.

From the time of its creation the Constitutional court passed a hard way of creation through recognition and disclaimer.

Some politicians and public figures in Kyrgyzstan from time to time raise a question about necessity of the Constitutional court in general and in the system of the judiciary.

Today's status of the Constitutional court in the state system of state of the Kyrgyz Republic was laid down by referendum from 21 of October 2007, when the last constitutional amendment was adopted.

It is the result of reflecting the approach of most countries of the world, where the constitutional justice became an essential part of a democratic state. The position of the Constitutional court as a safeguard was expressed by international organizations as the Venice Commission of the Council of Europe and most representatives of legal institutions, also it was supported by the President of the Kyrgyz Republic Bakiev Kurmanbek Salievich.

The 1993 Constitution implemented the Constitutional court of the Kyrgyz Republic into the system of the Judiciary and appointed in accordance with the Constitution

that the Constitutional court is the highest body of judicial power, meant to protect the Constitution. The term "highest" is an ambiguous term. It applies not only to describe a hierarchy. The Constitutional court actually is not higher in terms of doesn't lead the system of the judiciary and doesn't exercises supervisory, cassation and appellate functions. The Constitutional court is highest, because it takes the higher position in the mechanism of the constitutional control in the state, and it is not accountable to any other body. It's decisions are equally binding for all subjects of law, also for other higher institutes of legislative, executive and judiciary bodies and it's carrying out of court proceedings it only restricted by the Constitution and laws about itself. The competence of the Constitutional court among all judicial bodies specified in the Constitution of the Kyrgyz Republic is equal to the competence of the President, the Parliament and the Government because of the special status of the Constitutional court in the mechanism of the state authority (Article 85).

The task of the Constitutional court consists in the legal protection of the Constitution, in supporting supremacy and direct action of it, it's constitutional competence, validity of the passing of judgments, the role in providing balance and limiting the power predetermined the status of the Constitutional court as not only judicial body, but the highest constitutional body equal to the legislative and executive branch. Thereby the unique legal nature of the Constitutional court is expressed. The famous German constitutionalist Professor K. Hesse, describing the legal constitutional position of the similar body – The Germany Federal constitutional court, noted that "such body should be put into highest state bodies, establishing by the main law, and it status differs from the legal constitutional position of other courts, and he was also indicated on equal position with highest federal bodies"<sup>1</sup>.

Independence and self-dependence of the Constitutional court as part of the state system doesn't mean to deprive the other branches of Government of their possibility to have an influence on the Constitutional court. True, such possibilities are limited, but in the system of check and balances it only raised their value.

In conclusion I like to emphasize another function of the Constitutional Court concerning human rights. From a formal point of view the constitutional court's competence to deliver a judgment is closely limited to constitutional complaints. But reality is different. In fact it is an acting and active body, the highest judicial body protecting the constitution and safeguarding the respect of human rights in the lawmaking process. Knowing this the legislator has to take into account that in case of contradiction to the Constitution such a document can be declared unconstitutional. And there are considerable examples of it in the practice of the Constitutional court.

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<sup>1</sup> Hesse K., *Theory of the Constitutional Law of Germany M.*, 1981. C.313-314.

Dear participants and guests of the conference!

The Constitutional court plays a special role a state following the doctrine of separation of powers, in the system of checks and balances. Protecting the separation of power and the system of state bodies' competences, the Constitutional court protects the legal organization and functioning of power, and stands up for the guarantee of political stability in the society and state, as the keeper of constitutional values, being on the watch of the constitutional system. An efficient constitutional justice is the important guarantee of the human rights protection. That is why the complex cooperation between organs of constitutional review and other branches is the necessary precondition of a fully functioning protection system for the constitutional rights and freedoms.

In the end of my speech allow me to express my thanks to the Konrad Adenauer Foundation and the Constitutional Court of Mongolia for giving me the opportunity to take part in this conference and in this exchange of experiences, that is very important for us and for the cordial welcome, that was shown to us.  
Thank you for your attention!



RUDOLF MELLINGHOFF

## CONSTITUTIONAL JURISDICTION AND LEGISLATION

In a state under the constitution, the constitution has primacy even over Acts of Parliament. The primacy of the constitution is the characteristic feature of a modern state under the constitution. Checking the legislature is only one aspect of this, but this aspect is a very important one. The court or courts which exercise the review of constitutionality, be it the constitutional jurisdiction or the supreme courts of a state, play a vital role when it comes to enforcing the constitution in a state under the rule of law in which the separation of powers is established. In this context, the question at issue is always whether the parliamentary majority or a court is the institution which has the last word when it comes to bindingly interpret the constitution of a state.

At first, supreme courts courageously wrested this competence from the legislature. One example of this is the United States Supreme Court's famous *Marbury vs. Madison* ruling from the year 1803 concerning the review of the constitutionality of statutes. In recent times, constitutions have provided for an independent constitutional jurisdiction which is authorised to review the constitutionality of statutes.

In Germany, a constitutional jurisdiction with extraordinarily far-reaching competences was introduced after the horrors of the National Socialist rule. The Federal Constitutional Court's case-law has had a decisive influence on constitutional reality in Germany. Since 1951, the court has interpreted the constitution in more than 5,000 Senate rulings, which have been published in 120 volumes of *Collected Decisions*, and has thus influenced law and politics in Germany. Here, the influential effect of the Federal Constitutional Court's case-law unfolds in all parts of the constitution. When interpreting the fundamental rights, the court determines the relation between the citizens and the state as well as the citizens' relations among themselves. It clarifies questions of competence and of power between the state bodies, and it reviews compliance with procedural provisions under constitutional law.

### **I. TENSIONS WHICH ARE NATURAL**

The Federal Constitutional Court's far-reaching competences and its extensive case-law inevitably result in tensions that emerge in the relation between law and politics. Particularly the Federal Constitutional Court's relation to the democratically elected parliament, which has the political responsibility for enacting laws, and which is the only state body in Germany that is directly elected by the people, is one of the issues that are time and again dealt with by legal scholars in Germany.

If one takes the classic separation of powers between the legislative power, the executive power and the judicial power as a basis, a constitutional court is always part of the judicial power. The constitutional court as such is on an equal footing with the constitutional body of the legislative power; the constitutional court checks the constitutionality of the legislative power's action without, however, having a legislative mandate of its own.

However, this division of tasks, which seems very clear at first sight, holds many problems and conflicting priorities. There are several reasons for this. Firstly, this is due to the fact that the constitution, which is the standard for parliament as well as for the constitutional court, has more elements which are open and require concretisation, than other legal provisions.

A constitution always opens a large margin of interpretation to the legislature; the legislature is bound by the limits of constitutional law but also lends concrete shape to the rules of constitutional law by enacting non-constitutional, or ordinary, law. If a constitutional court sets the boundaries and margins of interpretation in a different way than the legislature does, tensions will inevitably arise. What parliament opposes in particular are encroachments on its political margin of drafting. Those who win a case before the Federal Constitutional Court praise the court's wisdom and make reference to the commitment to the constitutional law that has been established in the ruling.

The fact that a constitution needs concretisation becomes apparent especially with regard to the fundamental rights and human rights, but also with regard to the fundamental structural principles of the state such as democracy, the social state under the rule of law and the separation of powers, and when it comes to determining the state's objectives. The fact that the text of the constitution is often of apodictic brevity means with regard to the constitutional court that in a certain way it is the constitutional court that lends shape to constitutional law, or further develops it, in the first place. In a particular way, constitutional jurisprudence also means further development of the law and legal innovation. One cannot in every case infer directly applicable legal rules from the vague and brief Articles of the German Basic Law, especially from its catalogue of human rights. The interpretation of the constitution therefore cannot be an operation that is based on logic alone. Instead, it always creates law. The insight which is obtained in this way then serves as a guideline for the legislature, which, for its part, will possibly interpret the constitution in a different manner.

That this particularly often results in tensions between the legislature and the Federal Constitutional Court is among other things due to the fact that in Germany, all essential decisions take the shape of laws. It is true that the central position of parliament in a representative democracy does not mean that all decisions, without exception, must be taken by parliament. Due to the Federal Constitutional Court's

case-law, it is, however, acknowledged in Germany today that in all questions which are of decisive importance for the body politic, decisions may not be taken without involving parliament. Not only encroachments on freedom and property but all essential decisions, in particular those which are of fundamental-rights relevance, are reserved to the parliamentary legislature.

Numerous examples can be cited to show the tensions that exist between the Federal Constitutional Court and the legislature. The court has decided, for instance, that the legislature is obliged to protect human life and must, in principle, prohibit the termination of pregnancy. The court has obliged the legislature not to levy taxes on the subsistence level of a person liable to pay taxes and on that of this person's family. In the context of the immigration of foreigners, the court has held that the sole fact that a marriage or a family relationship with a German exists does not as such establish an unconditional right of residence. The court holds the view that assemblies may only be banned or dissolved if the principle of proportionality is strictly adhered to because the freedom of assembly is one of the indispensable functional elements of a democratic body politic. Occupational freedom only permits restricting the numbers of first-year students for certain courses of study only if the state has exhausted the existing course capacities and appropriate criteria are used to select applicants. The guarantee of property allows the legislature to adopt provisions in landlord and tenant law according to which the owner of a flat can only give the tenant notice to quit if the owner him or herself has a justified interest vis-à-vis the tenant. The legislature may in principle prohibit shop owners and proprietors from opening their shops and businesses on Sundays. The state must grant the citizens the right to inspect files if effective legal protection depends on their gaining knowledge of administrative procedures.

In recent times, the Federal Constitutional Court has decided that parliament must be accorded sufficient rights of participation in European lawmaking procedures and treaty amendment procedures, that voting machines may only under strict preconditions be deployed in elections to the German parliament, that duties collected for promoting the sales of German agricultural products are impermissible, that the Law on the Storage and Disclosure of Telecommunications data may provisionally not be applied, that the present provisions concerning automatic number plate recognition and so-called online searches do not comply with constitutional requirements, that the provisions on inheritance taxation must be amended and that the shooting down of a civil aircraft which has possibly been hijacked by terrorists and has persons on board who are not participants in the crime may not be provided for by law.

Some of these decisions have been severely criticised by members of parliament. It was argued that the court transgressed its competences, violated the separation of powers, engaged in politics and restricted parliament's freedom of drafting too heavily.

## **II. JUSTIFICATION OF A CONSTITUTIONAL COURT'S PASSING FINAL AND BINDING DECISIONS**

Many decisions in which the court declares Acts of Parliament unconstitutional make the tension between law and politics evident. These rulings show the legislature the limits of its political freedom of drafting. The constitutional court provides parliament with the framework of lawmaking. In doing so, the constitutional court can even declare laws unconstitutional which have been adopted by an overwhelming majority, or even unanimously, by a democratically elected parliament.

Why is a constitutional court accorded such power? This question has also been dealt with in the constituent assembly for the German constitution. A famous German member of parliament, Carlo Schmid, has pointed out that the problem of the courts' power of disposition over the state bodies leads into the depths of the concept of state, namely the distinction between the power state (Machtstaat) and the state under the rule of law (Rechtsstaat). Other participants argued that either the law would have to be recognised as the foundation of human community, which would mean that it would also have to be vested with the necessary guarantees for its realisation, or that political expediency would be made the supreme principle, which would result in the reappearance of the dangerous fundamental dogmas from the era that had just passed. Under the impression of German history, the creators of the Basic Law drafted the human rights and the liberty rights not only as rights which are actionable by the individual. They explicitly committed legislation, administration and jurisprudence directly to the constitution. This secures the acceptance of the state under the rule of law.

In doing so, the content of a constitution is deliberately not placed at the legislature's free disposition. It is not the majority which is supposed to assert itself in the controversy about the constitutionality of the law, but a constitutional body is supposed to decide in judicial independence. No monism of powers can be derived from the principle of parliamentary democracy, and there is no comprehensive primacy of parliament over the other powers as a principle that would bypass all assignments of competence specifically made by the constitution. If right or wrong before the constitution is at issue, the constitutional court is stronger than the legislature.

Since the point in time in which constitutional courts started to review the constitutionality of statutes, parliamentary absolutism has ceased to exist. In its actions, the legislature itself has to focus its attention to the greatest extent possible on ensuring their adherence to constitutionality. The establishment of such a constitutional jurisdiction necessarily and deliberately results in restrictions of the political freedom of action of the legislative and the executive power. The legislative power, the executive power and also the normal judicial power must tolerate that it is corrected by the constitutional jurisdiction in the name of the constitution, because in cases at issue and as regards the matter at issue, it is for the constitutional

jurisdiction to decide the dispute and to bindingly interpret constitutional law. In the continuing process of interpretation, it is inevitable that every provision of the constitution will increase in density. As regards the interpretation of the constitution, this results in the impression that the margin for political negotiations narrows more and more.

### **III. LIMITS OF CONSTITUTIONAL JURISDICTION**

#### **1. Theoretical limits**

The actual legitimisation of the review of constitutionality by a constitutional court hence results from the primacy of the constitution. All state authority is bound by the Basic Law. Parliament may not disregard the constitution, even if it has the necessary majority to do so. The idea is that parliament is competent for political action, and the constitutional court is competent for compliance with the commitments to the constitution.

In this context, it is often difficult to make the difference between political and constitutional assessment clear. It is for the democratically legitimised legislature alone to decide on the expediency of a law. It is not for the constitutional court to assess whether a law is necessary or useful. The court only reviews the compatibility of the law with the Basic Law.

There is no fundamental primacy of the constitutional jurisdiction over the other classic powers. Political leadership and the determination of political objectives still unequivocally rest with the legislature and the government, particularly as the constitutional court's position depends on its decisions not only being respected but essentially accepted by all forces in society.

The constitutional court also does not have a monopoly of the interpretation of the constitution. It is for the legislature as well to lend the constitution concrete shape. The legislature is not only the body which is set its limits by the constitution; it also participates in elaborating the constitution. To the extent that the legislature touches the content of the constitution by its provisions, the legislature at the same time acts as an interpreter of the constitution. The constitutional court has to respect this mission of the legislature as part of the constitutional law that is binding upon the jurisdiction.

If the constitution admits of several possibilities of interpretation and concretisation, the competence of interpretation rests with the legislature. Under the constitution, the legislature is the first interpreter of the constitution; the constitutional court is its reviewing second interpreter.

Parliamentary deficits as regards its decision-making cannot, however, be compensated by a constitutional court. The legislature may not delegate to the constitutional court its responsibility for the realisation of the constitutional provisions

and its competences for being the first interpreter of the constitution, especially of the fundamental rights. This means in particular that the political actors and the legislature may not deliberately remain inactive and openly postpone their becoming active until the constitutional court has rendered judgment. In the state under the constitution, however, the legislature runs the risk of failing because constitutional objections are raised. If it evades that risk, the legislature itself passes the role of the substitute legislature to the constitutional court, which has the consequence that both legislative and judicial power fail to fulfil their respective roles which have been assigned to them by the constitution.

## **2. The court may not act on its own accord**

In the tensions that emerge between the constitutional jurisdiction and the legislature, the question of whether and to what extent a court may have the competence to annul acts of the democratic legislature arises time and again. First of all, these limits result from the respective constitution itself. As a general rule, constitutional courts do not have an overall competence of the judicial protection of the constitution. The Basic Law of the Federal Republic of Germany for instance specifies the Federal Constitutional Court's competences in its Article 93 subsection

1. In doing so, it refrains from introducing a general clause. It is true that the legislature has the power to assign more competences to the Federal Constitutional Court. As a general rule, however, this power is made use of only in a very restrained manner.

Even in the framework of the respective competences a constitutional court depends on others bringing proceedings before the court. It may not on its own accord take up questions that require clarification or are controversial under constitutional law. It neither has a right of initiative nor a competence to accompany legislative action by a review of constitutionality. It is solely called upon to review the constitutionality of decisions taken by the legislature, decisions which are concluded and for which the legislature has assumed political responsibility, if and to the extent that they are brought before the court in admissible proceedings. As long as no legitimate applicant brings a case before the court by means of an admissible application, the court cannot intervene even if a serious and evident violation of the constitution exists. If proceedings for the review of the constitutionality of a statute are not brought by a legitimate applicant, it must be tolerated that unconstitutional laws factually remain applicable.

## **3. The legislature's latitude**

Apart from these limits, which are more formal ones, a constitutional court must also respect the legislature's latitude in the cases in which it is called upon to render judgment. The court would lose its acceptance and its influence on the interpretation of the constitution if it did not practice self-restraint with regard to political issues and if it did not respect the other constitutional bodies' freedom of action.

It is true that concern for the constitution may require determined intervention on the part of the court. The principle of judicial self-restraint with regard to political issues which the Federal Constitutional Court exercises does not mean that its competence is curtailed or weakened. It means that the Federal Constitutional Court refrains from "engaging in politics", that is, from intervening in the area of free political action which is created and limited by the constitution. The area of free political action, which is guaranteed by the constitution for the other constitutional bodies, must be preserved.

The Federal Constitutional Court therefore emphasises in its established case-law that it is not for the court to review the expediency of a solution which has been chosen by the legislature, or to evaluate whether this solution is the most sensible or the fairest one. As a matter of principle, the legislature has broad latitude for drafting. It is not for the constitutional court to examine whether the directly democratically legitimised legislature has made the arrangement which is the fairest and the most expedient one in a given situation; in principle, the legislature has to decide itself in which manner, to which extent and in which point in time state tasks are fulfilled.

#### **IV. THE COOPERATION OF CONSTITUTIONAL JURISDICTION AND LEGISLATURE, EXEMPLIFIED BY JUDGMENTS WHICH HAVE LEGAL CONSEQUENCES**

The democratic state under the rule of law in which the separation of powers is established existentially depends on the viability of both state powers. Overemphasising a constitutional court's right to take the final and binding decision would too strongly diminish the legislature's weight and importance in the process of realising the constitution. In this context, the mutual recognition of the respective margins of discretion is a fundamental precondition of a beneficial cooperation of constitutional jurisdiction and legislature when it comes to implementing standards established under constitutional law. Especially the decision on the respective legal consequence in proceedings which involve the review of the constitutionality of a statute makes it possible for the constitutional court to recognise the legislature's margin of discretion.

When reviewing the constitutionality of a statute, a constitutional court firstly has the possibility of finding that the statute reviewed is compatible with the constitution, or of finding that the statute infringes the constitution and is hence void. However, even these two alternatives, which look very simple at first sight, contain some difficult problems.

In the review of whether a statute is compatible with the constitution, the principle of interpretation in conformity with the constitution is of outstanding importance. It is in the nature of the law that those who apply the law time and again find themselves in situations in which the interpretation of a statute admits of different

interpretations even in spite of the greatest methodical effort possible. In order to achieve that the content of important constitutional provisions, in particular of the fundamental rights, attains the greatest effectiveness possible, the interpreter should in such situations not choose at will one of the possible interpretations but should give preference to the interpretation that corresponds best with the principles of the constitution. The special characteristic of the interpretation in conformity with the constitution is that several possibilities of interpreting the statute exist, some of which lead to an unconstitutional and some of which lead to a constitutional result.

Under such circumstances, the decision which alternative to choose virtually does not pose any problems because it goes without saying that no interpretation which violates the Basic Law can enter into consideration. The characteristic feature of an interpretation in conformity with the constitution is the requirement to maintain the statute. This means according to the Federal Constitutional Court's established case-law that where according to the usual criteria of interpretation (wording, systematic context, legislative history, purpose), the interpretation of non-constitutional, or ordinary, law admits, apart from an unconstitutional interpretation, also of an interpretation that is compatible with the Basic Law, the statute remains valid.

Interpretation in conformity with the constitution hence means that the reviewed statute is declared compatible with the constitution. However, it is only compatible with the constitution in the interpretation in conformity with the constitution which results from the ruling. That interpretation is binding on all constitutional bodies, courts and public authorities.

The principle of interpretation in conformity with the constitution has the positive effect that it decreases the number of laws which are declared unconstitutional. In the court's relation to the legislature, the interpretation in conformity with the constitution is normally a less incisive approach compared to declaring the statute void. The legislature does not have to adopt a new statute, and parliament's possibilities of drafting are recognised.

Also in this context, however, the danger exists that a constitutional court intervenes in the legislature's competences in an impermissible manner. A constitutional court may not, by means of an interpretation in conformity with the constitution, impose on the legislature a statute which the legislature did not want in this particular form. Nor may the principle of interpretation in conformity with the constitution become a general instrument of repair with which the constitutional court ultimately releases the legislature from the responsibility of enacting a statute which is constitutional in every respect.

The second alternative for a decision, the declaration of nullity of the statute, is also not as straightforward as it may seem at first sight. The first question is:



What follows from a law being declared void? This question is answered differently in different states. It is traditionally assumed in German legal dogmatics that an unconstitutional law is in principle ineffective from the very beginning (*ex nunc*). This dogmatic approach is by no means obvious. Other states follow a different model whose prototype goes back to the Austrian Hans Kelsen. According to this approach, an unconstitutional law is repealed for the future by a constitutive ruling. In principle, the repeal becomes effective only when the decision is pronounced, that is, it becomes effective *ex nunc*.

There are not only theoretical, but also considerable practical differences between both constructions because the logical consequence of a retroactive declaration of nullity would be that all judgments which are based on the void statute would have been rendered without a legal basis, which means that they would have been passed wrongfully. For obvious reasons, however, the German legislature has shied away from this far-reaching consequence. It has therefore decided that the resumption of criminal proceedings is admissible in the case of a non-appealable sentence which is based on a statute that has been declared void. In all other cases, the non-appealable decisions which are based on the void statute remain unaffected. Thus, comparable results are reached, although via a detour of thought.

The idea that an unconstitutional statute is in principle void from the very beginning is nevertheless the correct starting point. For the citizen affected, it cannot be satisfying and will be hard to understand if the violation of the constitution will ultimately go unsanctioned as regards the past and if the point in time of the declaration of nullity also depends on how long it takes until corresponding proceedings can be decided by a constitutional court in the first place. For this reason, the Court of Justice of the European Communities today proceeds on the assumption that a law which is contrary to European law is void from the very beginning.

In the Federal Constitutional Court's case-law, the problems concerning the legal consequences of a declaration of nullity have led to another type of ruling. The core of this third type of ruling is that the Federal Constitutional Court does not declare an unconstitutional statute void but restricts itself to establishing the incompatibility of the statute with the constitution. This kind of dictum, that is, to merely establish incompatibility with the constitution, plays an important role in the Federal Constitutional Court's case-law. If a statute is merely declared unconstitutional, it often remains valid for some time, which makes it possible for the legislature to enact a law that is in harmony with the constitution.

The declaration of incompatibility is frequently employed in decisions which deal with a violation of the principle of equality. German labour law, for instance, provides for specific time limits which have to be observed by employers when dismissing employees. The law not only used to distinguish according to the employee's age and length of employment but also provided for different periods of notice for wage

earners and salaried employees. As the periods of notice were always shorter for wage earners than they were for salaried employees, the Federal Constitutional Court held that this constituted an unjustified unfavourable treatment of wage earners as against salaried employees, and thus an infringement of the general principle of equality. In such a case, it is out of the question to declare the statute void because this would mean that no periods of notice would apply at all. On the other hand, the constitutional court cannot bring about equal treatment of wage earners and salaried employees itself because several possibilities exist for doing so: The legislature might provide for longer periods of notice for wage earners, for shorter periods of notice for salaried employees or for a completely new model of equal periods of notice for all employees. Which of these possibilities is chosen is the responsibility of the legislature, not that of the constitutional court. This is the reason why the court at first restricts itself to establishing that the existing legal situation is incompatible with the constitution.

Once a statute has been declared incompatible with the constitution, several possibilities exist for bringing about a situation that is in harmony with the constitution. The first possibility consists in establishing that the law which is incompatible with the constitution may no longer be applied from the point in time of the pronouncement of the ruling. A second variation is that the law which is incompatible with the constitution may be applied provisionally until the legislature has enacted a new statute. This variation is based on the consideration that in certain situations, the transitional application of an unconstitutional statute is more acceptable than a completely unregulated situation. Finally, there are also cases in which neither of the variations will lead to satisfying results. In these cases the constitutional court itself must, in a similar manner as a legislature, draft a transitional arrangement which creates a constitutional situation for a certain transitional period. Then the legislature itself must decide, possibly within a certain time-limit, which situation it intends to establish after the expiry of the transitional period. The Federal Constitutional Court makes use of this type of ruling only in very rare exceptional cases because a transitional arrangement itself often gives the impression of the court acting as a legislature. One example is the manner in which childcare costs are taken into account in tax law. The Federal Constitutional Court has found that these costs are to be taken into account for tax assessment. It is true that the court has emphasised that it is for the legislature to determine the amount of such costs. The court decided, however, that for a transitional period, that is, until the legislature has enacted a new statute, a certain minimum amount must be taken into account for tax purposes.

## **V. CONCLUSION**

In a democratic state under the rule of law in which the constitutional jurisdiction is authorised to review the constitutionality of statutes, the relation between the legislature and the constitutional jurisdiction is always fraught with tension. In a state in which the separation of powers is established, both state powers have

their own competences: the legislature has the democratically legitimised right to legislate, and the constitutional court, as the guardian of the constitution, has the task of judicially checking compliance with the guidelines laid down in the constitution. Both state powers have to perform these tasks in mutual and reciprocal responsibility on an equal footing. Both state powers should always respect each other when exercising their competences.

In spite of all the difficulties in the relation between constitutional jurisdiction and legislature, the judicial decision on whether the legislature in its acts observes constitutionality is the only correct way to proceed. Tensions between parliament and constitutional jurisdiction will always arise. They must be endured.

DONG-HEUB LEE

# **THE BINDING EFFECT OF THE DECISION OF UNCONSTITUTIONALITY ON THE LEGISLATURE -WHETHER WE SHOULD ALLOW REPETITIVE ENACTMENT BY THE LEGISLATURE**

## **I. ISSUE RAISING -THE BINDING EFFECT ON THE LEGISLATURE**

Article 47 Section 1 of the Constitutional Court Act stipulates that “any decision that statutes are unconstitutional shall bind the ordinary courts, other state agencies and local governments”, making clear that the effect of the decision of unconstitutionality reaches courts, other governmental institutions and local governments. In addition, Article 75 Section 6 of the Constitutional Court Act provides that Article 47 shall also apply *mutatis mutandis* where a constitutional complaint is upheld. These provisions are important legal means to guarantee the effectiveness of the decisions of the Constitutional Court.

However, with regard to the scope of the binding effect of unconstitutionality, whether this binding effect reaches the legislature still remains as an issue. In other words, whether the binding effect of unconstitutionality reaches the lawmakers who will legislate in the future with respect to such matters that had involved statutes held unconstitutional, and therefore whether the lawmakers are bound to follow the decisions of unconstitutionality without any exception, is still subject to debate.

This is an issue when the lawmakers enact a statute or a provision that is identical or substantially similar to the statute or provision once held unconstitutional, that is, when so called repetitive enactment has occurred. If we presume that the binding effect reaches the lawmakers, then the repetitive enactment will be prohibited as it is against the binding effect, and the Constitutional Court must hold the statute unconstitutional without adjudicating on the merits. On the other hand, if we presume otherwise, then such repetitive enactment would be allowed, and if constitutional adjudication is requested with respect to such law then the Court should adjudicate on the merits *de novo*.

This question is a question of competency between the Constitutional Court and the legislature, and involves not only essential questions on the scope and limitation of judicial power and legislature but also a fundamental question on the principle of the separation of powers.

German Constitutional Court through case precedents dealt with such issues regarding the scope of the binding effect of unconstitutionality and issues regarding whether to allow repetitive enactments. The theories in Korea are not so much different from those of Germany. While the Constitutional Court of Korea has not directly and clearly held whether the legislature is bound by the decision of unconstitutionality including whether to allow repetitive enactment, the Court nevertheless is viewed as having expressed its position indirectly as to such issues in a couple of cases. Here, I will illustrate a few Constitutional Court cases that are viewed as typical cases involving such issues.

## **II. THE CONSTITUTIONAL COURT CASES**

### **1. The Massager Case**

#### **A. Issue**

After the Constitutional Court had held the regulation which confers massage license only to the visually impaired as unconstitutional (May 25, 2006, 2003Hun-Ma715 et al.), the National Assembly again enacted a statute almost identical to such unconstitutional regulation. The Constitutional Court ruled on the ground that the 'regulation on massagers' conferring monopolistic massage license to the visually impaired is against the freedom of occupation. Nonetheless the National Assembly by reforming medical law enacted a law that again confers massage license only to the visually impaired. The rule was enacted in the form of law and not the regulation, and thus such enactment had a change in formality. However, as the Court's reasoning was that the monopolistic license to the visually impaired is against the freedom of occupation, the National Assembly may be viewed as having enacted a law that is practically against the decision of the Constitutional Court.

#### **B. Case Development**

##### **a. 2003Hun-Ma715 et al. (May 25, 2006)**

The Constitutional Court ruled that the Regulation on Massager Article 3 Section 1 made under the Medical Act Article 61 Section 4, which permits only the visually impaired as qualified massagers materially limits freedom of occupational choice of other people who are not visually impaired, and thereby violates the principle of statutory reservation, and the prohibition of excessive restriction, and therefore is against the Constitution. Although the decision of unconstitutionality is made by votes of 7 among 8 Justices, only 5 Justices maintained that the law is against the prohibition of excessive restriction.

##### **b. Legislative Amendment after the Decision of Unconstitutionality**

While the National Assembly amended the Medical Act pursuant to the Court's decision, nevertheless the National Assembly sustained the current system which allows only the visually impaired as massagers. The National Assembly on September 27, 2006 amended the Medical Act and provided under Medical Act Article 61 Section 1 what once had been provided under the Article 3 Section 1 of the Ministry of Health, Welfare and Family Affairs Regulation. Thus such

enactment may be viewed as a change in formality (where the violation of principle of statutory reservation has been solved), it may nonetheless be viewed as in conflict with the Court's reasoning that the monopolistic license is against the freedom of occupational choice of other people who are not visually impaired.

The National Assembly when amending the Medical Act commented on its legislative intent as follows:

On May 25, 2006 the Constitutional Court ruled that the 'visually impaired' part of the Article 3 Section 1 subsection 1 and 2 of the Regulation on Massagers which regulates the qualification of massagers in accordance with the Article 61 Section 4, are unconstitutional. However, in order to take into account our Nation's duty to protect citizens who are physically impaired as prescribed under Article 34 Section 5 of our Constitution more fully than freedom of occupational choices of the non-visually impaired while respecting the decision of the Constitutional Court, we intend to regulate directly by legislative act limiting the massager qualification to the visually impaired who have finished the required courses on massage.

c. 2006Hun-Ma1098 (October 30, 2008)

The Constitutional Court ruled that the Article 61 Section 1 of the Medical Act which permits only the visually impaired as massagers as constitutional in a 6 (constitutional): 3 (unconstitutional) decision.

One of the issues in the above case was whether such provision is in conflict with the binding effect of the decision of unconstitutionality. With respect to such issue the Court said that:

Article 47 Section 1 of the Constitutional Court Act provides that 'any decision that statutes are unconstitutional shall bind the ordinary courts, other state agencies and local governments.' And Article 75 Section 1 stipulates that 'a decision to uphold a constitutional complaint shall bind all the state agencies and the local governments.', so that the binding effect of the decision of unconstitutionality and of upholding constitutional complaint of the Constitutional Court can be guaranteed. In connection with this, the issue can be raised as to whether the binding effect reaches the National Assembly, and whether the binding effect reaches not only the holding but also the reasoning of the Court. With respect to such issue, we have to consider boundary and scope of both the judicial power of the Constitutional Court and the power of the legislature, and decide with caution. In this case, the petitioners argue that the legislative enactment of the substantially similar law notwithstanding the Constitutional Court's decision that the law providing massage license only to the visually impaired is against the prohibition of excessive restriction, and thereby infringes upon the freedom of occupation of the non-visually impaired, is in conflict with the binding effect of the decision of unconstitutionality. This argument basically assumes that the Court's reasoning that the exclusion of the non-visually impaired is against the prohibition of excessive restriction has the binding effect. As we

have noted above we need to be cautious in deciding whether to recognize the binding effect of the reasoning of the decision. And even if we do recognize such binding effect, to follow the reasoning that exclusion of the non-visually impaired is against the prohibition of excessive restriction, we need the votes of 6 Justices for the reasoning which substantiates the holding, being a quorum of decision of unconstitutionality (see Article 113 Section 1 of the Constitution, and Article 23 Section 2 of the Constitutional Court Act), and if the votes for the reasoning are less than 6, then there is no reason why we should follow such reasoning.

As we have seen above, in the case 2003Hun-Ma715 et al. 7 Justices have voted for the decision of unconstitutionality in the holding that the exclusion of the non-visually impaired is against the Constitution. However, there was a split of opinions in the reasoning. While there was an opinion that said that such exclusion is against the principle of statutory reservation, there was another opinion that such exclusion is against the prohibition of excessive restriction, and only 5 Justices have voted for the reasoning that such exclusion is against the prohibition of excessive restriction. Thus, there is no reason that we should recognize the binding effect of the reasoning that such exclusion is against the prohibition of excessive restriction. Hence, even though the National Assembly has enacted a provision that is substantially similar to the law in the case of 2003Hun-Ma715 et al , excluding the non-visually impaired, as long as the binding effect of the reasoning that such exclusion is against the prohibition of excessive restriction is not recognized, it cannot be viewed that such provision is in conflict with the binding effect of unconstitutionality without reaching any further decision whether to the binding effect reaches the National Assembly, the lawmakers, and to recognize the binding effect not only of the holding but also of the reasoning of the Court.”

Further, the Constitutional Court stated that:

The provision aims to enable rewarding lives and realization of the right to humane living conditions for the visually impaired, and therefore has the legitimate legislative purpose. And, given the nature of massage service that it barely requires spatial movement and mobility compared to other types of jobs, and that it is friendly for the visually impaired who have more developed sense of touch, it is deemed that the provision is an adequate means to serve such legislative purpose, as it offers the opportunity to assist in the livelihood of the visually impaired in addition to engaging the visually impaired in occupational activities by allowing their monopoly over the massage business.

Moreover, the Provision does not contradict the principle of the least restrictive means in that, amid insufficient welfare policies for the visually impaired, the massagist may be the only occupation available for them, that there are no ample alternatives for them to maintain their livelihood when the non-visually impaired are also authorized to engage in the massage business, that it is necessary to take preferential measures for the visually impaired, the minority who have been

discriminated against over the years in terms of education, employment, and in many other areas, to realize substantial equality, etc. Also, even when comparing public interests such as the right to livelihood of the visually impaired with the private interests substituted as a consequence, such as people's freedom of occupational choice, it cannot be concluded that disparity occurs between the public and private interests. Therefore, it cannot be seen that the Provision overrode the boundary of restriction on basic rights set forth in Article 37 Section 2 of the Constitution and thus violated the freedom of occupational choice or right to equality of the non-visually impaired.

## **2. Relocation of the Nation's Capital**

### **A. Issue**

Despite the Constitutional Court's decision of unconstitutionality regarding the statute that decreed the establishment and the relocation of a new administrative capital, the National Assembly enacted a new act which was largely similar to the previous act declared unconstitutional in terms of its system and contents, with only small changes such as narrowing the number of public institutions to be relocated and changing the name of the act. In response to the new act, another constitutional complaint was filed to challenge its constitutionality, arguing that the new act ran afoul of the binding effect of the aforementioned unconstitutionality decision by the Constitutional Court.

### **B. Case Overview**

#### a. 2004 Hun-Ma 554 etc. (October 21, 2004)

The Constitutional Court, in an 8 (unconstitutional):1 (constitutional) opinion, held unconstitutional the Special Act on the Construction of a New Administrative Capital, which mandated the relocation of the capital and set forth procedure of the relocation, on the grounds that although not explicitly stated in the text of the Constitution, Seoul's status as the nation's capital has been legally effective for more than 600 years as an endearing legal custom and regarded as a part of the most fundamental and self-evident customary constitutional norm since the establishment of the Korean constitutional system.

Moreover, the wide consensus among the people that the capital of Korea is Seoul has existed even before the drafting of our written constitution, and therefore, even though it is not expressly provided for in the text, it is a norm which is evident to everybody and which was presupposed by the written constitution. As a customary constitutional norm, it has gained the status of unwritten constitution. Therefore, in order to repeal certain practices exercised on the basis of such a customary constitutional norm, it is required to follow the procedures required for revising the Constitution. Nevertheless, passing the 'Special Act on the Construction of a New Administrative Capital' without going through the process of constitutional revision is then an attempt to make changes to the Constitution through an ordinary statute, and the whole part of the statute is in violation of the Constitution on the grounds



that it infringes on the right to vote of the citizens, including the complainants, in a national referendum.

Although the Constitutional Court received criticism in terms of its legal reasoning, the Court made the decision to effectively curb the then government and the ruling majority's unilateral decision on such an important policy issue against opposition from the greater part of the citizens, understanding well the background reasons behind the legislation of the relocation of the capital including both social motives (to achieve decentralization and balanced development of the nation) and political motives (to cater to the expectation and support of voters in Chungcheong Province).

b. 2005 Hun-Ma 579 (November 24, 2005)

After the Constitutional Court's decision of unconstitutionality, the legislature enacted a new act called 'the Special Act on the Construction of an Administration-oriented Complex City in the Yeongi and Gongju Region as Follow-up Measure to the New Administrative Capital Project (hereinafter, the Instant Act).' The new Act specified the six central administrative agencies including the Blue House (Cheongwadae, or the Office of the President of the Republic of Korea) which were excluded from the relocation.

In response to the new legislation, another constitutional complaint was filed. The Constitutional Court, however, dismissed the second round challenge on the grounds that the new act did not endanger the complainants' right to vote in a national referendum, stating "the complainants argue that the Act is practically the same as the previous one which had been decided unconstitutional, thereby running afoul of the binding effect of the Constitutional Court's decision or the rule of *res judicata*. But, as reviewed above, since the capital will neither be relocated nor the function of the capital will be dismantled by the Instant Act, it cannot be regarded as the same as the Special Act on the Construction of a New Administrative Capital Act or going against the binding effect of the Constitutional Court's decision or the rule of *res judicata*."

Two Justices, on the other hand, dissented on the grounds that "it is a serious problem that the Instant Act was enacted only shortly after the decision of unconstitutionality regarding the Special Act on the Construction of a New Administrative Capital, posing grave threat to adherence to the Constitution, authority of the Constitution and the effect of the Constitutional Court's decision. Therefore, the Constitutional Court, as long as there is even a slight chance for the Instant Act to violate the citizens' basic rights, should not dismiss the case but review the case on the merits and clarify whether the Instant Act is constitutional or not . . . . The Instant Act is a succession of the Special Act on the Construction of a New Administrative Capital which would bear the same unconstitutional aspects unless the practical difference, such as reducing the number of administrative agencies to be relocated, fundamentally transforms the core character of the Instant Act."

### **C. Evaluation**

In a case of constitutional complaint on a statute similar to another statute that has already been decided unconstitutional, the Constitutional Court decided that the statute to be reviewed is not in violation of the binding effect of the Constitutional Court's decision of unconstitutionality, considering it practically different from the unconstitutional statute. Regarding this, two Justices dissented on the grounds that the statute to be reviewed is practically the same as the statute decided unconstitutional. The aforementioned decision, although not directly specified the binding effect of the Constitutional Court's unconstitutionality decision over the legislature and its scope, may show that the statute to be reviewed is in violation of the binding effect of the Court's decision if it is practically the same as the statute decided unconstitutional.

### **3. National Assembly Candidate Deposit Case**

#### **A. Issue**

In this case, although the Constitutional Court rendered a decision of unconstitutionality on a statute enacted by the National Assembly on the grounds that the statute was practically and virtually the same as the previous statute which had been decided unconstitutional by the Court, the legislature once again enacted a similar statute that could be in violation of the Court's decision of unconstitutionality. The issue here is, therefore, whether such enactment of statute by the National Assembly is constitutional or not.

In this case, the Constitutional Court first rendered a decision of unconstitutionality on the repeated legislation. But later, the Court decided the similar legislation constitutional, thereby allowing the National Assembly's repetitive legislation in conclusion.

#### **B. Case Overview**

a. 1 KCCR 199, 88Hun-Ka6 (September 8, 1989)

Article 33(1) of the former Election of National Assembly Members Act (hereinafter, 'the Instant Act') required "independent candidates to make a deposit of KRW 20 million to the local Election Commission at the time of registering as a candidate while party nominees to deposit KRW 10 million." Regarding this, the Constitutional Court ruled the Instant Act was in violation of the Constitution, infringing upon candidates' right to equality, right to be elected and the voters' freedom of choice, on the grounds that not only the deposit requirement of KRW 10 or 20 million was restrictive to people of ordinary income or in their twenties' or thirties' and therefore, permitted only the wealthy to the candidacy, but also unreasonably discriminated independent candidates from party nominees by providing different standards for the candidate deposit. However, the Court went on saying that having respect for the authority of the legislature and the homogeneity of its membership, the National Assembly must make the revisions themselves and the Instant Act still remained applicable for another re-election or by-election that

would take place before the revision of the Instant Act by the legislature. The Court hereby rendered a decision of nonconformity to the Constitution, allowing the Instant Act to remain effective until revised by the legislature by the end of May 1991.

After the nonconformity decision, however, the National Assembly which had provided for an equal deposit requirement of KRW 10 million for both independent candidates and party nominees in the revised Act on the Election of Public Officials (Act No. 4462, December 31, 1991) finally raised the candidate deposit requirement up to KRW 20 million for a candidate in the Act on the Election of Public Officer and Prevention of Electoral Malpractice in 1994.

b. 13-2 KCCR 77, 2000Hun-Ma91 (July 19, 2001)

In this case, the Constitutional Court declared unconstitutional the provision on the candidate deposit requirement of KRW 20 million in the Election of Public Officer and Prevention of Electoral Malpractice Act on the grounds that the high deposit amount effectively barred many qualified candidates from running for the National Assembly, thereby infringing on the candidates' right to equality, right to be elected and the voters' freedom of choice. In its reasoning, the Court articulated:

The essence of the Court's former decision of nonconformity to the Constitution, regarding Article 33 of the former Election of National Assembly Members Act requiring independent candidates to make a deposit of KRW 20 million (for party nominees, KRW 10 million) to the local Election Commission at the time of registering as a candidate (88 Hun-Ka 6, September 8, 1989), are such that the deposit requirement of KRW 10 or 20 million was restrictive to people of ordinary income or in their twenties' or thirties' and could prevent serious but indigent people's candidacy, turning the election into a game for the wealthy, thereby infringing on the citizens' right to participate in the government in violation of the basic principle of democracy.

The Court also pointed out "since the decision of nonconformity to the Constitution was rendered, there has been no major change in the situation where the deposit money of KRW 20 million, to be paid to the local Election Commission by an individual candidate in order to run for public office, is not an amount that can be procured easily by average citizens in order to exercise their right to be elected."

According to the decision of unconstitutionality of the Constitutional Court, legislators revised the amount of deposit necessary for registering as candidates for the National Assembly from KRW 20 million to KRW 15 million by Law No. 6518 on October 8, 2001. However, this amendment, decreasing the amount of deposit from KRW 20 million to KRW 15 million, may be against the holding of the Constitutional Court as a repetition of legislation because the former decision of the nonconformity to the Constitution stated the deposit of ten KRW 10 million was excessive.

c. 2001 Hun-Ma 687 et al. (August 21, 2003)

In the case of the Constitutional Complainant alleging the deposit of KRW 15 million is excessive, the Constitutional Court dismissed the complaint and held “the deposit of KRW 15 million is not excessive to infringe the rights to hold public office fundamentally, and therefore, it is not unconstitutional because the legislators set the amount within the appropriate scope and limit of the legislative power by considering the public policy of candidate deposit intended by the legislature, the right to hold public office, the right to vote, our election culture, and our economic circumstances.”

The Constitutional Court cited the change in economic circumstances and election culture as the ground of constitutionality, by the study on the change in the average monthly income of September 1989 when the candidate deposit of KRW 10 million was declared as the nonconformity to the Constitution, July 2001 when the deposit of KRW 20 million was declared as unconstitutional and January 2003 when the instant decision was decided. At the time of January 2003, a typical town worker living on his or her ordinary salary, without other assets, would raise the deposit of KRW 15 million within six months; and a finance or insurance industry employee would raise the deposit within three months.

### **C. Evaluation**

The candidate deposit cases imply that the Constitutional Court would consider significant changes in circumstances since the former decision of unconstitutionality in deciding the constitutionality of a new legislation. The Constitutional Court found the unconstitutionality of the new repetition of legislation, implicitly suggesting there were no significant changes in circumstances since the first decision of nonconformity to the Constitution; however, it later confirmed the constitutionality of the new repetition of legislation, finding the changes in economic circumstances since the former cases of the unconformity to the Constitution and unconstitutionality.

It may be interpreted as the recognition of the binding effect on the National Assembly, while it would admit the exception of the binding effect if significant circumstances justify the repetition of legislation; or, it may be interpreted as the denial of the binding effect on the National Assembly, while the Court should find unconstitutionality, as before, against the repetition of legislation without proper justifications.

### **III. CONCLUSION**

As aforementioned, we need to take a cautious approach to the issues whether the decision of unconstitutionality binds the National Assembly and whether the reasonings of the decision have the binding effect as holdings. These issues are related to the scope and limit of the judicial power of the Constitutional Court and the legislative power of the National Assembly, and the Constitutional Court has not expressly answered the issue.

However, when considering the decisions of the Constitutional Court collectively, the basic attitude of the Constitutional Court would be interpreted into two possible ways which would have no particular difference in the way of problem solving: the first interpretation recognizes the binding effect on the National Assembly in a very limited way, admitting the exception when there are reasonable justifications of the repetition of legislation; and another interpretation does not recognize the binding effect on the National Assembly, however, it permits the legislature to enact the repetitive legislation only if there are reasonable justifications of the repetition of legislation, instead of allowing the unrestricted freedom of the repetition of legislation.

Such attitude of the Constitutional Court has received favourable comments for the good balance between the efficacy of the decisions of the Constitutional Court and the deference to the legislative power, under the principle of separation of powers and the balance of power (principle of mutual deference to each institution).

#### **IV. OTHER CONSIDERATIONS – PRESENTATION OF THE GUIDELINE TO THE LEGISLATURE BY THE CONSTITUTIONAL COURT AND THE DECISION OF NONCONFORMITY TO THE CONSTITUTION**

The Constitutional Court may provide a guideline to the legislature in the reasoning when rendering a decision of unconstitutionality, although such guideline would not directly bind legislators. Or, the Constitutional Court, as a way of respecting the authority of the legislature, may render a decision of nonconformity to the Constitution despite the statute is unconstitutional, setting a time limit for the enactment of a new legislation. In that case, if the time for the enactment expires, the existing statute, which has not been amended within the time limit, would automatically lose its effect. The Constitutional Court has rendered 124 decisions of nonconformity to the Constitution, while declaring 98 statutes as nonconformity to the Constitution, during the 21 years of the history of the Constitutional Court. However, 3 statutes have still remained unamended even after the time has expired (as of August 31, 2009).

An example of the legislative guideline of the Constitutional Court is Greenbelt case. The Constitutional Court has decided it is nonconforming to the Constitution to designate the development-restricted zone (greenbelt) and restrict the private ownership there (89 Hun-Ma 214, December 24, 1998). In the decision, the Constitutional Court stated:

The restriction on the right to property by the instant provision would be a constitutional and proportional concretization of social limits inherent in the right to property, as long as it allows the continued use of the land consistent with the original land category and conditions. However, if it limits such use or is so exceptional as to substantially forfeit the right of use and profit and if it does not compensate for such exceptional circumstances, it violates the principle of proportionality, excessively abridging the landowner's right or property. Therefore, legislators, in order to make

the instant provisions constitutional, should enact compensation provisions to address the exceptional circumstances and alleviate the cruel burden exceeding the permissible scope. Such compensation provisions are required when the legislature form the contents of the right to property, regulating it for the sake of public interest in accordance with Article 23 Section 1 and Section 2 of the Constitution. The means to restore the proportionality between public interest and the infringement on the right to property does not have to be monetary compensation. The legislators may release the land from the designated zone, grant the landowners the right to request the state to purchase the land, or use other means to alleviate the loss. The legislators have broad discretion of formation in choosing the appropriate 'means' to accomplish the 'end' of adjusting or alleviating the cruel burden . . . .

The legislators have enacted the 'Act on Special Measures for Designating and Managing Development-Restricted Zones,' following this decision of nonconformity to the Constitution. This new act eliminates unconstitutional elements and ensures the right to property by the provision that property owners may request the government to purchase the property that has become practically impossible to use and profit from, and whose utility has severely declined because of the designation as the development-restricted zone.

DR. HARJONO, S.H., M.C.L

# THE INDONESIAN CONSTITUTIONAL COURT AND ITS IMPORTANT ROLES

## **I. THE CONSTITUTIONAL COURT IN THE INDONESIAN COURT SYSTEM**

The Indonesian Constitutional Court is one of the judicial organs with special jurisdiction as stipulated in Article 24 and Article 24C of the Constitution of the Republic of Indonesia of 1945 (hereinafter 1945 Constitution). It is enshrined by the Indonesian Constitution after being amended on August 2002. Transitional Provisions on Article III of the Amended Constitution stating that the Constitutional Court shall be established at the latest by 17 August 2003 and the Supreme Court shall undertake its functions before it is established.

Since its independence, Indonesia had been under three Constitutions, namely: 1945 Constitution, Federal Republic of Indonesia Constitution, and Temporary Constitution of 1950. In 1959 by Presidential Decree, Constitution 1945 was effective again replacing Temporary Constitution 1950. Starting on 1999, the 1945 Constitution underwent annually amendments until 2002. The last amendment in 2002 completed all changes of constitutional provisions. Article 24 of 1945 Constitution has been amended and Article 24C was added. Under those new articles, the Constitutional Court of Indonesia is now constitutionally based. For decades Indonesian judges and lawyers have argued that an Indonesian court should have the authority to rule on the constitutionality of statutes.

Under the amended 1945 Constitution, there are two main judicial organs. Their jurisdiction is separated from each other. Firstly, the Supreme Court which exercises general jurisdiction together with its subordinated courts. Secondly, the Constitutional Court with its special jurisdiction. Before the constitutional amendment, the court had no jurisdiction on constitutional issues arising from acts (statutes), the court's jurisdiction was limited to regulations lower than acts.

Fundamental constitutional changes took place when the 1945 Constitution was amended. The relation among government bodies changed from structurally hierarchic to functionally distributed powers. Human rights were also added to the amended constitution (Article 28A to 28J of Amended 1945 Constitution). Along with the intention to strengthen the implementation of rule of law principles with the Constitution as the highest law of the country, new legal remedies are posted in the Constitution known as constitutional adjudication. There is judicial review

of a statute and there is a legal settlement of disputes between state organs. The jurisdiction to settle constitutional adjudication is on the new judicial organ, namely the Constitutional Court.

## **II. THE ORGANIZATION OF THE INDONESIAN CONSTITUTIONAL COURT**

Since a state organ has its own function, the Constitutional Court has an equal rank to other constitutional state organs. It is not an appellate court. The Constitutional Court as judicial organ is free from intervention of other state organs. The Court consists of 9 (nine) Justices wherein three Justices are appointed by the President, three Justices are appointed by the Supreme Court and three Justices are appointed by the House of Representatives. According to Article 24 C paragraph (3) and (4) 1945 Constitution, the requirements for holding the office of a Justice should be:

1. possessing a strong integrity and good personality;
2. being just ; and
3. being a statesman who has sufficient knowledge of the Constitution and state administration.

Moreover, Article 16 of Law Number 24 Year 2003 concerning the Constitutional Court (hereinafter the Constitutional Court Law) adds the requirements for candidacy with:

1. holding an Indonesian citizenship;
2. holding a law degree;
3. aged at least forty years old at the time of appointment;
4. having never been imprisoned based on enforceable court decision for committing a crime punishable by at least five years of imprisonment;
5. have not been declared bankrupt by court decision; and
6. having some experience in the field of law for at least ten years.

The Constitutional Court has only one panel which consists of nine Justices for hearing of each case, for trials, and for rendering a decision. Under extraordinary circumstances, the session should be at least attended by seven Justices (Article 28 of the Constitutional Court Law). The term for the office of Justice is five years and they can be re-elected for another one term. While holding office, based on Article 17 of the Constitution Justices of the Constitutional Court are prohibited to hold positions as:

1. others state officials;
2. members of any political party;
3. doing business;
4. legal advocates;
5. public servants.

In comparison to that, the German Constitutional Court is organized in two separate panels (Senates), each consisting of eight Justices. The Justices should have to qualify for admission to the bar and judicial office and are not allowed to engage in



any other professional activities except the teaching of law at a German University. They are elected by the federal legislative bodies (Bundestag and Bundesrat) where each body electing one half. They are elected for a single term of twelve years and re-election is not permitted. Each Justice is elected to one panel for his term and he/she cannot serve on the other panel. The Justices must retire at sixty-eight which leads to the consequence that as a rule no one would be elected who is over fifty-six years of age. A further requirement is that three Justices in each panel have to be chosen from among the Justices of the five federal courts.<sup>1</sup>

### III. SCOPE OF JURISDICTION

The Indonesian Constitutional Court is a court established by the Constitution as stipulated in Article 24 and 24C of the 1945 Constitution. Therefore to abolish the Court, it would require another constitutional amendment. This position is similar to the United State Supreme Court and German Federal Constitutional Court. The Constitution itself determines clearly the scope of its jurisdiction which it means not to be extended and curtailed by statute. Compared to Article 24A of 1945 Constitution dealing with the Supreme Court, the Constitution says that the Supreme Court shall possess other authorities as provided by statute. A similar statement is not found in the provisions dealing with the Constitutional Court.

Article 24C paragraph (6) of the 1945 Constitution says that the appointment and removal of constitutional justices, the judicial procedure, and other provisions concerning the Constitutional Court shall be further regulated by statute. The Constitutional Court Law is a law to implement the order of Article 24C paragraph (6) of the 1945 Constitution. Article 50 of the Constitutional Court Law states that statutes which are requested to be reviewed are statutes issued after the amendment of the 1945 Constitution of the Republic of Indonesia.

The Jurisdiction of the Constitutional Court is stipulated in Article 24C of the amended 1945 Constitution, namely:

1. reviewing laws on their conformity to the constitution;
2. to settle a dispute arising between government whose powers are given by the constitution;
3. deciding on the dissolution of a political party; and
4. deciding on disputes on the results of the general election.

Beside those four jurisdictions, the Indonesian Constitutional Court involves in the process of impeachment to remove the President and or Vice President during his/her terms of office. According to Article 7A, Article 7B, and Article 24 paragraph (2) of the 1945 Constitution, the Constitutional Court has a duty to decide whether the President and or Vice President is guilty in doing the acts prohibited by Constitution

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<sup>1</sup> Hans G. Rupp, *The Federal Constitutional Court and The Constitution of The Federal Republic of Germany*, *Saint Louis University Law Journal*, vol. 16, pp. 359-60.

as alleged and proposed by the House of Representatives. The jurisdiction of the Constitutional Court is limited only to an issue of law but not to the removal of the President and or Vice President from his/her office whereas that authority belongs to the People Consultative Assembly (Majelis Permusyawaratan Rakyat).

#### **IV. TRANSPARENCY OF THE CONSTITUTIONAL COURT**

The decisions rendered by the Constitutional Court are attributed as final and binding which means that there would not be any legal remedies to challenge the decisions. This attribute fulfills *res judicata facit ius* as a principle of judicial power. Judicial independence is a pre-requisite to the rule of law and fundamental guarantee of fair trial. A Justice shall therefore uphold and exemplify judicial independence in both its individual and institutional aspects.

The Constitutional Court should also perform its function in a way required by good governance principles. The Constitutional Court Law puts in its articles about the duties to be performed by the Court in order to meet those requirements. Those articles are:

1. Article 34 paragraph (3): Public announcement (determination of first session) is done by pasting the copy of notification on a public announcement board dedicated to such a purpose at the Constitutional Court's building;
2. Article 36 paragraph (2): Ways of obtaining letters or writings evidence has to be legally held accountable;
3. Article 38 paragraph (2): Letters of summons have to be received by the summoned at least three days before the court session;
4. Article 40 paragraph (1): Constitutional Court sessions are open to the public, except the justices' meetings;
5. Article 41 paragraph (2): In the interest of the examination, the Constitutional Court Justices have to summons parties involved to provide necessary information and/or to send written inquiries to the state institution related to the application;
6. Article 43: In the court examination, applicant and/or respondent can be accompanied or represented by his/her representative based on authorization special for the purpose;
7. Article 45 paragraph (3): Decision of Constitutional Court has to contain facts obtained from court sessions and legal considerations used as bases of the decision;
8. Article 45 paragraph (5): In the session, all Constitutional Court Justices are obliged to present a written consideration or opinion deals with the application;
9. Article 46: Decision of the Constitutional Court are signed by justices who examined, tried, and decided the case, as well as the clerk of the court;
10. Article 47: Decision of the Constitutional Court obtained a final legal force once the decision is announce in plenary session open to public;
11. Article 49: Constitutional Court has to provide copies of the decision to the parties at the latest seven working days after the decision is announce.

## V. PROCEEDINGS IN GENERAL

The Constitutional Court is a judicial organ. Judicial decisions typically are distinguished from those of political organs in the strict sense (Parliament and Government) by at least three factors, namely:

1. Judicial organs are more strongly programmed by the given law while Parliament makes law;
2. Courts have to wait for cases to be brought before them, they are re-active, while politicians can initiate policy;
3. Court can in principle only make decisions using code lawful or unlawful, while the political system can use a differentiated range of instrument and has no problems in saying "a little", "maybe", or even "no" and "yes" at the same time.

## VI. CONSTITUTIONAL COURT AND HUMAN RIGHTS

As mentioned before, the Indonesian Constitutional Court has jurisdiction on reviewing the laws as against the Constitution and one on reviewing the constitutionality of law as against human rights. After the Second Amendment in 2000, the entire substance of the provisions on human rights in the 1945 Constitution gave an extremely solid ground for the efforts of protection, fulfillment and advancement of human rights. The substance on human rights in the post-amendment 1945 Constitution can be classified into civil and political rights as well as economic, social and cultural rights. Civil and political rights can be further classified into among others the following rights:

1. The right to fair recognition, guarantee, protection and legal certainty as well as equal treatment before the law [Article 28D paragraph (1) of the 1945 Constitution];
2. The right to work and to obtain a fair and proper remuneration in work relationship [Article 28D paragraph (2) of the 1945 Constitution];
3. The right to obtain equal opportunity in government [Article 28D paragraph (3) of the 1945 Constitution];
4. The right to citizenship status [Article 28D paragraph (4) of the 1945 Constitution];
5. The right to live and to maintain one's life [Article 28A of the 1945 Constitution];
6. The right to possess personal property rights and such property rights shall not be taken over arbitrarily by anybody [Article 28H paragraph (4) of the 1945 Constitution];
7. The right to establish a family and to procreate through legitimate marriage [Article 28B paragraph (1) of the 1945 Constitution];
8. The right to the freedom to hold a belief, to express his/her thought and attitude in accordance with his/her conscience [Article 28E paragraph (2) of the 1945 Constitution];
9. The right to adhere to one's religion and to worship in accordance with such religion and belief [Article 29 of the 1945 Constitution];
10. The right to the freedom of association and expression of opinion [Article 28E paragraph (3) of the 1945 Constitution];

11. The right to protect him/herself, his/her family, honour, dignity and property under his/her control [Article 28G paragraph (1) of the 1945 Constitution];
12. The right to feel secure and be protected from the threat of fear to do or not to do something [Article 28G paragraph (1) of the 1945 Constitution];
13. The right to be free from torture or treatments degrading human dignity [Article 28G paragraph (2) of the 1945 Constitution];
14. The right to be free from discriminatory treatment and the right to obtain protection against any such discriminatory treatment obtain protection against any such discriminatory treatment [Article 28I paragraph (2) of the 1945 Constitution];
15. The right to obtain political asylum from another country [Article 28G paragraph (2) of the 1945 Constitution]; and
16. The right to the freedom to adhere to a religion and to worship in accordance with his/her religion, to choose education and teaching, to choose occupation, to choose citizenship, to choose residence in the state territory and to leave it, and shall have the right to [Article 28E paragraph (1) of the 1945 Constitution].

Meanwhile, those rights which can be categorized as economic, social and cultural rights are as follows:

1. The right to develop oneself through the fulfillment of basic needs [Article 28C paragraph (1) of the 1945 Constitution];
2. The right to obtain education and the benefits of science and technology, arts and culture [Article 28C paragraph (1) of the 1945 Constitution];
3. The right to advance oneself in striving for his/her rights collectively [Article 28C paragraph (2) of the 1945 Constitution];
4. The right to live a physically and mentally prosperous life, and to obtain proper and healthy environment [Article 28H paragraph (1) of the 1945 Constitution];
5. The right to health service [Article 28H paragraph (1) of the 1945 Constitution];
6. The right to facilities and special treatment to obtain equal opportunity and benefit in order to reach equality and justice [Article 28H paragraph (2) of the 1945 Constitution];
7. The right to social security [Article 28H paragraph (3) of the 1945 Constitution]; and
8. The right to communicate and to obtain information [Article 28F of the 1945 Constitution].

In addition, the 1945 Constitution also sets forth the rights usually categorized as a group of special rights and the rights to development, namely:

1. The right to obtain facilities and special treatment in obtaining equal opportunities and benefits for achieving equality and justice [Article 28H paragraph (2) of the 1945 Constitution];
2. Every child's right to survive, grow and develop and shall have the right to be protected from violence and discrimination [Article 28B paragraph (2) of the 1945 Constitution];

3. The right to develop himself/herself through the fulfillment of their basic needs shall have the right to obtain education and to enjoy the benefits of science and technology, arts and culture for the enhancement of the quality of their life and for the welfare of humankind [Article 28C paragraph (1) of the 1945 Constitution];
4. Every person's right to obtain a proper and healthy living environment [Article 28H paragraph (1) of the 1945 Constitution].

Among the rights guaranteed in the 1945 Constitution, there are rights determined as human rights which shall not be diminished under any circumstances whatsoever or non-derogable rights stated in Article 28I paragraph (1) of the 1945 Constitution, namely:

1. right to life;
2. right not to be tortured;
3. right to the freedom of thought and conscience;
4. right to adhere to a religion;
5. right not to be enslaved;
6. right to be recognized as a person before the law; and
7. right not to be prosecuted under the laws with retroactive application.

In the context of enforcing the provisions on human rights as described above, there is also the obligation to respect other people's human rights as well as the responsibility of the state for the upholding of such human rights, namely:

1. The State shall guarantee freedom to every resident to adhere his/her religion and to worship in accordance with such religion and belief [Article 29 paragraph (2) of the 1945 Constitution];
2. Culture identities and the rights of traditional communities shall be respected in conformity with the development of time and civilization [Article 28I paragraph (3) of the 1945 Constitution];
3. Protection, promotion, enforcement and fulfillment of human rights shall be the responsibility of the state, particularly the government [Article 28I paragraph (4) of the 1945 Constitution];
4. To enforce and protect human rights in accordance with the principle of a democratic constitutional state, the exercise of human rights shall be guaranteed, regulated and set forth in laws and regulations [Article 28I paragraph (5) of the 1945 Constitution];
5. Every person shall be obligated to respect the human rights of another person in the orderly life of community, nation and state [Article 28J paragraph (1) of the 1945 Constitution];
6. In exercising his/her right and freedom, every person must submit to the restrictions stipulated in laws and regulations with the sole purpose to guarantee the recognition of and the respect for other persons' rights and freedom and fulfill fair demand in accordance with the considerations of morality, religious values, security, and public order in a democratic society [Article 28J paragraph (2) of the 1945 Constitution].

The above provisions which give constitutional guarantee with respect to human rights are vitally important and even considered as one of the main features of the adoption of the constitutional state principle. Beside human rights, every person also has his/her basic obligations and responsibilities attached to him/her as a human being. The building of the state and government, must not, for any reason whatsoever, eliminate the principle of rights and obligations born by every human being. Therefore, the guarantee of such rights and obligations shall not be determined based on a person's status as a citizen of a state. Every person, wherever he/she is, must be guaranteed of his/her human rights. At the same time, wherever a person is, he/she is obligated to properly uphold other people's human rights. The awareness of such basic rights and obligations constitutes an important characteristic of the basic perspective of the Indonesian nation concerning human beings and a fair and civilized humanity.

Article 28 J Paragraph (2) of the Constitution of the State of the Republic of Indonesia 1945 provides for the possibility of limiting the rights and freedom of a person by law, provided that the limitation of such rights must be based on solid, reasonable, proportional and realistic grounds. Such limitation can only be made for the purpose of "merely guaranteeing the recognition of and the respect for other persons' rights and freedom and to fulfill fair demand in accordance with the considerations of morality, religious values, security, and public order in a democratic society".

### **VII. INTERNATIONAL LAW SOURCES CONFIRMING THE POSITION OF THE INDONESIAN CONSTITUTION**

Indonesia, as previously affirmed, is a constitutional state. As a constitutional state, it must give respect, protection and fulfillment of human rights as an inherent indispensable requirement. The respect, protection and fulfillment of such human rights are evidenced not only by the regulation in a separate chapter on human rights in the 1945 Constitution (Chapter XA) or by the enactment of a number of laws regulating human rights or concerning the efforts for the respect, protection and fulfillment of human rights, but also by the ratification of international legal instruments concerning human rights.

In deciding upon cases submitted to it, though not as the main law source, the Constitutional Court several times has employed international law by carefully studying international law sources and practices of the Constitutional Courts of friendly countries.

One of the important decisions could be seen on judicial review of Law on Truth and Reconciliation Commission and Law on Electrical Power.<sup>2</sup> The Court cancelled the entire laws being petitioned although only several articles of the laws were

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<sup>2</sup> See the Court Decision in Case Number 001-021-022/PUU-I/2003 concerning Judicial Review of Law Number 20 Year 2002 concerning Electrical Power.

petitioned for review. However, because the articles concerned serve as the central provisions or the spirit of such laws, the Court cancelled the entire laws.

In the event of absence of regulation in the legislation on a certain issue, if public interest is concerned, the Constitutional Court Justice shall not rely only on the petition or the claim (*petitum*) being filed. Such matters also constitute customary practices of Constitutional Courts in other countries.<sup>3</sup>

With respect to former members of the now-defunct Indonesian Communist Party, the Court declared that every citizen shall have the equal right to elect and to be elected and to participate in voting his/her aspiration by referring to Article 25 of the International Covenant on Civil and Political Rights (ICCPR).<sup>4</sup>

The Universal Declaration of Human Rights (UDHR) has been repeatedly used as a reference for Justices to make their considerations for deciding cases, such as the case of Corruption Court [Article 12 paragraph (2)], the case of former President Abdurrahman Wahid (Article 21), the case of Agus Miftach and the case of Human Rights Court [Article 29 paragraph (2)].

Moreover, with respect to Kadir's case, a convict punished based on retroactive clauses, the Court referred to various international law instruments such as Article 11.2 of the Universal Declaration of Human Rights (UDHR), Article 7 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Eight Protocols (ECHR), Article 14 and Article 15 of the International Covenant on Civil and Political Rights (ICCPR), Article 9 of the American Convention on Human Rights (ACHR) and Article 22, Article 23 and Article 24 of the Rome Statute of the International Criminal Court (ICC).

The court also rejected the petition concerning the retroactive principle in the Formation of the Human Rights Court by referring to several international conventions such as Article 20 paragraph (2) UDHR, Article 15 ICCPR; Article 7 ECHR as well as by referring to the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR).

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<sup>3</sup> Article 45 of the Constitutional Court Law of South Korea stated, "The Constitutional Court shall decide only whether or not the requested statute or any provision of the statute is unconstitutional: Provided, that if it is deemed that the whole provisions of the statute are unable to enforce due to a decision of unconstitutionality of the requested provision, a decision of unconstitutionality may be made on the whole statute".

<sup>4</sup> Article 25 of UDHR stated, "Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions: a) To take part in the conduct of public affairs, directly or through freely chosen representatives; b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors; c) To have access, on general terms of equality, to public service in his country".

In the case of Truth and Reconciliation,<sup>5</sup> the Court stated that although the General Comments have not been accepted as binding law, the definitions set forth in the General Comments have been adopted in the articles of the 1945 Constitution.<sup>6</sup>

### **VIII. CONCLUSION**

In its formative period, the Indonesian Constitutional Court is able to introduce a new legal culture based on the rule of law in the Indonesian legal system. The challenges of this Court initially come from members of parliament who are unhappy with Constitutional Court decisions considering that the Court has curtailed Parliament authority to make a law. Nevertheless those reactions gradually weaken along with the public support of court decisions.

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<sup>5</sup> See Case Number 006/PUU-IV/2006 concerning Judicial Review of Law on Truth and Reconsolidation.

<sup>6</sup> See Article 28G paragraph (2) of the 1945 Constitution concerning the right to freedom from torture, Article 28I paragraph (1) of the 1945 Constitution concerning the right to life and not to be tortured, Article 28 paragraph (4) and paragraph (5) of the 1945 Constitution concerning the protection, advancement and fulfillment of human rights which become the responsibility of the state.



SAYYORA KHAKIMOVA

# CONSTITUTIONAL ADJUDICATION AND JUDICIAL REFORMS IN UZBEKISTAN

## I. JUDICIAL REFORMS

As it is known the second half of the 20th century ended with the breakage of the totalitarian system in the former socialist countries, the fall of the USSR and the formation of newly independent states which chose a road of democratic development and the formation of a free civil society. One of the characteristic features of the transformation of their state legal systems was the development and functioning of the constitutional justice carried out by specialized courts. In the last years this process remains one of the main factors of the constitutional development in many states of the world.

During the years of independence significant work has been done in Uzbekistan aimed at democratization of the judicial and legal system of the country, liberalization of the criminal and criminal procedure laws, which allowed shaping the independent judiciary with the mission to secure effective protection of human rights and freedoms.

Reforming the judicial and legal system has been carried out consistently and stage by stage in close connection with radical transformations in the sphere of state and public building.

Securing protection of the rights and interests of a person, supremacy of law, raising legal culture and conscience of citizens, which appear as an important condition of establishing a democratic state with a rule of law and civil society, have been the main priority directions of the judicial and legal reforms being carried out under the leadership of the President of the Republic of Uzbekistan Islam Karimov. The reforms have been carried out taking universally recognized norms of international law into account as well as the rich historical experience of the national statehood, customs and traditions of our people.

Thus, in the course of the judicial and legal reforms economic courts have been instituted, specialization of courts on civil and criminal cases have been completed that enabled to raise quality of hearing. The courts have been liberated from inappropriate functions such as execution of the court rulings. Due to the institution of appeal and mechanisms of hearing as well as introduction of the cassation institution, additional guarantees have been created for timely correction of judicial

mistakes as well as exclusion of procrastination in legal procedure, and other organizational and legal measures have been undertaken aimed at raising quality of administering justice.

Liberalization of criminal punishments, which marked the beginning of an important stage of the judicial and legal reforms, had a great social and socially political significance. Classification of crimes have been revised, namely 75 percents of *corporis delicti* from grave ones have been re-classified in the category of offences that do not pose serious social danger and non-grave ones. Only 25 percent of them are included into the category of grave and extremely grave crimes. The number of norms, in which a punishment in the form of imprisonment is not applied to a person who fully compensates the caused damage in economic crimes, has been expanded.

The legal mechanisms securing equality of defense and prosecution in court procedure have been elaborated. Maximum terms of preliminary investigation and confinement of the accused have been significantly reduced.

In this context it is worth mentioning that introduction of the institute of reconciliation served as an important step in further liberalization of humanization of the system of criminal punishment. Reflecting the humanistic nature of our laws, the given norm promotes making people obedient to the laws on the basis of respect, voluntary and conscious observance. So far, this has been used in regard of about eighty thousand people.

Abolishment of the capital punishment since January 1, 2008, proves as an important historical step demonstrating commitment of Uzbekistan to shared standards and principles in the area of human rights as well as humanism of our people. And the death penalty as a punishment has been excluded and replaced with a life or long term of imprisonment that are applied for deliberate murder in aggravating circumstances (Art. 97, part two of Criminal Code) and terrorism (Art. 155, part three of Criminal Code).

The task of transforming court from a body protecting the state interests only into a body on securing the primacy of law and protection of human rights is being addressed successfully.

In order to raise the role of courts in securing guarantees of the constitutional human rights for freedom and personal immunity the institution of committal warrant authority to the courts have been introduced into the judicial and legal systems of the country. Transfer of warrant for arrest to the courts allowed establishing an efficient mechanism of judicial review of the legality taking into custody on pre-trial stage of the criminal procedure. Besides, this measure fostered strengthening responsibility of investigators and prosecutors as well as raising the role of the judicial branch

in the effective protection of human rights and freedoms. This institution, which is widely spread in the democratic countries across the world, successfully functions in Uzbekistan since January 1, 2008.

It is noteworthy that reforms underway in sphere of judicial and legal systems are met with approval and understanding among population that is plainly reflected by the results of sociological polls. For instance, according to the results of the poll conducted by the "Ijtimoiy Fikr" Public Opinion Study Centre, 92.2 percent of those surveyed indicated that they support the President of the Republic of Uzbekistan's initiative on abolishment of the capital punishment, and 90.3 percent supported the initiative on transfer of committal warrant authority to the courts. The Research centre on democratization and liberalization of judicial legislation and ensuring independence of judicial system under the Supreme Court of the Republic of Uzbekistan was established in 2008 in order to further democratize and liberalize the judicial and legal system, raising authority and independence of courts, securing legality while administering justice, non-admission of interference with activities of the courts and wrongful court rulings.

## **II. THE JUDICIAL BRANCH**

According to the Constitution of the Republic of Uzbekistan judicial protection of his/her rights and freedoms, right to appeal to the courts against illegal actions of the government bodies, official, public associations is guaranteed to each person.

The main law of the Republic of Uzbekistan declared that the judicial branch acts independently from the legislative and executive branches, political parties, and other public associations.

The legal basis of the judicial branch of Uzbekistan is stated in Art. 107 of the Constitution. According to this Article the judicial system in the Republic of Uzbekistan consists of the Constitutional Court of the Republic of Uzbekistan, the Supreme Court of the Republic of Uzbekistan, the Highest Economic Court of the Republic of Uzbekistan, the Supreme Courts of the Republic of Karakalpakstan on civil and criminal cases, elected for the term of five years, oblast (regional) courts, Tashkent City court on civil and criminal cases, inter-district, district, city courts on civil and criminal cases, military courts and economic courts appointed for the same term.

Citizens of the Republic of Uzbekistan, foreign citizens, and persons without citizenship are entitled for judicial protection against any wrongful acts (decisions) of the government and other bodies, officials, and attempts on lives and health, honour and dignity, personal freedom and property, and other rights and freedoms. Enterprises, institutions, and organizations have right for judicial protection. Court hearing is open in all courts. In camera hearings are only allowed in the cases specified by law.

The courts in the Republic of Uzbekistan may be specialized by categories of cases. Establishment of tribunals is banned by the Constitution and Law "On Courts".

Thus, the judicial system in Uzbekistan has been established as follows:

1. The Constitutional Court.
2. Courts of general jurisdiction consisting of the Supreme Court, the Supreme Courts of the Republic of Karakalpakstan on civil and criminal cases, regional courts, Tashkent City court on civil and criminal cases, inter-district, district, city courts on civil and criminal cases, as well as military courts. The system of military courts is formed of the Military Chamber of the Supreme Court, Military Court, district and territorial military courts.
3. Economic courts including the High Economic Court, Economic Court of the Republic of Karakalpakstan, economic courts of the regions and Tashkent City.

The organization and order of functioning of the Constitutional Court are defined by the "Law on the Constitutional Court of the Republic of Uzbekistan". The organization and order of functioning of the courts of general jurisdiction and economic courts are defined in the Law "On Courts".

Several procedures of administering of justice have been created in Uzbekistan, in particular, the constitutional, civil, criminal, economic, and administrative legal proceedings, each of them being governed by special normative legal acts.

The Constitutional Court is a body of judicial branch on consideration of cases on compliance of acts of the legislative and executive branches with the Constitution. The Supreme Court is the highest body of judicial branch in the sphere of civil, criminal, and administrative legal proceedings, and the High Economic Court that in the sphere of economic legal proceedings.

According to the Constitution the Constitutional Court, the Supreme Court and High Economic Court the Republic of Uzbekistan are subjects of right of legislative initiative that is realized through submission of draft laws to the Legislative Chamber of the Oliy Majlis of the Republic of Uzbekistan.

The organizational provision of functioning of the courts of general jurisdiction is carried out in strict compliance with the principles of independence of judges and their obedience to the laws only by the Higher Qualification Commission of Selection and Nominations to the judicial positions under the President of the Republic of Uzbekistan.

Judge is a person allotted with the power to administer justice according to law. All judges in the Republic of Uzbekistan have the same status. Chair and Deputy Chair of the courts are judges at the same time.

A citizen of the Republic of Uzbekistan not younger than twenty five years of age graduate of higher educational institution in law and with minimum three years of

legal experience and having passed the qualification examination can be appointed as a judge of the inter-district, district (town) court, economic court.

A citizen of the Republic of Uzbekistan graduate of higher educational institution in law and with minimum five years of legal experience including minimum two years as a judge and having passed the qualification examination can be appointed as a judge of the Supreme Court of the Republic of Karakalpakstan, regional court, Tashkent City court, Court Martial of the Republic of Uzbekistan.

A citizen of the Republic of Uzbekistan graduate of higher educational institution in law and with minimum seven years of legal experience including, as a rule, minimum five years as a judge and having passed the qualification examination can be appointed as a judge of the Supreme Court, Higher Economic Court.

A citizen of the Republic of Uzbekistan in active military service and having a rank of commissioned officer, and meeting requirements of the Law "On Courts" can be appointed as a judge of military court.

In order to secure independence of judges, norms setting guarantees aimed at prevention of interference with their actions while administering justice are enshrined in the laws. In particular, the government and other bodies, enterprises, institutions and organizations, officials, citizens must respect independence of judges. Any form of interference on judges with the aim to prevent comprehensive, all-round, and objective examination of a particular case, or seek illegal court ruling entails criminal liability in accordance with law. It is forbidden to request any explanation from judges on the merits of cases heard or in hearing, as well as to give case files to anybody to familiarization other than those involved in the case and in accordance with order provided by law.

Judges enjoy the right of personal immunity. This rule extends to housing, office of the judge, the vehicles and communication means he/she uses, correspondence, personal belongings and documents. When necessary, the armed guards shall be provided to judge and his/her family members by a department of the Ministry of Internal Affairs based on the decision of the Chair of the respective court.

Criminal action against a judge may be brought by the Prosecutor General only. A judge of the Constitutional Court may not be brought to criminal or administrative liability, and taken into custody without consent of the Constitutional Court. Forcible arrest, detention, as well as inspection of personal items, luggage, vehicles, house or office premises of a judge of the Constitutional Court are not permitted.

A judge may not be brought to criminal account, taken into custody without concurrence of the Plenary meeting or the Supreme Court or the Plenary meeting of the High Economic Court respectively. For making a judge administratively liable, concurrence of the respective qualification board of judges is needed.

Infringement into house or office premises of a judge, vehicle he/she use, inspection, inspection, search or seizure there, tapping his/her telephone conversations, personal examination, search as well as examination, seizure of his/her correspondence, item he/she owns and documents can be executed only by approval of the Prosecutor of the Republic of Karakalpakstan, Prosecutor of the region, Tashkent City, Military Prosecutor or by court decision.

Life and health of judges are under special protection of the state and subject to mandatory insurance through funds of the government budget. Employees of the courts undergo periodical in-service trainings at the Centre of Training of Lawyers under the Ministry of Justice of the Republic of Uzbekistan. Qualification ranks of judges are instituted by law and awarded to them.

### **III. THE CONSTITUTIONAL COURT**

As you know, Constitutional courts play a key role in upholding the rule of law in many states of the world. They often resolve difficult disputes involving highest public offices of all branches of government. Their decisions often have far-reaching consequences for individual's constitutional rights.

The new Constitution of independent Uzbekistan, adopted on the 8th December of 1992 consolidates the competence, procedure of organization and activities of the Constitutional Court for the first time.

The Constitutional Court is the first genuine judicial body of constitutional supervision in the history of Uzbekistan. Its establishment was preceded by the fruitful activity of the Committee of Constitutional supervision founded on 24/03/1990 at the first session of the Supreme Council of Uzbekistan. The basic task of the Constitutional Court is to create a humane democratic law-governed State as it is proclaimed in the Preamble of the Constitution . The new law «On the Constitutional Court of the Republic of Uzbekistan» was adopted on 30th of August 1995. The Oliy Majlis of the Republic of Uzbekistan elected the Constitutional Court in December 1995. Its competence as well as its everyday activity shall embody independence of the judicial power as a whole from the legislative and executive powers as one of the most significant constitutional principles. Unlike the ordinary courts, the Constitutional Court shall consider cases concerning the constitutionality of acts of the executive and legislative power, giving opinions exclusively on the basis of the Constitution of the Republic of Uzbekistan.

The Constitutional Court's Rules of Procedure were adopted in July 1996. The Scientific and Advisory Council composed of famous researchers in law and practitioners was established under the Constitutional Court.

The Constitutional Court shall be elected by the Oliy Majlis to the proposal of the President of the Republic of Uzbekistan, and composed of Chairman, Deputy Chairman and five members of the Constitutional Court including a judge from the Republic of Karakalpakstan.

The Constitutional Court shall have the right to start its activity provided that four judges had been elected. Judge of the Constitutional Court maybe elected a citizen of the Republic of Uzbekistan from among specialists in the domain of politics and law having high moral qualities and qualifications. Each judge of the Constitutional Court shall be elected in the individual order. The person, who gets the majority of votes from the general number of deputies of the Oliy Majlis, shall be considered elected. The term of office for a judge of the Constitutional Court is five years. The constitutional judge's independence shall be guaranteed by law, as by rules on irrevocability, immunity, and equality.

A person elected judge of the Constitutional Court shall take an oath of the following content: "I shall solemnly oath to honestly perform the duties of the judge of the Constitutional Court, to protect the constitutional structure, being solely obedient to the Constitutional Court of the Republic of Uzbekistan". The President of the Republic of Uzbekistan shall bring judges of the Constitutional Court to oath.

The Code of honour shall define rules of ethics compulsory for judges of the Constitutional Court.

A judge by his activity and behavior shall favour a respectful attitude towards the Constitution and set an example of complying with the law. Judges at any moment and in any place shall exhibit impartiality, and independence as characteristics of the Constitutional Court.

The Constitutional principles are independence, collegiality, open access and equality of judges' rights. These principles are inseparably interconnected. The Constitutional Court shall consider cases pursuant to these principles.

Sessions of the Constitutional Court as a rule shall be held openly.

The consideration of matters by the Constitutional Court shall be exercised on the basis of equality not irrespective of an official position, subordination and location. Pursuant to Article 109 of the Constitution and Article I of the Law "On the Constitutional Court of the Republic of Uzbekistan" the Constitutional Court shall:

- determine the conformity to the Constitution of the Republic Uzbekistan of laws of the Republic of Uzbekistan and other acts adopted by the Oliy Majlis of the Republic of Uzbekistan, decrees of the President of the Republic of Uzbekistan, resolutions of the Government and local agencies of State power, inter-State treaties and other obligations of the Republic of Uzbekistan;
- give an opinion concerning the conformity of the Constitution of the Republic of Karakalpakstan to the Constitution of the Republic of Uzbekistan and laws of the Republic of Karakalpakstan to the laws of the Republic of Uzbekistan.
- give an interpretation of norms of the Constitution and laws of the Republic of Uzbekistan;
- consider other cases delegated to the court by the Constitution and by laws of the Republic of Uzbekistan.

The Constitutional Court's practice to decide upon the constitutionality of acts of Parliament and government shall be inseparably linked to the interpretation of Constitutional provisions.

The chambers of the Oliy Majlis of the Republic of Uzbekistan, the President of the Republic of Uzbekistan, the Speaker of the Legislative Chamber of the Oliy Majlis, the Chairman of the Oliy Majlis Senate, the Jokargy Kenes of the Republic of Karakalpakstan, a group of deputies - not more than one fourth of the total number of deputies of the Legislative Chamber of the Oliy Majlis - , a group of senators - not more than one fourth of the total number of members of the Oliy Majlis Senate - , the Chairman of the Supreme Court, the Chairman of the Supreme Economic Court and the Procurator-General of the Republic of Uzbekistan shall have the right to initiate a review by the Constitutional Court. An issue may be introduced by the initiative of three judges of the Constitutional Court.

The Constitutional Court shall only adjudicate on officially promulgated law acts. The Court shall not take preventive control.

Statutes and other legal acts not complying with the Constitution shall be null and void from the moment of their entry into force. Decisions of the Constitutional Court shall be final and not subject to appeal. Pursuant to the law the Constitutional Court may review its decisions in case of new circumstances unknown at the moment of the decision's adoption and in case of a changing of the constitutional provision on which the decision is based.

Among the most significant decisions of the Constitutional Court shall be resolutions, which are aimed at securing the constitutional rights of citizens to housing, social maintenance, and the right to citizenship.

The Constitutional Court was addressed with issues relating to the protection of rights of entrepreneurs and bank investors. Using the right to legislative initiative the Constitutional Court introduced to the Oliy Majlis suggestions on the issues of improvement of administrative, criminal, civil, labour, criminal-procedural legislation.

Numerous petitions of state bodies and appeals by citizens and judicial bodies that are filed with the Constitutional Court ground in the problems, difficulties and contradictions inherent to the process of establishing a civilized market economy, a consolidated economic space.



SUPHOT KHAIMUK

# **THE RELATIONSHIP BETWEEN CONSTITUTIONAL REVIEW ORGANS, GOVERNMENTS AND THE ORDINARY JUDICIARY IN THAILAND**

## **I. INTRODUCTION**

The Constitution of the Kingdom of Thailand, 2007 was promulgated with the paramount aim of resolving the problems of the Constitution of the Kingdom of Thailand, 1997 by introducing fundamental changes in four principal areas. First, one of the main goals of the Constitution is to protect and promote the extension of rights and liberties of the people with the view to achieving the actual manifestation of peoples' rights and liberties in practice. Secondly, the Constitution is framed to reduce the absolute control of the state power and to eradicate an unfair treatment. Thirdly, the Constitution aims to bring honesty, transparency as well as merit and moral principles into the political system. And lastly, the Constitution installs a number of mechanisms to ensure the substantive balance and efficiencies to the scrutiny system.

## **II. THE RELATIONSHIP BETWEEN THE CONSTITUTIONAL REVIEW ORGANS, GOVERNMENT AND THE COURT OF JUSTICE UNDER THE THAI CONSTITUTION**

The Constitution of the Kingdom of Thailand, 2007 provides for provisions which can be elaborated the relation of the constitutional review organs with the governments and the judiciary into these two following areas:

### **1. The Relationship between the Constitutional Review Organs and the Court of Justice.**

#### **A. Composition of the Selective Committee for Justices of the Constitutional Court**

The Constitutional Court comprises one President of the Constitutional Court and eight other Justices or a total of nine Constitutional Court Justices, appointed by the King upon advice of the Senate from the following persons: three justices of the Supreme Court of Justice, two justices of the Supreme Administrative Court, two qualified persons in law and two qualified persons in political science, public administration or social sciences.

The selection and election of justices of the Constitutional Court shall be carried out by a Selective Committee for justices of the Constitutional Court consisting of the President of the Supreme Court of Justice, the President of the Supreme Administrative Court, the President of the House of Representatives, the Leader of the Opposition in the House of Representatives and the Presidents of the Constitutional independent organs being election among themselves to be one in number, as members. The selective Committee must complete the selection and election of qualified persons within thirty days as from the date a ground for the election occurs and then nominates the selected persons, with their consents, to the President of the Senate.

### **B. Constitutional Review of Laws**

A constitutional review of provisions of law to be applied by the Court to the case must involve a case which had already arisen in the Court, whether that may be the Courts of Justice, Administrative Court or Military Court or any other court, regardless of the court level which the case is pending trial. If deemed by the court itself or parties in the case raise an objection that a provision of law to be applied by the court to the case is contrary to or inconsistent with the Constitution and there has not yet been a relevant decision of the Constitutional Court on such provisions, a motion may be filed at the court requesting for a reference of such matter to the Constitutional Court for consideration. In such case, the court may proceed with the trial but shall impose a temporary stay on the proceedings until the Constitutional Court gives a decision thereon. It should be noted that this constitutional review of provisions of law to be referred by the court is one of the important channels indicating the powers and duties of the Constitutional Court in relation to other courts such as the Courts of Justice, the Administrative Court, the Military Court or any other court.

Being referred by the court, the provisions of law which are subject to the adjudicative jurisdiction of the Constitutional Court consist only of those provisions of Acts enacted by the legislative body, such as Organic Acts and Acts or laws of equivalent status such as an Emergency Decree and Military Government Order, that has been approved by the National Assembly.

For example, Constitutional Court Ruling No. 12/ 2552, Dated the 19th August 2009: The Ordinary Court submitted the objection of the defendant to the Constitutional Court for a ruling in the case of whether or not the Military Government Order was contrary to or inconsistent with the Constitution of the Kingdom of Thailand.

In this case, the Constitutional Court decided that the time limitation for operating and selling the food and beverages during the period of Revolution Order not only restricted an opportunity of people to engage in the enterprises and obstructed the people to undertake business freely and fairly by imposed unnecessary measures but also put the burden on the other people who need to consume those food and

beverages during night time on their normal basis. In addition, the restriction of rights and liberties to engage in the enterprise or occupation and to undertake free and fair competition did not enact for the specific purpose provided by this Constitution, and therefore imposed the unnecessary limitation of the liberties which affected the essential substances of rights and liberties of the people. By the reasons above, the Constitutional Court held that the Revolution Order was contrary to or inconsistent with the provisions of the Constitution on protection of rights and liberties of people.

**C. The decisions of the Constitutional Court shall be deemed final and binding on the National Assembly, Council of Ministers, Courts and other State organs.**

The effects of a Constitutional Court ruling may be divided into two instances, namely:

- a) A ruling of the Constitutional Court is final, meaning that once the Constitutional Court passes a ruling, the parties, related persons or applicant to the Constitutional Court may not file an appeal to an appellate or supreme court, or object such ruling of the Constitutional Court, or file an action in another court to reverse such ruling of the Constitutional Court;
- b) Upon a ruling of the Constitutional Court, the decision of the Constitutional Court would also be binding upon third parties who are not parties, related persons or the applicant to the Constitutional Court; in other words, the ruling is binding upon the National Assembly, Council of Ministers, courts or other state organs pursuant to the protection principle of constitutional supremacy.

The binding force of the Constitutional Court is provided under the Constitution which contains provisions recognizing and preserving the supremacy of the Constitution relating to the binding force of Constitutional Court rulings. Once the Constitutional Court passes a ruling on rights and liberties on any matter, the ruling would be directly binding on the National Assembly, Council of Ministers, courts as well as constitutional organs and state agencies in the enactment of laws, application of laws and interpretation of laws.

**2. The Relationship between the Constitutional Review Organs and the Government.**

**A. Constitutional review of a Bill (by the Prime Minister)**

With regard to any Bill approved by the National Assembly prior to submission by the Prime Minister to the King for royal assent, or any Bill confirmed by the National Assembly and prior to re-submission of the Bill by the Prime Minister to the King for royal assent, if the Prime Minister is of the opinion that such Bill contains provisions which are contrary to or inconsistent with this Constitution or the enactment process as provided by this Constitution was not properly complied with, such opinion shall be sent to the Constitutional Court for ruling and the President of the House of Representatives and President of the Senate shall be notified without delay.

If the Constitutional Court rules that such Bill contains provisions which are contrary to or inconsistent with this Constitution, or has not been enacted in accordance with the provisions of this Constitution, and such provisions constitute an essential substance, the entire bill shall lapse. If the Constitutional Court rules that such Bill contains provisions which are contrary to or inconsistent with this Constitution, but does not constitute an essential substance, only such contrary or inconsistent provision shall lapse. The Bill shall, however, be able to come into force upon promulgation.

For example, Constitutional Court Ruling No. 8/ 2551, Dated the 8th July 2008: The Prime Minister referred the draft bill on Office of the Ombudsmen to the Constitutional Court for ruling whether or not an enactment of such draft bill raised a question of constitutionality of law. The consideration of an organic law bill or bill in the House of Representatives and the senate shall be made in three following readings: (1) voting for adoption of a bill's principle in the first reading; (2) voting for the section by section scrutiny of a bill in the second reading and; (3) voting for passing the bill in the third reading. However, as for the consideration in the first reading, the draft bill on Office of the Ombudsmen did not make by majority of votes of each house as required by the Constitution. The Constitutional Court therefore held that such draft Bill had not been duly enacted under the provisions of the Constitution due to an invalid resolution, such draft bill shall lapse.

## **B. Ruling on disputes of conflicts pertaining to the respective powers and duties of two or more organs with respect to the National Assembly, Council of Ministers or non-judicial constitutional organs**

A dispute on the conflicts of powers and duties which may be submitted to the Constitutional Court for ruling must be a dispute on conflicts concerning the respective powers and duties of the National Assembly, Council of Ministers or constitutional organ, and must be a conflict between at least two organs. Questions on the powers and duties of a single organ with respect to its ability to take a certain action will not be admitted for consideration. The Constitution of the Kingdom of Thailand, 2007 provides for 2 types of "constitutional organs", as follows:

- 2.2.1 Independent Constitutional Organs. There are four of these organs, namely the Election Commission, Ombudsmen, National Counter Corruption Commission and the State Audit Commission.
- 2.2.2 Other Constitutional Organs. There are three of these organs, namely the State attorney, National Human Rights Commission and National Economic and Social Council.

*For Instance, Constitutional Court ruling No. 52/2546, dated the 30th December 2003:* The Election Commission requested for a Constitutional Court ruling under the Constitution of the Kingdom of Thailand on the powers and duties of the Election Commission under the Constitution of the Kingdom of Thailand.

As for a preliminary fact of this case, the Supreme Administrative Court issued Order that an Election Commission or a Constituency Election Commission was a State

official under the Act on Establishment of Administrative Courts and Administrative Court Procedure, 1999. Because the word "Government" entailed a wider meaning than "Council of Ministers", whereby it extended to the "State in its capacity as agent of the nation", and not restricted to "Council of Ministers or Ministers of Ministries or Sub-Ministries", the Election Commission and the Constituency Election Commission could therefore be subject to proceedings in the Administrative Court. The Election Commission was in disagreement with the Supreme Court Order, and therefore requested for a Constitutional Court ruling under the Constitution of the Kingdom of Thailand on the powers and duties of the Election Commission.

The issue considered by the Constitutional Court was whether or not an exercise of powers by the Election Commission on the investigation and fact-finding inquiry and the adjudication of problems or disputes under the Constitution, was conclusive. The Election Commission was entrusted with the charge and control of the election of members of the House of Representatives, senators, members of local assemblies or local administrators as well as referendums rendering them to proceed in an honest and fair manner. Such powers were specifically vested in the Election Commission to take charge and control of the administration of an election under various laws referred to in the Constitution.

### **C. Ruling on the membership or qualifications of members of the National Assembly, Minister and Election Commissioners**

One of the key reasons for termination of an individual the National Assembly, Minister and Election Commissioners is the commission of an act which constitutes a conflict of interests or a prohibited act with respect to being a partner or shareholder or retaining partnership status or shareholding or company. As such, members of the House of Representatives or senators numbering no fewer than one-tenth of the existing members of the respective house have the rights to file an application with the President of the House for referring the application to the Constitutional Court. This power and duty of the Constitutional Court aims at bringing honesty, transparency, the ethical standard as well as merit and moral principles into the political system and eliminating all conflict of interests from the holders of political position.

The Constitutional Court ruling No. 12-13/2551, dated the 9th September 2008 set a precedent for the court's rulings as evidenced by the case of Prime Minister Samak Sundaravej and Defense Minister hosting TV cooking shows. The Constitutional Court held that the Constitution prohibits the Prime Minister and Ministers from being employees of any person to prevent conflict of interests. Therefore, the fact that Mr. Samak still acted as a host for the TV cooking shows and accepted remuneration after holding the position of Prime Minister shows that he was employed according to the meaning of the word "employee" under the Constitution. The Constitutional Court, therefore, voted unanimously that the respondent had committed an act prohibited by the Constitution, resulting in the termination of the premiership of Mr. Samak Sundaravej.

ADOLFO S. AZCUNA

## **THE RELATIONSHIP BETWEEN CONSTITUTIONAL REVIEW ORGANS, GOVERNMENTS AND THE ORDINARY JUDICIARY - PHILIPPINES**

The Philippines follows the Presidential form of government where there is separation of powers into Legislative, Executive and Judicial. The separation is not absolute and there is a system of checks and balances embedded in the set-up.

Judicial Power is vested in one Supreme Court established by the Constitution and in lower courts established by law. The Supreme Court is the Constitutional Review Organ. Composed of a Chief Justice and fourteen Associate Justices, it sits *en banc* or in three divisions of five Members. All cases involving the constitutionality of a treaty, international or executive agreement, or law, are heard by the Supreme Court *en banc* including those involving the constitutionality, application or operation of Presidential decrees, proclamations, orders, instructions, ordinances, and other regulations. These cases are decided with the concurrence of a majority of the Members who actually took part in the deliberations on the issues in the case and voted thereon.<sup>1</sup>

The lower courts, *i.e.*, courts other than the Supreme Court, may rule on the constitutionality or validity of a treaty, executive agreement, law, presidential decree, proclamation, order, instruction, ordinance or regulation, but their final judgments and orders in such cases are subject to the power of the Supreme Court to review, revise, modify, or affirm on appeal or *certiorari*.<sup>2</sup>

Thus, the Supreme Court is the Constitutional Court in the Philippines, as it is there that the power of final judicial review is lodged.

Accordingly, the role and function of the Supreme Court under the Constitution has been characterized as that of being the arbiter in allocating the boundaries of powers under the Constitution.<sup>3</sup>

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<sup>1</sup> Art. VIII, Sec. 1 and Sec. 4 (1) and (2), Philippine Constitution.

<sup>2</sup> Art. VIII, Sec. 5 (2), Philippine Constitution.

<sup>3</sup> *Angara v. Electoral Commission*, 63 Phil. 139 (1936).

A final point is that a new provision in the present 1987 Constitution grants the Supreme Court, together with the ordinary courts, the power and duty to determine, in actual justiciable cases, whether or not there has been a grave abuse of discretion amounting to lack or excess of jurisdiction on the part of any branch or instrumentality of the Government.<sup>4</sup>

This is often referred to as the expanded certiorari jurisdiction of the Court and, while it has been exercised sparingly, it has given the Court quite a powerful role in reviewing the constitutionality of acts of Congress or of the President.

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<sup>4</sup> *Art. VIII, Sec. 1, par. 2, Philippine Constitution.*

CHAN RASY

# REPORTS ON IMPORTANT DECISIONS OF THE CONSTITUTIONAL COUNCIL OF THE KINGDOM OF CAMBODIA

The summaries of the important decisions of the Constitutional Council read as follows:

## **I. DECISIONS CONCERNING THE REGISTRATION OF NAMES IN THE VOTER LISTS:**

### **1. Decision No 094/005/2007 CC.D dated November 21, 2007**

Following the National Election Committee(NEC), by its decision of November 08, 2007, ruling to maintain the names of 1,331 persons at the Prek Chrey commune and the names of 702 persons at the Sampoeu Poun commune (total 2033 persons) in the preliminary voter lists, Mr. LONG LIMHEA, representative of SAM RAINSY party, lodged the petition of November 13, 2007 with the Constitutional Council, demanding to delete the names of 2,033 Vietnamese and rejecting the decision of NEC Trial Jury, signed by H.E. IM SUOSDEY on November 08, 2002 (in fact : 2007)

The Constitutional Council held that Mr. LONG LIMHEA's petition, made within the period of the public posting of the preliminary voter lists, is admissible for its legal form according to Article 64 (New) of the Law on the Elections of the Members of the National Assembly and to Item 3 of Article 26 of the Law on the Organization and the Functioning of the Constitutional Council, notwithstanding the error committed, as to its subject on the date of November 08, 2002 given to the NEC decision instead of November 08 ,2007.

After having heard the parties, the Constitutional Council considered that Mr. LONG LIMHEA has no evidence in order to have the names of 2,033 persons to be stricken off the preliminary voter lists, besides his affirmation, has no legal ground. Whereas the motives given by H.E. MEAN SATIK and H.E. MAO SOPHEARITH, NEC representatives , referring to Article 64(New) of the Law on the Elections of the Members of the National Assembly, prove to have legal foundation and can be considered as relevant. And according to the investigation conducted by the representatives of the Constitutional Council, the 1,331 persons of Prek Chrey commune and the 702 persons of Sampoeu Poun commune, (Koh Thom district, Kandal province), whose names Mr. LONG LIMHEA demanded to be stricken off from the preliminary voter lists, have all their names registered in the final voter lists, in accordance with Article 54(New), Item "C" of the Law on the Elections of the Members of the National Assembly. Furthermore, concerning the names which



Mr. LONG LIMHEA demanded to be stricken off from the preliminary voter lists at Prek Chrey and Sampoeu Poun communes,( Koh Thom district, Kandal province), the investigation at Prek Chrey and Sampoeu Poun commune conducted by the representatives of the Constitutional Council and the verification by its expert department which has examined the decision of the Constitutional Council in 2006, have found similar affirmation about a great number of, if not nearly all the names on the lists that Mr. TOUCH RITHY has demanded to be deleted in his petition of November 17, 2006 about Prek Chrey commune and in the petition of Mr. DYNA SAKUN of November 16, 2006 at Sampoeu Poun commune, which the Constitutional Council had already examined and decided on:

- the case of Prek Chrey commune by its Decision N° 086/013/2006 CC.D of November 25, 2006 upholding the decision of NEC.
- the case of Sampoeu Poun commune by its Decision N° 084/011/2006 CC.D of November 24, 2006 upholding the decision of NEC but enjoining NEC to delete the names of 2 deceased and the other 26 persons, who have already moved out among the names of 763 registered persons at Chong Kneas commune,( Siem Reap district, Siem Reap province); whereas for the case of Sampoeu Poun all the names are maintained.

The Constitutional Council ruled that: in Article 1, the petition of Mr. LONG LIMHEA of November 13, 2007 is admissible for its legal form, but is rejected for being unfounded. And in Article 2, it upheld the November 08, 2007 decision of NEC Trial Jury to maintain:

- the names of 1,331 persons registered in the preliminary voter lists at Prek Chrey commune.
- the names of 702 persons registered in the preliminary voter lists at Sampoeu Poun commune.

## **2. Decision No 095/006/2007 CC.D dated November 22, 2007**

Following the November 08, 2007 decision of the National Election Committee (NEC), rejecting the November 03, 2007 decision of the Council of the Kilometer 6 Sangkat and deleting the names of 3,244 voters from the preliminary voter lists of the Kilometer 6 Sangkat, Mr. LY SOVICHEA lodged with the Constitutional Council the petition of November 13, 2007 demanding to maintain the names of 3,244 Cambodians in the preliminary voter lists of the Kilometer 6 Sangkat (Khan Russey Keo).

The Constitutional Council held that Mr. LY SOVICHEA's petition, made within the period of the public posting of the preliminary voter lists, is admissible for its legal form according to Article 64 (New) of the Law on the Elections of the Members of the National Assembly and to Item 3 of Article 26 of the Law on the Organization and the Functioning of the Constitutional Council.

At the inquiry session, Mr. LY SOVICHEA can not determine whether the 3,244 persons would really have permanent residences at the Kilometer 6 Sangkat or

among them how many persons have or have not permanent residences. He emphasized that only the local authorities can pronounce on this case.

The Constitutional Council proposed Mr. LY SOVICHEA to accompany the representatives of the Constitutional Council and to go down to the 3 villages in the Kilometer 6 Sangkat in order to check some of the 3,244 persons chosen at random by the representatives of the Constitutional Council; yet Mr. LY SOVICHEA claimed that he can take the latter to only meet the 14 persons whom he represented as well as the additional 36 persons. Whereas at the Public Hearing of the Constitutional Council, H.E.Mr. EM SOPHAT, H.E.Mr. KLOK BUDDHI and Mr.KEO PHALLA, NEC representatives, asserted that:

1. The NEC decision is well founded because the question of the peoples' residence fall within the competence of the local administrative police, and according to the latter's affirmation, those persons did not live in Kilometer 6 Sangkat. Furthermore, during the NEC public hearing, the Kilometer 6 Sangkat chief did not provide any evidence to the NEC Trial Jury; He only claimed that the names on the final voter lists, according to the procedure, cannot be deleted. To the questions by the NEC Trial Jury as to whether he had proceeded in investigating the case, he negatively responded. The investigation conducted by the working group about the 20 person's names by Random Check, is to insure that the report of the local administrative police is correct or not. The result showed that indeed these 20 persons have no residences at the Kilometer 6 Sangkat.
2. The names recorded by the village chief on the voter lists, barring his signature as well those of his deputy and the local administrative police chief of Kilometer 6 Sangkat, are the evidences which the plaintiff presented to NEC in compliance with Article 64 (New) of the Law on the Elections of the Members of the National Assembly. Concerning the question of delegating of powers, the NEC recognized to have granted them to the Khum/ Sangkat Council in order to update the voter lists which become thereafter the preliminary voter lists that the Khum/ Sangkat Council must to post to allow the concerned persons to contest or to oppose. According to Article 64 (New) of the Law on the Elections of the Members of the National Assembly, the chief of the administrative police station of the Kilometer 6 Sangkat, in charge of the residence books, is better informed than anyone else concerning the people's domiciles in his Kilometer 6 Sangkat.

The Constitutional Council ruled that: in Article 1, the petition of Mr. LY SOVICHEA of November 13, 2007 is admissible for its legal form, but is rejected for being unfounded. And in Article 2, it upheld the NEC Trial Jury decision of November 08, 2007, rejecting the November 03, 2007 Kilometer 6 Sangkat Council decision and by deleting the names of 3,244 voters from the preliminary voter lists of the Kilometer 6 Sangkat.

## **II. DECISION CONCERNING COMPLAINT AGAINST THE PRELIMINARY RESULT: DECISION NO 104/009/2008 CC.D DATED AUGUST 28, 2008**

Following the National Election Committee (NEC) issued the decision N° 591/08 N. E.C/D of August 12, 2008, Mr. NHEK VANNARA, a Representative of the Human

Rights Party, lodged the petition of August 16, 2008 with the Constitutional Council, contesting the preliminary results of the Elections of the Members of the National Assembly for the 4th legislature, and charging NEC with inflating the name lists by duplicating several names on the voter lists at each polling station.

The Constitutional Council held that the August 16, 2008 appeal of Mr. NHEK VANNARA, Representative of the Human Rights Party, submitted to the Constitutional Council and received by the Secretariat General of the Constitutional Council on August 16, 2008 at 09:25 am, was filed within the period of 72 hours after the party received the August 12, 2008 NEC decision N° 591/08 N.E.C/D, and is admissible in conformity with Article 115 (New) and Article 117 (New) of the Law on the Elections of the Members of the National Assembly and Item 2 of Article 27 (New) of the Law on the Organization and the Functioning of the Constitutional Council.

In addition to his appeal, Mr. NHEK VANNARA stated that "there are countless irregularities but at this time I would like to appeal about the voter lists. Concerning to the other cases, I would like to treat them separately in order to avoid any confusion. In my appeal, I have clearly indicated that the voter lists are inflated by NEC and there are several duplicated names in each polling station. I am only filing a petition against the irregularities in the voter lists. Whereas H.E. EM SOPHAT, NEC Representative, stated that "Mr. NHEK VANNARA files a petition against the preliminary results of the Elections of the Members of the National Assembly for the 4th legislature which he only show the voter lists, should have contested during the period of posting as preliminary voter lists. NEC has examined this petition and decided that: If Mr. NHEK VANNARA files a petition against the preliminary result or a part of the preliminary result of the polls; he has 72 hours to give the irregularities as prescribed in Article 114 of the Law on the Elections of the Members of the National Assembly. It is only for his failing to produce evidences on the irregularities, on the voting process, on the ballot counts and on the total results of ballot counts, that NEC realized on Article 115 (New) of the Law on the Elections of the Members of the National Assembly, for its decision to reject his petition for lack of clear evidences to support his motive. Furthermore, H.E. EM SOPHAT stated that "before validating the voter lists, there were very few complaints about the duplication of names or their name deletion, and those complaints were already handled by NEC and the Constitutional Council. The lists, which Mr. NHEK VANNARA brought forth as evidences, are the official lists already validated by NEC on February 29, 2008".

The Constitutional Council ruled that the appeal of Mr. NHEK VANNARA is admissible for its legal form, but is rejected for being unfounded.

Finally, I would like to inform you that if all you like to get the decisions of the Constitutional Council (2007-2009), please visit our Website: <http://www.ccc.gov.kh>.

ACHMAD SODIKI

# TAMING POLITICAL TURMOIL THROUGH CONSTITUTIONAL COURT DECISION

## I. INTRODUCTION

Indonesia has just conducted its legislative and presidential elections for the period 2009-2014. Out of Indonesia's population of 240 million people, there are 170 million eligible voters, out of which 120 million people have cast their votes.

Ever since the commencement of the preparations for the general elections, throughout the implementation of the general elections, and following the general elections, various issues have emerged, the resolution of which falls under the competence of the General Election Commission. Several other institutions are also involved, while the Constitutional Court of the Republic of Indonesia has the authority under law to settle disputes related to the general elections vote count.

## II. LEGISLATIVE ELECTIONS

An important issue that arose during the preparation period was the complaint filed by two presidential candidate pairs concerning the alleged inaccuracy in the total number of registered voters. Substantial evidence was found indicating that the permanent list of voters issued by the General Election Commission was hardly reliable, as certain discrepancies were discovered upon comparing it to the total number of voters and the actual identity of voters. This gave rise to an opportunity for misuse in the form of distending the votes obtained by political parties as well as the incumbent Presidential candidate.

Indeed, a similar complaint concerning the inaccuracy of the voters' list had already come up during the legislative general election preceding the presidential election. The General Election Commission had not taken any anticipatory measures to deal with the complexities related to the voters' list caused by several factors, namely as follows:

- a. The number of Political Parties participating in the general election increased significantly compared to the previous general election in 2004, namely from 25 parties to 43 parties in 2009.
- b. Each of the parties had to indicate their own legislative candidates, which consequently led to an increase in the number of voting ballots.
- c. Indonesia's vast territory could not be fully covered, due to an insufficient use of adequate technology in the preparatory stage.

- d. A relatively uneven spread of the level of education, resulting in different perceptions concerning regulations on the implementation of general election.
- e. As a result of the continuous changes taking place in the permanent list of voters following the response of the regions, it became difficult to determine the definite total number of voters.
- f. Inadequate coordination with other institutions.
- g. The administrative violations as well as criminal offenses occurring in the general elections were not properly followed up by the relevant law enforcement apparatus, thus creating the impression that violations were allowed to occur without sanctions.
- h. General election violations, both administrative as well as criminal, reported by the Election Supervisory Board (Banwaslu) received inadequate attention from the General Election Commission (KPU), as a result of which the level of confidence in the organizer of general elections (General Election Commission) declined.

As a result of the perceivably inappropriate way of resolving such violations, the Constitutional Court was put in a difficult position. On the one hand, such administrative and criminal issues are not part of the Constitutional Court's competence under the law. On the other hand, however, if left unresolved, they can potentially affect the general election vote count. Refusing to be constrained by rigid formal provisions, the Constitutional Court took the stance that it had the obligation to seek the substantive truth. If such violations were likely to affect the result of the general election, the Constitutional Court would not keep its eyes closed, but would pay due attention to and take into consideration the same. In the Constitutional Court's view, there are two categories of violations, namely tolerable and intolerable violations. Minor, insignificant violations in determining the number of votes obtained are considered to be part of the tolerable category, while systemic, massive and structured violations are part of the category of intolerable violations. Based on such argument, the Constitutional Court has made decisions on various general election disputes in the legislative, regional house of representatives and presidential elections, determining the correct number of votes obtained. Certain regions have had to hold a second round of elections, others only had to recount votes in one or two polling stations. The Constitutional Court's final and binding decisions have been successful in taming political turmoil in the legislative general election.

In the 2009 legislative general election, the Constitutional Court received 69 cases filed by 42 political parties, 27 of which were filed by Regional House of Representatives candidates. All of these cases had to be settled within 30 days from the date of the application's registration in the Constitutional Dispute Registry. About 12% of the total applications filed were granted.

The fact that general election participants demonstrated a mature attitude in the face of the political turmoil occurring in the above mentioned general election,

without shedding any blood and submitting to the Constitutional Court's final and binding decision, has been an achievement in itself. The culture of using the law as an avenue for dispute settlement instituted by the Constitutional Court has been lauded by the community, boosting credibility in the Constitutional Court's ability to resolve disputes related to general election results.

### **III. PRESIDENTIAL ELECTION**

The issue of inaccuracy in the Permanent List of Voters continued to occur in the 2009-2014 Presidential Election organized by the General Election Commission, thus disrupting the uninterrupted implementation of the general election. Two out of the three presidential candidates lodged a protest with the General Election Commission with regards to the inaccuracy and the low level of reliability of the above mentioned voters' list, threatening to withdraw as presidential general election participants. This caused great concern. The General Election Commission was unable to come up with a satisfactory solution, arguing that it was bound by the provisions of the law stating that only voters registered in the permanent list of voters were eligible to vote. Naturally, this provision prevented potential voters not registered, yet having the right to vote, from exercising their right guaranteed under the Constitution. The Constitutional Court took prompt action after it had received an application from a person whose constitutional right had been impaired by the reason of such person not having been registered in the Permanent List of Voters, ordering that the person concerned be allowed to vote by using another way of identification, namely identity card. The Constitutional Court decided that it was appropriate to use Identification Card (ID) or passport if the person concerned had not been registered in the permanent list of voters, provided however that such person would be allowed to vote only in the region concerned one hour prior to the closing of the voting process. The Constitutional Court's decision number 102/PUU-VII/2009 received a positive response and was able to tame the political turmoil in the presidential general election, although admittedly results have not been maximal.

A significant progress was made in the organization of the 2004 and 2009 general elections, namely by conducting a public debate between presidential and vice presidential candidate pairs on television. The free press was successful in giving a wide coverage to these public debates, thus providing a greater opportunity to the public to better assess the character of as well as the program offered by presidential candidates. The results of preliminary polls predicting the winning candidates received wide coverage through the media. As many as 6 survey agencies funded by political parties competing in the general election launched a war of surveys. Certain political tensions occurred in the community, however without causing any fatalities.

With the presidential election approaching, the political heat escalated as a result of persisting suspicions concerning the alleged inaccuracy of the Permanent List of

Voters, causing concern and political turmoil which was feared to claim property and human lives as was the case in Iran. This was also triggered by the disappointment of large parties which had been defeated in the legislative general election conducted prior to the presidential election, as their predictions of the number of votes obtained by them turned out to be far below their expectations.

Two days before general election day, two presidential candidates threatened to withdraw from the presidential election if the issue of the permanent list of voters was not corrected, and if unregistered voters were not given the opportunity to vote. The Constitutional Court considered this as a serious threat which would potentially cause chaos, as it would have left only one presidential candidate, while there is no prohibition under the law for the other two candidates to withdraw. This would have seriously disrupted the carefully structured state administration agenda, and would have created legal uncertainty. In order to overcome such deadlock, the Constitutional Court made a decision in the case filed by two persons for constitutional review of the provisions of the law providing that only voters registered in the permanent list of voters were eligible to vote in the Presidential election. The Constitutional Court decided that the above mentioned article in the law prevented constituents with the right to vote from exercising their constitutional rights, hence such article was contradictory to the Constitution. Thus, voters not registered in the permanent list of voters were allowed to vote by showing their valid identity card or passport. The decision was welcomed by the public, although it was unable to maximally achieve its objective. Eventually, the presidential candidates concerned abandoned their initial intent to withdraw, and the general election was conducted without disruptions. However, as it turned out, the results of the Presidential election were not acceptable to the above mentioned two presidential candidates either, hence they filed their case with the Constitutional Court. After a careful consideration of various legal aspects, the Constitutional Court issued its decision which was ultimately accepted by all presidential candidates. So, once again, the Constitutional Court's decision was successful in taming political tension.

#### **IV. CONCLUSION**

Finally, two general elections, namely the legislative and presidential elections, were conducted successfully, despite certain shortcomings. The mature attitude of constituents, political parties participating in the general elections and presidential candidates in resolving all issues through the legal avenue has now become part of our culture, thus enabling us to avoid all forms of physical violence. The Constitutional Court's credibility in taking just and independent action, free from the influence of dynamics of political forces, and free from accusations of corruption, has positioned the Constitutional Court as an institution which has been able to make a significant contribution to the development of democracy and the development of a democratic state based on law.

DONG-HEUB LEE

# RECENT IMPORTANT DECISIONS OF THE KOREAN CONSTITUTIONAL COURT

## I. INTRODUCTION

In the process of development of democracy and the rule of law in various parts of Korean society including social, political and economic sectors, many important constitutional issues have been brought to the Constitutional Court. This means that the role of the Constitution and its normative power as a standard for resolving social and political disputes have been gaining extra importance. This also reflects the fact that the Constitutional Court has received tremendous support from the people for more than twenty years since its foundation, as the survey results annually conducted by a media company demonstrate.

As reviewing the important recent decisions since the fifth Conference of Asian Constitutional Court Judges in 2007, we will recognize that the types and subjects of the constitutional disputes are diverse. During the period of time, the Constitutional Court dealt with, among many other significant cases, the following cases:

1. competence dispute case in which members of the National Assembly argued that the government's conclusion of a treaty without obtaining consent from the National Assembly infringed on their power to review and vote on the proposed laws (dismissed, 2006 Hun-Ra 5, October 25, 2007);
2. constitutional complaint case as to whether Korea Broadcasting Commission's warning against a broadcast company and its producer infringed on the complainants' basic right (accepted, 2004 Hun-Ma 290, November 29, 2007);
3. case of adjudication on the constitutionality of the Military Criminal Act which provided for death penalty as the only statutory punishment when a subordinate killed a superior (unconstitutional, 2006 Hun-Ka 13, November 29, 2007);
4. case of adjudication on the constitutionality of a statutory provision stipulating that a business proprietor shall be automatically punished together with his/her employee or agent who committed an illegal act in the course of business regardless of whether the business proprietor himself/herself also has responsibility in the illegal act or not (unconstitutional, 2005 Hun-Ka 10, November 29, 2007);
5. constitutional complaint case on a statutory provision regarding appointment of a special prosecutor for the investigation of a president candidate under criminal suspicion (unconstitutional in part, 2007 Hun-Ma 1468, January 10, 2008);



6. constitutional complaint case filed by the President as an individual complainant regarding the freedom of expression (denied, 2007 Hun-Ma 700, January 17, 2008);
7. constitutional complaint case as to whether the prior review of broadcast advertisements amounts to the constitutionally prohibited prior censorship (unconstitutional, 2005 Hun-Ma 506, June 26, 2008);
8. constitutional complaint case regarding a statutory provision banning physicians from telling the sex of a fetus before a certain period of pregnancy (unconformable to the Constitution, 2004 Hun-Ma 1010, July 31, 2008);
9. case of adjudication on constitutionality of the Movie Promotion Act which provided for the standard of classification regarding the movies rated as "restricted screening" (unconformable to the Constitution, 2007 Hun-Ka 4, July 31, 2008);
10. case of adjudication on constitutionality of a statutory provision imposing criminal punishment on a person committing adultery (constitutional<sup>1</sup>, 2007 Hun-Ka 17, October 30, 2008);
11. constitutional complaint case regarding a provision of the Medical Service Act which gives massager licenses exclusively to the visually impaired (constitutional, 2006 Hun-Ma 1098, October 30, 2008);
12. constitutional complaint case regarding comprehensive real estate tax imposed on those who possess houses or lands exceeding certain value (unconstitutional in part, 2006 Hun-Ba 112, etc., November 13, 2008);
13. constitutional complaint case regarding a provision of the Act on Special Cases Concerning the Settlement of Traffic Accidents which allows unconditional immunity to drivers whose vehicles are covered by general car insurance as long as the driver has not committed violation of the "Ten Obligations" (unconstitutional, 2005 Hun-Ma 764, etc., February 26, 2009);
14. constitutional complaint case concerning the equality in voting value under the Municipal Order regarding the local government's election of metropolitan or provincial council members (unconformable to the Constitution, 2006 Hun-Ma 240, March 26, 2009);
15. constitutional complaint case regarding the Public Official Election Act which does not allow the person who is entitled to succeed to the seat of a vacant member in accordance with the order of the roll of candidates for the proportional representative National Assembly members to take the vacant seat if the vacancy accrues within 180 days before the date on which the vacant member's term of office expires (unconformable to the Constitution, 2008 Hun-Ma 413, June 25, 2009);
16. constitutional complaint case regarding the Public Official Election Act which does not allow the person who is entitled to succeed to the seat of a

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<sup>1</sup> Although the majority of five Justices voted for unconstitutional, the provision in this case was decided constitutional as a quorum of six Justices required for the ruling of unconstitutionality was not met.

vacant member in accordance with the order of the roll of candidates for the proportional representative local council members to take the vacant seat if the vacant member is deprived of his/her office for committing an election offense (unconstitutional, 2007 Hun-Ma 40, June 25, 2009) and;

17. competence dispute case regarding the jurisdiction over the sea between local governments (accepted, 2005 Hun-Ra 2, July 30, 2009).

For today's presentation, I chose only three cases among the aforementioned seventeen important cases, due to time constraints. The cases I would like to introduce include the prior censorship of broadcast advertisements case (2005 Hun-Ma 506), the visually impaired messenger case (2006 Hun-Ma 1098) and the case regarding a provision of the Act on Special Cases Concerning the Settlement of Traffic Accidents which provides drivers covered by general car insurance with immunity from criminal punishment (2005 Hun-Ma 764, etc.).

The first case involves the Court's decision which expands the scope of protection under the freedom of expression, by applying the prohibition against prior censorship by the Constitution to commercial advertisements. The second case pertains to the decision which allows preferential treatment for a social minority in order to protect their right to life. The third case is about the decision that it is in violation of the Constitution to exclude many drivers who cause traffic accidents leading to severe injury from criminal punishments only because their vehicles involved in the accidents are covered by general car insurance.

## **II. PRIOR CENSORSHIP OF BROADCAST ADVERTISEMENTS CASE**

<2005 Hun-Ma 506, June 26, 2008>

In this case, the Constitutional Court decided that subjecting broadcasting advertisements to prior review by the Korea Advertising Review Board, to which the Korea Broadcasting Commission has entrusted prior review, is prior censorship prohibited by the Constitution, and therefore violates the Constitution.

### **1. Background of the Case**

Complainant is a proprietor of Donghae Dried Fish in Gangneung city. On March 25, 2005, the complainant applied for a broadcast advertisement to the YTN broadcasting company for a commercial of Donghae Dried Fish, and was refused on the basis that it had not passed the prior review as specified in Article 32 of the Broadcasting Act (hereinafter, the "Act") and Article 21-1 of the Enforcement Decree of the Broadcasting Act (hereinafter, the "Enforcement Decree"). The complainant filed a constitutional complaint on May 23, 2005, claiming that his basic rights were violated by Article 32 Section 2 and Article 32 Section 3 of the Act, and Article 21-1 of the Enforcement Decree. In the meantime, the Act had been amended on February 29, 2008 as Act No. 8867, which transferred the authority of prior review from the Korea Broadcasting Commission to the Korea Communications Standards Commission.

## **2. Summary of the Decision**

The Constitutional Court, with a decision of 7(unconstitutional): 1(concurring): 1(nonconformity), ruled prior review of broadcast advertisements to be a form of censorship stipulated in the Constitution as unconstitutional, and therefore is in violation of the Constitution, for the following reasons.

### **A. MAJORITY OPINION OF SEVEN JUSTICES**

Article 21 Section 1 of the Constitution provides that all citizens shall enjoy freedom of speech and the press, thereby guaranteeing freedom of expression. As general advertisements also propagate ideology, knowledge, information, etc. to unspecified masses, they are also subject to protection of the freedom of speech and the press. In this regard, broadcast advertisements are also included in this protection. Article 21 Section 2 of the Constitution stipulates that licensing or censorship of speech and the press shall not be recognized. Here, the definition of censorship is screening and selecting opinions or ideology before the publication as a preventive measure, with initiatives of the administrative power. Such prior censorship is strictly prohibited, even if based in statute.

According to the provisions involved in this case, however, those who wish to air a broadcast advertisement must undergo prior review by the Korea Broadcasting Commission. The Korea Broadcasting Commission consists of nine committee members appointed by the President, and their duties include reviewing and deciding on issues such as basic planning for broadcasting, operation and programming of broadcast programs and advertisements, recommendation, approval, registration and cancellation of permits and re-issuing of permits for broadcasting business operators, CATV relay broadcasting business operators, CATV music broadcasting operators and electric signboard broadcasting business operators, mediation of joint business or conflicts between broadcasting business operators, CATV relay broadcasting business operators, CATV music broadcasting operators and electric signboard broadcasting business operators, matters pertaining to fair transaction and establishment of order in circulation of broadcast programs. In certain circumstances, the Commission must consult the Minister of Culture and Tourism, or hear the opinions of the Minister of Information and Communication, and the Chairman of the Fair Trade Commission. Considering the formation, duties, and arrangement of affairs of the Commission, it qualifies as an administrative organ.

On the other hand, Article 103 Section 2 of the former Act states that the Korea Broadcasting Commission must entrust a private organization with prior review of broadcast advertisements. According to this, the Korea Broadcasting Commission has commissioned prior review of broadcast advertisements to Korea Advertising Review Board (hereafter, the "Review Board"). The Review Board is a private organization, and has been in charge of prior review of broadcast advertisements since August 1, 2000.

However, prior review performed by the Review Board is a form of governmental censorship prohibited by the Constitution on the following grounds: the administration intervenes in the formation of the Review Board and the Review Board, as a private entity charged with the execution of administrative functions stipulated in the Korean Administrative Act, is under government's command and supervision on the entrusted matters; the Korea Broadcasting Commission has the right to enact and revise Regulations for review, which become the standard against which television advertisements are inspected; and the Review Board's operational expenses, office expenses, and personnel expenses are paid by the Korea Broadcasting Commission. For these reasons, it can be said that prior review performed by the Review Board is an extension of functions of the Korea Broadcasting Commission, carried out in the form of entrustment.

Meanwhile, Article 32 of the former Act was amended on Feb. 29, 2008 as Act No. 8867. The new Act gave the authority of prior review to the Korea Communications Standards Commission. However, the formation, function and arrangement of affairs of the Korea Communications Standards Commission are largely identical to those of the Korea Broadcasting Commission. Therefore, allowing the amended Act to stand, despite the similarity, would result in maintaining prior review which constitutes government censorship, being negligent of an unconstitutional state. Therefore, for legal consistency and judicial economy, the amended Act would also need to be declared unconstitutional. Thus, the Court hereby declares Article 32 Section 2 and Article 32 Section 3 of the amended Broadcasting Act unconstitutional, as well as the former Broadcasting Act.

## **B. CONCURRING OPINION OF ONE JUSTICE**

The provisions involved in this case are in violation of Article 21 Section 2 of the Constitution to the extent that they subject the broadcast advertisements that fall into the category of "speech and the press" stipulated in Article 21 Section 1 of the Constitution to prior review. And, regarding the broadcast advertisements that do not fall into this category of "speech and the press," the provisions are also in violation of Article 37 Section 2 of the Constitution to the extent that they fail to provide the public interest reasons for the prior review and the minimum level of such prior review.

In conclusion, the provisions involved in this case are in violation of Article 21 Section 2 or Article 37 Section 2 of the Constitution.

## **C. DISSENTING OPINION OF ONE JUSTICE (OPINION OF NONCONFORMITY)**

In this case, the intervention of public power in the formation and operation of the Review Board cannot be said to employ an appropriate means to achieve the purpose of the provisions in this case because the legislative purpose can be achieved by establishing a non-governmental, purely private advertising review board. Also, by uniformly subjecting all television advertisements to prior review,

the provisions in this case also restrict the freedom of expression, exceeding the scope to achieve the legislative purpose. However, although some of the provisions involved in this case are clearly in violation of the rule against excessive restriction under the Constitution, others also contain constitutional elements. Therefore, it is reasonable that a decision of constitutional unconstitutionality should be declared, thereby allowing succeeding legislations to eliminate unconstitutional elements in the provisions involved.

### **3. Aftermath of the Case**

When the decision was declared, the media reported the acceptance from advertisers such as the Korea Advertisers Association, which had continuously asked for abolishment of prior review of broadcast advertisements. They also remarked that this decision of unconstitutionality of prior review of broadcast advertisements which came after the decision of unconstitutionality regarding prior review of movies and records finally put a period to all prior censorship on major forms of expression.

The Korea Advertisers Association also welcomed the decision, stating that it eliminated the governmental prior review, which has been named as the biggest existing problem of the advertising market for a long time, and finally established a civilian self-review system. The existing conductor of prior review, Korea Communications Standards Commission, has announced plans to establish a post-review system of broadcast advertisements as soon as possible, in order to minimize confusion of the market and prevent customer inconveniences. (Yonhap News Agency, June 26, 2008; Chosun Ilbo, Hankook Ilbo, Kyunghyang Shinmun, The Hankyoreh, Segye Ilbo, etc. June 27, 2008)

## **III. VISUALLY IMPAIRED MASSAGERS CASE**

<2006Hun-Ma1098,1116,1117 (Consolidated), October 30, 2008>

In this case, the Constitutional Court decided that Article 61 Section 1 of the former Medical Service Act and other relevant provisions which exclude the non-visually impaired from massage services by giving massager licenses exclusively to the visually impaired do not contradict the Constitution.

### **1. Background of the Case**

Despite the Constitutional Court's previous decision that held unconstitutional the former regulation excluding the non-visually impaired from the massage profession, the National Assembly, on September 27, 2006, revised Article 61 Section 1 of the former Medical Service Act to grant exclusive license to the visually impaired (hereinafter the "Provision"), thereby retaining the restriction upon the non-visually impaired in attaining massager licenses. The complainants filed a constitutional complaint, arguing that the Provision barred non-visually impaired persons from obtaining the massager licenses and therefore infringed on their basic rights, including their freedom of occupational choice.

## **2. Summary of Decision**

In a vote of 6 (constitutional): 3 (unconstitutional), the Constitutional Court declared the Provision constitutional according to the following reasons.

## **3. Majority Opinion of Six Justices**

The Provision aims to guarantee the livelihood of the visually impaired based on, for instance, Article 34 Section 5 of the Constitution that concerns the protection of the impaired. In this case, such constitutional requirement to protect the impaired may clash with people's basic rights such as the freedom of occupational choice. Therefore, in reviewing whether or not the Provision exceeded the limit to the restriction on basic rights defined in Article 37 Section 2 of the Constitution, specifically concerning the adherence to principles of the least restrictive means and balance of interests, it would be necessary to comprehensively weigh factors, including the extent to which people's basic rights are regulated, characteristics of basic rights of the visually impaired and the status of relevant welfare policies, the massage business system as an occupation favouring the visually impaired and other feasible alternatives in addition to the stated constitutional requirement.

The Provision aims to enable the visually impaired to lead a rewarding life and realize their right to humane living conditions, which serves the legitimate legislative purpose. Furthermore, given the nature of massage services that barely require spatial movement and mobility compared to other types of jobs and that offer easier jobs for the visually impaired who are equipped with more developed sense of touch, it can be recognized that the Provision performs as a suitable means to serve the aforementioned legislative purpose as it assists the visually impaired in their livelihood and gives them the opportunity for occupational activities by allowing their monopoly over the massage business.

Moreover, the Provision does not contradict the principle of the least restrictive means, in that, amid insufficient welfare policies for the visually impaired, the massager is almost the only occupation available for the visually impaired, that there are no ample alternatives for them to maintain livelihood when the non-visually impaired are also authorized to engage in the massage profession, and that it is necessary to take preferential measures for the visually impaired—the minority who have been discriminated against over the years in terms of education, employment, and in many other areas—in order to realize substantial equality. Also, even when weighing public interests such as the right to livelihood of the visually impaired and the private interest sacrificed as a consequence such as people's freedom of occupational choice, it cannot be immediately concluded that there is imbalance between the two interests.

However, such a system favouring the visually impaired, which is designed to secure their right to livelihood by restricting people's basic rights, is nothing but a policy measure that we must inevitably accept in light of our social reality where efficient

policy means to guarantee visually impaired persons the right to livelihood is hardly found. It would also be impossible to maintain the system when the socioeconomic conditions are developed. In that sense, it is required of the government authorities, including the legislators, to perform a more serious and active review to devise plans to resolve the tension between the two conflicting basic rights—the right to livelihood of the visually impaired and the freedom of occupational choice of the non-visually impaired—and enable their harmonious coexistence.

Therefore, it cannot be seen that the Provision overrode the permitted boundary of restriction on basic rights set forth in Article 37 Section 2 of the Constitution and thus violated the freedom of occupational choice or equality rights of the non-visually impaired.

#### **4. Dissenting Opinion of Three Justices**

It can be duly recognized that guaranteeing the visually impaired their living and the opportunity to engage in occupational activities serves major public interests. Yet, removing the visually impaireds' monopoly over massager licenses does not make their relevant business activities impossible, and the single fact that they have to compete with the non-visually impaired does not give ample reason to view that there is a clear and evident risk of justifying the restriction on freedom of occupational choice. Furthermore, considering facts such as only some 17 percent of those with severe visual impairments, or 6,000 to 7,000 visually-impaired, are registered and working as massagers, it is doubted whether the Provision is effective in guaranteeing their livelihood and whether simply providing monopoly over the massage business offers the opportunity to choose one's job as a means to self actualization and personality development. Therefore, it is also difficult to approve that the Provision substantially and fully contributes to serving the relevant legislative purpose. In addition, provided that the visually impaireds' monopoly over the massage profession as prescribed by the Provision is not the only means on the table to provide the visually impaired with opportunities to guarantee their living and occupational activities, their monopoly is hardly viewed as an inevitable means to serve the legislative purpose. The Provision also contradicts the principle of the least restrictive means in protecting basic rights and, furthermore, it is difficult to see that the public interest protected by the Provision such as the guarantee of living of the visually impaired, overrides the freedom of occupational choice of the non-visually impaired.

Therefore, the Provision undermines the essence of the freedom of occupation by violating the rule against excessive restriction and therefore contradicts the Constitution.

#### **5. Aftermath of the Case**

The Constitutional Court had held the former regulation granting massager licenses exclusively to the visually impaired unconstitutional for violation of the non-visually

impaired's freedom of occupational choice. The press, with respect to the decision of this case that held the Provision constitutional, played up such aspects as that the system was inevitable to protect the socially underprivileged group of the visually impaired and issued positive reports as the following: "Exclusive massager licenses for the visually impaired turned constitutional from unconstitutional two years ago (October 31, 2008 issue, The Korea Economic Daily)," "The underprivileged need preferential measures, which is not a violation of people's freedom of occupation (November 3, 2008 issue, The Law Times)."

#### **IV. Restriction on Authority to Prosecute Offenders of Traffic Accidents Causing Serious Injury Case**

<2005Hun-Ma764, 2008Hun-Ma118 (Consolidated), February 26, 2009>

In this case, the Constitutional Court decided that the provision of the Act on Special Cases Concerning the Settlement of Traffic Accidents which prevents the prosecution of a driver who causes a traffic accident leading to serious injury by negligence in the conduct of business or gross negligence (bodily injury leading to life-threatening status, disability, incurable or intractable diseases; hereinafter the same applies) violates the Constitution.

##### **1. Background of the Case**

Article 4 Section 1 of the Act on Special Cases Concerning the Settlement of Traffic Accidents (hereinafter the "Provision") provides that even in cases where the driver causes a traffic accident leading to severe injury by negligence in the conduct of business or gross negligence, he/she shall not be prosecuted insofar as there is no violation of ten obligations such as traffic signal violation and drunk driving as prescribed by acts (hereinafter "violation of the Ten Obligations") and the vehicle in question is covered by general car insurance. The complainants, herein victims of traffic accidents suffering from severe aftereffects, filed a constitutional complaint arguing they had been infringed on their right to make a statement during trial proceedings and right to equality as the prosecutor decided that there was no authority to pursue prosecution against the traffic accident offenders pursuant to the Provision.

##### **2. Summary of Decision**

In an opinion of 7 (unconstitutional) to 2 (constitutional), the Constitutional Court decided that the Provision violated the Constitution according to the following reasons.

##### **A. Majority Opinion**

- a) In case traffic accident victims suffer serious injury, they should be, taking into account the details of accident causes, victim characteristics (the weak and the elderly, etc.), whether or not the offender is guilty of negligence and the degree of negligence thereof, etc., entitled to numerous actions other than



regular prosecution such as summary indictment or suspension of prosecution and, in case of being prosecuted, to make a statement during trial proceedings. Regardless, the Provision allows unconditional immunity to drivers whose vehicles are covered by general car insurance as long as the driver has not committed violation of the Ten Obligations, and this is against the least restrictive means.

Meanwhile, the traffic accident rate in Korea is very high compared to other OECD member countries. It is also hardly the case in developed countries that prosecution of drivers who caused traffic accidents is prevented just because the vehicles in question are insured. The drivers involved in traffic accidents are apt to make light of violating small traffic rules and neglect their duty of safe driving, and there is even a tendency among drivers inflicting severe injury on traffic accident victims to entrust post-accident management including payment of insurance money to insurers and not to sincerely commit themselves to recovering the damage of victims. In light of this fact, foreclosing the exercise of the right to make a statement during trial proceedings by the seriously injured victims pursuant to the Provision is equivalent to substantially neglecting the said victims' private interests in order to uphold the public interests—prompt traffic accident management or prevention of mass-production of individuals with criminal records. This is thus a violation of the principle of balance of interests.

Therefore, the Provision violates the rule against excessive restriction and thus the right to make a statement during trial proceedings of the victims who were severely injured in traffic accidents resulting from negligence in the conduct of business or gross negligence.

- b) Severely injured victims of traffic accidents that does not concern violation of the Ten Obligations are differentiated from those involved in accidents that are caused by violation of the Ten Obligations. Such discrimination constitutes a major restriction on the exercise of basic rights because whether the victim is able to exercise the right to make a statement during trial proceedings as guaranteed under the Constitution will depend on whether the responsible driver is prosecuted or not. Therefore, a strict standard of review shall be applied in judging if the right to equality has been infringed upon.

Severely injured victims of traffic accidents which are not caused by violation of the Ten Obligations become, due to an incidental circumstance where the traffic accidents they are involved in do not fall under the category specified in the proviso concerned, completely unable to exercise the right to make a statement during trial proceedings, whereas victims of traffic accidents that also incidentally involve violation of the Ten Obligations are entitled to exercise the right to make a statement during trial proceedings. Comparing the two contrary cases, the former victims are discriminated against without reasonable grounds.

In addition, in case the victim falls into a vegetative state, becomes severely impaired or develops an intractable disease as a result of a traffic accident, the resulting illegitimacy can by no means be concluded as smaller than that of death-causing traffic accidents. In that sense, it would also amount to discriminatory treatment without reasonable grounds to restrict the rights of the seriously injured victims, as opposed to those who died from the traffic accident, to make a statement during trial proceedings by not prosecuting the responsible drivers.

Therefore, having the traffic accident victims suffering serious injury but not involved with violation of the Ten Obligations addressed differently, pursuant to the Provision, from those who are involved in accidents caused by violation of the Ten Obligations or who consequently face death in the exercise of the right to make a statement during trial proceedings is an infringement on the former's equality rights.

### **B. Dissenting Opinion of Two Justices**

The Provision serves to promote prompt recovery from traffic accident damages by reminding the drivers that driving is an essential part of people's daily lives and thus encouraging drivers to buy general car insurance, etc. The Provision also serves an appropriate means to exempt drivers who cause accidents that do not involve violation of the Ten Obligations from criminal punishment.

If traffic accident offenders who are not involved in violation of the Ten Obligations can also be prosecuted for inflicting severe injury as the majority opinion argues, the problem is that it would be difficult to decide clearly whether the injury is severe or not. Additionally, as the degree of traffic accident injury is not proportionate to the degree of the drivers' negligence but may vary by incidental circumstances such as the victim's age, sex, types of injury and physical characteristics, it would be difficult to secure predictability and coherence in the application of law.

### **C. Aftermath of the Case**

The auto insurance industry expects that this decision will further alert drivers to safe driving and thus lead to a reduced traffic accident rate. The prosecution, in reference to the cases of the Supreme Court, legislation and theories of foreign countries, etc., proposed a criteria for serious injury (major damage on brain or main organs, loss or significant deformation of major body parts such as limb amputation, permanent loss of important body functions such as vision, hearing, linguistic sense and reproduction, serious mental disorders or hardly curable diseases resulting from aftereffects, etc.), but the police expressed concern by stating that the proposed standard is still unclear and thus may cause confusion in the application of law (February 27, 2009, Yonhap News).

According to nationwide statistics of the Police Administration on the number of traffic accidents collected from February 26 to March 4, 2009, the death toll stood at 98, a 23.4 percent decrease from that of the same period last year (128). The number of accidents that caused injury was 6047, a 8.3 percent drop from that of last year (6598), and the incidence of minor accidents went down by 6.1 percent from last year to 3914 (March 6, 2009, Maeil Business Newspaper).

MOHD ZAKI BIN ABDUL WAHAB

## **IMPORTANT DECISIONS OF MALAYSIAN COURTS IN RECENT YEARS**

In Malaysia the Federal Court, the Court of Appeal and the High Court have the power to decide any issues related to the Constitution. Recently there are few cases decided by Malaysian courts related to constitutional provisions.

### **I. DATO' SERI AHMAD NIZAR JAMALUDIN V. DATO' ZAMRI ABDUL KADIR**

The applicant filed a proceeding in the High Court of Malaysia seeking a declaration he is at all the material times the Menteri Besar of Perak. The applicant was appointed Menteri Besar of Perak having won a seat in the Perak State Assembly in the 12th General Election. He led a coalition of three political parties known as People Alliance. He was later dismissed by the Sultan of Perak as the Menteri Besar after His Royal Highness found him to loose support of the majority of the Perak State Assemblymen. However there was no vote of non-confidence tabled in the Perak State Assembly to prove the Applicant's loss of support.

The Respondent is a leader of the National Front, who ruled the Perak State since the Merdeka day. He was appointed by His Royal Highness to replace the Applicant as the Menteri Besar.

Before the High Court, an issue on the interpretation of Arts. XVI(6) of the Perak State Constitution was raised. Under this articles if the Menteri loses the support of the majority of the State Assemblyman he must resign unless the Sultan agrees to his advice to dissolve the State Assembly. There was uncertainty about who had the command of the majority support in this case. The Applicant and the Respondent were said to have the equal number of State Assemblymen supporting them. However there were three Assemblymen said to be independent but will give their support to the Respondent.

His Royal Highness requested all the 28 Assemblymen who were supporting the Respondent together with the three independent Assemblymen to have an audience with His Royal Highness. After the audience, his Royal Highness having satisfied that the applicant had lost the majority support issued a media statement for the Applicant together with his Exco Member to resign. If he refused he would be deemed to be dismissed.

It was held by the High Court that His Royal Highness the Sultan of Perak does not have the power to dismiss a Menteri Besar under the Perak State Constitution and the loss of confidence can only be issued by vote on the floor. Accordingly the High Court granted the requested declaration. The respondent filed an appeal against the decision to the Court of Appeal.

The Court of Appeal by unanimous decision allowed the appeal. The Court of Appeal ruled that the loss of confidence can not only be evidenced by a vote on the floor. His Royal Highness had satisfied himself that the applicant had lost the support of the majority of the State Assemblymen and had rightly dismissed the applicant as the Menteri Besar after His Royal Highness declined to exercise his discretion to dissolve the State Assembly as requested by the applicant.

## **II. JAMALUDIN BIN MOHD RADZI & ORS V SIVAKUMAR A/L VARATHARAJU NAIDU [2009] 4 MLJ 593**

There are three applicants in this case. They were elected to the Perak State Assembly in the 12th General Election. All the three applicants and the Respondent were initially members of People Alliance, a coalition of three political parties. As the People Alliance had most of the seats in the Perak State Assembly, they were given the right to form a government to rule the Perak State. The Respondent was elected the Speaker for the State Assembly.

The three applicants later resigned from their parties and the Respondent declared their seats to be vacant based on undated letters the three had signed earlier and in the possession of the Respondent. The Respondent submitted these three undated letters to the Election Commission to prove the vacancies and requested the Commission to hold by-election for the vacant seats. The three applicants retracted their earlier letters and contended that they never intended to vacate their seats and did not resign from their seats voluntarily.

The Election Commission refused to hold bye-election to fill-up the vacancy as requested by the Respondent. In the opinion of the Commission there was no vacancy occurred in the Perak State Assembly on the ground that there was an ambiguity as to whether the applicants had resigned voluntarily from their seats. The three applicants then filed a suit against the Respondent in the High Court at Ipoh praying for a declaration that they were still elected representatives.

This case was referred directly to the Federal Court by relying on Art. 63 of the Perak Constitution to determine few questions of law. The first was whether, on a true interpretation of Art. XXXVI (5) ("Art. 36(5)") of the Perak Constitution read together with s. 12 (3) of the Elections Act 1958, the Election Commission is the rightful body which establishes if there is casual vacancy of a State Legislative Assembly seat. The second question to be decided by the Federal was whether the Speaker enjoys the immunity from due process of law as to the validity of any proceedings in the Assembly as guaranteed under Art. 72(1) of the Federal Constitution.

On this point the Federal Court ruled that the Speaker cannot interfere with the constitutional duty of the Election Commission to establish whether there is a casual vacancy or not. The receipt by the Speaker of a letter of resignation purporting to be coming from an Assemblyman will not automatically cause the Assemblyman's seat to become vacant. Under Art. 35 of the Perak Constitution, the Speaker's role is limited to receiving the written resignation letter of the Assemblyman and forwarding the same to the Election Commission which will then by its own procedure determine whether a casual vacancy has arisen or not. Once the casual vacancy is established, it is the duty of the Election Commission to fill the vacancy by holding a by-election.

On the second issue the Court opined that the declaration of the vacancies of the seats by the Speaker does not fall within the term "proceedings of the State Legislative Assembly", thus the immunity from the due process of law as to the validity of any proceedings in the Assembly as guaranteed under Art. 72(1) of the Federal Constitution did not apply in this case.

### **III. SUBASHINI RAJASINGAM V. SARAVANAN THANGATHORAY & OTHER APPEAL [2008] 2 MLJ 147**

The parties were originally Hindus and married under the Law Reform (Marriage and Divorce) Act 1976. They had two children from the marriage. The husband later converted himself and the elder son to Islam. Subsequent to that he commenced proceedings in the Syariah High Court in Kuala Lumpur for the dissolution of the marriage and for the custody of the elder son.

Later the wife filed a petition for the dissolution of the marriage in the High Court of Malaya coupled with an application for custody and ancillary reliefs. She also filed an ex parte application for an injunction to restrain the husband from moving the Syariah Court for reliefs against a non-muslim wife.

The husband challenged the application for the injunction. After an inter parte hearing the injunction was set aside. The wife's appeal to the Court of Appeal was also dismissed later. The wife subsequently obtained leave to appeal to the Federal Court on question of law.

One of the issues before the court is regarding the jurisdiction of the courts. The question was whether the High Court can grant an injunction to restrain the husband, pending the disposal of the wife's petition, from commencing and continuing with any form of proceedings in any Syariah Court. Clause (1A) of Art. 121 of the Federal Constitution was highlighted in view of the issue.

Under Clause 1A of the Article 121 of the Federal Constitution the court ruled that secular courts should have no jurisdiction on matters within the jurisdiction of the Syariah.

Abdul Aziz bin Mohamed FCJ opined that the dissolution of the marriage in this case, which is a non-Muslim marriage, and matters consequential or ancillary thereto, including maintenance, custody of children and other ancillary reliefs, are not matters within the jurisdiction of the Syariah Courts. Clause (1A) of Art. 121, which denies to the secular courts jurisdiction in respect of “any matter within the jurisdiction of the Syariah Courts”, therefore does not operate to deny to the High Court jurisdiction in respect of the matter that is given by s. 51 of the Law Reform Act.

The learned judge made a reference to s. 46 of the Administration of Islamic Law (Federal Territories) Act 1993 and s. 46 of the Islamic Family Law (Federal Territories) Act 1984 and stated that the latter does not enable a Syariah Court to bring about dissolution of a non-Muslim marriage where a party to it has converted to Islam.

He opined it is obvious from the very wording of the section that it is predicated on the supposition that in Islamic law the conversion of a party to Islam by itself may or does operate to dissolve the marriage. The section prevents that supposition from having a legal effect unless and until it is confirmed by the Syariah Court. What the Syariah Court does under the section is merely to confirm that the conversion has operated to dissolve the marriage. The Syariah Court does not do anything under s. 46(2) to bring about dissolution of the marriage. It merely confirms that dissolution has taken place by reason of conversion. In relation to that section, therefore, clause (1A) of Art. 121 does not apply to deprive the High Court of jurisdiction under s. 51 of the Law Reform Act.

Nik Hashim bin Nik Ab. Rahman FCJ on the other hand held that both civil and Syariah courts are creatures of statutes such as the Federal Constitution, the Acts of Parliament and the State Enactments. These two courts are administered separately and they are independent of each other. Although the Syariah courts are state courts they are not lower in status than the civil courts. Both are of equal standing under the Federal Constitution. This recognition of the Syariah courts was largely due to Art. 121(1A) of the Federal Constitution which excludes the jurisdiction of the civil courts on any matter within the jurisdiction of the Syariah courts. This view has been shared by Azmel Haji Maamor FCJ and the Federal Court by way of majority, concluding that the civil court cannot be moved to enjoin a validly obtained order of a Syariah court of competent jurisdiction. The injunction obtained by the wife, although addressed to the husband, was in effect a stay of proceedings of the husband’s applications in the Syariah High Court and this amounts to interference by the High Court of the husband’s exercise of his right as a Muslim to pursue his remedies in the Syariah High Court. Obviously, the law does not permit such interference.

#### **IV. PUBLIC PROSECUTOR V. KOK WAH WAH KUAN [2007] 6 CLJ 341**

The accused was charged for the offence of murder punishable under s. 302 of the Penal Code. He was 12 years and 9 months old at the time of the commission of the offence.

The High Court convicted the accused and ordered him to be detained during the pleasure of the Yang Di-Pertuan Agong.

The accused appealed and the Court of Appeal upheld the conviction but set aside the sentence imposed on him and released him from custody on the sole ground that s. 97(2) of the Child Act 2001 was unconstitutional as it contravenes the doctrine of separation of power which is an integral part of the Malaysian Constitution.

The case went for further appeal to the Federal Court. The court ruled that the doctrine of separation of powers is merely a political doctrine and it is not absolute. The doctrine is not a provision of the Constitution and no provision of law can be struck down as being unconstitutional merely because it offended that doctrine. So the court held that Sect. 97(2) of the Child Act 2001 was not inconsistent with any provision of the Constitution.

**V. Yab Dato' Dr Zambray Bin Abd Kadir & ORS v YB Sivakumar A/L Varatharaju Naidu (Attorney General of Malaysia, Intervener) [2009] 4 MLJ 24**

The Respondent in this case was the Speaker of the Perak State Assembly. The applicants were the Menteri Besar and Exco Member for the Perak State. The case was raised upon a complaint made to the Respondent by a member of the State Assembly that the applicants committed acts of contempt of the State Legislative Assembly. The Respondent subsequently issued summonses pursuant to Standing Order 72 of the Standing Orders of the State Assembly of Perak containing the alleged breaches of privilege and a direction against the applicants to attend before the Committee of Privileges ('Committee') on 18 February 2009.

All the applicants were later suspended for a long period of time from attending the State Assembly sitting.

The applicants filed an originating summons in the High Court seeking, inter alia, a declaration that the Respondent's decision suspending and prohibiting the applicants from attending sessions of the State Legislative Assembly was against the laws of the Constitution of Perak and was accordingly null and void. The Respondent argued his action was protected under Art 72(1) of the Malaysian Constitution.

The Federal Court held that Article XLIV of the Perak State Constitution read together with the Standing Orders of the Legislative Assembly and the Legislative Assembly (Privileges) Enactment 1959 do not provide for the offence of contempt and the resultant punishment of suspension from attending sessions of the State Legislative Assembly. Thus in its opinion the Respondent was not protected by Art. 72(1), the issues raised by the applicants were, hence, justiciable.



ADOLFO S. AZCUNA

## REPORT ON IMPORTANT DECISIONS IN RECENT YEARS – PHILIPPINES

The Philippine Supreme Court has recently decided three landmark cases on the constitutionality of the acts of the Government and the Legislature.

### **1. THE MOA CASE<sup>1</sup>**

This has to do with the Memorandum of Agreement drawn up by the Government's Peace Panel together with the Muslim rebel group, the MILF, covering points of agreement ranging from territory, autonomy and amendments of the Constitution.

The Government and the MILF had initialed the agreement and scheduled its signing in Kuala Lumpur in the presence of representatives from Malaysia, the United States, and other countries.

Suit was filed in the Supreme Court by various groups including affected provinces in the island of Mindanao and their officials who claimed lack of consultation on the MOA and assailed its constitutionality.

After issuing a temporary restraining order to stop the signing, the Court held a full-blown oral argument on the cases and thereafter extensive memoranda were filed by all parties.

On October 14, 2008, the Supreme Court decided the cases and annulled the MOA on grounds of unconstitutionality, mainly for lack of consultation of affected citizens and stakeholders on such far-reaching and grave matters as sovereignty, territory, armed forces and amendments to the Constitution.

### **2. THE NICOLE-LANCE CPL. SMITH CASE<sup>2</sup>**

This involved a prosecution for rape filed by a Filipina woman against a member of the Armed Forces of the United States present in the Philippines under the RP-US Visiting Forces Agreement (VFA).

Defendants Smith and companions were arrested but turned over to the custody of the United States under the provisions of the VFA, pursuant to which they were

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<sup>1</sup> *The Province of North Cotabato v. Government*, G.R. No. 183591, October 14, 2008.

<sup>2</sup> *Nicolas v. Sec. Romulo*, G.R. No. 175888, February 11, 2009.

brought to the court every time there was trial.

The trial court convicted Lance Cpl. Smith and acquitted his companions.

Smith appealed but the trial court ordered his immediate detention in a Philippine jail until further orders. Nevertheless, Smith was thereafter transferred to the United States custody under an agreement made between the Secretary of Foreign Affairs of the Philippines and the United States Ambassador wherein he could be held in confinement at the U.S. Embassy during the pendency of his appeal.

A suit was filed in the intermediate appeals court to question the handover of custody to United States authorities after conviction pending appeal. The Court of Appeals upheld the arrangement.

The case was then brought to the Supreme Court by way of review of the Court of Appeals' decision.

The Supreme Court held that the VFA was valid but that under its provisions the custody of Smith after conviction pending appeal should be in a Philippine facility agreed upon by both parties.

It thereupon ordered the Philippine Government to take steps to carry out the provision by calling on the United States to agree on the specific Philippine facility for Smith's confinement.

Before this could be done, however, Smith was acquitted in the main case.

### **3. THE MANILA BAY CASE<sup>3</sup>**

This case involved the clean up of Manila Bay. Some thirteen government agencies were sued to compel them to implement the laws that would clean up the polluted bay.

The Supreme Court, in an unprecedented exercise of the power of issuing the writ of continuing mandamus, deemed it the duty of these government agencies to carry out a planned clean up of Manila Bay and set up the procedure for it to monitor compliance of the program over the years. The Court followed the example of the Supreme Court of India in ordering the cleaning up of the Ganges River.

These three recent cases illustrate the active involvement of the Supreme Court of the Philippines in delineating boundaries of power under the Constitution and in unhesitatingly enforcing the constitutional mandate.

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<sup>3</sup> *Metropolitan Manila Development Authority v. Concerned Residents of Manila Bay*, G.R. Nos. 171947-48, December 18, 2008.

SUPHOT KHAIMUK

## IMPORTANT DECISIONS IN RECENT YEARS IN THAILAND

### **I. CONSTITUTIONAL COURT RULING NO. 12/ 2552, DATED THE 19TH AUGUST 2009:**

The Court of Justice (The Saraburee Provincial Court) submitted the objection of the defendant to the Constitutional Court for a ruling in the case of whether a Military Government Order in 1972 was contrary to or inconsistent the Constitution of the Kingdom of Thailand.

In this case, the Constitutional Court held that a Military Government Order which prohibited the owners or possessors of a shop operating food and beverages businesses as well as selling their products from 01.00 am. to 05.00 am. was contrary to or inconsistent with the Constitution of the Kingdom of Thailand in these two following issues.

#### **1. The restriction of liberties in occupation shall be imposed by the exemption provision and must be in accordance with the protection of rights and liberties principle provided by the Constitution**

The Constitutional Court decides that the law restricting rights and liberties not merely consider the country atmosphere and the way of life of people in the time of enactment the law but must also take those concerns to the time after the promulgation of law into the court consideration as well.

In this case, it was clear when the Military Government Order in 1972 was enacted, the Military Council seized the sovereign power by having both the legislative power and executive power in the administration of country for the purpose of maintaining public order and peaceful society until the Constitution had been promulgated. In that period, the Military Council as the government, intended to have the people staying in peace without conducting anything that may cause the chaos and send the serious affect to the security of State; therefore, they must enact a specific law for the purposes of restriction some rights and liberties of people. Likewise, such law limited the liberty to engage in operating food and beverages businesses or occupations and restricted the rights and liberties of consumer due to the fact that the prevention of the people traveling in the night time was difficult to inspect and might led to collective activities of the people that unavoidable effect the security of state and the peaceful society.

However, in the peaceful circumstances as the present, the individual way of life is different from that of the period of seizure as well as an affect of the globalization changes in the society and a key factor of the economic growth of country. In particular, the convenient transportation in the whole nation contributed to the easier traveling in any place and any time as well as the development of technology that made the cycle of daily life change from the past until the people cannot determine the certain time for the working or relaxing. As a result, the government cannot control the people to live at home for the whole night due to the necessity of individual traveling in order to handle theirs businesses or contact with other purposes, including the necessity of the owners or occupants in food or beverages operation to run their normal businesses.

For these reasons, the Constitutional Court ruled that the Military Government Order in 1972 limited the liberties to run a business or an occupation and restricted all undertakings of a fair and free competition, and therefore, held that the Military Government Order in 1972 was contrary to or inconsistent with the provision on restriction of the rights and liberties of the people as provided by the Constitution as well as the rights of engagement in a business or an occupation of the Constitution of the Kingdom of Thailand, 1997.

## **2. An exemption for enacting the law restricting of the liberties by virtue of law.**

The Constitutional Court decided that the provisions of law specifically enacted for restriction of the rights and liberties fell within these three following criteria.

- A. A consideration on the provisions of law which limit the liberties in running a business or an occupation must enact for specific purposes in relation to the rights and liberties prescribed by the Constitution. The Constitution has laid down conditions for enacting such restrictive laws within the specific purposes as follows:
  - (1) maintaining the security and safety of the State or the national economy;
  - (2) protecting the public utilities;
  - (3) maintaining public order and good morals;
  - (4) regulating the engagement in an occupation;
  - (5) protecting the consumers;
  - (6) planning urban and rural areas;
  - (7) preserving natural resources, environment and public safety
  - (8) preventing monopoly or eliminating unfair competition among enterprises.
- B. The restriction of rights and liberties of a person as recognized by the Constitution must consider the necessity.
- C. The limitation shall not affect the essential substances of such rights and liberties.

In this case, the Constitutional Court decided that the time limitation for operating and selling the food and beverages during the period of the Military Government Order not only restricted an opportunity of people to run in the businesses and obstructed the people to undertake businesses freely and fairly by imposed unnecessary measures but also put the burden on the other people who need to consume those food and beverages during night time on their normal basis. Though there was a measure to relieve the restriction of laws by seeking the permission of the Police Director or the Governor, such measure would only conduct an unnecessary process and would be complicated the exercise of liberties through people under the Constitution. In practice, it was also difficult to force any person in many areas who engage in the businesses to get the commercial licenses from the high ranking officers and will unavoidably cause wrongful influences of those officers on the businesses. The restriction of rights and liberties to run in the business or the occupation and to undertake free and fair competition did not enact for the specific purposes provided by this Constitution, and therefore imposed the unnecessary limitation of the liberties which affected the essential substances of rights and liberties of the people.

As such, the essence of this decision is to set a precedent of its ruling on the protection of rights and liberties of the individuals, even if a party who submitted the petition is an ordinary merchant without any power or authority. Thus, the rights and liberties recognized by decisions of the Constitutional Court shall achieve the actual manifestation of people's rights and liberties in practice.

DONG-HEUB LEE

# REPORT ON CURRENT STATUS AND FURTHER PROCEDURES OF ESTABLISHING THE ASIAN ASSOCIATION

## I. HISTORY OVERVIEW

The movement towards establishing a permanent regional body for Asian constitutional courts officially started when the heads of the Constitutional Council of Cambodia, Constitutional Court of Indonesia, Constitutional Court of Korea, Constitutional Court of Mongolia, Supreme Court of the Philippines and the Constitutional Court of Thailand gathered at the 3rd Seminar of Asian Constitutional Court Judges in Ulaan Baatar, Mongolia on September 8, 2005 and adopted a memorandum of understanding aimed at establishing an Asian association of constitutional courts and other similar institutions exercising constitutional jurisdiction. Driven by the cause, it was agreed among participating countries to set up the Preparatory Committee for the Establishment of the Association of Asian Constitutional Courts in accordance with the Memorandum of Understanding on Setting up a Preparatory Committee for the Establishment of the Association of Asian Constitutional Courts, which was signed by the representatives from the Constitutional Court of Indonesia, Constitutional Court of Korea, Constitutional Court of Mongolia and the Supreme Court of the Philippines. Much has been achieved over the first and second meetings of Preparatory Committee in April 2008 and May 2009, respectively, including increase in membership and revisions to the draft Statute of the Association of Asian Constitutional Courts (tentatively agreed as "Asian Association of Constitutional Courts and Equivalent Organs") adopted in October 2007.

## II. RECENT DEVELOPMENTS (SECOND PREPARATORY COMMITTEE MEETING)

The following points reflect the details of the latest developments of the Preparatory Committee's activities by mainly focusing on the outcome of the Second Meeting of the Preparatory Committee:

- The Second Meeting of the Preparatory Committee for the Establishment of the Association of Asian Constitutional Courts was held in cooperation with Konrad Adenauer Stiftung (KAS) in Seoul, May 12-13, 2009, with the participation of delegates from the Constitutional Court of Korea, Constitutional Court of the Kyrgyz Republic, Constitutional Court of Mongolia, Constitutional Court of the Republic of Uzbekistan, Federal Court of Malaysia and Supreme Court of the

Philippines (The First Meeting was held also in Seoul on April 7-8, 2008, attended by delegations from Indonesia, Korea, Mongolia and the Philippines).

- The Kyrgyz Republic and the Republic of Uzbekistan attended the Meeting initially as observers but were later accepted as members. The Constitutional Courts of Indonesia and Thailand had originally planned to attend the Meeting but failed to come due to their unexpected circumstances.
- The members reported their activities since the First Meeting of the Preparatory Committee to expand membership. The Constitutional Court of Korea, in its capacity as the chair country, and KAS contacted countries including Japan and the Republic of India, which showed initial interest but replied they would first just follow the developments of the Preparatory Committee. Mongolia's efforts for extended membership specifically encouraged the Kyrgyz Republic and the Republic of Uzbekistan to attend the Second Meeting and therefore to join the Preparatory Committee.
- In reviewing the agreements reached during the First Meeting of the Preparatory Committee, new participants were encouraged to present their views. Some participants, mindful of the limitation of a regional judicial union, expressed concerns over the wording "to protect human rights" in the "Objectives and Function" of the draft Statute. In this context, it was suggested that the term "promote" be added to the existing text to accommodate such concerns.
- As regards the "Chairmanship" in the draft Statute, the need to determine the precise period of presidency, which also concerns the frequency of meetings, was raised, and participants reached an understanding that a two-year term was appropriate with the possibility of holding at least one meeting every two years under the competent chairmanship. Besides, the rotational mechanism of the "Secretariat" in association with the two-year term of Chairmanship was agreed in principle. Yet, there were also views that a certain country might assume the Chairmanship for a longer term and serve as a semi-permanent Secretariat.
- In discussing the name of the Association, names such as "Asian Conference of Constitutional Justice," "Asian Association of Constitutional Adjudicative Organs" and "Association of Constitutional Courts of Asian Countries" were proposed, but it was finally agreed that "Asian Association of Constitutional Courts and Equivalent Organs" would serve as a tentative name for the time being and the issue would be discussed further in the next meeting.
- A member raised concerns about "equal contribution of each member" in "Financing" of the draft Statute and stressed the need to differentiate the share of contribution depending on respective capabilities. Members also discussed the convenience of preliminarily assigning a fixed amount of financial contribution to

each member, stating that it would help promote members' budget security and facilitate internal decisions. It was suggested that travel and hotel accommodation expenses be borne by each member, apart from the common budget utilized for general expenses, and that members would come back to the next meeting with more information including their own budget capabilities and discuss the issue further.

- The Kyrgyz Republic and the Republic of Uzbekistan expressed their intention to join the Preparatory Committee and, with four out of six members present and thus fulfilling the quorum for decision-making, were unanimously accepted as members.
- The participants reached an understanding that it was more important for the Preparatory Committee to efficiently and without additional delay make progress in launching the Association than to concentrate on further expanding the membership. In this context, it was agreed that members may as well be narrowed to the existing members—the Kyrgyz Republic, Malaysia, Mongolia, the Republic of Korea, the Republic of the Philippines, the Republic of Uzbekistan as well as Kingdom of Thailand and the Republic of Indonesia—and the previously contacted countries such as Japan and the Republic of India. Meanwhile, the Republic of Korea proposed to continue to call China's attention to the Preparatory Committee and/or the Association.
- The participants positively reviewed the possibility of holding the Third Meeting of the Preparatory Committee in Seoul in spring next year.

### **III. OTHER DEVELOPMENTS**

Follow-up measures have taken place since the Second Meeting of the Preparatory Committee in May of this year.

A few contacts have been made as regards communicating and promoting the Preparatory Committee's activities in order to bring other Asian countries on board. After the Second Meeting of the Preparatory Committee, Korea sent the Chairperson's Summary and draft Statute to the Supreme Court of Japan, the Supreme Court of India, the Constitutional Court of Indonesia and the Constitutional Court of Thailand for their information. The Japanese Supreme Court replied that it found the materials interesting and informative while the Thai Constitutional Court responded by expressing interest in the Preparatory Committee's activities. Regarding the Supreme People's Court of the People's Republic of China, the Court sent a reply to us in June, stating that since the Court does not have jurisdiction in constitutional matters, it would be difficult for it to participate in the Asian Constitutional Court Conference. And China's Law Committee of the National People's Congress was contacted through the Embassy of the Republic of Korea in China and it requested the information about Preparatory Committee's activities in February of this year,



and Korea sent outcome documents of the first and second Preparatory Committee meetings. In response to our request to confirm its decision, the Committee said that the matter is now under consideration.

In the meantime, the opinions and suggestions of members presented up until the Second Meeting of the Preparatory Committee have been collected and reflected on the draft Statute of the Association through revisions, and the revised draft Statute as of now is attached herewith.

While awaiting the Third Meeting of the Preparatory Committee next year, the members will continue to build on the understanding and consensus reached in the First and Second Meeting of the Preparatory Committee.

### **<Preparatory Committee's 2nd Draft Statute>**

*[Note: This draft reflects the results of the Second Meeting of the Preparatory Committee held in May, 2009 with the basis of the 1st draft which was drafted by combining both Korean draft and Adenauer Foundations' draft and distributed at the Second Meeting. It should be noted that this can be neither an official draft nor a final draft. This is distributed for your reference purpose only.]*

*Revisions made in accordance with the agreement of 1st meetings are marked with underline, while issues to be discussed at next meeting are marked in Italic.]*

## **The Statute of the Association of Asian Constitutional Courts**

### **Preamble**

The Presidents of Asian constitutional courts and other similar institutions exercising constitutional jurisdiction:

RECALLING the Memorandum of Understanding to establish the Asian Conference of Constitutional Courts which was adopted at the 3rd Seminar of Asian Constitutional Court Judges in Ulan Bator, Mongolia, on 8 September, 2005;

TAKING NOTE with appreciation of the work done by the Preparatory Committee for the Establishment of the Association of Asian Constitutional Courts since October 2007;

CONSIDERING the importance of close cooperation among Asian constitutional courts and other similar institutions exercising constitutional jurisdiction for the progress of democracy and the rule of law in Asia;

REALIZING the need of sharing experience, exchanging information, and discussing issues of mutual concern to constitutional practice and jurisprudence for the development of Asian constitutional courts;

CONVINCED of the establishment of a permanently functioning body composed of Asian constitutional courts and equivalent institutions will enhance cooperation and exchanges among them into a higher dimension;

HAVE THEREFORE AGREED on the following provisions for the establishment of an association on the basis of mutual respects and with a due regard to the principle of judicial independence:

## **PART I OBJECTIVES AND GENERAL PROVISIONS**

### **Article 1 Name**

The name of the association shall be "The Asian Association of Constitutional Courts and Equivalent Organs" (tentatively)(hereinafter referred to as "the Association").

### **Article 2 Legal Status**

The Association shall operate as an autonomous, independent, and non-political body in accordance with this Statute. It shall not produce any legally binding effects outside the Association.

### **Article 3 Objectives**

The objectives of the Association shall be, to promote within the full extent of its power,

- 1) protection of human rights;
- 2) guarantee of democracy;
- 3) implementation of rule of law; and
- 4) cooperation and exchanges among members.

### **Article 4 Functions**

With a view to achieving the objectives set out in Article 3, the Association shall have the following functions:

- (a) To hold regular meetings;
- (b) To organize activities such as symposia, workshops and seminars among members;
- (c) To facilitate sharing experiences of constitutional case-law or adjudication through different mediums;

- (d) To promote the exchange of information on the working methods and constitutional case-law of member courts;
- (e) To promote the exchange views on institutional, structural and operational issues as regards public-law and constitutional jurisdiction;
- (f) To meet requests from members to provide them with technical assistance in their enhancing the independence of constitutional courts as an essential factor in guaranteeing and implementing democracy and the rule of law, in particular with a view to securing protection of human rights;
- (g) To support efforts for maintaining regular contacts among members; and
- (h) To enter into cooperation with organizations related to constitutional matters as deemed necessary.

## **Article 5**

### **Working Language**

1. The official working language of the Association shall be English.
2. Each member may request simultaneous translation into another language, at its own expense. The host court shall take care of this additional simultaneous translation insofar as is technically possible.
3. The President of the Association may be requested to allow that an interpreter translates the intervention of a delegation, at the latter's own expense, into English.

## **PART II**

### **MEMBERSHIP**

#### **Article 6**

##### **Membership**

1. Only one institution from each sovereign country in the region of Asia shall have the status of a member of the Association.
2. The status of a member is open to Asian Constitutional Courts and similar institutions which exercise constitutional jurisdiction, in particular reviewing the conformity of legislation and which conduct their judicial activities in accordance with the principle of judicial independence, being bound by the fundamental principles of democracy and the rule of law and the duty to respect human rights.
3. Members of the Association are:
  - (a) Original members that are the parties to this Statute in accordance with Article 30(Entry into Force); and
  - (b) Constitutional courts or equivalent institutions in the region of Asia that are admitted in accordance with Article 7(Admission to Membership).

## **Article 7**

### **Admission to Membership**

1. A written application to be admitted to the Association as a member should be addressed to the Board of Members and submitted to the President of the Association.
2. In so far as possible the following documents should accompany an application;
  - (a) Legal instruments governing the establishment and composition of the candidate institution and the appointment and status of judges; and
  - (b) Texts establishing the nature and scope of its jurisdiction;
  - (c) Ratification or the acceptance letter of this Statute, signed by the President of the candidate constitutional court or equivalent institution, addressed to the President of the Association.
3. Upon the receipt of the application and necessary documents, the President of the Association transmits their copies to all members.
4. The admission to membership will be effected by a decision of the Board of Members.

## **Article 8**

### **Loss of Membership**

1. Any member may at any time declare its intention to withdraw from the Association. This declaration shall be made in written notification to the President of the Association.
2. Where there is an important reason for concluding that effective co-operation in good faith between the Association and a member is no longer possible, a member may be declared to have lost its membership with written notification by the President of the Association.
3. The President of the Association shall inform all members of the name of members withdrawing from the Association.

## **PART III**

### **OBSERVERS AND GUESTS**

## **Article 9**

### **Observers**

1. The status of an observer may be granted to supranational courts, constitutional courts and equivalent institutions that do not have membership to the Association.

2. Observers are allowed to:
  - (a) Attend the Congress;
  - (b) Make presentation of a report on the specific themes of the Congress upon the prior request of the President of the Association;
  - (c) Respond questions relating to their presentation; and
  - (d) Participate in the Association's activities such as symposia, workshops and seminars.
3. A written application to be admitted to the Association as an observer should be addressed to the Board of Members and submitted to the President of the Association.
4. Upon the receipt of the application for an observer status, the President of the Association transmits their copies to all members.
5. The admission to observer status will be effected by a decision of the Board of Members.
6. Any member may propose which observers would be invited to the next Congress. Such proposal shall be approved by the Board of Members.

## **Article 10**

### **Guests**

The President of the Association may invite guests to attend the Congress and Association's activities such as symposia, workshops and seminars.

## **PART IV**

### **ORGANS**

## **Article 11**

### **Organs**

The organs of the Association shall be the Board of Members and the Congress.

## **PART V**

### **BOARD OF MEMBERS**

## **Article 12**

### **Composition**

The Board of Members shall be composed of the Presidents of the Courts and the institutions with member status. The Presidents shall be accompanied by their

Secretary General, or, where appropriate, a member of their court or institution or of its secretariat.

### **Article 13**

#### **Competence**

The Board of Members is the central decision-making body and has competence in the following matters:

- (a) admission, suspension and expulsion of members;
- (b) admission and expulsion of observers and guests;
- (c) fixing the date and venue of the meetings of the Congress to be held at regular intervals; the selection of topics and choice of Association languages;
- (d) approval of the Association budget;
- (e) fixing the financial contributions to the Congress;
- (f) approving financial gifts from a third party;
- (g) adoption of the final declaration of the Association;
- (h) drawing up the Association regulations;
- (i) amending the Statute;
- (j) dissolving the Association.
- (k) taking decision on recommendations from the other organs of the Association;
- (f) adoption of the Association's work programmes for next two years; and
- (o) taking decision on matters related to the Association, not specified in this Statute.

### **Article 14**

#### **Chairmanship**

1. The President of the Court which is to host the next Congress shall be the President of the Association.
2. The term of office of the President shall be two years.
3. The President of the Association shall preside over the Board of Members as well as the Congress. If it deems necessary, the President may designate participating Presidents of other members to preside over parts of the meeting except the opening and the closing of the Congress.

### **Article 15**

#### **Meetings**

1. The Board of Members shall in so far as possible hold at least one meeting between the Congress dates and, in principle, on the day preceding the opening of the Congress.

2. The Board of Members meets in general on the day preceding the opening of the Congress and also before the closing of the Congress.
3. In general, a preparatory meeting will be held after the last Congress in order to prepare the next Congress. Other meetings of the Board of Members may be held if necessary.
4. Decisions may be taken by way of circulation.

## **Article 16**

### **Agenda**

1. The President of the Association shall send written invitation to all members of the Association at least three months in advance of the opening of the Board of Members. The written invitation to the meetings of the Board of Members shall be accompanied by the agenda for the meeting.
2. The agenda mentions the individual topics of the debates. It may be modified or completed at the beginning of the meeting.
3. The provisional agenda of the Board of Members shall include:
  - (a) The individual topics of the debates;
  - (b) The budget for the next two years and the financial statement of the Association;
  - (c) The reports on the work of the Association;
  - (d) The recommendations from other organs of the Association; and
  - (e) All items that the President of the Association deems it necessary to put before the Board of Members.
4. The decisions taken shall be written down in the minutes of the meeting. The Secretariat shall be responsible for preparing the minutes of the meeting.
5. Members shall be provided in writing with the minutes.

## **Article 17**

### **Venue of meetings:**

The Board of Members shall, as a rule, meet at the seat of the court responsible for organizing the next Congress. In a particular case, the Board of Members may fix another venue.

## **Article 18**

### **Quorum**

1. The Board of Members shall be empowered to take decisions if at least two thirds of the members of the Association are present at the meeting or are represented.
2. A judge, the Secretary General or another designated staff member of the court concerned may represent the President in meetings and vote on his/her behalf.

## **Article 19**

### **Voting regulations**

1. The Board of Members shall take decisions by a consensus (or two thirds majority) of members present at a meeting.
2. Each member shall have one vote only.

## **PART VI**

### **CONGRESS**

## **Article 20**

### **Composition**

The following shall be entitled to participate in the Congress: members, observers and guests. However, observers and guests are not allowed to participate in voting or decision-making.

## **Article 21**

### **Meetings**

1. The Association of the Asian Constitutional Courts holds in general a Congress at least every two years. The Congress is held to share experiences and to exchange views in the field of case-law or adjudication.
2. The Congress comprises an opening and a closing session as well as the debates.
3. The Congress shall start with a solemn opening session. It ends with a special closing session.
4. The Board of Members may designate a chairperson for each meeting in the Congress.



5. For the preparatory meeting and the Congress, the host court provides the participants with an updated list of members with voting right, observers and guests.

## **PART VII SECRETARIAT**

### **Article 22 Secretariat**

The Secretariat of the Association shall be provided by the member organizing the next Congress.

## **PART VIII FINANCING**

### **Article 23 Principles of Financing**

#### **1. The general rules on the sharing of costs:**

The Association shall be financed primarily by the equal contributions of members. National financial and budget regulations shall apply.

#### **2. Other costs and their financing:**

- (a) The equal contributions of members shall be fixed to cover the costs of organizing the Congress (in particular the hire of premises, printing, translation and interpretation costs, the administrative overheads and the cost of transport to the venues of the main and preparatory meetings);
- (b) The President of the Association may require observers to pay a fee to contribute to the costs of organizing the Congress. This fee shall be fixed in the light of the costs incurred in respect of the services provided to observers, taking into account the contribution paid by members; and
- (c) The acceptance of all types of financial gifts from third shall be subject to prior approval by the Board of Members.

#### **3. Congress Budget:**

The Court organizing the Congress shall draw up, in so far as possible not later than one year before the opening of the Congress, a budget for the Congress which shall be submitted for the approval of the Board of Members.

#### **4. Final settlement of accounts:**

The final settlement is effected on the basis of a final statement of accounts drawn up by the organizing Court after the end of the Congress.

## **Article 24**

### **Financial Contribution of Members**

1. In principle, members bear their own travel and hotel accommodation expenses.
2. The general costs of organizing the Congress and which are to be born in equal parts are the following:
  - a. rental of the premises;
  - b. printing costs;
  - c. costs for the translation of written documents;
  - d. interpretation costs;
  - e. administrative overheads; and
  - f. costs for local transportation.
3. The Board of Members decides whether and how far the following costs may be part of the general Association costs:
  - a. costs for food;
  - b. costs to any recreational events;
  - c. specific costs of providing an Internet site for the Association; and
  - d. costs for specific security measures.
4. The Board of Members will furthermore decide on the number of delegates per country whose costs will be born by the budget of the Association.

## **Article 25**

### **Financial Contribution of Observers**

1. Observers bear their own travel and accommodation expenses.
2. Observers may be required to pay a participation fee for each participant, which comprises the costs of food and any recreational events, as well as a reduced, fixed amount which contributes to the general Association costs.
3. The costs for special programs are billed separately.
4. The amount of the participation fee is decided based on the proposal made by the host country.

## **Article 26**

### **Financial Contribution of Guests**

1. In general, guests bear their own travel and accommodation expenses.

2. Guests do not contribute to the general Association costs and are not required to pay the costs of food and any recreational events.
3. Costs for special programs will in general be charged to the guests.
4. The host country remains free to cover partly or entirely all other costs.
5. The Board of Members may moreover decide that these costs are partly or entirely included in the general Association costs.

## **PART IX MISCELLANEOUS PROVISIONS**

### **Article 27 Liaison Officer**

1. Each member shall designate one officer as Liaison Officer.
2. The Liaison Officer shall act as the channel of communication among members.

### **Article 28 Seating Arrangements**

1. At the Congress, there would be not more than five seats for each member and not more than two seats for each observer. Members are to be seated up-front, followed by observers. In general, seats for members, and observers are arranged by alphabetical order of their countries.
2. Seats for guests will be arranged by the member organizing the meeting.
3. At the meetings, there should also be seats for secretarial works, not far from the chair.

### **Article 29 Media and Publicity**

1. The media (press, radio, television) is invited to the opening of the Congress.
2. The debates are not open to the public.
3. After the closing session, a press conference may be held by the President of the Association, accompanied, if appropriate, by other participants of the meeting.

**PART X  
FINAL PROVISIONS**

**Article 30  
Entry into Force**

This Statute shall enter into force when all the members of the Preparatory Committee agree on the Statute. The approved Statute will be adopted and announced at the opening ceremony of the Association to bring formality to the scene and finalize the effectuation.

**Article 31  
Original Copy**

This Statute shall be drawn up in English. If translation of this Statute is made for reference purpose, the English version shall be authentic.

**Article 32  
Dissolution**

The Association may be dissolved by a decision of the Board of Members. The remaining finances, if any, shall be distributed proportionally between the contributors.

IN WITNESS WHEREOF, the undersigned, being duly authorized by their respective constitutional court or equivalent institution, have signed this Statute in a single original in the English language.

DONE in \_\_\_\_\_, on \_\_\_\_\_, 200\_\_

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

SCHNUTZ RUDOLF DÜRR

## **THE WORLD CONFERENCE ON CONSTITUTIONAL JUSTICE**

The Venice Commission co-operates not only with Asian courts but also with other regional and linguistic bodies: Ibero-American, European, Southern African, French Speaking, Portuguese speaking, Arabic. In January of this year the Commission invited all these regional partners the first time to the World Conference on Constitutional Justice. I am glad to see here some of you who were present at this very successful event in Cape Town. Some 10 regional groups and 93 Courts and Councils met at this occasion. The Conference adopted a final declaration, which calls for the establishment of the Conference as a permanent body.

In April 2009 the Bureau, composed according to the Cape Town Declaration of the representatives of the regional and linguistic groups, met in Mexico and prepared a draft Statute. This draft Statute envisages inter alia that the Asian Constitutional Courts be invited to become a founding group of the World Conference.

Already in Mexico, the Ibero-American Conference welcomed this draft statute in principle. Since then, the Joint Council on Constitutional Justice (Courts in member and observer states of the Venice Commission), French Speaking Courts – ACCPUF and the Southern African Chief Justices Forum have met and welcomed the idea of the creation of a World Conference on Constitutional Justice.

I would like to use the occasion of the present Asian Conference for presenting a few of the main elements of this draft Statute and for seeking your approval for the establishment of the World Conference.

The Membership in the World Conference will be both to individual constitutional and supreme courts exercising constitutional jurisdiction as well as the regional or linguistic groups uniting them.

The objectives of the World Conference are the promotion of constitutional justice – understood as constitutional review including human rights case-law – as a key element for democracy, the protection of human rights and the rule of law. The World Conference promotes the exchange of experiences and case-law within the groups, between them and between the individual courts and supports the independence of its members.

At least every three years, the World Conference will organise events called congresses like the first one in Cape Town. The World Conference will have its case-law database and web-forum as a means to enable regular exchanges between the members between the congresses. For this purpose, the Venice Commission will provide its CODICES database with already some 7000 cases and the well-established Venice Forum. Upon their request, the Conference will also be able to offer its good offices to its members.

The Conference is to have three organs. The General Assembly is composed of the individual courts and meets at the occasion of the congresses. The regional and linguistic groups are represented in the Bureau of the Conference. The Presidency of the Bureau, which represents the World Conference in external contacts, rotates annually between the groups. The Bureau, which meets annually, *inter alia* decides on the topic and venue of the next Congress, and - upon their request - offers its good offices to the members of the Conference. It is foreseen that the Venice Commission ensures the Secretariat of the Conference.

A topic intensely discussed within the regional groups which met so far was finances. While the financial contributions by the members are of course welcome, the draft Statute does not contain any obligation to contribute to the budget.

Here in Ulaanbaatar, I would kindly seek your approval in principle of this draft Statute and I look forward to your remarks and possible proposals for amendment.

What are the next steps? In October, the Conference of Constitutional Control Organs of Countries of Young Democracy and the Conference of European Constitutional Courts will examine the draft Statute. The same month, the Bureau of the French speaking courts will meet again to formulate any proposals for amendment. Informally, already in October and formally at their meeting in December, the Arab Courts will discuss the World Conference. Finally, on 12 December, the Bureau of the World Conference is to meet again, this time in Venice, Italy, with a view to finalise the draft Statute and to open it for acceptance by the groups and individual courts.

If you have not yet been able to do so, I would be grateful if you could look through the draft Statute and inform me whether you and your Court agree with the idea of the Creation of a World Conference in principle and whether you have any suggestions for amendments to the draft Statute, which could be discussed and integrated at the Bureau meeting in December.

I should also like use this occasion to inform you that the Federal Supreme Court of Brazil has kindly offered to host the Second Congress of the World Conference on Constitutional Justice in Rio de Janeiro, in early 2011. Your Courts will of course be invited to this event.

Thank you very much for your kind understanding and assistance in the endeavour to establish a World Conference on Constitutional Justice.

PROGRAMME

**CONSTITUTIONAL REVIEW AND  
SEPARATION OF POWERS**

SIXTH CONFERENCE OF  
ASIAN CONSTITUTIONAL COURT JUDGES  
24 TO 26 SEPTEMBER 2009  
ULAAN BAATAR/MONGOLIA

**THURSDAY, 24 SEPTEMBER 2009**

Arrival of International Participants  
at Chinggis Khaan Airport at Ulaanbaatar

Transfer to Hotel KEMPINSKI -Khan Palace

**FRIDAY, 25 SEPTEMBER 2009**

- 0900 – 0920 hrs Welcome and Opening Remarks  
**Hon. Prof. J. Byambadorj**  
Chairman of Constitutional Court of Mongolia  
**Dr. Thomas Schrapel**  
Country Representative of Konrad Adenauer Stiftung to Mongolia
- 0920 – 0950 hrs Keynote Speech  
**Hon. Prof. Dr. J. Byambadorj**  
Chairman of Constitutional Court of Mongolia
- 0950 - 1000 hrs **Photo Session**
- 1000 - 1015 hrs Tea & Coffee Break

**Session One: The Relation Between Constitutional Review Organs, Governments And The Ordinary Judiciary**

Chair: **Prof. Dr. J. Byambadorj**,  
Chairman of the Constitutional Court of Mongolia

1015 – 1045 hrs **Rt. Hon. Justice Arifin Bin Zakaria**  
Chief Judge of Malaya, Federal Court of Malaysia

1045 – 1115 hrs **H.E. Top Sam**  
Member of the Constitutional Council of Cambodia

1115 – 1145 hrs **Hon. Justice Sydykova Svetlana**  
President of the Constitutional Court of Kyrgyzstan

1145 – 1230 hrs Q & A

1230 – 1400 hrs Oasis Restaurant (1st Floor of hotel)

**Session Two: Constitutional Adjudication Vis-à-vis The Legislature**

Chair: **Clauspeter Hill, Rule-of-Law Programme**,  
Konrad-Adenauer-Stiftung, Singapore

1400 – 1430 hrs **Hon. Justice Prof. Dr. Rudolf Mellinghoff**  
Federal Constitutional Court of Germany

1430 – 1500 hrs **Hon. Justice Dong-Heub Lee**  
Constitutional Court of Korea

1500 – 1530 hrs **Hon. Justice Dr. Harjono, S.H., MCL**  
Constitutional Court of Indonesia

1530 – 1600 hrs Q & A session

1600 – 1615 hrs Tea & Coffee Break

1615 – 1645 hrs **Hon. Justice Sayyora Khakimova**  
Constitutional Court of Uzbekistan

1645 – 1715 hrs **Hon. Justice Suphot Khaimuk**  
Justice of the Constitutional Court of Thailand

1715 – 1745 hrs **Hon. Justice Adolfo S. Azcuna**  
Chancellor of the Judicial Academy of the Philippines

1745 – 1815 hrs Q & A session

1900 hrs Official Welcome Dinner (Chinggis Khaan Camp)  
Hosted by: **Hon. Prof. J. Byambadorj**  
Chairman of the Constitutional Court of Mongolia



**SATURDAY, 26 SEPTEMBER 2009****Session Three: Reports On Important Decisions In Recent Years**

Chair: **Hon. Justice Adolfo S. Azcuna,**  
Chancellor of the Judicial Academy, Philippines

*(Remarks: The countries are mentioned here in alphabetical order without any priority.)*

0900 – 1015 hrs Presentations of 15 min. each

H.E. Chan Rassy  
Secretary General, Constitutional Council of Cambodia

Hon. Justice Prof. Dr. Achmad Sodiki, S.H.  
Constitutional Court of Indonesia

Hon. Justice Dong-Heub Lee  
Constitutional Court of Korea

Hon. Justice Kurbanova Chynara  
Constitutional Court of Kyrgyzstan

Mr. Mohd Zaki Bin Abdul Wahab  
Registrar, Federal Court of Malaysia

1015 – 1045 hrs Q & A

1045 – 1100 hrs Tea & Coffee Break

Chair: **Clauspeter Hill, Rule-of-Law Programme,**  
Konrad-Adenauer-Stiftung, Singapore

1100 – 1200 hrs Hon. Justice Prof. N. Jantsan  
Deputy Chairman of the Constitutional Court of Mongolia

Hon. Justice Adolfo S. Azcuna  
Chancellor of the Judicial Academy of the Philippines

Hon. Justice Suphot Khaimuk  
Justice of the Constitutional Court of Thailand

Hon. Justice Sayyora Khakimova  
Constitutional Court of Uzbekistan

1200 – 1230 hrs Q & A session

**Session Four: Establishment Of An Asian Association Of Constitutional Courts And Equivalent Organs**

1230 – 1250 hrs Report by the Chairman of the Preparatory Committee on the current status and further procedures

**Hon. Justice Dong-Heub Lee**  
Constitutional Court of Korea

1250 – 1300 hrs Short intervention by  
**Dr. Schnutz Rudolf Durr**  
Head of Constitutional Justice Division, Venice Commission  
Council of Europe, Strasbourg

1300 – 1315 hrs Summing Up and Closing Remarks  
**Hon. Prof. J. Byambadorj**  
Chairman of Constitutional Court of Mongolia

1315 – 1430 hrs Lunch at Oasis Restaurant

19.30 hrs Dinner (venue tbc)

**SUNDAY, 27 SEPTEMBER 2009**

Departure of International Participants



Freedom, justice and solidarity are the basic principles underlying the work of the Konrad-Adenauer-Stiftung (KAS). KAS is a political foundation, closely associated with the Christian Democratic Union of Germany (CDU).

In 2005 the Konrad-Adenauer-Stiftung (KAS) started a regional programme to support the development of the Rule of Law in Asian countries. The Rule of Law Programme Asia is one of five regional rule of law programmes managed worldwide by KAS. With this new project, the foundation's long-term goal is to contribute to the development and enhancement of an efficient legal system, based on the rule of law, as a core element of democratic statehood.

It is important in this context to initiate or intensify the discussion process, in order to provide and extend respectively the constitutional foundations. This includes the establishment or stabilisation of those institutions or organisations which guarantee the constitutional order and the enforcement of citizens' rights in accordance with the Rule of Law. Very important institutions in this context are constitutional courts, respectively highest courts adjudicating on constitutional matters.

This is why the Konrad-Adenauer-Stiftung organizes the Conference of Asian Constitutional Court Judges and Judges from the highest courts of Asian countries as an annually event since 2003. The meetings of Constitutional Judges aim at creating a broad network to further improve the effectiveness of the relevant institutions, providing a forum for the exchange of experiences and reflection.

The articles of this book are papers prepared for the 6th Conference of Asian Constitutional Court Judges and Judges from the highest courts of Asian countries, held 2009 in Ulaanbaatar, Mongolia.

For more information on the work of the Konrad-Adenauer-Stiftung and the Foundation's Regional Office in Singapore, please visit our website at –

German URL: [www.kas.de/rspasien](http://www.kas.de/rspasien)

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