1st International Symposium of the AACC Secretariat for Research and Development

아시아헌법재판소연합 연구사무국 제1차 재판관 국제회의

Constitutionalism in Asia : Past, Present and Future

아시아 지역의 입헌주의 : 과거, 현재 그리고 미래

Date : *10/30(Mon) ~ 11/2(Thu)* | ***Venue :*** *Seoul Global Center (9F)*

헌법재판소
Constitutional Court of Korea

AACC SRD
AACC Secretariat for Research and Development

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Day 1 (31 October 2017)

Time	Program	
09:30~10:00	○ Registration of Participants	
10:00~10:30	**Opening Ceremony**	○ **Welcoming Remarks** - **Yi-Su Kim,** Acting President of the Constitutional Court of Korea ○ **Congratulatory Remarks** - **Raus Sharif,** Chief Justice of the Federal Court of Malaysia - **Han-Chul Park,** Former President of the Constitutional Court of Korea - **Giovanni Buquicchio,** President of the Venice Commission ○ **Report on the AACC SRD** - **AACC SRD** ○ **Group Photo**
10:30～10:45	**Coffee Break**	
10:45~12:15	**Session 1**	**Diversity in Constitutional Justice : Differences among AACC Members** ***Chair : Jinsung Lee**, Justice, Constitutional Court of Korea* ○ **1st PT : Bakyt Nurmukhanov** Secretary General, Constitutional Council of the Republic of Kazakhstan ○ **2nd PT : Raus Sharif** Chief Justice, Federal Court of Malaysia ○ **3rd PT : Kyaw San** Justice, Constitutional Tribunal of the Union of Myanmar ○ **4th PT : Dorj Odbayar** Chairman, Constitutional Court of Mongolia ○ **5th PT : Mukhabbat Gulzor** Justice, Constitutional Court of the Republic of Tajikistan ○ **Q & A**
12:15~14:30	**Luncheon**	
14:30~16:00	**Session 2**	**Protecting and Promoting Fundamental Rights through Constitutional Adjudication** ***Chair : Dorj Odbayar**, Chairman, Constitutional Court of Mongolia* ○ **1st PT : Mohammad Qasim Hashimzai** President, Independent Commission for Overseeing the Implementation of the Constitution of Afghanistan ○ **2nd PT : Seo Kiseog** Justice, Constitutional Court of Korea ○ **3rd PT : Erkinbek Mamyrov** President, Constitutional Chamber of the Supreme Court of the Kyrgyz Republic ○ **4th PT : Sergei Sergevnin** Head of the Department of International Relations and Research of Constitutional Review Practice, Constitutional Court of the Russian Federation ○ **5th PT : Punya Udchachon** Justice, The Constitutional Court of the Kingdom of Thailand ○ **Q & A**
16:00~16:30	**Visit to the AACC Secretariat for Research and Development**	

Day 2 (1 November 2017)

Time	Program	
10:00~12:00	**Session 3-1**	**International Human Rights Norms and Constitutional Adjudication : Convergence and Divergence** ***Chair : Raus Sharif****, Justice, Federal Court of Malaysia*
		○ **1st PT : Wahiduddin Adams** Justice, The Constitutional Court of the Republic of Indonesia ○ **2nd PT : Ilwon Kang** Justice, Constitutional Court of Korea ○ **3rd PT : Hasan Tahsin Gökcan** Justice, The Constitutional Court of the Republic of Turkey ○ **4th PT : Bakhtiyar Mirbabaev** Chairman, Constitutional Court of the Republic of Uzbekistan
		○ **Q & A**
12:00~14:00	**Luncheon**	
14:00~15:30	**Session 3-2**	**International Human Rights Norms and Constitutional Adjudication : Convergence and Divergence** ***Chair : Mohammad Qasim Hashimzai*** *President, Independent Commission for Overseeing the Implementation of the Constitution of Afghanistan*
		○ **1st PT : Sylvain Oré** President, African Court on Human and Peoples' Rights ○ **2nd PT : Martin Nettesheim** Professor, University of Tübingen
		○ **Q & A**
	Session 4	**Necessity of Communication and Cooperation among Constitutional Courts and Equivalent Institutions : Focusing on Expert and Guest suggestions** ***Chair : Mohammad Qasim Hashimzai*** *President, Independent Commission for Overseeing the Implementation of the Constitution of Afghanistan*
		○ **1st PT : Akiko Ejima** Professor, Meiji University ○ **2nd PT : Chuljoon Chang** Professor, Dankook University
		○ **Q & A**
15:30~15:40	**Closing Ceremony**	○ **Closing Report** - **AACC SRD**
15:40~17:00	**Visit to the Constitutional Court of Korea**	
19:00~21:00	**Farwell Dinner**	

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Necessity of Communication and Cooperation among Constitutional Courts and Equivalent Institutions : Focusing on Expert and Guest suggestions

Session 1

Diversity in Constitutional Justice : Differences among AACC Members

Chair : Jinsung Lee,
Justice, Constitutional Court of Korea

1st PT : Bakyt Nurmukhanov
Secretary General,
Constitutional Council of the Republic of Kazakhstan

2nd PT : Raus Sharif
Chief Justice,
Federal Court of Malaysia

3rd PT : Kyaw San
Justice,
Constitutional Tribunal of the Union of Myanmar

4th PT : Dorj Odbayar
Chairman,
Constitutional Court of Mongolia

5th PT : Mukhabbat Gulzor
Justice,
Constitutional Court of the Republic of Tajikistan

Session 1

Diversity in Constitutional Justice : Differences among AACC Members

Modern Trends of Development of the Constitutional Control in the Republic of Kazakhstan

1st PT : Bakyt Nurmukhanov

Secretary General,
Constitutional Council of the Republic of Kazakhstan

Руководитель аппарата Конституционного Совета Республики Казахстан
Нурмуханов Б.М.,
кандидат юридических наук

Современные тренды в развитии конституционного контроля в Республике Казахстан

Позвольте приветствовать вас и выразить благодарность Конституционному Суду Республики Корея за приглашение и прекрасную организацию работы.

Я хотел бы также поздравить коллег по Ассоциации с началом работы Секретариата по исследованиям и развитию и пожелать больших успехов в достижении поставленных целей.

Сегодняшний форум посвящен актуальной теме. В эпоху глобализации обеспечение верховенства и правовой охраны Конституции, прямого и непосредственного действия ее норм, защита основных прав и свобод человека, основ конституционного строя как важнейшие задачи органов конституционной юстиции имеют особую актуальность и предопределяют необходимость глубокого исследования и совершенствования инструментов их реализации.

Конституционный контроль в Казахстане возложен на квазисудебный государственный орган - Конституционный Совет, пришедший на смену Конституционному Суду при принятии действующего Основного Закона страны в 1995 году.

С момента создания организационно-правовые основы Конституционного Совета находятся в процессе постоянного совершенствования. Реализованные в этом направлении меры были приняты в рамках как национальных потребностей, так и общих закономерностей мирового конституционного развития.

Как показывает международный опыт, одним из направлений дальнейшего совершенствования органов конституционной юрисдикции является расширение их полномочий и круга субъектов обращения.

В Казахстане также наблюдается тенденция поэтапного расширения полномочий органа конституционного контроля. Так, одним из положений конституционной

реформы 2007 года явилось предоставление Конституционному Совету Казахстана права рассматривать на соответствие Основному Закону постановлений Парламента и его Палат.

Очередные меры по модернизации деятельности Конституционного Совета приняты в этом году. Как вам известно, в начале текущего года в Казахстане по инициативе Главы государства проведена конституционная реформа, которая затронула и правовые основы органа конституционного контроля.

Увеличилось количество субъектов обращения в Конституционный Совет в порядке последующего конституционного контроля. Если раньше к таковым относились только суды, то теперь подобным полномочием наделен Президент Республики, который в интересах защиты прав и свобод человека и гражданина, обеспечения национальной безопасности, суверенитета и целостности государства направляет обращения в Конституционный Совет о рассмотрении вступившего в силу закона или иного правового акта на соответствие Конституции.

Конституционные изменения предусмотрели обязательное получение заключения Конституционного Совета о соответствии предлагаемых изменений в Конституцию требованиям пункта 2 статьи 91 Основного Закона до их вынесения на республиканский референдум или на рассмотрение Парламента. В этой статье Конституции закреплен перечень особо охраняемых конституционных ценностей, которые не могут быть изменены ни в каких случаях: независимость государства, унитарность и территориальная целостность Республики, форма ее правления, а также основополагающие принципы деятельности Республики, заложенные Основателем независимого Казахстана, Первым Президентом Республики Казахстан - Елбасы, и его статус.

По инициативе Главы государства исключен пункт 4 статьи 73 Конституции, который предусматривал право Президента Республики вносить возражения на решение Конституционного Совета и регулировал порядок и последствия их рассмотрения. Принятое решение придает окончательный характер актам Конституционного Совета, что соответствует общепринятым стандартам.

Во многих странах в органы конституционного правосудия имеют право обращаться граждане. Несколько лет назад это было сделано в Турции, Украине и других странах.

В ряде государств граждане обращаются в органы конституционного контроля опосредованно через суды. В 2008 году в Конституцию Франции было внесено дополнение (статья 61-1), согласно которому если в связи с рассмотрением какого-либо дела в суде делается утверждение о том, что то или иное положение закона наносит ущерб гарантируемым Конституцией правам и свободам, запрос об этом может быть

передан в Конституционный Совет Государственным Советом или Кассационным Судом.

Следует отметить, что функцией последующего контроля Конституционный Совет Республики Казахстан был наделен с самого начала, т.е. с 1995 года. В Казахстане любой суд может обратиться в Конституционный Совет в порядке статьи 78 Основного Закона, согласно которой суды не вправе применять законы и иные нормативные правовые акты, ущемляющие закрепленные Конституцией права и свободы человека и гражданина. Кроме того, предметом рассмотрения могут быть не только нормы законов, но и других нормативных правовых актов.

В целях полноценного использования потенциала последующего контроля совершенствуется процессуальное законодательство страны, регулирующее вопросы обращения судов в Конституционный Совет. В 2012 году Парламентом Республики был принят специальный закон, направленный на приведение Уголовно-процессуального, Гражданского процессуального кодексов, а также Кодекса об административных правонарушениях в соответствие с упомянутой статьей 78 Конституции.

Конституционным законом от 3 июля 2013 года в процессуальные законы были внесены поправки, предусматривающие модернизацию порядка обращения судов в Конституционный Совет, в частности: случаи признания неконституционным закона, подлежащего применению по уголовному делу, отнесены к обстоятельствам, исключающим производство по уголовному делу; закреплена обязанность суда при наличии ходатайства стороны защиты приостановить производство по делу, если Конституционным Советом по инициативе другого суда принято к производству представление о признании этого закона неконституционным; установлена обязанность судов откладывать стадию постановления приговора в случаях, когда Конституционным Советом по инициативе другого суда проводится проверка конституционности закона, подлежащего применению по уголовному делу и др.

После отмеченной конституционной реформы в этом году внесены поправки в законодательство Казахстана, регламентирующее деятельность Конституционного Совета, которые создают условия для эффективного осуществления его полномочий. Конституционным законом от 15 июня 2017 года «О внесении изменений и дополнений в некоторые конституционные законы Республики Казахстан» из пункта 3 статьи 22 Конституционного закона «О Конституционном Совете Республики Казахстан» исключено требование о необходимости подписания представления суда в Конституционный Совет председателем соответствующего суда. Теперь обращение должно быть подписано надлежащим субъектом. Таковым при единоличном рассмотрении дела является судья, а при коллегиальном (в апелляционном и кассационном порядке) - председательствующий в заседании.

Завершая свое выступление, хотел бы отметить, что принятые меры в конечном итоге направлены на обеспечение полноценной реализации Конституции, пресечение фактов ее нарушений, усиление механизмов защиты прав и свобод человека и особо охраняемых конституционных ценностей.

Secretary General of the Constitutional Council of the Republic of Kazakhstan
Mr. Bakyt Nurmukhanov
Candidate of Law

Modern trends in the development of constitutional control in the Republic of Kazakhstan

Let me greet you and express my gratitude to the Constitutional Court of the Republic of Korea for the invitation and excellent organization of the work.

I would also like to congratulate my colleagues by the Association on the beginning of the work of the Secretariat for Research and Development and wish you great success in achieving your goals.

Today's forum is devoted to the current topic. In the era of globalization, ensuring the supremacy and legal protection of the Constitution, the direct and immediate operation of its norms, the protection of fundamental human rights and freedoms, the foundations of the constitutional order as the most important tasks of the bodies of constitutional justice are of particular relevance and predetermine the need for in-depth research and improvement of instruments for their implementation.

Constitutional control in Kazakhstan is entrusted to a quasi-judicial state body - the Constitutional Council, which replaced the Constitutional Court when the current Basic Law of the country was adopted in 1995.

Since the establishment of the organizational and legal framework of the Constitutional Council are in the process of continuous improvement. The activities implemented in this direction were adopted in the framework of both national needs and the general laws of world constitutional development.

As international experience shows, one of the directions for further improvement of the bodies of constitutional jurisdiction is the expansion of their powers and the circle of subjects of circulation.

In Kazakhstan, there is also a tendency to gradually expand the powers of the body of constitutional control. Thus, one of the provisions of the constitutional reform of 2007 was the empowerment of the Constitutional Council of Kazakhstan with the right to consider the

compliance with the Basic Law of the resolutions of the Parliament and its Chambers.

The next steps to modernize the activities of the Constitutional Council were adopted this year. As you know, at the beginning of this year in Kazakhstan, by the initiative of the Head of State, a constitutional reform was carried out, which also touched upon the legal foundations of the body of constitutional control.

The number of subjects of the appeal to the Constitutional Council has increased in the order of the subsequent constitutional control. If earlier only courts were relevant to such, now the President of the Republic is endowed with such authority, which, in the interests of protecting human and civil rights and freedoms, ensuring national security, sovereignty and integrity of the state, sends appeals to the Constitutional Council on considering the law or other legal act that came into force for compliance with the Constitution.

The Constitutional amendments envisaged mandatory receipt of the Constitutional Council's opinion on the compliance of the proposed amendments to the Constitution with the requirements of paragraph 2 of Article 91 of the Basic Law before they are submitted to the republican referendum or to the Parliament. This article of the Constitution contains a list of especially protected constitutional values that can not be changed in any cases: the independence of the state, the unitarity and territorial integrity of the Republic, the form of its government, and the fundamental principles of the Republic's activities laid down by the Founder of Independent Kazakhstan, the First President of the Republic of Kazakhstan - Elbasy, and his status.

By the initiative of the Head of State, Article 73 (4) of the Constitution was excluded, which provided for the right of the President of the Republic to object to the decision of the Constitutional Council and regulated the procedure and consequences of their consideration. The adopted decision attaches the final character to the acts of the Constitutional Council, which corresponds to generally accepted standards.

In many countries citizens have the right to appeal to the bodies of constitutional justice. Several years ago this was done in Turkey, Ukraine and other countries.

In a number of countries, citizens appeal to the bodies of constitutional control indirectly through the courts. In 2008, an addition was added to the French Constitution (art. 61-1), according to which if in connection with the consideration of a case in court an assertion is made that a provision of the law violates the rights and freedoms guaranteed by the Constitution, the request for This may be referred to the Constitutional Council by the State Council or the Court of Cassation.

It should be noted that the Constitutional Council of the Republic of Kazakhstan was endowed with the function of follow-up control from the very beginning, since 1995. In Kazakhstan, any court can apply to the Constitutional Council in accordance with Article 78

of the Basic Law, according to which courts are not entitled to apply laws and other normative legal acts that violate upon the rights and freedoms of a person and citizen enshrined in the Constitution. In addition, the subject of consideration may be not only the norms of laws, but also other normative legal acts.

In order to fully use of the potential of subsequent control, the procedural legislation of the country regulating the appeals of courts to the Constitutional Council is being improved. In 2012, the Parliament of the Republic adopted a special law aimed at carrying the Code of Criminal Procedure, the Civil Procedure Code, as well as the Code of Administrative Offenses in line with the mentioned Article 78 of the Constitution.

The Constitutional Law of 3 July 2013 amended the procedural laws providing for the modernization of the procedure for the circulation of courts to the Constitutional Council, in particular: cases of recognition as unconstitutional of the law subject to application in a criminal case are attributed to circumstances precluding the criminal case; the duty of the court is fixed, if there is a request of the defense to suspend the proceedings, if the Constitutional Council by the initiative of another court has accepted the idea of recognition of this law as unconstitutional; it is the duty of courts to suspend the stage of the verdict in cases where the Constitutional Council, at the initiative of another court, checks the constitutionality of the law to be applied in a criminal case.

After the noted constitutional reform this year, amendments were applied to the legislation of Kazakhstan regulating the activities of the Constitutional Council, which create conditions for the effective exercise of its powers. The Constitutional Law of June 15, 2017 ”On Making Amendments and Additions to Some Constitutional Laws of the Republic of Kazakhstan” from clause 3 of Article 22 of the Constitutional Law ”On the Constitutional Council of the Republic of Kazakhstan” eliminates the requirement that the court’s submission to the Constitutional Council be signed by the chairman of the relevant court. Now the appeal must be signed by the proper subject. Such is the case when the case is solely examined, and in the case of a collegial (in appellate and cassation order) - presiding in the meeting.

In conclusion of my speech, I would like to note that the measures taken are ultimately aimed to ensuring the full implementation of the Constitution, suppressing the facts of its violations, strengthening mechanisms for protecting human rights and freedoms and especially protected constitutional values.

Session 1

Diversity in Constitutional Justice : Differences among AACC Members

Diversity in Constitutional Justice : Malaysia's Experience

2nd PT : Raus Sharif

Chief Justice,
Federal Court of Malaysia

1ST AACC SRD INTERNATIONAL SYMPOSIUM

THEME:
"CONSTITUTIONALISM IN ASIA : PAST, PRESENT, FUTURE"

BY: THE RIGHT HON TUN RAUS SHARIF
30 October - 2 November 2017
Seoul, Republic of Korea

Mr / Madam Chairperson,
Fellow speakers,

Honourable Heads of Delegation,

Members of AACC,

Ladies and gentlemen.

[1] It is indeed a great honour to be given this opportunity to address the Symposium, to share Malaysia's experience on the topic of *'Diversity in Constitutional Justice'*. Allow me first to congratulate the host and Secretariat for Research and Development of the AACC, the Republic of Korea, for successfully organising this inaugural Symposium. We are indeed humbled and touched by the warm hospitality extended to us in this historic metropolitan city of Seoul.

[2] Before I venture into the topic of the day, let me first give a brief overview on the history of Malaysia and our legal system.

[3] Originally known as Malaya, Malaysia attained independence from the British on 31st August 1957. We have adopted, albeit with local modifications, a bicameral Westminster styled legislature, a common law based judicial system, and a democratically appointed cabinet, all governed and subject to, a written Constitution known as the Federal Constitution.

[4] Malaysia is a peaceful country and home to over 30 million people scattered over thirteen (13) States which form the Federation of Malaysia. We are headed by a Constitutional Monarch, His Majesty the Yang di-Pertuan Agong, appointed every five (5) years on a rotational basis amongst the nine (9) Malay Rulers of each State within the Federatio.

[5] Out of 30 million of the population in Malaysia, 69% are Malays, 23% are Chinese, 7% Indians, and 1% of the population is made up of other minor racial groups. Thus, with such racial composition, Malaysia is a melting pot of cultures, traditions, races and religions.

[6] The Malaysian Courts can be broadly divided into two tiers. The Superior Courts and the Subordinate Courts. The Superior Courts consist of the High Court, the Court of Appeal and at the apex is the Federal Court. Below the High Court is the Subordinate Courts, i.e the Sessions Court and the Magistrates' Court.

Ladies and Gentlemen,

[7] In the following (15) minutes, I wish to share the experience of the Malaysian Judiciary in constitutional adjudication. In doing so, I will be highlighting certain key differences and similarities between the review process adopted in Malaysia and most civil law countries which make up the majority of the members of AACC.

[8] To start with, allow me first to explain the constitutional adjudication process in Malaysia. There are various modes in which a constitutional complaint may be filed in the Malaysian Courts. The Federal Constitution confers jurisdiction on the High courts to review legislative and executive action[1)] and grant public law remedies where appropriate. The most common and prevalent mode of commencing a constitutional complaint is by way of a judicial review.

[9] The jurisdiction to adjudicate judicial review cases is not solely vested in the Federal Court of Malaysia. In practice, judicial review cases are heard before the High Courts.

[10] In dealing with judicial review cases, Paragraph 1 of the Schedule to the Court of Judicature Act grants the High Court the power to issue to any person or authority, directions, orders or writs, including, **certiorari, prohibition, mandamus quo warranto and habeas corpus** (famously known as "**prerogative writs**") or any others for the enforcement of the rights conferred by Part II of the Federal Constitution (fundamental liberties) or for any other purposes.

[11] These prerogative writs, along with the remedies of **Injunction** and **Declaration** are often invoked in constitutional disputes in Malaysia.

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1) Articles 4, 128 and 130 of the Federal Constitution

Members of the Floor,

[12] The expression 'judicial review' refers to the process by which the Court exercises their supervisory jurisdiction in ensuring that public authorities do not act beyond the remit of their powers. In other words, judicial review is a process whereby a court of law examines the conduct of an inferior public tribunal and determine whether or not that tribunal has acted lawfully, within the scope of its legal powers.[2)]

[13] The general rule is that, not every decision made by an authoritative body is amenable for judicial review. There must be a public law element in the decision made for it to satisfy the threshold for review. The courts will look at the structure, nature, powers, duties and functions of the body in issue to look for the existence of that 'public law element'.[3)]

The public authorities who are generally accepted to be amenable to judicial review include –

a) Ministers charged with specific decision making powers under relevant laws;[4)]

b) The Industrial Court established under the Industrial Relations Act 1967 (Act 177);

c) Officers and bodies established under statute having quasi-judicial powers concerning a range of matters;[5)]

d) General law enforcement departments like the immigration, police and the customs department;

e) Various disciplinary bodies (government and non-government);[6)]

f) Specialized tribunals;[7)] and

g) Statutory Bodies.[8)]

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2) De Smith, Woolf and Jowell, 'Judicial Review of Administrative Action' (Sweet & Maxwell, London, 1995) at p 552.

3) OSK & Partners Sdn. Bhd. v Tengku Noone Aziz & Anor [1983] 1 MLJ 179

4) For example, the Minister of Human Resources with regard to decisions concerning industrial or employment disputes and recognition or non-recognition of trade unions under the Industrial Relations Act 1967 (Act 177), Employment Act 1955 (Act 265) and the Trade Unions Act 1959 (Act 262)

5) for example registration of births; citizenship; and the registration of societies; to name a few

6) for example the Police Disciplinary Board, Police Service Commission, Public Service Commission, Malaysian Medical Council, Bar Council; Universities and Board of Engineers.

7) for example the Tribunal for Homebuyers Claims established under the Housing Development (Control and Licensing) Act 1966 (Act 118) and the Tribunal for Consumer Claims established under the Consumer Protection Act 1999 (Act 599);

8) like the Election Commission; Sports Commission, Securities Commission, Bursa Malaysia (or also known

[14] The rationale behind the remedy of judicial review is to protect individuals against illegal acts of the administration by providing remedies for wrongs done to the individual. Courts are also duty bound to ensure that administrative bodies act lawfully and not unlawfully, and also perform their public duties in accordance with law. Judicial review has then a dual role; to provide relief to the person who has challenged some particular administrative action, and to influence future administrative action.

Ladies and Gentleman,

Centralized review vs Decentralized Review

[15] The first key difference that I wish to highlight today, stems from the fact that, unlike in most civil law countries, in Malaysia we do not have a Constitutional Court. Malaysia adopts a unitary court system as in many common law jurisdictions. The Malaysian Federal Court which is the Apex Court of the country assumes a dual role that is; as the interpreter of the Federal Constitution and as the highest appellate court.

[16] Malaysia thus practices a decentralized system of judicial review. This simply means that the power to adjudicate constitutional and/or administrative disputes in Malaysia is exercised by the High Courts, as opposed to a constitutional court. The High Courts have original jurisdiction to preside over civil (which includes judicial review cases) and criminal matters.[9)]

[17] As mentioned earlier, the Federal Court is a court of final appeal for all disputes emanating from the High Court (which includes constitutional and/or administrative appeals)[10)] , as well as a court of original jurisdiction in constitutional interpretation and dispute, as provided under the Malaysian Federal Constitution as follows:

(i) **Article 128 (1) :** The Federal Court has **exclusive jurisdiction**, to determine —

(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.

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as the Foreign Exchange);

9) Tun M. Suffian, "The Judiciary during the First Twenty Years of Independence", HP Lee and FA Trindade.

10) Article 128 (2) of the Federal Constitution.

(ii) **Article 128 (2)**: Often referred to as the R**eferral Jurisdiction of the Federal Court**; this provision states that if in any proceedings before another (lower) court a constitutional question arises, the Federal Court shall have jurisdiction to (without prejudice to its appellate jurisdictions) determine the question and remit the case to that (lower) court to be disposed of in accordance with the determination.

(iii) **Article 130**: Often referred to as the **Advisory Jurisdiction of the Federal Court**; this provision prescribes that His Majesty, the Yang Di-Pertuan Agong may refer to the Federal Court for its opinion any question as to the effect of any provision of this Constitution which has arisen or appears to him likely to arise, and the Federal Court shall pronounce in open court its opinion on any question so referred to it.

[18] This model of Constitutional Adjudication which we practice in Malaysia, is almost similar to many Asian Countries including Singapore, India, and Hong Kong to name a few.

Distinguished delegates,

Abstract Review vs. Concrete Review

[19] Having discussed the administrative aspect of the review process in Malaysia. I would like to discuss the substantive aspects involved in judicial review in Malaysia.

[20] In Malaysia the review process is well-placed. Simply put, the Malaysian Courts do not operate in a vacuum.

[21] A constitutional litigation for judicial review in Malaysia cannot be initiated unless the complainant had suffered a direct injury or loss as a result of the conduct of a government or public body. The Malaysian courts will not simply entertain a complainant if he cannot show any direct and/or personal violation of his or her constitutional rights.

[22] In contrast to the Malaysian review process, in some civil law countries, an abstract judicial review can be initiated in the constitutional courts without there being an actual dispute before the court. Such proceedings, also known as a Posteriori Review is undertaken to review legislative and/or executive acts prior to their enforcement to avoid any future harm. This is in an interesting point which I would very much be interested to know about from other presenters in today's forum.

Doctrine of Seperation of Powers

Ladies & Gentleman,

[23] Having understood our differences, perhaps we would be able to appreciate more our

similarities.

[24] As the saying goes 'a rose by any other name would smell as sweet'. Constitutional adjudications may differ in form, but in substance, the purpose and outcome remain the same, to ensure that the proper check and balances are available to avoid tyranny in any society. The mere presence of the review process in any legal system, is a positive marker of the health of the democratic process and the operation of the rule of law.

[25] Consonant to constitutional justice, is the concept of separation of powers. Montesquieu advocated the idea that judicial power should be separated from the legislature and executive in order to prevent the over-concentration of power in any one body. He argued for the separation of all three organs of government, with each playing a role to check on the power of the two other bodies. The judiciary should serve to review legislation enacted by Parliament and enforcement action taken by the executive, in order to ensure that it bears the values of higher law.[11)]

[26]Common to all Constitutions is the basic doctrine that neither Executive nor Legislative State Action may violate the basic precepts of the Constitution. Lord Steyn of Privy Council in the case of **State of Mauritius v Abdool Rachid Khoyratty [2007] 1 AC 80** explained the concept as follows:

> "The idea of a democracy involves a number of different concepts. The first is that the people must decide who should govern them. Secondly, there is the principle that fundamental rights should be protected by an impartial and independent judiciary. Thirdly, in order to achieve a reconciliation between the inevitable tensions between these ideas, a separation of powers between the legislature, the executive, and the judiciary is necessary."

[27] The principles enunciated by Lord Steyn holds true for the Malaysian judiciary. To ensure that the balance in the 'trinity of powers' do not go unchecked, the Malaysian judiciary considers it crucial that its independence and integrity are not undermined by the executive or legislature at all costs. This can be seen from a recent decision12) of the Malaysian Federal Court which stated in clear terms, the role of the judiciary within the Malaysian constitutional framework. It was held that:

> "The judiciary is thus entrusted with keeping every organ and institution

11) A Study Of The Relationship Between Natural Rights Theory And The Doctrine Of Constitutionalism Encapsulated Within The Federal Constitution [2005] 6 MLJ i

12) Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat [2017] MLJU 535

> of the state within its legal boundary. Concomitantly the concept of the independence of the Judiciary is the foundation of the principles of the separation of powers. This is essentially the basis upon which rests the edifice of judicial power. The important concepts of judicial power, judicial independence and the separation of powers are as critical as they are sacrosanct in our constitutional framework."

[28] The purpose of having such a system of check and balances in place is simply to ensure that all organs of the government act within the limits of the constitution so as to ensure that the rule of law is maintained.

Conclusion

Respected members of the AACC,

[29] I have almost come to the end of my speech. We have seen the differences in the mode of deliverance of constitutional justice between the legal systems as well as its similarities in substance. As they say, our similarities bring us together, but it is our differences that give us strength.

[30] With that I thank you for your time and attention.

Raus Sharif
Chief Justice
Malaysia

Session 1

Diversity in Constitutional Justice : Differences among AACC Members

Comparative Studies on the Jurisdiction of the Constitutional Tribunal of the Republic of the Union of Myanmar with Constitutional Adjudication of other Member Countries of AACC

3rd PT : Kyaw San

Justice,
Constitutional Tribunal of the Union of Myanmar

October 30 – November 2, 2017, Seoul, Korea
Justice H.E. U Kyaw SAN.
Member of the Constitutional Tribunal, Myanmar.

First International Symposium of the AACC Secretariat for Research and Development

Main Theme: "Constitutionalism in Asia: Past, Present and Future"

Session I : " Diversity in Constitutional Justice: Differences among AACC Members"

Presentation of Comparative Perspective studies on the Constitutional Justice of the Constitutional Tribunal of the Republic of the Union of Myanmar with other members of the AACC.

1. Introduction

Mr. Chairman,
Thank you very much for giving me the floor.

Mr. Chairman,
Distinguished Delegates,
Ladies and Gentlemen,

It is a great honour for me to give a presentation on this occasion as the representative of the Constitutional Tribunal of the Republic of the Union of Myanmar.

Mr. Chairman,
First and foremost I would like to thank Excellency Mr. PARK Han-Chul, Former

President of the Constitutional Court of Korea who had retired on 31st January, 2017, His Excellency Mr. Kim Yi-su, Acting President of the Constitutional Court of Korea and Honorable Mr. KIM Yong-Hun, Secretary-General of the AACC Permanent secretariat for Research and Development for their invitation, warm welcome and for the arrangements to meet our every need in this beautiful country and Capital of Seoul.

Mr. Chairman,

In terms of the title of this session I would like to present my paper namely "Comparative Perspective Studies of Constitutional Justice of the Constitutional Tribunal of the Republic of the Union of Myanmar with other member countries of the AACC."

2. Historical Concept of Constitutional Court/Tribunal

Mr. Chairman,

In the 20th century, the Austrian Professor of Law, Hans- Kelsen created a new theory or a new policy of Constitutionalism to be more complete with those of Civil Law system. Now, 70 countries of the world are applying Kelsen's theories of constitutional law. The functions performed by the legislature and executive are required to be in compliance with the Constitution and Constitutional Justice in accordance with the constitutional doctrine and theories of Hans Kelsen. Professor Kelsen established the Constitutional Court Theory.

Mr. Chairman,

Constitutional review, is the Constitutional Court's power to review the constitutionality of the acts of the legislature and executive powers; or the Court's power to invalidate legislature and executive actions as being unconstitutional.

3. Myanmar's Past Practice of Constitutional Justice compared with its Current Practice and Other Countries' Practices

Mr. Chairman,

Myanmar regained her Independence, in 1948, from the British colony and the Constitution of the Union of Burmar, 1947 was enforced on 4th January of 1948.

Under the 1947 Constitution of the Union of the then Burma, the then Supreme Court exercised not only the regular powers of a judiciary but also a constitutional review power like other Federal and Common Law countries such as Malaysia, Philippines , Pakistan and the Constitutional Chamber of the Supreme Court of Kyrgyzstan which are AACC member countries. A similar exercise is also undertaken by non members of the AACC which are the United States of America, Canada, Australia, India, Brazil, Argentina and Nigeria. In many such Common Law countries, the Supreme Court plays a role as the final constitutional arbiter. On the other hand, Germany, Austria, Belgium, Spain and members of the AACC countries such as Indonesia, Afghanistan, Kazakhstan, Azerbaijan Republic, the Republic of

Tajikistan, the Republic of Turkey, the Republic of Korea, Mongolia, the Russia Federation, the Kingdom of Thailand, and the Republic of Uzbekistan are practising a system utilizing a Constitutional Court or Tribunal.

Myanmar during the Socialist Era, States People's Council and Parliament exercised the interpretation power of the Socialist Constitution.

The current 2008 Constitution was ratified by referendum on the 10th of May 2008 and promulgated on 29th of May 2008. It was entered into forced on the 31st of January 2011. That was the first day of the first meeting of the Union Parliament.

Mr. Chairman,

Under the current constitution the regular judiciary, the Supreme Court, has the power to adjudicate disputes between subjects of the Union as long as they are not constitutional disputes. The jurisdiction of the Supreme Court of the Union is provided in Article 295 and it is clear that constitutional issues are not included in its jurisdiction.

Mr. Chairman,

As we are aware, each country provides for the Fundamental Rights or citizen rights or Human Rights in their constitutions and if there arises any violation by the executive in those countries with Common Law systems, the submission of prerogative writs can be submitted to the Supreme Court. It has the power to review such a submission with the relevant writs. In Civil Law countries, in cases of the violation of the Fundamental Rights or citizen rights or Human Rights, the victim or his or her representative can directly submit a case as an individual claim for his or her remedy to the Constitutional Court or Chamber or Tribunal or Independent commission and so on.

Mr. Chairman,

In Myanmar, all of the Fundamental Rights and Duties of citizens are provided in Article 345 to 390, in Chapter 8 of the Constitution. From that chapter, Article 378 empowers the Supreme Court as follow:-

Quote *"Article 378(a) In the connection with the filing of application for rights granted under this Chapter, the Supreme Court of the Union shall have the power to issue the following writs as suitable:*

1) Writ of Habeas Corpus;
2) Writ of Mandamus;
3) Writ of Prohibition;
4) Writ of Quo Warranto;
5) Writ of Certiorari.

(b) The right to issue writs by the Supreme Court of the Union shall not affect the power of other court to issue order that has the nature of writs according to the existing laws.

Mr. Chairman,

What I want to highlight is the separation of powers vested in the two constitutional institutions, Union Supreme Court and the Constitutional Tribunal by the Constitution. Under Article 295, sub clauses (a) (ii) and (iii) of the 2008 Constitution, the Supreme Court is empowered to hear cases and disputes other than those relating to constitutional issues between the Union Government and the Region or State Governments.

On the other hand, for constitutional disputes between Union subjects, the constitution provides specific powers to the Constitutional Tribunal of the Union, a nine member panel, for the establishment of the Rule of Law and constitutionalism in Myanmar.

This purpose for the establishment of the Constitutional Tribunal is provided in Article 46 as one of the basic principles of the Union and the selection procedure, duties and functions of the Constitutional Tribunal are also provided in Article 321 and 322. (I mention here the legal text of these provision for your reference)

46. A Constitutional Tribunal shall be set up to interpret the provisions of the Constitution, to scrutinize whether or not laws enacted by the Pyidaungsu Hluttaw, the Region Hluttaws and the State Hluttaws and functions of executive authorities of Pyidaungsu, Regions, States and Self-Administered Areas are in conformity with the Constitution, to decide on disputes relating to the Constitution between Pyidaungsu and Regions, between Pyidaungsu and States, among Regions, among States, and between Regions or States and Self-Administered Areas and among Self-Administered Areas themselves, and to perform other duties prescribed in this Constitution.

321. The President shall submit the candidature list of total nine persons, three members chosen by him, three members chosen by the Speaker of the Puithu Hluttaw and three members chosen by the Speaker of the Amyotha Hluttaw, and one member from among nine members to be assigned as the Chairperson of the Constitutional Tribunal of the Union, to the Pyidaungsu Hluttaw for its approval.

322. The functions and the duties of the Constitutional Tribunal of the Union are as follows:

(a) Interpreting the provisions under the Constitution;

(b) vetting whether the laws promulgated by the Pyidaungsu Hluttaw, the Region Hluttaw, the State Hluttaw or the Self- Administered Division Leading Body and the Self-

Administered Zone Leading Body are in conformity with the Constitution or not;

(c) vetting whether the measures of the executive authorities of the Union, the Regions, the States, and the Self-Administered Areas are in conformity with the Constitution or not;

(d) deciding Constitutional disputes between the Union and a Region, between the Union and a State, between a Region and a State, among the Regions, among the States, between a Region or a State and Self-Administered Area and among the Self-Administered Areas;

(e) deciding disputes arising out of the rights and duties of the Union and a Region, a State or a Self-Administered Area in implementing the Union Law by a Region, State or Self- Administered Area;

(f) vetting and deciding matters intimated by the President relating to the Union Territory;

(g) functions and duties conferred by laws enacted by the Pyidaungsu Hluttaw.

Mr. Chairman,

In terms of access to the Tribunal, our 2008 Constitution stipulates that the President, the Speaker of Pyidaungsu Hluttaw, the Chairman (Speaker) of the Pyithu Hluttaw (Lower House), the Chairman (Speaker) of the Amyothar Hluttaw (Upper House), the Chief Justice of the Union and the Chairperson of the Union Election Commission can apply directly to the Constitutional Tribunal to obtain the interpretation, resolution and opinion of the Tribunal on a particular matter.

The Chief Ministers of the Region or State, the Speakers of the Region and State Hluttaw or the Chairperson of the Self-Administered Division (SAD) leading Body or the Self-Administered Zone (SAZ) leading Body and representatives numbering at least 10 % of the Pyithu Hluttaw or Amyothar Hluttaw only have the right to submit matters related to the Constitution indirectly through the President, or Speakers of the Union Hluttaw, to the Tribunal in accordance with the prescribed procedures.

Mr. Chairman,

Indonesia, Korea, Mongolia, Thailand and Myanmar have the same number of members of the Constitutional Court or Tribunal, however in Myanmar's case, the sources for the selection process are the President and two houses of Parliament. Indonesia, Korea and Mongolia have three sources of selection process, but one source is the Supreme Court and the others are the President and the Parliament. In the case of Thailand, the members of the Constitutional Court are elected by the Supreme Court and mix selection commission. Within those countries important ancillary powers are different. Among them the Thailand Tribunal has the power of overseeing corruption and electoral commissions whereas that of Korea has the power of impeachment and dissolution of political parties. Indonesia has also the power of impeachment, and that of Mongolia has both the power of impeachment and overseeing its

electoral commission. In Myanmar the Constitutional Tribunal has the power to hear intra-regional disputes only.

In addition, Article 323 of the Constitution provides that if, in a hearing before an ordinary judicial court, there arises a dispute as to whether the provisions contained in any law contradict or conform to the Constitution, and if no resolution has been made by the Constitutional Tribunal of the Union on the said dispute, the judicial court shall stay the hearing and submit its opinion to the Constitutional Tribunal of the Union in accordance with the prescribed procedures and shall obtain a decision from the Constitutional Tribunal. In respect of the said dispute, the resolution of the Constitutional Tribunal of the Union shall be applied to all cases. So the Constitutional Tribunal of the Union has the power to make such resolutions when so submitted and requested by an ordinary judicial court. Likewise, the Korean Constitutional Court also has the power to make a resolution when the ordinary court so submits to it.

Mr. Chairman,

The state structure of the Republic of the Union of Myanmar has some characteristics of federal Constitutions or quasi-federal state as there are two levels of government, each of which has constitutional authority in its own right. Legislative power is shared between levels of government. The provision for resolving any conflict between laws when each level of government validly exercises a power, is mentioned in Article 198 of the Constitution. Also we can see the elements of federalism are mentioned in such Articles relating to the Basic Principles. They speak of the none-disintegration of the Union; non- disintegration of National solidarity; and Perpetuation of sovereignty. Now Myanmar is endeavouring to build a genuine democratic federal system.

4. Myanmar's Future Practice for Constitutional Justice as a Federal Democratic Republic

Mr. Chairman,

Looking forward to non-disintegration of the Union, non- disintegration of national solidarity and perpetuation of the sovereignty , based on freedom, equality and justice, the Union Peace Conference-21st Century Panglong 2nd session was held at Nay Pyi Taw from 24th May 2017 to 29th May 2017. The purpose of this conference was for the building of the Union in harmony with the Panglong spirit, based on democracy and federalism which guarantees democracy, national equality and self-determination. This is, in accordance with the outcomes of the country's political dialogues.

We are aware that the framework process of the Constitution is in some cases based on the terms of a peace agreement. Likewise, Myanmar is in the process of conducting a Peace Conference of the 21st Century Panglong paving the way toward a new Democratic Federal Republic. A in terms of the Pyidaungsu Accord, 37 agreements under four sectors namely

political, economic, social, land and natural environment sectors, were signed. In the political sector, it is mentioned that a "Separate and Independent Tribunal on State Constitution must be set up for dealing with disputes on Constitution among Union and Regions and States or among Regions and States."

5. Conclusion

Mr. Chairman,

Let me conclude my presentation with the remark that every nation whatever political or legal system it practises, must have a constitution. Whatever constitution it has, it must have a constitutional court or tribunal or likelihood of a judicial institution as a mechanism to resolve constitutional disputes for constitutional justice. This plays a crucial role in a Federal Democratic Nation.

I thank you, Mr. Chairman.

Session 1

Diversity in Constitutional Justice : Differences among AACC Members

Constitutional Justice of Mongolia and its Features

4th PT : Dorj Odbayar

Chairman,
Constitutional Court of Mongolia

CHAIRMAN OF THE CONSTITUTIONAL COURT OF MONGOLIA DORJ ODBAYAR

CONSTITUTIONAL JUSTICE OF MONGOLIA AND ITS FEATURES

Honorable Chairperson,
Honorable Presidents of the Constitutional Courts, Chairmen, Chief Justices,
Ladies and Gentlemen,

The Constitutional Court of Mongolia presents its compliments to the Constitutional Court of the Republic of Korea and extends gratitude for inviting us to this first International Symposium of the Association of Asian Constitutional Courts and Equivalent Institutions, Secretariat for Research and Development under the theme "Constitutionalism in Asia: Past, Present and Future".

Foreword

Dear friends,

Until the end of the 20th century Mongolia did not have a Constitutional court to exercise any kind of supreme judicial review and for the upliftment and enforcement of the Constitution.

One of the historical achievements of the new Constitution, adopted in 1992, was the establishment of the Constitutional Court of Mongolia (Constitutional Tsets) and enhancing its full powers. However, the Constitutional Court of Mongolia was not established from thin air. It was established on the basis of national and international legal and cultural findings. Constitutional Courts were established in many countries which had a rich history of Constitutional Justice. Probably, the fact that the Constitutional Court of Mongolia was established during the period when numerous Constitutional Courts were established in European countries is justification in itself for setting up this essential institution.[1)]

The essence of the Constitutions being adopted by many nations in the second half of

1) N.Jantsan, Analysis and lessons of the 25 years activity of the Constitutional Court (Tsets) of Mongolia// Challenges of the Constitutional law (theory, methodology, implementation). Ulaanbaatar, 2017, P.11-13.

the 20th century was quick. For instance, European countries such as Germany, Italy, Asian countries such as Philippines, Japan, India, some African countries, Latin American countries such as Uruguay started adopting their Constitutions. Mongolia adopted its first Constitution in 1924. Thus, the 20th century was the century of Constitutions.

Although it is considered that a modern interpretation of the Constitutional review was created during the Marbury v. Madison case resolving in 1803, USA, the first Constitutional Court in Europe was established in 1920s and in Asia – in 1947. Then in the 21st century a number of Constitutional Courts were established. Also in the end of the 20th century, numerous countries in the West Europe and Central Asia started exercising actual Constitutional control. In view of this tendency towards change it is obvious that the 21st century is the age of Constitutional Courts.

The Constitutional Court of Mongolia has been exercising a supreme judicial review over the enforcement of the Constitution for the last 25 years. It noteworthy that the Constitutional Court has power to examine and decide disputes regarding a breach of the Constitution and to issue numerous decisions protecting the basic structure and concept of the Constitution, values of democracy, citizens' rights and freedoms, ensuring a principle of separation of powers, restoring norms of the state organization.

1. General comparison on differences and similarities of the Constitutional Justice system

While the comparative legal study is gradually developing, at the same time, legal terms are classified in accordance with the legal family, institution and certain differences and similarities are shown more clearly. The clearest evidence is of issuance of numerous works regarding comparative analysis on Constitutional law, Administrative law, Civil law and Criminal law.

As the Constitutional Justice system is a mechanism of exercising a supreme judicial review over the enforcement of the Constitution, with the power to examine and decide disputes regarding a breach of the Constitution, it should not be outside of the scope of the comparative law study. Therefore, this session will include considerations regarding a development of the Constitutionalism in Asia including diversity in the Constitutional Justice system.

It is internationally recognized that there are two models of Constitutional review such as "American model" and "European model". Besides, researchers are also writing about existence of a third "Combined model".[2)]

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2) A.A.Klishas. Constitutional review and Constitutional justice of foreign countries. (comparative-law research). – M.; International relations, 2007. P. 13-14

It classifies Constitutional Justice forms exercised in one country, into one type, by their similarity and this classification determines their differences and shows unique "features".

On the other hand, researchers and academicians who analyze international situations say that strictly distinguished types are unified by their advantages and it is portrayed as a legal convergence.

Dr. N.M.Kasatkina, a leading scientific researcher, the Institute of Legislation and Comparative Law under the Government of the Russian Federation, said, "Diversity of the Constitutional Justice is a quite complicated and relative term" after referring to M.Melchior, President of the Court of Arbitration of Belgium, who said, "If we consider the Constitutional review in global scale there is no unified criteria regarding structure and duties in Europe". Consequently the main objective of the Constitutional review is ensuring human rights and freedoms.[3)]

According to this view, it could be concluded that even Constitutional jurisdiction of each country has its own features. However, there is a similarity based on fundamental values such as Constitutional review, human rights and freedoms.

Asia is a unique region and a large continent. A mechanism of Constitutional review came into Asia with a western term and product of civilization "Constitutionalism"[4)] , although the organs of Constitutional control are related to appropriate parts of the classification of "American model", "European model", Asian Constitutionalism still has its features such as Confucianism, compatibility, unique culture and values.[5)] Nevertheless, Tom Ginsburg, Professor of the University of Chicago, concluded that emergence of Constitutional review in Asia suggests that supposed cultural barriers to the emergence of constitutional constraint are no longer operative.[6)] Therefore, a basic concept of the Constitutional review mechanism in Asia could not be considered differently from the Western similar mechanism.

Thus, in this session, it would be appropriate to discuss a process, rather than the specific features of the Constitutional Justice system, including specific features of the Constitutional Court of Mongolia.

Comparing systems of the Constitutional Justice system among the Members of the

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3) N.M.Kasatkina. Constitutional review in foreign countries (development tendency)//Foreign law and comparative legal study journal. – Mongolia,: Nota Bene, 2012, №5 (36). P.13-19

4) Albert H. Y. Chen (Professor in Constitutional Law, Faculty of Law, University of Hong Kong). Pathways of Western liberal constitutional development in Asia: A comparative study of five major nations //Oxford University Press and New York University School of Law (2010).

5) ibid

6) Tom Ginsburg, "Constitutional Courts in East Asia: Understanding Variation," 3 Journal of Comparative Law 80 (2008).

Association of Asian Constitutional Courts and Equivalent Institutions[7] , it is possible to say that the Constitutional Justice system in these countries is exercised by Constitutional Courts, Supreme Courts, Constitutional Councils and other institutions. However, we should cooperate and exchange knowledge and experience with each other.

Mongolia exercises the Constitutional review through the Constitutional Court. This in a way is similar to the Constitutional Courts of Thailand, Azerbaijan, Russian Federation, Indonesia, Republic of Korea, Tajikistan, Turkey and Uzbekistan.

On the other hand, there are still some specific distinguishing features depending on the history and traditions of legal system of the countries with Constitutional Courts.

In this point, let me share with you the main features of the Constitutional Court of Mongolia via specific features of the disputes to be resolved.

2. Disputes resolved by the Constitutional Court of Mongolia and its features

Paragraph 1 of the Article 64 of the Constitution of Mongolia says, "The Constitutional Court is an organ exercising supreme judicial review over the implementation of the Constitution, making judgement on the violation of its provisions, and resolving Constitutional disputes. It is the guarantee for the strict observance of the Constitution" and determines main powers of the Constitutional Court. Article 66 of the Constitution determines disputes to be resolved by the Constitutional Court. In the framework of this article the Law on the Constitutional Court of Mongolia and the Law on the Constitutional Court procedure was adopted and followed.

Dr. Galdan Sovd, first Chairman of the Constitutional Court of Mongolia, said, "One important criterion determining the Constitutional review is its object. The object could be considered in 2 classifications such as act issued by a relevant subject and moral of Government authorities".[8]

According to this concept, the Constitutional Court reviews as to whether the following legal acts violate the Constitution and in case of violation the Court issue a decision to repeal it. These acts are:

- Laws;
- Other decisions of the Parliament;

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7) Currently there 16 members. http://www.aaccei.org/ccourt?act=membership

8) G.Sovd, The Constitutional Court's position in the Constitution review system // The Constitutional Court of Mongolia (articles, presentations compilation). Ulaanbaatar, 2007. P. 93-94

- The President's decrees, other decisions;
- Resolutions of the Government;
- International treaties of Mongolia;
- Decisions of the central electoral body on Referendums, elections of the Parliament, its members, and the President.

The Constitutional Court reviews the following disputes regarding a breach of the Constitution by the following authorities and issues conclusions. These are:

- The President;
- The Chairman or the Speaker of the Parliament:
- The Members of the Parliament;
- The Prime Minister;
- The Members of the Government, Cabinet;
- The Chief Justice of the Supreme Court;
- The Prosecutor General.

The Constitutional Court of Mongolia has overreaching powers to determine the grounds required for impeachment of the President, of the Chairman of the Parliament, of the Prime Minister, and for withdrawing the Members of the Parliament.

As it is declared in the Constitution, citizens of Mongolia (foreign citizens and stateless persons residing lawfully in the territory of Mongolia are also included) have a right to submit petitions and information to the Constitutional Court of Mongolia regarding any issue which falls under its jurisdiction. However, it does not require the cases to be previously settled by any court. The Constitutional Court of Mongolia initiates Constitutional proceedings on the basis not only of petitions and information received from citizens but also examines and decides Constitutional disputes at the request of the Parliament, President, Prime Minister, Supreme Court and the Prosecutor General. The Constitutional Court has no right suo moto rights to initiate the dispute reviewing process without any petitions and information.

Having considered those features of the Constitutional Court of Mongolia, Dr. Ts.Sarantuya, former Judge of the Constitutional Court, has expressed her own opinion regarding the Constitutional proceeding of the Constitutional Court of Mongolia.

The following global differences can be observed on a comparison of the world courts basic characteristics:

1. Disputes are reviewed on a basis of citizens' petitions and information, however, they could file a suit regarding issues "not relevant to themselves".

2. Norms are controlled abstractly, but not specifically (the form of control is not determined by law)

3. Decisions of other courts are not considered to be the objects.

4. Decisions of central and local Administrative organs and officials are not subject to the Constitutional Court.[9)]

It is publicly acknowledged that these are fundamental features of the Constitutional Court of Mongolia. However, the results of these features are considered differently.

It could be seen from the articles of the Chapter 5 of the Constitution that powers and form of control of the Constitutional Court of Mongolia differ from the classical forms and **limited**.[10)] Whereas Dr. N.Jantsan said, "On the one hand, the Constitutional Court controls decisions of the law making and executive branches' organs, on the other hand, it interprets their decisions on behalf of the Constitution… It should never been understood as the petitions submitted by citizens are related to their own rights only, it should be clear that there are number of citizens with the same issues. Constitutional rights of the citizens in the frame of Constitution control have **advantages**. That is, citizens could appeal to the Constitutional Court regarding any case of violations of their own rights only. In other words every citizen has a possibility to participate in protection of the Constitution."[11)]

As for me, there are two reasons why I am accepting the latter position.

Firstly, once this issue was resolved by the Constitutional Court as a Chairman of the Constitutional control organ I have no right to over-step the Constitution.

Secondly, based on my own beliefs I **conclude** that uniqueness of the Constitutional justice system of Mongolia has the following advantages:

1. Apart from the issues regarding violation of individual rights of citizen, he/she may submit petitions, information regarding violation of the rights and interests of the public.

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9) Ts. Sarantuya, Constitution Court; Fundamental right-Constitutional Court; Specifications of the Constitutional Court of Mongolia; Legal comparison; Constitution and Administrative courts: connections, comparison; Constitutional proceeding// The Constitutional Court of Mongolia (Articles, presentations compilation), Ulaanbaatar, 20017 P. 148-149; 187; 231-236; 294-296; 350.

10) Ts.Sarantuya, Constitution and Administrative courts: connections, comparison; The Constitutional Court of Mongolia (Articles, presentations compilation), Ulaanbaatar, 20017 P.294

11) N.Jantsan, The Constitutional Court and development of the Constitutionalism // Development of the Constitutionalism, further tendency, International conference. Presentations compilation. Ulaanbaatar, 2012. 31. P.34

This gives broader opportunities to the Constitutional Court of Mongolia in comparison with other courts internationally. Thus, the Constitutional Court of Mongolia protects the rights and freedom of the citizens through an abstract form of judicial review over an enforcement of the Constitution which is appropriate for our country. The reason is related with the fact that only high ranking officials may in many occasions breach the Constitution than the ordinary citizen.

2. Issues of ordinary and specified courts, in some countries Constitutional Courts are determined by their jurisdiction. As for the Constitutional Court of Mongolia, the disputes to be reviewed are classified and listed in the Constitution and other laws. In this case those disputes that are related to the Constitution only are reviewed, as a result, the capacity of the Constitutional Court could be balanced. On the other hand, the fact that the Constitutional Court does not review many disputes, has positive influence on independence and impartiality of the Court. In other words controlling the acts of high ranking organizations and officials increases the prestige of the Constitutional Court.

3. Although decisions of the officials of the central and local administrative organizations are not subject to the Constitutional Court's control, an Administrative court, established in Mongolia in 2004, has became a mechanism of resolving disputes related to public law.

4. Finally, the Constitutional Court of Mongolia, while examining petitions and information submitted by citizens, issued decisions to twart breach of the Constitution which has a practical influence on development of Constitutionalism.

For instance, according to statistics, 10 percent of the petitions and information submitted to the Constitutional Court of Mongolia were reviewed as disputes. Remaining 90 percent did not contain character of disputes or were subject to the jurisdiction of other Courts. 55 percent of the decisions of the Constitutional Court of Mongolia stated that the Constitution was breached. As for the disputes regarding violations of the articles on the human rights and freedoms, 60 percent of decisions stated that the Constitution was breached.

Honorable Chairperson,

The Constitutional Court of Mongolia considers that increasing the number of the members of the Association of Asian Constitutional Courts and Equivalent Institutions will be significant in strengthening and developing the Association's activities.

In this regard, we would like to propose, to involve in our activity, the following countries such as Republic of India, Japan, Republic of China and Georgia and etc. Therefore, the Constitutional Justice in Asia would be able to confirm and strengthen its position, to demonstrate that it is a mechanism to protect values of democracy, Constitutionalism, human and citizen rights and freedoms.

I wish you success in this session. Thank you all very much for your kind attention.

Session 1

Diversity in Constitutional Justice : Differences among AACC Members

Constitutionalism in Tajikistan : Prospects for Development

5th PT : Mukhabbat Gulzor

Justice,
Constitutional Court of the Republic of Tajikistan

Гулзор М.М.
Судья Конституционного Суда
Республики Таджикистан

КОНСТИТУЦИОННАЯ ЮСТИЦИЯ – ГАРАНТИЯ ЗАКОННОСТИ В ТАДЖИКИСТАНЕ

Уважаемые участники симпозиума!
Уважаемые коллеги!
Дамы и господа!

Позвольте, прежде всего, от имени Конституционного Суда Республики Таджикистан сердечно поздравить Вас Господин председатель и коллектив Конституционного Суда Кореи, а также всех присутствующих с началом работы 1-го Международного Симпозиума Ассоциации Азиатских Конституционных Судов и Аналогичных Институтов который должен сыграть важную роль в обеспечении конституционной законности на всем азиатском пространстве.

Также хочу выразить благодарность организаторам этого представительного Международного Симпозиума за высокую подготовку и замечательную организацию, и за радушный прием, который чувствуется с первого дня нашего пребывания в прекрасном городе Сеуле столицы сказочной страны-Корея.

Уважаемые участники Симпозиума!

Таджикистан является правовым и демократическим государством, и у нас на конституционном уровне закреплена концепция правовой организации государства, разделения властей, прав и свобод человека и гражданина, как высшей социальной ценности, адекватной современному социально-экономическому уровню развития страны.

Демократические перемены, произошедшие после обретения государственной независимости, проведения правовой и судебной реформы расширили сферу осуществления судебной власти, и в целях обеспечения верховенства и прямого действия конституционных норм, которые относятся к неотъемлемым признакам современного правового государства, создали основу для возникновения и существования конституцион-

ного правосудия (конституционной юстиции) в нашей стране.

На становление Конституционного Суда, осуществляющего конституционное правосудие в Таджикистане, как фундаментальной демократической ценности и главного элемента в механизме правовой защиты Конституции, а, следовательно, и гарантии законности, также оказала решающее воздействие социально-политическая обстановка и уровень демократического развития общества.

Институт конституционного правосудия имеет серьезное политическое и юридическое обоснование, в связи, с чем создан практически во всех государствах современного мира, и сегодня по результатам деятельности органа конституционного правосудия можно судить о степени демократичности общества и государства.

Следует отметить, что образование в Таджикистане Конституционного Суда - это решительный шаг в деле защиты основ конституционного строя, прав и свобод человека и гражданина, а также обеспечения конституционной законности, что в свою очередь выступает как позитивный фактор развития государственности.

Конституционный Суд выступает в качестве важного элемента политической системы и служит обеспечению социальной стабильности в условиях развития демократии и реформирования общества, а также решает существующие проблемы в области конституционной законности, поскольку важной составляющей его компетенции является полномочие по проверке на соответствие Конституции нормативно-правовых актов, издаваемых органами государственной власти.

Исходя из деятельности Конституционного Суда, можно отметить, что данный орган, защищая Конституцию, тем самым обеспечивает единообразное понимание и восприятие Основного закона, который является правовой основой законотворческого процесса государства и способствует обеспечению сохранности идей Конституции в государстве на всех уровнях власти.

Президент Республики Таджикистан, уважаемый Эмомали Рахмон, уделяя особое внимание роли органа конституционного контроля в защите прав и свобод человека и гражданина, а также в обеспечении конституционной законности в стране, в своем выступлении на Международной конференции на тему: «Конституционное правосудие – гарантия обеспечения верховенства Конституции», посвященном 20-летию образования Конституционного Суда Таджикистана, в частности, отметил: «Конституционный суд своими превентивными функциями контролирует самую важную сферу деятельности государства и его органов, каковой является нормотворчество, и аннулирует все нормативные правовые документы, противоречащие Конституции, и таким образом обеспечивает конституционную защиту прав и свобод человека и гражданина, которые предусмотрены в международных правовых документах и

Конституции страны»[1)] .

В Таджикистане Конституционный Суд является не только особым судебным органом, входящим в качестве составной части в общую систему судебной власти согласно статье 84 Конституции Таджикистана, но и представляет собой один из высших конституционных органов одного уровня с высшими звеньями законодательной и исполнительной власти, через который судебная власть фактически участвует в балансе властей.

Отнесение органа конституционного контроля к высшим органам государственной власти обусловлено, прежде всего, тем, что его полномочия, наряду с высшими органами законодательной и исполнительной власти, предусмотрены в Основном законе страны (ст. 89).

Конституционный Суд, осуществляя свои полномочия, развивает конституционно-правовую доктрину мотивацией принятых им решений, уточняет смысл и содержание конституционных норм, обеспечивает реализуемость Основного закона[2)] .

Наличие у Конституционного Суда широких полномочий по обеспечению прямого действия Конституции путем процедуры конституционного судопроизводства позволяет охарактеризовать его как важный элемент политической системы, являющийся частью механизма ее само регуляции и саморазвития и служащий обеспечению стабильности политической обстановки и развитию политических процессов в рамках Конституции[3)] .

В соответствии с полномочиями и правовым статусом органа конституционного контроля он занимает особое место в системе разделения властей, а также в системе судебной власти и является важнейшим политико-правовым институтом, поскольку его решения имеют не только правовое, но и политическое значение.

Уважаемые коллеги!

Конституционный Суд Республики Таджикистан, являясь неотъемлемым атрибутом

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1) См.: Эмомали Рахмон / Выступление на Международной конференции на тему: «Конституционное правосудие – гарантия обеспечения верховенства Конституции», посвященной 20-летию образования Конституционного Суда Республики Таджикистан, Душанбе 17 сентября 2015 года.

2) См.: Хошимзода Д.Д. Роль Конституционного Суда Республики Таджикистан в реализации принципа разделения властей// Материалы Международной конференции, посвященной 20-летию образования Конституционного Суда Республики Таджикистан на тему: «Конституционное правосудие – гарант обеспечения верховенства Конституции». (Душанбе, 17-18 сентября 2015 года). – Душанбе: ЭР-граф, 2015. – С. 232.

3) См.: Эбзеев Б.С. Конституция. Правовое государство. Конституционный Суд. -М., 1997. – С. 128.

демократического правового государства, наряду с установлением соответствия нормативных правовых актов Конституции, исходя из своих полномочий, также разрешает споры между государственными органами относительно их компетенции.

Конституционным Судом споры о компетенции рассматриваются и разрешаются с позиции конституционного принципа разделения властей и разграничения компетенции между государственными органами в целях сохранения установленного баланса интересов и их правомочий.

Субъектами обращения в Конституционный Суд по разрешению споров о компетенции являются только органы публичной власти, и предметом обращения в таких спорах является разрешение противоречия в позициях сторон о принадлежности полномочия тому или иному государственному органу.

В этом смысле Конституционный Суд необходим как орган, не подверженный влиянию политических страстей и эмоций, именно своими решениями он очерчивает рамки действий властей и их компетенцию, и эффективно защищает права граждан.

В связи с тем, что органы конституционного контроля рассматривают вопросы, относящиеся к праву, в случае решения спора о компетенции между государственными органами используются правовые средства разрешения споров.

Это является фактором того, что посредством конституционного контроля, осуществляемого в порядке конституционного судопроизводства, обеспечивается гарантия удержания властей в границах их компетенции, предусмотренной Основным законом страны на основе принципа разделения властей.

Конституция, возлагая на Конституционный Суд функции высшего судебного органа, осуществляющего контроль конституционности, тем самым обязывает проверять законы и компетенцию государственных органов с точки зрения установленного ею разделения властей[4)].

Разделение властей является основополагающим принципом конституционализма, и орган конституционного контроля, посредством своих полномочий осуществляя охрану Конституции, одновременно обеспечивает защиту принципа разделения властей как одну из основ конституционного строя.

Конституционный Суд, выступая в качестве эффективного механизма охраны

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4) См.: Выступление Председателя Конституционного Суда Российской Федерации Зорькина В.Д. на тему: «Принцип разделения властей в деятельности Конституционного Суда Российской Федерации». Корея, 1 февраля 2008 года. URL:http://www.ksrf.ru.

Конституции, рассматривает конституционные споры, обеспечивает реальное соблюдение принципа разделения властей органами государственной власти при реализации своих полномочий.

На современном этапе развития Таджикистана конституционное правосудие является частью действующей системы сдержек и противовесов, поскольку предоставляет на высшем уровне юридическую возможность оказывать активное воздействие на решения и действия законодательной и исполнительной властей, как бы уравновешивая их.

При реализации основополагающего принципа разделения властей и системы сдержек и противовесов Конституционный Суд выступает в роли арбитра, обеспечивая баланс в государственном механизме, и является инструментом самоограничения власти государства.

Данный орган позволяет расширить сферу судебного контроля, включив в него нормативные правовые акты органов законодательной и исполнительной власти, и призван играть роль политического и юридического инструмента государства, разрешающего возникающие коллизии.

Конституционный Суд Таджикистана также обладает полномочиями рассмотрения проектов изменений и дополнений, выносимых в Конституцию Республики Таджикистан, проектов законов и других вопросов, представляемых на всенародный референдум, и по этим вопросам принимает заключения.

Данное полномочие является важным инструментом обеспечения защиты, а также соблюдения и реализации конституционного принципа разделения властей, поскольку при рассмотрении проектов изменений и дополнений, выносимых в Конституцию, Конституционным судом всячески исключается возможность нарушения баланса принципа сдержек и противовесов между властями.

В целом только благодаря стабильности деятельности конституционных судов можно вести речь о реализации конституционного принципа разделения властей в полном объеме, поскольку без наличия органов конституционной юстиции принцип разделения властей воплощается не в полном объеме.

Исходя из того, что в государстве взаимодействие между основными государственными институтами является ключевым вопросом, сегодня, независимо от развития конституционно-правовых институтов, обеспечивающих реализацию принципа разделения властей, все еще необходимо принятие мер, направленных на всемерную демократизацию системы организации и функционирования государственной власти.

Другим направлением деятельности органа конституционного контроля, которое способствует реальному достижению определенных результатов в области обеспечения верховенства Конституции и конституционной законности в стране, является тесное взаимодействие с органами государственной власти, в частности законодательной и исполнительной власти.

Конституционный Закон Республики Таджикистан «О Конституционном суде Республики Таджикистан» предусматривает специальную форму взаимодействия органа судебного конституционного контроля с главой государства и высшими органом законодательной власти посредством ежегодного направления им посланий о состоянии конституционной законности в стране.

Такая форма взаимодействия признается весьма положительной, и имеет непосредственное отношение к нормотворчеству органа конституционного контроля. В основном в посланиях о состоянии конституционной законности до сведения законодательной власти доводятся правовые положения, сформулированные органом конституционного контроля в ходе осуществления своей деятельности, а также обращается внимание законодателя на наличие пробелов в правовом регулировании. Таким образом, не имея права законодательной инициативы, орган конституционного контроля получает правовую возможность косвенного участия в законодательном процессе[5)].

Уважаемые участники Симпозиума!

Принятие Конституции и в соответствии с её нормами образование органа конституционного контроля в Таджикистане, а также в последующем принятие ряда нормативных правовых актов, способствующих осуществлению деятельности данного органа, является свидетельством того, что произошло правовое усиление нашего общества и судебной власти, создана важная предпосылка превращения Конституции в действующее право, граждане и юридические лица получили дополнительные гарантии в защите своих интересов.

Здесь хочу обратить Ваше внимание на то, что в соответствии с конституционным Законом Республики Таджикистан «О Конституционном Суде Республики Таджикистан» физические и юридические лица вправе для определения соответствия Конституции определенных правовых актов непосредственно обращаться в Конституционный Суд. Исходя из положений указанного Конституционного Закона, очень часто физические и юридические лица напрямую обращаются в Конститу-

5) См.: Вступление Председателя Конституционного Суда Республики Таджикистан Махмудзода М.А. на тему: «Конституционный контроль-важнейший способ обеспечения верховенства Конституции». Астана, 28 августа 2015 года.

ционный Суд Таджикистана.

Из практики деятельности органа конституционного контроля нашей страны можно привести несколько примеров, согласно которым на основе обращений физических и юридических лиц было возбуждено конституционное судопроизводство, в частности постановлением Конституционного Суда оспариваемая норма законодательства была признана неконституционной.

Так, постановлением Конституционного Суда Республики Таджикистан от 27 сентября 2013 года на основании ходатайства гражданки Саидовой Н.А. часть 2 статьи 363 Уголовно-процессуального кодекса Республики Таджикистан в части, касающейся того, что не подлежит обжалованию и опротестованию вынесенное в ходе судебного разбирательства определение (постановление) в отношении избрания, изменения или отмены меры пресечения была признана неконституционной, то есть не соответствующей статьям 5, 14, 18 и 19 Конституции Республики Таджикистан[6)].

При рассмотрении данного дела Конституционный Суд, с учетом норм международного права и национального законодательства относительно беспрепятственного осуществления гражданами своих конституционных прав, установил, что любой порядок, который ограничивает права участников уголовного процесса по защите их процессуальных прав и становится преградой для осуществления, в частности, их прав на обжалование судебных актов, считается ограничивающим гарантию судебной защиты и право на обращение в государственные органы, установленные Конституцией, законами и процессуальным законодательством Республики Таджикистан.

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

Как показывает сущность конституционного контроля, признавая неконституционной норму закона, Конституционный Суд обеспечивает конституционную законность в стране, а также стабильность и устойчивость национальной правовой системы, и этим получает правовую возможность косвенного участия в нормотворческом процессе. Данный орган в определенном смысле отыскивает, творит право, влияет на волю законодателя и правоприменителя.

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6) См.: Сборник постановлений Конституционного Суда Республики Таджикистан (1996-2015). – Душанбе: ЭР-граф, 2015. – С. 342-351.

Следует отметить, что в рамках Конституционного закона «О Конституционном Суде Республики Таджикистан» предусматривается презумпция добросовестности законодателя (конституционности закона), то есть при равенстве голосов при принятии решения принимается решение о соответствии Конституции оспариваемого закона, иного нормативного правового акта.

Решения Конституционного Суда обладают свойствами само исполнимости и непосредственного действия, и по своей юридической силе общеобязательны и не могут быть отменены или преодолены, вступают в силу с момента их принятия либо с момента, указанного в них.

Юридическая сила решений органа конституционного контроля проявляется через совокупность специфических свойств, которые и определяют его роль и место в отечественной правовой системе, так как сочетают в себе качества как правоприменительного, так и нормоустанавливающего, и в определенной мере правотворческого, акта. Они имеют такую же сферу действия, как и акты нормотворческого органа, и являются источником особого рода.

Решения Конституционного Суда, в результате которых неконституционные нормативные акты утрачивают юридическую силу, имеют такую же сферу действия во времени, в пространстве и по кругу лиц, как и решения нормотворческого органа, и, следовательно, общее значение, не присущее актам судов общей юрисдикции.[7)]

Посредством вынесения решений, Конституционный Суд реализует свои властные полномочия, обеспечивает верховенство и прямое действие Конституции. Признанная государством особая роль этого суда в системе институтов власти является предпосылкой закрепления на высшем уровне положений о юридической силе и правовых последствиях его решений.

Решением Конституционного Суда является принимаемый в определенном законом порядке и облеченный в установленную форму правовой акт, констатирующий установление определенных фактов и обстоятельств, содержащий государственно-правовое веление и имеющий обязательный характер, которым окончательно разрешается вопрос, относящийся к его компетенции.

В то же время этих качеств недостаточно для гарантированного исполнения решений Конституционного Суда, поскольку законодательно провозглашенная обязательность исполнения указанных актов не влечет за собой автоматической реализации их

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7) Сайбулаева С.А. Конституционный Суд Республики Дагестан: проблемы совершенствования статуса // Труды молодых ученых Дагестанского государственного университета. К 75-летию Дагестанского государственного университета. -Махачкала: ИПЦ ДГУ, 2006. - С. 75-77.

предписаний.

Только фактическое исполнение решений Конституционного суда делает конституционное правосудие реальным и завершенным, для чего требуется законодательное закрепление процедур исполнения данных актов, а также мер государственного принуждения к исполнению актов Конституционного суда.

Уважаемые коллеги!

В текущем году Конституционный Суд Таджикистана отметил 23-летие своей деятельности.

Данный юбилей стал не только знаменательным событием для Конституционного Суда нашей страны, но и поводом к анализу того, насколько современная нормативная основа организации и деятельности органа конституционного правосудия нашей страны обеспечивает решение задач, стоящих перед ним.

Следует отметить, что хотя данный институт является сравнительно новым институтом конституционного права в нашей стране, который проходит этап своего становления, но результаты его деятельности сегодня свидетельствует об укреплении демократических начал и правовых основ государства в соответствии с признанными в мировой практике общечеловеческими ценностями, а также об укреплении конституционной законности в стране.

Сегодня стабильное развитие демократических основ нашего государства и обеспечение в нем конституционной законности свидетельствуют о важности и необходимости функционирования Конституционного Суда.

Пользуясь, случаем, позвольте еще раз поздравить коллег из Конституционного Суда Кореи со столь знаменательным событием – и поблагодарить за радушный приём!

Благодарю за внимание!

Session 2

Protecting and Promoting Fundamental Rights through Constitutional Adjudication

Chair : Dorj Odbayar,
Chairman, Constitutional Court of Mongolia

1st PT : Mohammad Qasim Hashimzai
President,
Independent Commission for Overseeing the Implementation of the Constitution of Afghanistan

2nd PT : Seo Kiseog
Justice,
Constitutional Court of Korea

3rd PT : Erkinbek Mamyrov
President,
Constitutional Chamber of the Supreme Court of the Kyrgyz Republic

4th PT : Sergei Sergevnin
Head of the Department of International Relations and Research of Constitutional Review Practice,
Constitutional Court of the Russian Federation

5th PT : Punya Udchachon
Justice,
The Constitutional Court of the Kingdom of Thailand

Protecting and Promoting Fundamental Rights through Constitutional Adjudication

1st PT : Mohammad Qasim Hashimzai

President,
Independent Commission for Overseeing the Implementation
of the Constitution of Afghanistan

Protection and Promotion Fundamental Rights through Constitutional Adjudication : Learning from the Experience of AACC Members (Major Decisions in Regard to Ensuring Fundamental Rights)

My presentation aims at defining the role of Independent Commission for overseeing the Implementation of Constitution (ICOIC) in protecting the fundamental human rights of individuals, by interpreting provisions of the constitution. The Fundamental Rights, Directive Principles of State Policy and Fundamental Duties are sections of the Afghan Constitution that prescribe the fundamental obligations of the State to its citizens and the duties of the citizens to the State The provisions of this Chapter apply irrespective of race, place of birth, religion, caste, creed, or gender. They are enforceable by the courts, subject to specific restrictions.

Article 22 of the Afghan Constitution provides: "Any kind of discrimination and distinction between citizens of Afghanistan shall be forbidden. The citizens of Afghanistan, man and woman have equal rights and duties before the law."

The Afghan Constitution embodies practically most principles of human rights contained in the international treaties and conventions. Observance of the international conventions and treaties has constitutionally been recognized.

Article 7 of the Constitution provides:
"The state shall observe the United Nations Charter, inter-state agreements, as well as international treaties to which Afghanistan has joined and Universal Declaration of Human Rights."

In consideration of the above provision the ICOIC is in constant contact with the relevant authorities to make sure the provisions of the International Conventions to which Afghanistan is party, are being implemented in action.

Afghanistan under the supervision of the ICOIC has submitted reports to the UN Human Rights Commission on the implementation of the following conventions.

The Universal Periodic Report (UPR) in 2009.
Report on the Rights of Child
Report on the implementation of Economic, Social and Political Rights Convention
Preliminary report on the implementation of CEDAW in 2013
The second UPR Report in 2014
Report on the implementation of Convention against Torture
Second report on the implementation of CEDAW in 2016

Despite the fact that during the past years, the government has taken firm steps to enhance the participation of women in every aspects of life Which as a result the status of women vastly enhanced in the country in the political, social and economic areas, Afghanistan received 73 recommendations from the UN Human Rights Commission in Geneva after presenting its report on implementation of CEDAW. The ICOIC is now overseeing that these recommendations are applied.

Afghanistan is also a party to the UN Security Council Resolution 1325 and for the implementation of this Resolution a program of action has been devised and the participation of women in peace building in a war-turn country have been enhanced.

As Afghanistan is a party to the International Convention on the Right of Child, the ICOIC, in consideration of the above Article 7th of the Constitution, is overseer for the implementation of this Convention. A new Child Act embodying the provisions of the above Convention, has been newly enacted and now is enforce. Other laws for the protection of children such as law preventing sexual misuse of children, laws prevention child labor and recruitment of children in the armed forces as well as other legislative and strategic instruments for guaranteeing the rights of child, have been introduced and being implemented in Afghanistan.

Ladies and Gentlemen,

We all know that between sustainable development and human rights there is an inseparable relationship and a respect for human rights has been recognized as a prerequisite for development. The political and constitutional development of Afghanistan has been intertwined with the question for the promotion and protection of human rights.

In the present democratic government human rights questions have received merited attention in legal and political discourses.

In accordance with article 58 of the Constitution the Independent Human Right Commission with the duty to oversee, evaluate and to document issues and cases of human rights and to report annually to the nation as well as to investigate violation of human rights, has been established and operating in the country.

Because of the ongoing war in Afghanistan there are some shortcomings in some areas as

far as the implementation of the human rights principles is concerned.

The Human Rights Commission in 2014 reported and investigated 443 cases of violations of human rights and in 2015, 492 cases.

The fact that for a third world country such as Afghanistan, where the level of illiteracy is unacceptably high, and the conditions of existence extremely difficult for people to eke out a living, issues concerning human rights protection necessarily take time to get embedded in the mentality of the all those in charge of the affairs.

As the ICOIC cannot take directly cases of violation of human rights, this Commission on the basis of article 9 of its Law delegated such cases to the Independent Human Rights Commission, to consider and take necessary action when coming across of cases of violation of human rights. On this issue and nature of cooperation the ICOIC is about to sign a memorandum of understanding with the Independent Human Right Commission.

In accordance with draft of the MOU both Commissions cooperate with each other to see that the observance of the human rights principles embodied in the Constitution are embedded in the society. They both work for public awareness and awareness of officials in the government and non-government departments and in the capital and provinces and also convene seminars on this subject on the fundamental rights of the subjects.

In connection to violation of fundamental rights, both Commissions issue joint declaration and take a common stand.

The MOU also states that as the Independent Human Rights Commission is in charge of overseeing the observance of human rights in the government and non-government departments as well as in detention centers, the Commission can also refer the cases of violation of human rights to the ICOIC. The Human Rights Commission can also refer petitions, complaints of real and legal personalities on the subject of violation of the fundamental principle of human rights to the ICOIC for legal advice. The Independent Human Rights Commission shares its findings with ICOIC on the observance of the UN Charter, conventions and international treaties relevant to the fundamental principles of human rights; and introduce to the ICOIC the violators of the human rights after discovering. The ICOIC check list is designed to highlight observance and non-observance of the constitutional fundamental principles of human rights in prisons. The ICOIC check list contains topics such as term of imprisonment spent, committed crime, complaint, violation of the article or clause of the Constitution or other laws. The visiting panel discovered 18 non-observance of the laws in the detention center of Kabul in 2014.

As Afghanistan is party to the International Convention against Torture, the international and national observers and rapporteur are very keen to take under their scrutiny

the condition of suspects, accused and convicts in prisons and report any violation of the above Convention and Constitution to nation and international community. For the observance of the constitutional clause preventing torture and observance of the provisions of the above convention the government has issued instructions to all units of the police and security force to refrain strictly from torture in any form.

The ICOIC on the basis of article 22-29 of the constitution and provisions of the Convention against Torture continually through the staff of one of its department visits the detention centers and prisons.

The purpose of these actual visit is to check and to list any violation of the Constitutional rights of the prisoners in detention centers and prisons.

As Afghanistan is also party to the Standard Minimum Rules for the Treatment of prisoners, so ICOIC also check that these Rules are observed.

Ladies and Gentlemen,
Without access to justice, it is impossible to enjoy and ensure the realization of any other rights, whether civil, political or economic.

The relationship between access to justice and human rights protection stems from the fact that it is only when individuals have access to courts that they can espouse and seek for the protection of their basic rights.

Factors inhibiting access to justice in Afghanistan are:
Delay in the administration of justice; cost and illiteracy. Illiteracy is one of the significant obstacle to the realization of access to justice in Afghanistan.

In order to remove obstacles steps are being taken by the Supreme Court to review judicial process.
The aims of such review will include:
to reduce the cost of litigation and broaden access to justice;
to reduce delays so that cases can be decided speedily;
to ensure that litigants have an equal opportunity regardless of their resources, to assert or defend their rights;
To make the legal system understandable to those who use it.
Alternative dispute resolution mechanisms:
Even more significantly, efforts should be made to increase awareness of and resort to arbitration or other methods of alternative dispute resolution mechanisms in the country. The system of alternative dispute resolution mechanism well established traditionally in Afghanistan.

The following steps have been taken to regulate the system of alternative dispute resolution:

To establish links with such centres and to put them in contact with local courts.

To check that they only resolve civil dispute in according with the law.

Enhancement of the Legal Aid Scheme

ne important agency that can usefully be deployed to enhance access to justice in the country is the Legal Aid Scheme, which was established to provide assistance for indigent Afghans unable to secure the services of private legal practitioners to enforce their legal rights.

The system of legal aid, under the ICOIC supervision, has been established in the county but slowly progressing due to financial limitations.

Conclusion:

The standard and the nature of Protection and promotion of fundamental rights through constitutional adjudication can be assessed and recorded when the following essential requirements are in place.

First the provisions of the constitution, as the mother law, acknowledging the human rights fundamental international principles.

Secondly the system of law reporting reveals compliance to constitutional requirements.

The system of law reporting in Afghanistan in the style of international standard has not yet been established. Attempts are underway to secure financial assistance and expertise for the formation of such a department in the judiciary. The Independent Human Rights Commission is now the only forum to check and report to ICOIC the protection and promotion of human rights through constitutional adjudication

Thirdly, security is prerequisite for the protection and promotion of human rights nation-wide. Maintaining security is a major challenge in Afghanistan.

END

Session 2

Protecting and Promoting Fundamental Rights through Constitutional Adjudication

Constitutional Court of Korea : Major Decisions on Ensuring Fundamental Rights

2nd PT : Seo Kiseog

Justice,
Constitutional Court of Korea

Constitutional Court of Korea: Major Decisions on Ensuring Fundamental Rights

Justice Seo Kiseog

1. Good afternoon. I'm Seo Kiseog, a Justice from the Constitutional Court of Korea. It is my great pleasure and honor to introduce some of the major cases of our Court that contributed to ensuring fundamental rights of the people. It is especially meaningful to share these with you as you are committed to studying the Constitution and protecting the freedom and rights of the people in the Asian region.

Today, ensuring fundamental rights of the people is crucial in many aspects. Since the emergence of the idea of modern natural law and the social contract theory, a state has been considered an institutional mechanism designed to better guarantee fundamental freedom and rights of the people. A state is no longer an autotelic institution, but a means of happiness of the people. That is why one of the most important tasks of a modern state is to guarantee fundamental rights. In this regard, today's constitution of each country provides for the organization and structure of a state as well as the basic rights of its people.

In today's world, most states have adopted democracy, which pursues a decision-making process with every citizen given an equal and free status in the society. In this regard, a democratic society must ensure everyone's equal and free status. If the people's freedom is hindered or there is inequality in the process, the system of democracy cannot be maintained stably. For this reason, equality and freedom are essential for successful democracy as well as ensuring fundamental rights. John Rawls also mentioned in his book A Theory of Justice that constitutionalism, regardless of the form, can only be fair and just when equal liberty, such as the freedom of conscience and thought and equal political rights, is ensured.

Korea implemented the current Constitution in 1987 as a result of the people's high aspiration and passion for democratization. In the following year in 1988, the Constitutional Court of Korea was established. As of August 2017, for almost three decades since founded, 32,434 cases have been filed, of which decisions have been made for 31,526 cases. Among them, the Court ruled that 1,462 cases were unconstitutional (meaning they were unconstitutional, unconformable to the Constitution, conditionally unconstitutional or

upheld), many of which include critical decisions with regard to fundamental rights. Today, I would like to present some of the unconstitutional cases that made a significant impact on the Korean society.

2. Most importantly, the Constitutional Court of Korea has made its utmost effort to protect the citizens'fundamental political rights. Some of the examples include declaring the provisions of election acts that did not acknowledge the suffrage and right to vote on referendum of Korean nationals residing abroad were a violation of the Constitution (2004Hun-Ma644, etc.; and 2009Hun-Ma256, etc.). Thanks to the Court's decisions, overseas Korean citizens are now able to exercise their suffrage and right to vote on referendum outside of Korea. Also, the Court decided that it was unconstitutional to restrict the right to vote of prisoners and probationers with suspended sentences (2012Hun-Ma409, etc.), substantially easing such restrictions.

In the past, separate party vote was not allowed and the proportional representative seats were distributed based on the election results at local constituencies, reflecting the election results as support for each political party. However, since the Court ruled such provisions to be unconstitutional (2000Hun-Ma91, etc.), now there are separate votes for candidates for local constituencies and parties for proportional representations at legislative elections.

In addition, several decisions found severe unfairness and therefore violations of the Constitution in the population deviation between constituencies for the legislative and local elections (95Hun-Ma224, etc.; 2000Hun-Ma92, etc.; 2005Hun-Ma985, etc.; and 2012Hun-Ma192, etc.). If the number of voters of one constituency substantially exceeds that of another, there is bound to be unfairness in the value of the vote that each citizen casts. The Court's decision helped decrease the population deviation between constituencies, thereby contributing to equalizing the value of each citizen's vote.

The provisions that stipulate an automatic revocation of a political party's registration if it fails to obtain seats in the National Assembly and more than 2/100 of total number of effective votes were viewed as a violation of the Constitution (2012Hun-Ma431, etc.). The Court's decision allowed political parties with minority support to continue their political activities without their registration revoked. Another important decision regarding the freedom of political parties is the Court's ruling that provisions which prohibit financial aid to political parties and impose criminal punishment on such violations were unconstitutional (2013Hun-Ba168).

Now, let me move onto the Court's decisions regarding the freedom of speech. The Constitutional Court of Korea ruled on several cases that the reviewing of the content of motion pictures, sound records and video products in advance by an organization that can be influenced by administrative agencies or authorities was tantamount to prior censorship that the Constitution banned and therefore was unconstitutional (93Hun-Ka13, etc.; 94Hun-Ka6;

97Hun-Ka1’96Hun-Ka23; 2000Hun-Ka9; 2004Hun-Ka8; and 2004Hun-Ka18). The Court’s decisions are considered to have contributed to the development of Korea’s film industry in addition to the hard work and dedication of industry personnel.

Besides, the Court declared that the legal provision compelling a periodical publisher to have and register a certain level of physical facilities was conditionally unconstitutional, explaining that interpreting it as obliging the periodical publisher to directly possess the facilities specified in this article violates the Constitution (90Hun-Ka23). In another case (99Hun-Ma480), the Court decided that the provision prohibiting communications that undermine public order and good social custom was unconstitutional as the “public order”or “good social custom”was not clearly defined and it might impose over-regulation. The Court said that the identity verification system, which allows the Internet users to use internet boards only after they go through the identity verification process, infringed upon the freedom of expression on the Internet and declared it unconstitutional (2010Hun-Ma47, etc.) and also protected small Internet media by announcing it is unconstitutional to allow a new media to publish an online newspaper only after employing more than five people (2015Hun-Ma1206). The Court made efforts for people to raise their voices on various social issues, political comments and state affairs by making such decisions.

The Constitutional Court of Korea has paid close attention to the freedom of assembly and demonstration that a democratic society places a great significance on. One good example is that prohibiting an assembly after sunset in principle was unconstitutional (2008Hun-Ka25; 2011Hun-Ka29). The citizens were not permitted to wage a demonstration or hold an assembly outside after sunset basically before the decision. Now, they can at night. The decision enabled many of those working at day time like office workers to participate in demonstrations and assemblies.

Meanwhile, the act of restricting passage to and from a city square by completely blocking off the square with police buses was pronounced as a sweeping, extensive and extreme measure that bans all potential assemblies and protests and even forbids the passage of the general public; it was therefore held to be unconstitutional for violating the rule against excessive restriction (2009Hun-Ma406). This decision provided a new standard for the controversial act of deterring assemblies and protests by using ‘passage blockades’comprised of police buses.

Prohibiting any assembly in the vicinity of diplomatic institutions was also held unconstitutional (2000Hun-Ba67, etc.). Now, the Korean people can hold an assembly under conditions even in the vicinity of diplomatic offices.

As you are aware, political rights are the most important basic right that any citizen of a democratic country is entitled to exercise. Decisions to extend voting rights and more freedom to political parties and decisions opening up greater possibilities for people to

express their political views and also make them be reflected in the politics are significantly evaluated to have promoted political rights of the Korean people and eventually developed democracy of the country one step further.

3. It is also important for the Court to protect people's right to property. The Court decided it was unconstitutional to grant land expropriation to a private company with only an approval for and notification of an execution plan from an administrative office for a construction project of low public needs like a fancy golf course as the provision concerned did not demonstrate necessity for public expropriation required by the Constitution (2011Hun-Ba172, etc.). It also announced that the provision prohibiting acquisitive prescription for property subject to private economic transaction among national properties infringed upon the principle of equality and the right to property, as it prioritizes the state over the general public in private economic transactions with no justifiable cause (89Hun-Ka97). And it was held unconstitutional to give priority to national tax over all security rights without a reason (89Hun-Ka95). Furthermore, imposing an upper limit on land for housing that an individual household is allowed to own was found unconstitutional (94Hun-Ba37, etc.), and the provision was decided unconstitutional that did not state any compensation measure for damage incurred by non-execution of a decided urban planning for a long time and subsequent infringement of property right (97Hun-Ma26). All these decisions were meant to protect people's right to property. In particular, the move to stop the authorities from being able to acquire land easily by using the land expropriation system to build a fancy golf course or hotel of low public needs was evaluated to realize spirit of the Constitution in ways that meet the needs of the modern society.

4. The Court also noted the flaws in the law that allows for a person of 19 years or older to be sentenced to a medical treatment order of up to 15 years, in cases where that person has a paraphilic disorder, has committed a sexual crime and holds a risk of recidivism. Medical treatment per se does not run against the Constitution. However, long-term sentences may incur a significant gap between the sentencing of the medical treatment order and its actual execution, which in turn could lead to a situation where such treatment becomes unnecessary due to medical treatment administered during detention, or old age. The Court's decision was that this provision infringes upon fundamental rights as it does not provide an objection procedure that can prevent such unnecessary treatment from taking place (2013Hun-Ka9). This is a clear reflection of the idea that state authority must not go beyond the necessary boundaries when restricting the fundamental rights of the people.

5. A number of decisions kept the abuse of authority by state agencies in check, and called for a closer observance of the Constitution. For instance, the Court gave shape to the right of criminal suspects to defend themselves, through the following decisions. The Court held that requiring unconvicted prisoners to wear inmate uniforms during investigation or trial is unconstitutional, since it may be offensive or humiliating and prevent them from fully exercising their right of defense (97Hun-Ma137, etc.). It also held that the right to legal

communications with an attorney is infringed when an employee of the investigative agency or a correctional officer listens to or records the conversation between a physically restrained person and his or her defense counsel (91Hun-Ma111). Another relevant decision was made when the Court held that denying an attorney's request to read and copy investigation files in the prosecutor's possession without a justifiable reason infringes upon the right to a fair trial, among others (94Hun-Ma60).

The Constitutional Court also made important contributions to enhancing the treatment of prisoners, and some examples would be as follows. The Court held that installing toilets in detention rooms with not enough to shield them from view, consequently making body parts visible to other prisoners and police officers when in use, infringes upon the right to personality (2000Hun-Ma546). The Court also held that subjecting persons arrested in the act to body searches in a humiliating manner when confining them to detention rooms is unconstitutional (2000Hun-Ma327); that restricting prisoners under the execution of disciplinary action from outdoor exercise as a rule, and prohibiting them from writing is unconstitutional (2014Hun-Ma45; 2003Hun-Ma289); that providing 1.06 m2 or 1.27m2 of usable space per prisoner in a detention center, which is insufficient for a Korean male adult of average height to comfortably stretch his limbs, infringes upon human dignity and worth(2013Hun-Ma142); and that allowing the head of a detention center to prohibit an unconvicted prisoner from attending a religious ceremony or event taking place inside the detention center infringes upon the freedom of religion(92Hun-Ma144).

There were also several decisions that rectified unreasonable aspects of the criminal justice system. These include the decisions for unconstitutionality on the provision that restricts the rights of the defendant, suspect or the attorney thereof to be present and to cross-examine, despite allowing pre-trial witness examination (94Hun-Ba1); on the provision that prescribes the death penalty as the only statutory sentence for a soldier that has killed his or her superior (2006Hun-Ka13); and on the provision that prescribes the arbitrary, instead of mandatory, reflection of the entirety or part of a punishment that has already been executed overseas (2013Hun-Ba129).

6. The Constitutional Court of Korea also made many meaningful decisions to protect the right of the underprivileged in the society. For example, prohibiting a labor union from donating money to political parties was held unconstitutional (95Hun-Ma154); the provision that, in principle, does not accept accidents that occurred on a commute to or from work as occupational accidents, was declared unconstitutional (2014Hun-Ba254); the provision making it possible to fire a monthly paid worker who was employed for less than six months without notifying the worker of dismissal at least 30 days before or paying him or her ordinary wage of more than 30 days was decided unconstitutional (2014Hun-Ba3); and, entirely banning all government employees including those who provide de facto service from the right to collective action was held unconstitutional (88Hun-Ma5). All these represent judgments that enhanced workers'rights in the society.

There were also decisions made to protect women's rights. The Court decided that it was unconstitutional to force children to have only father's surname without allowing them to have mother's (2003Hun-Ka5, etc.) and follow only father's nationality after they are born (97Hun-Ka12). The statute assuming a baby born within 300 days after the termination of a marriage is biologically fathered by the ex-husband was held to infringe on mothers'right to personality and right to pursue happiness, and, thus, to be unconstitutional (201Hun-Ma623). The decisions were assessed to have contributed to democratically improving the family system and advancing women's right in the Korean society.

7. In the meantime, the Court tries to protect the basic rights of aliens. For example, it once held a regulation of the Labor Ministry unconstitutional as key sections of the labor standard under the Labor Standard Acts did not apply to industrial trainees from other countries under the pretext of training though they have de facto labor relations by providing service for their employer in return for financial gain under their direction and supervision and, therefore, discriminated them unreasonably (2004Hun-Ma670). Recently, an alien appealed to an ordinary court against the decision banning him from entering Korea and applied to consultation with a counsel for the proceedings but the authority rejected the request. In this case, the Court issued the interim injunction to determine the temporary status that the administrative office shall grant an application to consultation with a counsel (2014Hun-Sa592).

8. Finally, the Constitutional Court shed further light on the value of fundamental rights under the Constitution, by readily addressing controversial cases in Korean history where such rights were not respected. In the 1970s, there were Presidential Emergency Decrees that allowed for the President, without a warrant issued by a judge, to arrest, detain and punish anyone who criticized or proposed the amendment or repeal of the Constitution, or fabricated and distributed groundless rumors about the government. The Constitutional Court held that these Decrees violated the Constitution (2010Hun-Ba70, etc.). Although the related incidents took place decades ago, the decision of the Court paved the way for verdicts of acquittal and damages for people whose fundamental rights had been infringed by these Decrees, and taught society to guard against the recurrence of such past events. A decision for unconstitutionality was also pronounced for the provision which, at the time, granted the President the supra-constitutional right to declare a state of national emergency, and under such circumstances, restricted workers'rights to collective bargaining and collective action (2014Hun-Ka5).

9. As illustrated in these examples, by interpreting the Constitution in a way that upholds the constitutional spirit, the Constitutional Court of Korea has made numerous decisions that prevent the unfair exercise of state authority, and contribute to guaranteeing the fundamental rights of the people. Granted, we must admit there is room for improvement. However, it is clear that the decisions of the Constitutional Court have contributed a great deal to protecting

the fundamental rights of the Korean people.

The Constitutional Court of Korea has had the honor of being the country's most trusted and influential of all government agencies since 2005, according to surveys conducted by Korea's leading press organizations. We believe this is a reflection of the public's high appreciation of the efforts and achievements made by our Court.

With this, I conclude my presentation on the major decisions made by the Constitutional Court of Korea. Thank you.

한국 헌법재판소의 주요 기본권 보장 결정 개관(槪觀)

헌법재판관 서기석

1. 안녕하십니까. 저는 한국 헌법재판소 재판관으로 근무하고 있는 서기석입니다. 아시아 각국에서 헌법을 연구하고, 국민의 자유와 권리를 보장하기 위해 헌신적으로 노력하고 계신 여러분들 앞에서 국민의 기본권 보장에 기여한 우리 재판소의 주요 결정들을 소개하게 된 것을 매우 기쁘고 영광스럽게 생각합니다.

오늘날 국민의 기본적 권리를 보장하는 일은 여러 의미에서 중요합니다. 근대 자연법사상과 사회계약론이 대두된 이래, 국가는 국민의 기본적 자유와 권리를 더욱 확고하게 보장하기 위해 고안된 제도적 장치로 여겨지게 되었습니다. 국가는 더 이상 자기목적적인 존재가 아니며, 국민의 행복을 위한 수단이라 하겠습니다. 그래서 기본권 보장은 근대 국가에 주어진 가장 중요한 과제 중 하나가 되었습니다. 이러한 취지에서 오늘날 각 국의 헌법은 그 국가의 조직과 구성을 규율함과 동시에, 그 나라 국민들이 가지는 기본적 권리들을 명시하고 있습니다.

한편, 오늘날 대다수의 국가들은 민주주의 체제를 지향하고 있습니다. 민주주의는 모든 국민들이 자유롭고 평등한 지위에서 출발하는 공동체의 의사결정방식입니다. 따라서 민주주의에서는 무엇보다도 모든 국민들의 자유롭고 평등한 지위가 보장되어야 합니다. 국민들이 자유를 누릴 수 없거나 혹은 자유를 누리는 데 있어서 불평등이 생긴다면 민주주의는 안정적으로 유지될 수 없습니다. 이러한 의미에서 우리 기본권 체계의 핵심이라 할 자유와 평등은 민주주의의 성공을 위해서 반드시 필요하다고 하겠습니다. 존 롤즈(John Rawls)도『정의론』(A Theory of Justice)에서 입헌민주주의는 그것이 어떤 형태가 되었든 양심과 사상의 자유, 동등한 정치적 권리 같은 평등한 자유(equal liberty)를 보장해야만 정의로운 절차가 될 수 있다고 했습니다.

한국 헌법재판소는 민주화를 위한 국민의 뜨거운 열망으로 탄생한 1987년 헌법에 의해 도입되었습니다. 헌법재판소는 이 헌법이 시행된 그 이듬해인 1988년 창설되었고, 2017년 8월까지 29년 동안 모두 32,434건이 접수되었으며, 이중 31,526건에 대해서 결정이 이루어졌습니다. 그 가운데 위헌결정(위헌, 헌법불합치, 한정위헌, 인용 주문)이 1,462건에 이르고, 여기에는 기본권 보장과 관련한 중요한 결정들이 다수 포함되어 있습니다. 오늘 저는 이 중에서 한국 사회에 큰 영향을 미

친 위헌결정들을 중심으로 소개해 드릴까 합니다.

2. 무엇보다도 한국 헌법재판소는 국민의 정치적 기본권을 보호하기 위해 노력해 왔습니다. 해외에 거주하는 국민들에게는 선거권과 국민투표권을 부여하지 않았던 선거법조항들을 위헌으로 결정하여(2004헌마644등, 2009헌마256등) 현재는 해외에 거주하는 국민들도 대통령선거 등에서 선거권과 국민투표권을 행사할 수 있게 되었습니다. 집행유예기간 중인 자와 수형자의 선거권을 제한했던 법률조항도 위헌으로 판단하여(2012헌마409등) 이들에게 가해졌던 선거권의 제한도 크게 완화되었습니다.

그리고 과거에는 유권자에게 별도의 정당투표를 인정하지 않고 지역구선거에서 표출된 유권자의 의사를 그대로 정당에 대한 지지의사로 의제하여 비례대표의석을 배분하도록 했지만, 헌법재판소가 이 법률조항을 위헌으로 결정함으로써(2000헌마91등), 현재는 국회의원 선거에서 지역구후보자에 대한 투표와 비례대표를 뽑는 정당투표가 별도로 이루어지고 있습니다.

또한, 국회의원 및 지방의원 선거구별 인구편차에 과도한 불평등이 존재함을 지적하는 위헌결정도 수차례 있었습니다(95헌마224등, 2000헌마92등, 2005헌마985등, 2012헌마192등). 어떤 지역구의 유권자 수가 다른 지역구의 유권자 수를 훨씬 초과한다면, 동등한 국민임에도 불구하고 행사하는 표의 가치에 불평등이 발생할 수밖에 없습니다. 헌법재판소의 결정은 선거구별 인구편차를 줄여나감으로써 국민들의 표의 가치를 더욱 평등하게 만들었습니다.

국회의원 선거에서 의석을 얻지 못하고 유효투표총수의 100분의 2 이상을 득표하지 못한 정당은 자동적으로 등록취소되도록 한 법률조항에 대해서도 위헌결정(2012헌마431등)을 함으로써, 소수의 지지를 받는 정당이라도 그 등록이 취소되지 않고 계속 활동할 수 있게 되었습니다. 정당에 대한 재정적 후원을 금지하고 이를 위반할 때에는 형사처벌하도록 한 법률조항에 대한 위헌결정(2013헌바168)도 정당의 자유와 관련된 중요한 결정으로 여겨지고 있습니다.

다음으로, 표현의 자유와 관련하여 한국 사회를 변화시켜 온 여러 결정들을 소개해 드리고자 합니다. 헌법재판소는 영화와 음반, 비디오물에 대하여 행정기관이나 행정권이 영향력을 미칠 수 있는 단체가 그 내용을 미리 심사하는 제도를 헌법에서 금지한 사전검열로 보아 수차례에 걸쳐 위헌으로 결정했습니다(93헌가13등, 94헌가6, 97헌가1, 96헌가23, 2000헌가9, 2004헌가8, 2004헌가18). 오늘날 한국의 영화산업이 융성하게 된 것은 무엇보다도 많은 영화관계자들의 노력과 헌신의 결과이겠지만, 헌법재판소의 결정 역시 일정한 역할을 했다는 평가를 받고 있습니다.

뿐만 아니라, 헌법재판소는 정기간행물을 발행하고자 하는 자에게 일정한 물적 시설을 갖추어 등록할 것을 요구하는 법률조항에 대해서, 이 조항에 규정된 해당시설을 자기소유이어야 하는 것으로 해석하는 한 헌법에 위반된다는 한정위헌결정을 선고했으며(90헌가23), 공공의 안녕질서 또는 미풍양속을 해하는 내용의 통신을 금지하는 법률조항의 경우에는 "공공의 안녕질서", "미

풍양속"의 개념이 불명확하고, 과잉규제의 위험이 있다고 보아 위헌으로 판단했습니다(99헌마480). 인터넷게시판을 이용하는 사람들로 하여금 본인확인절차를 거쳐야만 게시판을 이용할 수 있도록 하는 이른바 인터넷 실명제에 대해서도 인터넷 이용자의 표현의 자유 및 게시판 운영자의 언론의 자유를 침해한다는 이유로 위헌으로 결정했으며(2010헌마47등), 5인 이상의 인력을 확보해야만 인터넷 신문을 발행할 수 있도록 한 법률조항에 대해서도 위헌으로 선언하여 소규모 인터넷 언론사의 존립을 보호했습니다(2015헌마1206). 헌법재판소는 이들 결정을 통해 다양한 사회적 논의들, 정치적 평론들, 국정운영에 관한 의견들이 폭넓게 제기될 수 있도록 노력했습니다.

한국 헌법재판소는 민주사회에서 특별한 중요성을 갖는 집회와 시위의 자유를 위해서도 세심한 관심을 쏟아 왔습니다. 대표적으로, 해가 저문 이후의 집회와 시위를 원칙적으로 금지했던 법률조항들에 대한 위헌결정을 언급할 수 있습니다(2008헌가25, 2011헌가29). 그 전에는 원칙적으로 해가 지면 옥외에서 집회와 시위를 할 수 없었지만, 이제는 야간에도 집회와 시위를 할 수 있게 되었습니다. 직장인들과 같이 낮에는 생업에 종사해야 하는 많은 사람들이 이제 집회와 시위에 더 폭넓게 참여할 수 있게 되었습니다.

경찰버스들로 광장을 둘러싸 통행을 제지한 행위는 광장에서 개최될 여지가 있는 일체의 집회와 시위를 금지하고 일반 시민들의 통행조차 금지하는 전면적이고 광범위하며 극단적인 조치이므로 과잉금지원칙에 위반되어 위헌이라고 선언함으로써(2009헌마406), 현재 한국에서 문제되고 있는 경찰버스, 이른바 차벽을 이용한 집회·시위 제지행위에 대한 새로운 기준을 제시했습니다.

그리고 외교 공관의 100미터 이내에서 집회·시위를 전면 금지한 법률조항 역시 위헌으로 선언했습니다(2000헌바67등). 이제 한국 국민들은 외교 공관의 100미터 이내라 하더라도 제한된 조건 하에서 집회·시위를 할 수 있게 되었습니다.

주지하다시피 정치적 기본권은 민주국가의 시민으로서 누려야 할 가장 중요한 기본권입니다. 이처럼 선거권을 넓히고 정당의 자유를 확대한 결정들, 국민들이 자신의 정치적 의사를 자유롭게 드러낼 수 있게 하고 그것이 실제로 국정에 반영될 수 있도록 하는 가능성을 확장한 결정들은 한국 국민들의 정치적 권리를 신장시켜 한국 민주주의의 수준을 한 단계 더 도약시킨 중요한 결정들이라고 평가되고 있습니다.

3. 개인의 재산권을 보호하는 일도 헌법재판소의 중요한 임무입니다. 헌법재판소는 행정기관의 승인과 고시만 있으면 고급골프장이나 고급리조트 사업과 같이 공익성이 낮은 사업에 대해서까지도 시행자인 민간개발업자에게 수용권한을 부여하는 법률조항이 헌법상 공용수용에서 요구되는 공공필요성을 갖추지 못하여 위헌임을 선언한 바 있습니다(2011헌바172등). 또한, 국유재산 중 사경제적(私經濟的) 거래의 대상이 되는 재산에 대하여 시효취득을 금지하는 법률조항은 사경제적 거래에 있어서 합리적 이유 없이 국가를 일반 국민보다 우대한다는 이유로 평등원칙과 재산권을 침해한다고 결정했고(89헌가97), 각종 담보권보다 국세에 우선권을 부여하는 법률조항은

합리적인 이유 없이 국세를 우대한다는 이유로 위헌결정을 했습니다(89헌가95). 또한, 개인에 대하여 가구별 택지 소유의 상한을 규정한 법률 전체에 대한 위헌결정(94헌바37등), 도시계획결정을 장기간 집행하지 아니함으로 인하여 현저한 재산적 손실이 발생하는 경우에도 그 손실을 보상하는 규정을 두지 않은 법률조항에 대한 위헌결정(97헌바26)도 있었습니다. 이들 결정은 국민의 재산권을 보호해 온 대표적인 결정들이며, 특히 공공필요성이 낮은 고급골프장이나 고급리조트의 건설을 위해 공용수용제도를 이용하여 손쉽게 토지와 건물을 취득해 온 사회문화에 제동을 건 것은 현대 사회의 조건에 맞게 헌법의 정신을 구현했다는 평가를 받았습니다.

4. 헌법재판소는 성폭력범죄를 저지른 성도착증 환자로서 재범의 위험성이 인정되는 19세 이상의 사람에 대해 법원이 15년의 범위에서 약물치료명령을 선고할 수 있도록 한 법률의 문제점을 지적하기도 했습니다. 약물치료명령 그 자체는 헌법에 위반되지 않지만, 장기형이 선고되는 경우 치료명령의 선고시점과 집행시점 사이에 상당한 시간적 간극이 생길 수 있고, 그로 인해 구금 중에 이루어지는 치료감호에 의한 치료, 노령화 등으로 약물 치료의 필요성이 없어질 가능성도 있으므로, 이러한 불필요한 치료를 막을 수 있는 불복절차가 마련되어 있지 않았다는 점에서 이 법률조항이 기본권을 침해한다고 결정했습니다(2013헌가9). 여기에는 국가권력이 국민의 기본권을 제한할 때 필요한 부분을 초과해서는 안 된다는 관념이 뚜렷이 반영되어 있습니다.

5. 국가기관이 그 권한을 남용하는 것을 견제하고 헌법을 더욱 존중하도록 만드는 결정들도 다수 있었습니다. 헌법재판소는 수사 및 재판단계에서 유죄가 확정되지 않은 미결수용자에게 재소자용 의류를 입게 하는 것은 미결수용자로 하여금 모욕감이나 수치심을 느끼게 하고 심리적인 위축으로 방어권을 제대로 행사할 수 없게 만든다고 보아 위헌으로 결정했고(97헌마137등), 신체를 구속당한 사람이 그의 변호인과 접견할 때 수사기관의 직원이나 교도관이 대화를 청취하거나 기록하는 것은 변호인과의 접견교통권을 침해한다고 결정했으며(91헌마111), 검사가 보관하는 수사기록에 대한 변호인의 열람·등사 신청을 정당한 사유를 밝히지 아니한 채 거부한 것은 공정한 재판을 받을 권리를 침해한다고 결정함으로써(94헌마60) 형사피의자의 방어권을 실질화했습니다.

또한 유치장에서 차폐시설이 부족한 상태의 화장실을 설치하여 사용과정에서 신체부위가 다른 유치인들 및 경찰관들에게 관찰될 수 있게 한 것이 인격권을 침해한다는 결정(2000헌마546), 현행범으로 체포된 사람을 유치장에 수용하는 과정에서 수치심을 유발하는 방식으로 신체를 수색하는 것에 대한 위헌결정(2000헌마327), 징벌 집행 중인 수형자에게 실외운동을 원칙적으로 제한하고, 집필을 금지한 것에 대한 위헌결정(2014헌마45, 2003헌마289), 구치소 방실 내 수형자 1인당 실제 사용할 수 있는 면적이 1.06㎡ 혹은 1.27㎡에 불과하여 한국 성인 남성의 평균 신장인 사람이 팔다리를 마음껏 뻗기 어려울 정도로 과밀하게 수용한 것이 인간의 존엄과 가치를 침해한다는 결정(2013헌마142), 구치소장이 구치소 내에서 실시하는 종교의식 또는 행사에 미결수용자의 참석을 금지한 것이 종교의 자유를 침해한다는 결정(92헌마144) 등을 통해 헌법재판소는 수용자의 처우향상을 위해서도 의미 있는 기여를 해 왔습니다.

불합리한 형사제도를 바로잡은 여러 결정들도 있었습니다. 공판기일 전 증인신문을 인정하면서도 피고인·피의자 또는 그 변호인의 참여권과 반대신문권을 제한한 법률조항에 대한 위헌결정(94헌바1), 상관을 살해한 군인에게 사형만을 유일한 법정형으로 규정한 법률조항에 대한 위헌결정(2006헌가13), 외국에서 형의 전부 혹은 일부를 집행받은 경우 필요적이 아니라 임의적으로 형을 감경 또는 면제할 수 있도록 규정한 법률조항에 대한 위헌결정(2013헌바129) 등이 그에 속합니다.

6. 한국 헌법재판소는 사회적 약자들의 기본권을 보호하는 의미 있는 결정들도 여럿 선보였습니다. 노동조합이 정당에 정치자금을 기부할 수 없도록 규정한 법률조항에 대한 위헌결정(95헌마154), 근로자가 출퇴근하던 중 발생한 재해를 원칙적으로 업무상 재해로 인정하지 않는 법률조항에 대한 위헌결정(2014헌바254), 월급근로자로서 6개월이 되지 아니한 자는 적어도 30일 전에 해고예고를 하거나 30일분 이상의 통상임금을 지급하지 않더라도 해고할 수 있도록 규정한 법률조항에 대한 위헌결정(2014헌바3), 사실상 노무에 종사하는 공무원을 포함한 모든 공무원의 단체행동권을 전면적으로 금지한 법률조항에 대한 위헌결정(88헌마5)은 한국 근로자들의 기본권을 강화해온 대표적인 사례들입니다.

나아가, 여성의 기본권을 보호해 온 결정들도 다수 있었습니다. 헌법재판소는 자식의 성을 정할 때 일방적으로 아버지의 성을 사용할 것을 강제하면서 어머니의 성의 사용을 원칙적으로 허용하지 않는 법률조항을 위헌으로 결정했고(2003헌가5등), 출생에 의한 국적취득에 있어서 자녀의 국적을 부의 국적에 따르도록 한 법률조항도 위헌으로 결정했습니다(97헌가12). 혼인 종료 후 300일 이내에 출생한 자를 전남편의 친생자로 추정하는 법률조항도 어머니의 인격권과 행복추구권을 침해한다고 결정했습니다(2013헌마623). 이들 결정은 한국 사회의 가족 제도를 민주적으로 개선하고 여성의 권익을 신장시키는 데 기여했다고 평가됩니다.

7. 한편, 한국 헌법재판소는 외국인의 기본권 보호를 위해서도 노력하고 있습니다. 외국인 산업연수생이 산업기술의 연수에 그치는 것이 아니라 사업주의 지시·감독을 받으면서 사실상 노무를 제공하고 수당 명목의 금품을 수령하는 등 실질적인 근로관계에 있는 경우에도, 근로기준법이 보장한 근로기준 중 주요사항을 외국인 산업연수생에 대하여 적용하지 않도록 규정한 노동부 예규는 외국인 산업연수생을 불합리하게 차별한다는 이유로 위헌으로 결정한 바 있습니다(2004헌마670). 최근에는,입국불허결정을 받은 외국인이 법원에 권리구제를 위한 소송을 제기한 후 그 소송수행을 위해서 변호인접견신청을 했으나 행정관청이 이를 거부한 사안에서, 헌법재판소는 행정관청으로 하여금 변호인접견을 허가하도록 가처분을 인용한 사례도 있었습니다(2014헌사592).

8. 마지막으로, 헌법재판소는 과거 한국의 역사에서 기본권이 존중되지 못했던 논쟁적 사안들에 대해서도 헌법적 해명을 함으로써 헌법상 기본권의 가치를 더욱 분명히 했습니다. 1970년대 한국 헌법은 헌법을 비방하거나 헌법의 개정 혹은 폐지를 주장하는 사람, 정부에 대한 유언비어

를 유포하는 사람 등을 법관의 영장이 없이도 체포, 구속하여 처벌할 수 있는 긴급조치를 발령할 수 있는 권한을 대통령에게 부여하고 있었습니다. 헌법재판소는 이 헌법의 규정에 근거하여 대통령이 발령한 긴급조치를 위헌으로 결정했습니다(2010헌바70등). 비록 수십년 전의 일이긴 하지만 헌법재판소의 결정은 긴급조치로 인해 기본권이 침해되었던 사람들에게 무죄 및 손해배상판결을 받을 수 있는 길을 열어주었고, 그와 같은 과거사의 재발을 경계해야 한다는 사회적 교훈을 남겼습니다. 더불어, 그 당시 대통령에게 국가비상사태의 선포권이라는 초헌법적 국가긴급권을 부여하고 국가비상사태가 선포될 때에는 근로자의 단체교섭권 및 단체행동권을 제한하도록 한 법률조항에 대해서도 그것이 헌법에 위반됨을 선언했습니다(2014헌가5).

9. 지금까지 확인했듯이, 한국 헌법재판소는 헌법의 정신을 실현하는 적극적인 헌법 해석을 통하여 국가권력의 부당한 행사를 억제하고, 국민의 기본권을 보장하는 다수의 결정들을 선고해 왔습니다. 물론 부족하고 아쉬운 측면이 없을 수는 없습니다. 그러나 헌법재판소의 결정이 한국 국민들의 기본권을 보호하는 데 크게 기여해 왔음은 분명한 사실입니다.

한국 헌법재판소는 지난 2005년 이후 한국의 유수의 언론기관이 수행한 여론조사에서, 정부 기관 중 국민적 신뢰도와 그 영향력에 있어서 줄곧 1위를 유지하는 영예를 누리고 있습니다. 그 동안 한국 헌법재판소가 보여주었던 노력과 성과를 국민들이 높이 인정해 준 결과라고 생각합니다.

이상으로 한국 헌법재판소의 주요 결정에 관한 저의 짧은 발표를 마치겠습니다. 감사합니다.

Session 2

Protecting and Promoting Fundamental Rights through Constitutional Adjudication

Protecting and Promoting Fundamental Rights through the Constitutional Adjudication : on the example of the Kyrgyz Republic

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President,
Constitutional Chamber of the Supreme Court
of the Kyrgyz Republic

Presentation
on the topic: “Protecting and Promoting Fundamental Rights through the Constitutional Adjudication: on the example of the Kyrgyz Republic.

Dear participants of the conference!

On behalf of the Constitutional Chamber of the Supreme Court of the Kyrgyz Republic, I am glad to greet all participants of today's meeting.

I want to express special gratitude to the Constitutional Court of Korea for organizing an international symposium at a high level.

Dear colleagues!

In the modern world, human rights and freedoms have a special meaning, which comes from a new understanding of the nature of this institution, its key place in the system of values of democratic and legal states.

Today, human rights and freedoms are a "human dimension" of statehood, they indicate the degree of civilization of the state and determine its development strategy. Respect and guarantee of human rights and freedoms, their security conditions - considered the most objective reflection of the level of maturity of democracy, economic security and social policy of the state.

The constitutional control remains as one of the most effective systems to protect human rights and individual’s freedoms. Its difference and specialty lies in the fact that the judicial protection is received not only by those who applied to the Chamber, but also by other citizens whose rights were violated or could be violated. The acts made by constitutional courts are comparable in nature and significance with legislative acts of higher legal force. The importance of legal positions of constitutional courts is that they contain legal guidelines for the further activities of other legislative bodies, including the protection of human rights and individuals freedoms.

Today, the appeals of citizens who see the body of constitutional control as an effective

instrument of restoring violated rights are becoming more and more numerous. This is evidenced by the statistics of the Constitutional Chamber. The Constitutional Chamber plays an important coordinating role in the constitutional and judicial protection of human rights, since it facilitates the development of conceptual approaches and mechanisms for their protection as a priority of constitutional values and goals. In this aspect, the Constitutional Chamber is considered as one of the factors of authority's self-limitation in order to establish a balance of power and one's freedoms.

At the same time, the effectiveness of the rights protection function performed by the Constitutional Chamber depends on the degree of citizens access to constitutional justice. In the Kyrgyz Republic, constitutional litigation operates on the principle of a "related initiative". In accordance with the legislation of the Kyrgyz Republic, the Constitutional Chamber is not entitled to initiate constitutional proceedings on its own, it is instituted only on the basis of requests from parties specifically provided by law.

The Constitution of the Kyrgyz Republic granted everyone the right to challenge the constitutionality of the law and other normative legal acts if it considers that they violate the rights and freedoms recognized by the Constitution.

Among the advantages of abstract control over other types of control, are the following:

- ability of a citizen to apply to the constitutional court;
- possibility of individual to protect the constitutional right before it is violated by an unconstitutional rule of law (preventive protection);
- restoration by a court of the violated constitutional right of a citizen in a considerably shorter period than if the citizen first must have applied to other human rights bodies;
- protection of citizens constitutional rights and freedoms, foreign citizens and stateless persons whose rights were violated or could be violated by the unconstitutional normative legal acts.

However, it should be noted that abstract control in our republic is combined with specific control. This makes possible to maintain the necessary proportions between ensuring compliance of the normative legal acts with the Constitution, timely elimination of the contradiction in the development of the national system of legislation and observance of legality in the consideration of civil, administrative and criminal cases by courts, the application of legal guarantees of human rights and individual's freedoms.

The Constitution has the highest legal force, allocated the basic human rights and freedoms, the rule of law, justice and equality as the Constitutional values. These constitutional values form a systemic unity, the main task of which is to maintain the balance and proportionality of constitutionally protected values, interests and goals. Decisions of the Constitutional Chamber put the final point in these issues. In other words, the Constitutional

Chamber ensures the operation of the Constitution throughout the country.

In accordance with the Constitution of the Kyrgyz Republic, the human rights and individuals freedoms are directly active. They determine the meaning and content activities of the state authorities, local self-government bodies and their officials. Based on this, the Constitutional Chamber, first of all, in interpreting and applying the provisions of the Constitution, takes such legal position that maximally protects the high dignity, basic rights and freedoms of the individual.

The practice of the Constitutional Chamber shows that the protection of constitutional rights and freedoms of a person and a citizen comes to the fore, both in quantitative and qualitative terms. In practice of the Constitutional Chamber, cases, regarding protection of fundamental rights and freedoms of a person and a citizen, are the most numerous out of all the categories of cases considered by Constitutional Chamber. Statistics show that an increasing number of citizens appeals to the Constitutional Chamber for protection of their constitutional rights and freedoms. The share of cases, considered by the Chamber on appeals of the citizens, account for more than 95 percent of all cases in the Chamber's overall practice; and every year the number increases.

There are many examples of legislative body removing legal gaps, regarding regulations of rights and freedoms of citizens, after the decision of the Constitutional Chamber.

In particular, on March 5th 2014 the Constitutional Chamber assessed, with its decision, one of the norms in the Constitutional Law "On the Status of the Judges of the Kyrgyz Republic" (Part 6 of Article 26) and recognized the contested provision as non-contradictory to the Constitution of the Kyrgyz Republic.

However, in its decision the Constitutional Chamber noted that the right to judicial protection is the right of anyone irrespective of the type of professional activity of a person, therefore, the decision of the judicial, self-governing body (the Council of Judges) on the early dismissal of a judge from his position should not restrict the judge's right to appeal against the decision of the said body. Consequently, the decision of the judicial self-governing body (the Council of Judges) on the early dismissal of a judge, as an extreme measure of disciplinary action, must be subject to judicial review. That was the reason, the Constitutional Chamber has pointed out the legislative body the need to develop legal instruments, which would allow the judge to appeal against the decision of the judicial self-governing body (the Council of Judges) during the time between the issuance of the decision by Council of Judges and its approval by the President of the Kyrgyz Republic.

The Constitutional Chamber also considered cases based on appeals of citizens regarding violations of their civil and political rights and freedoms guaranteed by the Constitution.

Thus, on June 4th 2014 the Constitutional Chamber assessed the constitutionality of recall of a member of local self-government body by the governing body of a political party after the proposal by the said party.

In its decision, the Constitutional Chamber stated that according to Article 112 of the Constitution of Kyrgyz Republic, deputies of the representative body of local self-government bodies are elected by citizens residing in the territory of the respective administrative and territorial units, while taking into account the equal opportunity principle, established by law.

The election of candidates for positions of deputies of a representative body of local self-government is a direct expression of the will of citizens. The only entity that has the opportunity to elect its representatives at the local level is the local community. Thus, the deputies of the representative body of local self-government body are the bearers of power of the local population, according to the principle of popular sovereignty.

Consequently, a candidate for the position of a deputy in a representative body of local self-government acquires the status of a deputy only on the basis of elections and following the results of elections. Such status obliges the deputy to protect the interests of the local community foremost. That is why the Constitutional Chamber stated that recall of a deputy off the position in a representative body of local self-government on the advice of a political party creates conditions for violating the electoral rights of citizens. Moreover, the Constitutional Chamber concluded that such provision violates the democratic principles, which are contained in Constitution, like that of people’s sovereignty and independence of local self-government.

With its decisions, the Constitutional Chamber also draws the attention of the legislation to the need to compliance with the supremacy of the Constitution in the law-making process, the consistent development of constitutional values and principles, which will allow achieving a flexible, dynamic and ultimately defined legal and regulatory framework that meets the needs of society and the state.

Thus, on November 6 2013 the Constitutional Chamber assessed on the constitutionality of Article 128 of the Criminal Code of the Kyrgyz Republic, which provided for criminal liability for acts that discredit or humiliate the honor and dignity of citizens. In this particular decision, the Constitutional Chamber noted that, according to the requirements written out in Constitution, everyone has the right to inviolability of private life, and right to protection of honor and dignity. Everyone is guaranteed protection, including judicial protection, from improper collection, storage, dissemination of confidential information and information about a person's private life, also, a person is guaranteed the right to compensation for material and moral harm caused by unlawful actions is guaranteed. At the same time, the Constitution guarantees ban on criminal prosecution for the dissemination of information, which discredits the honor and dignity of an individual (Section 5 of Article 33). Because of

this, the aforementioned norm was recognized contradictory to the Constitution. Moreover, the Constitutional Chamber, taking into account the aforementioned guarantees from the Constitution, indicated the legislator about the need to consider an effective mechanism of protection of honor and dignity of an individual through introduction of relevant changes and additions to civil and administrative law.

I would like to note on the decisions of the Constitutional Chamber, which, despite the final resolution on the constitutionality of the considered norms, point that it is necessary to implement additional legal regulation in the implementation of human rights and individuals freedoms. In particular, in the decision of January 24, 2014, the Constitutional Chamber assessed the constitutionality of certain norms of the Criminal Procedural Code of the Kyrgyz Republic (Section 1 of Article 131, section 1 of Article 132).

The Constitutional Chamber has outlined in the indicated decision that it is clearly defined that not only orders to dismiss criminal complaints and orders to terminate criminal cases can be appealed in the Criminal Procedural Code of the Kyrgyz Republic, but also other decisions and actions (inaction) which are capable of violating constitutional rights and freedoms of criminal trial participants or obstruct the access of citizens to justice.

In case the Constitutional Chamber has brought law enforcers to notice that during application of disputable norms of the Criminal Procedural Code of the Kyrgyz Republic (Section 1 of Article 131) a contradictory judicial practice establishes itself, when some courts accept to review complaints against decisions of investigators, prosecutors to institute criminal proceedings, other courts, believing that the decisions of investigators, prosecutors to institute criminal proceedings are not subject to appeal, dismiss the complaints. In such case, courts, having dismissed such complaints, reviewed the disputed legal norm of the Criminal Procedural Code of the Kyrgyz Republic in relationship to another article of the same Code, in which an exhaustive list of procedural acts subject to appeal by physical and legal entities is brought.

According to the results of the constitutional examination, the Constitutional Chamber recognized the disputed norm (Section 1 of Article 131) of the Criminal Procedural Code as contradictory to the Constitution, and has indicated that the legislative body should exclude the given contradictions in the norm of the Criminal Procedural Code. The Constitutional Chamber has specifically indicated that these changes should provide the guaranteed right of all persons to judicial protection of their rights and freedoms, exclude uncertainty in law enforcement processes and bring it to accordance with the constitutional principles of legal state through its application by judicial bodies.

The Constitutional Chamber does not just interpret separate legal norms, it forms the constitutional legal doctrine, it offers its own understanding of separate articles of the Constitution, which is required for all state bodies and other subjects under constitutional

legal relations. In this regard, it is possible to state that it creates law in a certain way. This view is purely theoretical, the Constitutional Chamber cannot replace the legislator, and its decisions are not aimed at creation of new legal norms.

In particular, in its decision on the 26th of the November, 2013, the Constitutional Chamber conducted a constitutional examination of Article 427 of the Labor Code of the Kyrgyz Republic and indicated that the legislative body had initially incorrectly understood the meaning and contents of such a definition as "political office". Because of this, the Constitutional Chamber defined the essence of this term in its decision. As a result of this the legislator formulated the definition of "political office" in the new version of the Law of the Kyrgyz Republic "On civil service and municipal service", guided by the fundamental principles and attributes written in the given decision of the Constitutional Chamber during ratification.

Dear colleagues!

In my opinion, the given examples from practice of the Constitutional Court may be reviewed as a step forward in the direction of further strengthening of the idea of constitutionalism. However, without effective execution of decisions of constitutional control bodies it is not possible to speak of achieving final results.

The effectiveness of execution of decisions becomes even more relevant if the normative character of the decisions of the Constitutional Chamber is considered, as well as their finality and impossibility of appeal. Execution of judicial decisions of any court, especially constitutional justice bodies, should provide for specific methods of such execution, giving full and timely implementation of legal positions, established in the decision itself.

Moreover, a legal vacuum or gap in the law can occur from the moment of recognition of a normative legal act as unconstitutional in whole or in part, which should be rectified by law-making bodies.

Due to this, the need for effective execution of judicial decisions obligates the state to ensure implementation of these requirements through the establishment of appropriate organizational and legal mechanisms of execution of final judicial decisions in the legislation.

Naturally, the formation of the institute of constitutional control in the Kyrgyz Republic will continue by the search of new methods, models and working standards, considering the specificities of the national context. However, on the whole, at present the Constitutional Chamber has established its place and role in provisioning, defense, and promotion of both human and citizen rights and freedoms.

Dear colleagues!

I am very happy to see that the meeting of the Association of Asian Constitutional Courts

occurs systematically and is becoming tradition. I am confident that such platforms contribute to the exchange of experience among members of the Association, popularization of ideas on constitutionalism and activities of constitutional courts and equivalent bodies in the Asian region.

Thank you for your attention.

ДОКЛАД
на тему: «Защита и продвижение основных прав и свобод человека и гражданина посредством конституционного правосудия: опыт КР»

Уважаемые участники конференции!

От имени Конституционной палаты Верховного суда Кыргызской Республики рад приветствовать всех участников сегодняшней встречи.

Особую признательность хочу выразить Конституционному суду Кореи за организацию международного симпозиума на высоком уровне.

Уважаемые коллеги!

В современном мире права и свободы человека имеют особое значение, которое исходит из нового понимания самой природы данного института, его ключевого места в системе ценностей демократических и правовых государств.

Сегодня права и свободы человека представляют собой «человеческое измерение» государственности, свидетельствуют о степени цивилизованности государства, определяют его стратегию развития. Соблюдение и гарантии прав и свобод человека, состояние их защищенности являются наиболее объективным отражением уровня зрелости демократии, экономической безопасности, социальной политики государства.

В свою очередь, конституционный контроль остается одним из эффективных средств защиты прав и свобод человека и гражданина. Ее отличие и особенность в этой системе заключается в том, что в результате конституционного судопроизводства судебную защиту получают не только лицо, обратившееся в орган конституционного правосудия, но и другие граждане, права которых нарушались или могли бы быть нарушены. Содержание актов конституционных судов сопоставимо по своему характеру и значению с законодательными актами высшей юридической силы. Значение правовых позиций конституционных судов состоит в том, что в них содержатся правовые ориентиры для дальнейшей деятельности законодательных органов, в том числе и в сфере обеспечения прав и свобод человека и гражданина.

Сегодня обращения граждан, видящих в органе конституционного правосудия эффективный инструмент восстановления нарушенных прав становятся все более и более многочисленными. Об этом свидетельствует статистические данные Конституционной палаты. Конституционная палата играет важную координирующую роль в конституционно-судебной защите прав человека, поскольку способствует выработке концептуальных подходов и механизмов их защиты как приоритетных конституционных ценностей и целей. В этом аспекте Конституционная палата является одним из факторов самоограничения власти в целях установления равновесия власти и свободы личности.

Вместе с тем, эффективность выполняемой Конституционной палатой правозащитной функции зависит от степени доступа граждан к конституционному правосудию. В Кыргызской Республике конституционное судопроизводство действует по принципу «связанной инициативы». В соответствии с законодательством Кыргызской Республики, Конституционная палата не вправе возбуждать конституционное судопроизводство по собственной инициативе, оно возбуждается только по обращениям субъектов, специально предусмотренных законом.

Конституция Кыргызской Республики предоставила право каждому оспорить конституционность закона и иного нормативного правового акта, если считает, что ими нарушаются права и свободы, признаваемые Конституцией.

В числе преимуществ абстрактного контроля над другими видами контроля можно назвать следующие:

- - доступность обращения гражданина в конституционный суд;
- - возможность защиты конституционного права индивида еще до его нарушения неконституционной нормой права (превентивная защита);
- - восстановление судом нарушенного конституционного права гражданина в значительно более короткий срок, чем в случае необходимости предварительного обращения гражданина в иные правозащитные органы;
- - защита конституционных прав и свобод граждан, иностранных граждан и лиц без гражданства, чьи права нарушались или могли бы быть нарушены неконституционными нормативными правовыми актами.

Но следует отметить, что абстрактный контроль в нашей республике сочетается с конкретным контролем. Это позволяет сохранить необходимые пропорции между обеспечением соответствия нормативных правовых актов конституции, своевременным устранением противоречия в развитии национальной системы законодательства и соблюдением законности при рассмотрении судами гражданских, административных и уголовных дел, применением юридических гарантий прав и свобод человека и гражданина.

Конституция, обладая высшей юридической силой, закрепляет основные права и свободы человека, верховенство права, справедливость, равенство как конституционные ценности. Указанные конституционные ценности образуют системное единство, главной задачей которого, является поддержание баланса и соразмерности конституционно защищаемых ценностей, интересов и целей. Решения Конституционной палаты ставят окончательную точку в этих вопросах. Иными словами, Конституционная палата обеспечивает действие Конституции на всей территории страны.

В соответствии с Конституцией Кыргызской Республики права и свободы человека и гражданина являются непосредственно действующими. Они определяют смысл и содержание деятельности всех государственных органов, органов местного самоуправления и их должностных лиц. Исходя из этого, Конституционная палата при интерпретации (толковании) и применении положений Конституции придерживается прежде всего такой правовой позиции, которая максимально защищает высокое достоинство, основные права и свободы личности.

Практика Конституционной палаты показывает, что защита конституционных прав и свобод человека и гражданина выходит на первый план, как в количественном, так и в качественном отношениях. Дела по защите основных прав и свобод человека и гражданина в практике Конституционной палаты являются самой многочисленной из категорий дел, рассматриваемых ею при осуществлении своих судебных полномочий. Как показывает статистика, все большее количество граждан обращается в Конституционную палату за защитой своих конституционных прав и свобод. Доля рассмотренных дел по обращениям граждан в общей практике Конституционной палаты превышает 95 процентов и из года в год увеличивается.

Немало примеров, когда на основе принятого Конституционной палатой решения по обращениям граждан, законодательным органом устранялись правовые пробелы в правовом регулировании касательно прав и свобод граждан.

В частности, решением от 5 марта 2014 года Конституционная палата дала оценку норме конституционного Закона «О статусе судей Кыргызской Республики» (часть 6 статьи 26) и признала оспариваемое положение не противоречащей Конституции Кыргызской Республики.

Однако в своем решении Конституционная палата отметила, что право на судебную защиту является правом каждого, независимо от рода профессиональной деятельности, поэтому решение органа судейского самоуправления (Совета судей) о досрочном освобождении судьи от занимаемой должности не должно ограничивать право судьи обжаловать решение данного органа. Следовательно, решение органа судейского самоуправления (Совета судей) о досрочном освобождении судьи, как

крайняя мера дисциплинарного воздействия, должно подлежать проверке судом. В связи с чем, Конституционная палата указала законотворческому органу о необходимости разработать правовые инструменты, позволяющие судье обжаловать решение органа судейского самоуправления (Совета судей) во временном промежутке между вынесением соответствующего решения органа судейского самоуправления (Советом судей) о досрочном освобождении судьи и до его утверждения Президентом Кыргызской Республики.

В практике Конституционной палаты также есть дела по обращениям граждан на нарушение их гражданских и политических прав и свобод, гарантированных Конституцией.

Так, в своем решении от 4 июня 2014 года Конституционная палата дала оценку конституционности отзыва депутата представительного органа местного самоуправления (местные кенеши) руководящим органом политической партии на основании предложения соответствующей депутатской фракции.

Конституционная палата в своем решении указала, что согласно статье 112 Конституции, депутаты представительного органа местного самоуправления (местные кенеши) избираются гражданами, проживающими на территории соответствующей административно-территориальной единицы, с соблюдением равных возможностей в порядке, установленном законом. Избрание кандидатов в депутаты представительного органа местного самоуправления (местные кенеши) является непосредственным выражением воли граждан. Единственным субъектом, обладающим возможностью избирать своих представителей на местном уровне является местное сообщество. Таким образом, депутаты представительного органа местного самоуправления (местные кенеши), согласно принципу народного суверенитета, являются носителями власти местного населения.

Следовательно, только на основании выборов и по итогам выборов кандидат в депутаты представительного органа местного самоуправления (местные кенеши) приобретает статус депутата. И такой статус обязует депутата защищать в первую очередь интересы местного сообщества. Поэтому Конституционная палата указала, что отзыв депутата представительного органа местного самоуправления руководящим органом политической партии на основании предложения фракции создает условия для нарушения сущности избирательного права граждан. Кроме того, Конституционная палата пришла к выводу, что подобное положение нарушает закрепленные Конституцией демократические принципы, такие как принцип народного суверенитета и независимость местного самоуправления.

В своих решениях Конституционная палата также обращает внимание законодателя на необходимость безусловного соблюдения в законотворческом процессе верховенства

Конституции, последовательного развития конституционных ценностей и принципов, что позволит достичь гибкого, динамичного, предельно определенного, отвечающего потребностям общества и государства правового регулирования.

В решении от 6 ноября 2013 года Конституционная палата дала оценку конституционности статьи 128 Уголовного кодекса Кыргызской Республики, которая предусматривала уголовную ответственность за действия, порочащие или унижающие честь и достоинство граждан. В данном решении Конституционная палата отметила, что в соответствии с требованиями Конституции каждый имеет право на неприкосновенность частной жизни, на защиту чести и достоинства. Каждому гарантируется защита, в том числе судебная, от неправомерного сбора, хранения, распространения конфиденциальной информации и информации о частной жизни человека, а также гарантируется право на возмещение материального и морального вреда, причиненного неправомерными действиями. Одновременно с этим, Конституция устанавливает гарантии запрета на уголовное преследование за распространение информации, порочащей честь и достоинство личности (часть 5 статьи 33). В этой связи норма Уголовного кодекса была признана противоречащей Конституции. Вместе с тем, Конституционная палата учитывая вышеуказанные конституционные гарантии, указала законодателю о необходимости рассмотреть эффективный механизм защиты чести и достоинства личности путем внесения соответствующих изменений и дополнений в гражданское и административное законодательство.

Хотел бы остановиться на решениях Конституционной палаты, в которых, несмотря на итоговую резолюцию о конституционности проверенных нормоположений, указывается на необходимость осуществления дополнительного правового регулирования в реализации прав и свобод человека и гражданина. В частности, в решении от 24 января 2014 года Конституционная палата дала оценку конституционности отдельным нормам Уголовно-процессуального кодекса Кыргызской Республики (часть 1 статьи 131, часть 1 статьи 132).

В указанном решении Конституционная палата отметила, что в Уголовно-процессуальном кодексе Кыргызской Республики законодателем четко определено, что обжалуются не только постановления об отказе в возбуждении уголовного дела, о прекращении уголовного дела, но и иные решения и действия (бездействие), которые способны причинить ущерб конституционным правам и свободам участников уголовного судопроизводства либо затруднить доступ граждан к правосудию.

При этом Конституционная палата обратила внимание правоприменителей на то, что при применении оспариваемой нормы Уголовно-процессуального кодекса Кыргызской Республики (часть 1 статьи 131) складывается противоречивая судебная практика, когда одни суды принимают к рассмотрению жалобу на постановление следователя, прокурора о возбуждении уголовного дела, другие суды, считая, что решение

следователя, прокурора о возбуждении уголовного дела не подлежит обжалованию, производство по жалобе прекращают. При этом суды, прекращая производство по таким делам, рассматривали оспариваемую норму Уголовно-процессуального кодекса Кыргызской Республики во взаимосвязи с другой статьей этого же кодекса, где приводится ограниченный перечень процессуальных актов, обжалуемых физическими и юридическими лицами.

По результатам конституционной проверки Конституционная палата признала оспоренную норму (часть 1 статьи 131) Уголовно-процессуального кодекса Кыргызской Республики не противоречащей Конституции и указала законотворческому органу исключить имеющуюся в Уголовно-процессуальном законодательстве противоречивость норм. Конституционная палата обозначила, что эти изменения должны обеспечивать гарантированную Конституцией право каждого на судебную защиту прав и свобод, и исключать неопределенность в процессе правоприменения и приводить к не согласующемуся с конституционным принципом правового государства произвольному его применению судебными органами.

Конституционная палата не просто интерпретирует отдельные правовые нормы, она формирует конституционно-правовую доктрину, предлагает свое понимание определенных положений Конституции, обязательное для всех государственных органов и иных субъектов конституционных правоотношений. В этой связи можно утверждать, что она в известном смысле и в известных пределах творит право. Это допущение весьма условно, Конституционная палата не может подменять законодателя, ее решения не направлены на создание новых правовых норм.

В частности, в своем решении от 26 ноября 2013 года, Конституционная палата осуществила проверку конституционности статьи 427 Трудового кодекса Кыргызской Республики и указала на то, что законотворческим органом изначально неправильно понят смысл и содержание такого понятия как «политическая должность». Поэтому в своем решении Конституционная палата раскрыла суть этого понятия. В последующем законодатель, руководствуясь основополагающими принципами и признаками, заложенными в указанном решении Конституционной палаты при принятии Закона Кыргызской Республики «О государственной гражданской службе и муниципальной службе» в новой ее редакции сформулировал понятие «политической должности».

Уважаемые коллеги!

На мой взгляд, приведенные примеры из практики Конституционной палаты можно рассматривать как шаг вперед в направлении дальнейшего укрепления идей конституционализма. Однако без эффективного исполнения решений органа конституционного контроля невозможно говорить о достижении конечных результатов.

Эффективность исполнения решений становится особенно актуальным, если учесть

нормативный характер решений Конституционной палаты, их окончательность и невозможность обжалования. Исполнение решений любого суда, тем более органа конституционного правосудия, должно предусматривать определенный способ такого исполнения, обеспечивающий полное и своевременное претворение в жизнь правовых позиций, прописанных в самом решении.

Тем более, с момента признания неконституционным нормативного правового акта в целом или в части, может возникнуть правовой вакуум или пробел в законодательстве, которое необходимо восполнить нормотворческому органу.

Поэтому требования эффективного исполнения судебных решений обязывает государство обеспечить реализацию этих требований посредством установления в законодательстве надлежащего организационно-правового механизма исполнения итоговых судебных актов.

Конечно, становление института конституционного контроля в Кыргызской Республике будет продолжаться путем поиска новых форм, моделей и стандартов работы, учитывающих специфику национальных особенностей. Но в целом, на сегодняшний день Конституционная палата прочно определила свое место и роль в обеспечении защиты и продвижении прав и свобод человека и гражданина.

Дорогие коллеги!

Я очень рад тому, что встреча членов Ассоциации азиатских конституционных судов проводится систематически и становится доброй традицией. Убежден, что подобного рода площадки способствует обмену опытом между членами Ассоциации, популяризации идей конституционализма и деятельности конституционных судов и эквивалентных органов в азиатском регионе.

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Session 2

Protecting and Promoting Fundamental Rights through Constitutional Adjudication

The Role of the Constitutional Court in Protecting and Promoting Fundamental Rights in the Russian Federation

4th PT : Sergei Sergevnin

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CONSTITUTIONAL COURT OF THE RUSSIAN FEDERATION

REPORT
to the Inaugural AACC SRD International Symposium
"Constitutionalism in Asia: Past, Present and Future**"**
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Session 2 **"**Protecting and Promoting Fundamental Rights through Constitutional Adjudication**"**

The Role of the Constitutional Court in Protecting and Promoting Fundamental Rights in the Russian Federation

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The Constitutional Court of the Russian Federation is the highest judicial authority in Russia, competent to deliver constitutional justice. It is one of the two highest courts along with the Supreme Court, which is the highest judicial authority for civil cases, economical disputes, criminal, administrative and other cases, except constitutional disputes.

Created in 1991 under the Law of the RSFSR "On the Constitutional Court of the Russian Soviet Federative Socialist Republic" the Court started its judicial activity in January 1992. Since 1995 the Federal Constitutional Law "On the Constitutional Court of

the Russian Federation" (hereinafter – Law on the Constitutional Court), which was adopted in accordance with the 1993 Constitution of the Russian Federation, regulates the Court's activity. Articles 118, 125, and 128 (Part 3) of the Constitution of the Russian Federation and the Law on the Constitutional Court designate the status of the Constitutional Court of the Russian Federation (hereinafter – Constitutional Court; Court) as the court exercising judicial power by means of constitutional adjudication and designate its constitutional competencies. These numerous competencies of the Constitutional Court imply to different extent interpretation of provisions of the basic law and administration of the constitutional normative review. These types of activity of the Constitutional Court determine the main substance of the Russian constitutional review.

Meanwhile, as provided for by Article 2 of the Russian Constitution, a human, the rights and freedoms thereof shall be the supreme value in the Russian Federation, whereas the recognition, observance and protection of rights and freedoms of a human and a citizen shall be an obligation of the State. This provision, therefore, predetermines the direction and the main target of all Russian bodies' of State's power activities, including the judicial activity of the Constitutional Court of the Russian Federation.

The Constitutional Court promotes and protects fundamental human rights and freedoms by carrying out its activities within the forms stipulated by the Russian Constitution and the Law on the Constitutional Court – in accordance with the existing powers and competencies.

One of the most obvious and popular way of protection of human and citizen rights by the Constitutional Court is handling cases initiated by individuals' constitutional complaints. An individual complaint of a citizen on violation of his fundamental rights and legitimate interests has been initially admissible at the Constitutional Court of Russia from the very foundation of the Court. It was stipulated as early as in the Law of the RSFSR of 6 May 1991 No. 1175-1 "On the Constitutional Court of the Russian Soviet Federative Socialist Republic". At that time it used to be considered within the constitutional review of law enforcement practice.

After the adoption of the new Constitution of the Russian Federation on 12 December 1993 pursuant to Section 4 of Article 125 of the latter particularly the Constitutional Court of the Russian Federation began to review the constitutionality of a law applied in a concrete case – in accordance with the respective federal law. The Law on the Constitutional Court of 21 July 1994 contains a particular Chapter XII named "Consideration of cases on the constitutionality of laws upon complaints on violation of constitutional rights and freedoms of citizens".

From the moment when the law came into force it was assumed that it would be either Russian citizens or foreign citizens, as well as persons without citizenship who would apply to the Constitutional Court of the Russian Federation with complaints on violation of their constitutional rights and freedoms. However, the Constitutional Court itself by a number

of its own judgments has expanded this list. As a result associations of citizens are also entitled to apply with constitutional complaints, including religious organizations, joint-stock companies, partnership companies, limited liability companies, state-owned enterprises, municipal entities, national minorities, national-cultural autonomies and structures thereof acting on federal and regional levels, etc.

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

And, obviously, within this stream of complaints and applications there are a lot of those declared by the Constitutional Court inadmissible; mainly – due to their non-constitutional nature, and due to that the issues addressed therein are subject to be resolved and are virtually resolved by other judicial bodies by means of criminal, administrative and civil proceedings, as well as by other law enforcement bodies, or due to that a citizen applies to the Constitutional Court not in relation to violation of his rights and freedoms, but in defense of a certain public interest that he comprehends in a specific way. At the present time since 2010 the Constitutional Court of the Russian Federation does not consider complaints if the contested law is only subject to application in a concrete case, currently it has to be applied virtually, provided that it is a judicial case which has been considered by general court or arbitration court, and that the court's decision has already come into legal force.

The presence of the institute of a constitutional complaint of citizens in the Russian Federation significantly intensifies legal defense of the fundamental rights and freedoms of citizens, promotes significance thereof. It is fair to say, that the availability of such an institute to a large extent determines the reason of existence of the Constitutional Court of the Russian Federation, and, on the contrary, the absence thereof would significantly devaluate the constitutional justice in Russia, would decrease the level of constitutional protection of fundamental rights and freedoms of human and citizen. The legislation, as well as the adjudication practice of the Constitutional Court concerning consideration of complaints of citizens on violation of their fundamental rights and freedoms, is on that level which bears evidence of that they will comply with international standards for constitutional justice, if and when such standards are elaborated. However, with no doubts, in our country there are certain peculiarities concerning the conditions and the procedure of submitting a claim, concerning the procedure of contesting of specific types of legal acts within the constitutional justice procedure, etc. We also have certain weakness points in this regard, which are determined and eliminated by virtue of the science of jurisprudence.

Nevertheless, despite the supreme significance of the institute of handling a constitutional complaint, other forms of administering constitutional review through delivering constitutional justice also considerably contribute to the protection and, which is not less important, promotion of human and citizen constitutional (i.e. fundamental) rights and freedoms. The Constitutional Court of the Russian Federation throughout every form of its constitutional-review activity applies the constitutional principles enshrined in the Constitution. This is an immanent part the Constitutional Court's activity. Application of the basic constitutional principles, being fundamental to the Russian constitutional order and forming the so-called constitutional ideology, to an issue under consideration allows the Constitutional Court to elaborate a legal position and resolve the issue of constitutionality or unconstitutionality of a legal act.

These are constitutional characteristics of the Russian Federation as a law-governed and social state. They often serve as a straightforward legal ground for the Constitutional Court to adopt certain decisions. With that the category a "law-governed state" has been de facto transformed into the principle of the rule of law. The notion of a "social state" is being used by the Constitutional Court in its reasoning even beyond the sphere of realisation of social constitutional rights. In the meantime the characteristic of Russia as a democratic state is usually being realised via the principle of appurtenance of public power to the people which is also enshrined in the Constitution.

Moreover, these are the principles of: the supreme value of human rights and freedoms and aiming of the sense, content and application of laws, activities of the legislature, the executive and local self-governance to implementation of rights and freedoms; inalienability of fundamental human rights and freedoms and their belonging to everyone from the moment of birth; impermissibility of violation of human rights and freedoms while realising human rights and freedoms of the others; equality of rights and freedoms and equality of realisation thereof; freedom of entrepreneurship; recognition and protection of private, state, local and other forms of property. This listing of the constitutional ideology principles of the Russian Federation, of course, is not exhaustive.

Furthermore, the Constitutional Court reveals such constitutional principles which are not explicitly stipulated in the Constitution but rather exist therein implicitly. These revealed constitutional principles include, in particular, humanism, justice, security of mutual trust in the relationship between an individual and public authority, legal certainty, and balance of constitutional values. These are the most significant and universal principles revealed by the Constitutional Court. They de facto are the basis for the assessment by the Constitutional Court of any contested provision.

It is of principle importance that the Constitutional Court does not "invent" new constitutional principles but reveals them. The Court does not claim and, as it seems, cannot claim that this is the Court itself which creates constitutional ideology. Constitutional

ideology in its entirety – both explicitly and implicitly – is contained in the Constitution itself. Sometimes the implicit principles being a part of the later can be identified by the usual means of interpreting its text. However, it is always necessary to proceed from the spiritual and cultural principles of the society, since it was the will of the people which inspired the life of the Constitution.

The guideline of all the practice of the Constitutional Court are the words of the Constitutional Preamble that the multinational people of the Russian Federation adopted the Constitution revering the memory of ancestors who have passed on to us their love for the Fatherland and faith in good and justice, striving to ensure the well-being and prosperity of Russia, proceeding from the responsibility for our Motherland before present and future generations. The argumentation of the Constitutional Court within the last years more often uses references to the Preamble, where the essence of the aspirations and goals of the people associated with the adoption of the Constitution are expressed the most vividly and emotionally.

In conclusion I would like to address such an important element of Russian constitutional ideology as the principle of balance of constitutional values. It has different emanations – balance of private and public interests, balance of rights and obligations, balance of rights and lawful interests of different persons, impermissibility of abuse of law, balance of dispositive and imperative methods of legal regulation, balance of interests of the Russian Federation and the constituent entities thereof etc.

The balance of constitutional values is the fundamental constitutional principle and, at the same time, this is the main methodological tool of the Constitutional Court's activity. If one asks what the core of the Constitutional Court's activity is, the answer would be – the balance of constitutional values.

Often in legal relations the rights and interests of one person are in opposition to the rights and interests of another. If the other side of legal relations is the public power, it would seem that the former should be prevailing when establishing a balance between the rights of a person and public interests. But even in such a situation everything is ambiguous. As, for example, demonstrated by the decisions of the Constitutional Court on tax issues, on the issue of the order of priorities in execution of the enterprise's liabilities in case of a lack of funds, one cannot ignore that on the other side – where it seems to be about public interests – there are people with their needs too, those, whose needs are covered by the budget. That is, in the case of a conflict of public and private interests, the establishment of a balance of constitutional values requires some elaboration, which is not a linear one.

Somewhen "[f]ascinated by protection of individual human rights, we began to forget that man, as Aristotle said, is by nature a social creature… We need now such an adjustment of the liberal-individualistic approach to legal understanding, which would introduce the idea

of solidarity into the very notion of law. We need a legal theory that synthesises within the framework of the notion of the law the ideas of individual freedom and social solidarity, because they both are the immanent components of the essence of man and, hence, the essence of law"[1)] . The Russian philosophy is characterised by the "strive to unite the idea of abstract, impersonal formal legal equality with the idea… about everyone's responsibility not only for themselves, but also for others. The aspiration… to harmonise within the concept of law the mind and spirit, freedom and mercy, right and truth, individual and social principles". That is why it is natural that the approach based on the balance of individual and social lies in the foundation of the Russian constitutional order.

1) Valery Zorkin, the President of the Constitutional Court of the Russian Federation, professor. Lecture "the Essence of Law" delivered at the St. Petersburg International Legal Forum. May, 2017.

For interpretation purposes only

Роль Конституционного Суда в защите и поощрении основных прав в Российской Федерации

Доклад на Международном симпозиуме СИР ААКС «Конституционализм в Азии: прошлое, настоящее и будущее» (30 октября – 2 ноября 2017 года, г. Сеул, Республика Корея) — Сессия 2 «Защита и поощрение основных прав посредством отправления конституционного правосудия

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Конституционный Суд Российской Федерации является высшим судебным органом в России, уполномоченным осуществлять конституционное правосудие. Это один из двух судов высшей инстанции наряду с Верховным Судом, который является высшим судебным органом по гражданским делам, экономическим спорам, уголовным, административным и другим делам, но не уполномочен рассматривать конституционные вопросы.

Созданный в 1991 году согласно Закону РСФСР «О Конституционном Суде Российской Советской Федеративной Социалистической Республики», Суд начал свою судебную деятельность в январе 1992 года. С 1995 года деятельность Суда регулирует Федеральный конституционный закон «О Конституционном Суде Российской Федерации» (далее — Закон о Конституционном Суде), принятый в соответствии с Конституцией Российской Федерации 1993 года. Статьи 118, 125 и 128 (часть 3) Конституции Российской Федерации, а также Закон о Конституционном Суде, определяют статус Конституционного Суда Российской Федерации (далее — Конституционный Суд, Суд) как осуществляющего судебную власть посредством конституционного судебного разбирательства и определяют его конституционные полномочия. Многочисленные полномочия Конституционного Суда подразумевают разную степень толкования положений основного закона и разрешение дел о соответствии Конституции нормативных правовых актов. Эти виды деятельности

Конституционного Суда отражают суть российского конституционного контроля.

Между тем, статьёй 2 Конституции России предусмотрено, что человек, его права и свободы являются высшей ценностью в Российской Федерации, а признание, соблюдение и защита прав и свобод человека и гражданина — обязанность государства. Таким образом, это положение предопределяет направление и основную цель деятельности всех российских органов государственной власти, в том числе судебной деятельности Конституционного Суда Российской Федерации.

Конституционный Суд поддерживает и защищает основные права и свободы человека путём осуществления своей деятельности в формах, предусмотренных Конституцией Российской Федерации и Законом о Конституционном Суде, в соответствии с существующими полномочиями и компетенциями.

Одним из наиболее очевидных и широко распространённых способов защиты Конституционным Судом прав человека и гражданина является рассмотрение дел, возбуждённых по индивидуальным конституционным жалобам. Индивидуальная жалоба гражданина на нарушение его основных прав и законных интересов была приемлемой в Конституционном Суде России с самого его основания. Такая возможность была предусмотрена ещё Законом РСФСР от 6 мая 1991 года № 1175-1 «О Конституционном Суде Российской Советской Федеративной Социалистической Республики». В то время она рассматривалась в порядке конституционного контроля правоприменительной практики.

После принятия 12 декабря 1993 года новой Конституции Российской Федерации, в частности в соответствии с разделом 4 статьи 125 последней, Конституционный Суд Российской Федерации начал рассматривать конституционность законов, применяемых в конкретном случае, согласно соответствующему федеральному закону. В Законе о Конституционном Суде от 21 июля 1994 года содержится глава XII «Рассмотрение дел о конституционности законов по жалобам на нарушение конституционных прав и свобод граждан».

С момента вступления закона в силу предполагалось, что обращаться в Конституционный Суд Российской Федерации с жалобами на нарушение их конституционных прав и свобод будут граждане России, иностранные граждане, а также лица без гражданства. Однако сам Конституционный Суд рядом своих решений расширил этот список. В результате право обращаться с конституционными жалобами получили объединения граждан, в том числе религиозные организации, акционерные общества, товарищества, общества с ограниченной ответственностью, государственные предприятия, муниципальные учреждения, национальные меньшинства, национально-культурные автономии и их структуры, действующие на федеральном и региональном уровнях и т.д.

Если учесть, что правом обратиться в Конституционный Суд в интересах граждан обладают Уполномоченный по правам человека (который делает это в среднем 6–7 раз в год) и Генеральный прокурор (который этого ещё ни разу не делал), то представляется очевидным, что в Российской Федерации довольно широкий круг лиц вправе прямо или косвенно обращаться в Конституционный Суд с жалобами на нарушение конституционных прав, свобод и интересов граждан. Среди примерно 20 тысяч жалоб и других обращений, ежегодно подаваемых в Конституционный Суд Российской Федерации, доля конституционных жалоб граждан существенно выше 90 процентов.

Разумеется, среди этого потока жалоб и обращений есть много признаваемых Конституционным Судом неприемлемыми; главным образом — из-за их неконституционного характера (в таком случае вопросы, поставленные в них, подлежат разрешению и фактически разрешаются либо другими судебными органами посредством уголовного, административного и гражданского судопроизводства, либо правоохранительными органами) или в связи с тем, что гражданин обращается в Конституционный Суд не в связи с нарушением его прав и свобод, а в защиту определённых общественных интересов, которые он определённым образом понимает. В настоящее время с 2010 года Конституционный Суд Российской Федерации не рассматривает жалобы, в которых оспаривается закон, подлежащий применению в конкретном деле. В настоящее время такой закон должен быть применён практически, при условии, что данное судебное дело было рассмотрено арбитражным судом или судом общей юрисдикции и что решение суда уже вступило в законную силу.

Наличие в Российской Федерации института конституционной жалобы граждан значительно усиливает юридическую защиту основных прав и свобод граждан, укрепляя их важное значение. Справедливо будет заметить, что наличие такого института в значительной степени оправдывает само существование Конституционного Суда Российской Федерации, и, наоборот, его отсутствие значительно обесценило бы конституционное правосудие в России, снизило бы уровень конституционной защиты основных прав и свобод человека и гражданина. Законодательство, а также судебная практика Конституционного Суда по рассмотрению жалоб граждан на нарушение их основных прав и свобод находятся на том уровне, который свидетельствует о том, что они будут соответствовать международным стандартам конституционного правосудия, если и когда такие стандарты будут разработаны. Однако, без всяких сомнений, в нашей стране существуют определённые особенности относительно условий и порядка подачи жалобы, относительно порядка оспаривания конкретных видов правовых актов в рамках процедуры конституционного правосудия и т.д. У нас также есть определённые недостатки в этом отношении, которые выявляются и устраняются посредством применения науки юриспруденции.

Однако, вместе с тем, что институт рассмотрения конституционной жалобы

обладает высочайшей важностью, другие формы осуществления конституционного контроля путём отправления конституционного правосудия также вносят существенный вклад в защиту и, что не менее важно, поощрение конституционных (т.е. основных) прав и свобод. Конституционный Суд Российской Федерации во всех формах своей деятельности по контролю за соблюдением Конституции применяет конституционные принципы, закреплённые в Конституции. Это постоянная составляющая деятельности Конституционного Суда. Применение к рассматриваемому вопросу основных конституционных принципов, имеющих основополагающее значение для российского конституционного строя и формирования так называемой конституционной идеологии, позволяет Конституционному Суду разработать правовую позицию и решить вопрос о конституционности или неконституционности правового акта.

Это конституционные характеристики Российской Федерации как правового и социального государства. Они часто непосредственно становятся самостоятельным правовым основанием для принятия Конституционным Судом определённых решений. При этом категория «правовое государство» фактически превратилась в принцип верховенства права. Понятие «социальное государство» используется Конституционным Судом в его аргументации даже вне сферы реализации социальных конституционных прав. Характеристика России как демократического государства обычно реализуется с помощью принципа принадлежности государственной власти народу, что также закреплено в Конституции.

Кроме того, это также принципы: высшей ценности прав и свобод человека, определения смысла, содержания и применения законов, деятельности законодателя, исполнительной власти и местного самоуправления осуществлением прав и свобод; неотъемлемости основных прав и свобод человека и их принадлежности каждому с рождения; недопустимости нарушения прав и свобод других при реализации прав и свобод человека; равенства прав и свобод, а также равенство способов их реализации; свободы предпринимательства; признания и защиты частной, государственной, местной и других форм собственности. Этот перечень принципов конституционной идеологии Российской Федерации, разумеется, не является исчерпывающим.

Также Конституционный Суд раскрывает такие конституционные принципы, которые явно не сформулированы в Конституции, но существуют в ней имплицитно. Эти вновь выявленные конституционные принципы включают, в частности, гуманизм, справедливость, обеспечение взаимного доверия в отношениях между индивидом и публичной властью, юридическую определённость и баланс конституционных ценностей. Это самые важные и универсальные принципы, выявленные Конституционным Судом. Они де-факто лежат в основе оценки Конституционным Судом любого оспариваемого положения.

Принципиально важно, чтобы Конституционный Суд не «изобретал» новые

конституционные принципы, а раскрывал их. Суд не утверждает и, как представляется, не может утверждать, что сам Суд создаёт конституционную идеологию. Конституционная идеология во всей полноте — как прямо, так и косвенно — содержится в самой Конституции. Иногда неявные принципы Конституции могут быть выявлены обычным способом интерпретации её текста. Однако всегда нужно исходить из духовных и культурных принципов общества, поскольку именно воля народа вдохновила создание Конституции.

Ориентиром для всей деятельности Конституционного Суда являются слова преамбулы к Конституции о том, что Конституцию принял многонациональный народ Российской Федерации, чтя память предков, которые передали свою любовь к Отечеству и веру в добро и справедливость, стремясь обеспечить благополучие и процветание России, исходя из ответственности за свою Родину перед нынешним и будущими поколениями. В своей аргументации Конституционный Суд в последние годы всё чаще ссылается на преамбулу, в которой суть ожиданий и целей людей, связанных с принятием Конституции, выражается наиболее ярко и эмоционально.

В заключение я хотел бы затронуть такой важный элемент российской конституционной идеологии, как принцип баланса конституционных ценностей. Он имеет различные источники — баланс частных и общественных интересов, баланс прав и обязанностей, баланс прав и законных интересов разных лиц, недопустимость злоупотребления законом, баланс диспозитивных и императивных методов правового регулирования, баланс интересов Российского Федерации и её субъектов и т.д.

Баланс конституционных ценностей является основным конституционным принципом и в то же время является основным методологическим инструментом деятельности Конституционного Суда. Если кто-то спросит, в чём состоит суть деятельности Конституционного Суда, то ответ будет — баланс конституционных ценностей.

Часто в правовых отношениях права и интересы человека противоречат правам и интересам другого. Если второй стороной правовых отношений является государственная власть, то, казалось бы, интересы первого должны превалировать при установлении баланса между правами человека и общественными интересами. Но даже в такой ситуации всё неоднозначно. Как, например, показали решения Конституционного Суда по налоговым вопросам, по вопросу о приоритетности исполнения обязательств предприятия в случае недостатка средств, нельзя игнорировать, что с другой стороны — хотя это и касается общественных интересов — находятся люди с их собственными потребностями, те, чьи потребности покрываются бюджетом. Словом, в случае конфликта общественных и частных интересов, установление баланса конституционных ценностей требует некоторой проработки, не носящей линейный характер.

Когда-то «[у]влёкшись защитой индивидуальных прав человека, мы стали забывать, что человек, как говорил Аристотель, по природе своей существо политическое, т.е. общественное. […] нам нужна сейчас такая корректировка либерально-индивидуалистического подхода к правопониманию, которая привнесла бы в само понятие права идеи солидаризма. То есть нужна правовая теория, синтезирующая в рамках понятия права идеи индивидуальной свободы и социальной солидарности. Потому что и то, и другое — это имманентные составляющие сути человека, а значит, и сути права».[1)] Русской философии характерно «стремление соединить идею абстрактного, обезличенного формально-правового равенства с […] идеей ответственности каждого не только за себя, но и за других — стремление […] согласовать в рамках понятия права разум и дух, свободу и милосердие, право и правду, индивидуальные и социальные начала». Поэтому кажется естественным, что подход, основанный на балансе индивидуального и общественного, лежит в основе российского конституционного строя.

1) Валерий Дмитриевич Зорькин, Председатель Конституционного Суда Российской Федерации, профессор. Лекция "Суть права", представленная на Петербургском международном юридическом форуме. Май, 2017 г.

Session 2

Protecting and Promoting Fundamental Rights through Constitutional Adjudication

The Research on "The Justice Administration Development of the Constitutional Court of the Kingdom of Thailand"

5th PT : Punya Udchachon

Justice,
The Constitutional Court of the Kingdom of Thailand

The Research on "The Justice Administration Development of the Constitutional Court of the Kingdom of Thailand"

In the Inaugural Conference of the AACC Permanent Secretariat on Research and Development
30 October - 3 November 2017, Seoul, Republic of Korea
Present by Dr. Punya Udchachon
The Judge of the Constitutional Court of the Kingdom of Thailand

Honorable the President of the Constitutional Court of the Republic of Korea, the delegations and the distinguished guests.

First of all, I would like to thanks the Constitutional Court of the Republic of Korea to invite the Constitutional Court of the Kingdom of Thailand in this honorable event today.

Rights and liberties of all people are the most significant feature of the modern world where Human Rights and Human Dignity have been recognized and protected through both international and domestic law. The Constitutional Court of the Kingdom of Thailand has realized the importance of this feature There are many outstanding rulings on this matter which I would like to demonstrate and exchange in this forum.

This presentation will be divided to 5 items: First, the Constitutional Court structure and its power and duties. Second, the cases that concern in the Constitutional Justice of Thailand. Third, the Constitutional Court dealing with the new Constitution. Forth, the research on the Justice Administration Development of the Constitutional Court of the Kingdom of Thailand. And Finally, conclusion.

1. The Constitutional Court structure and its Powers and Duties

The Constitutional Court of the Kingdom of Thailand is a specialized court that exercises in the Constitutional review and protects Rights and Liberties of the people under the Rule of Law, Democracy and Human Rights.

In terms of the sources of the Constitutional Court Judges are follow: 3 judges of the Supreme Court of the Justice, 2 judges of the Supreme Administration Court, 1 qualified persons in law 1 qualified persons in political science, public administration or other social sciences and 2 qualified persons in director – general or prosecutor deputy.

Now, Thailand has the Constitution of the Kingdom of Thailand 2017 provided for the Constitutional Court to have the power to determine whether or not a law is contrary to or inconsistent with this Constitution, and shall have the powers as prescribed by the organic law on ombudsman and the organic law on political parties. The Constitutional Court shall consider and decide cases as provided by law in accordance with the Rule of the Constitutional Court procedure and the Regulation of the Constitutional Court Case Management.

2. The Judgement concerning to the protection of fundamental rights

2.1 The Ombudsman requested for a Constitutional Court ruling under section 198 of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997), in the case where section 12 of the Names of Persons Act, B.E. 2505 (1962), raised the question of constitutionality.

Once it had been determined that the provision of section 12 had the characteristics of a mandatory provision for married women to use their husbands' surnames only, which was encroachment of the right to use of surnames of married women resulting in an inequality in rights as between men and women, it followed that the provision created inequality under the law due to differences in sex and personal status. The case was also an unjust discrimination because married women were one-sidely compelled to use their husbands' surnames on the grounds of marriage, and not to the grounds of differences in physical attributes or obligations between men and women rights from the differences in sex such that discrimination was necessary.

The Constitutional Court held that section 12 of the Names of Persons Act, B.E. 2505 (1962), was unconstitutional by reason of being contrary to or inconsistence with section 30 of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997).

The provision was therefore unenforceable according section 6 of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997).

2.2 The Constitutional Review of the Amendment to the Constitutional Draft

The Constitutional Court found as follows. The Constitution of the Kingdom of Thailand B.E. 2550 (2007) provided that the National Assembly comprised 2 chambers, namely the Senate and the House of Representatives, in an established balance. The Senate exercised

scrutiny over the functioning of the House of Representatives and balanced the powers of the House of Representatives. In this regard, the Senate had the power to investigate and remove Members of the House of Representatives pursuant to an allegation of unusual wealth showing signs of dishonest performance of duties, showing signs of an intentional exercise of functions contrary to the provisions of the Constitution or laws or a serious violation of or non-compliance with ethical standards pursuant to section 270 of the Constitution. The constitutional amendment in this application was therefore a destruction of the essential basis for maintaining two chambers thereby leading to a monopolization of state powers, a denial of participation by the people from several professions. The amendment would allow the participators on this occasion to have the opportunity to acquire governing powers by unconstitutional means.

The Constitutional Court thus held by a majority of 6 to 3 votes that the conduct of deliberations and voting on the constitutional amendment of all respondents in this case were inconsistent with section 122, section 125 paragraph one and paragraph two, section 126 paragraph three, section 291(1), (2) and (4) and section 3 paragraph two of the Constitution. The Constitutional Court further held by a majority of 5 to 4 votes that the Draft Amendment to the Constitution contained provisions which were in the essence contrary to the fundamental principles and intents of the Constitution of the Kingdom of Thailand B.E. 2550 (2007), constituting acts to enable all the respondents to acquire national government powers by means which were not provided under the Constitution of the Kingdom of Thailand B.E. 2550 (2007), and hence a violation of section 68 paragraph one of the Constitution.

3. The Constitutional Court and the New Constitution in 2017

According to the system of judicial constitutionality review of law in the modern world, the Constitutional Court is a significant mechanism in performing the duty of interpreting law to not be contrary to or inconsistent with the Constitution. Consequently, the Constitutional Court fulfills an important role concerning the protection of the Constitution, the security of rights and liberties of people, and the assurance of public interest, and the maintenance of democratic regime of government with the King as Head of State. Nonetheless, to sustain the supremacy of the Constitution, the commission of political organs or institutions shall be controlled in order to be harmonious with the Constitution. Furthermore, in connection with Thai society's aspiration, the Constitution's authority does not concern only the protection of the Constitution, but also the security of democratic regime of government with the King as Head of State where other organs are not able to perform this duty or there are not any State organs mechanisms to be reliable.

There are many interesting perspectives concerning powers and duties of the Constitutional Court under the new Constitution in 2017, approved by the national referendum on 7 August 2016, on the protection and maintenance of the democratic regime of government with the King as Head of State. They could be categorized as the followings:

3.1 The administration and upholding the sovereignty

The Constitutional Court of the Kingdom of Thailand exercises on whenever on provision under this Constitution is applicable to any case, an act shall be performed or a decision shall be made in accordance with the constitutional conventions of Thailand under the democratic regime of government with the King as Head of State. Moreover, the Court also has the authority to decide and rule on a treaty which Thailand concludes with other countries and could affect the sovereignty and a wide scale effect on the political, economic, social and commercial security.

3.2 The amendment of the Constitution

According to the Supremacy of the Constitution which Thailand adheres, The Court has the jurisdiction to rule on the draft amendment of the Constitution. This duty is an authority to safeguard or protect the Constitution in order to prevent any law being contrary to or inconsistent with the Constitution. Otherwise, there could be person or a group of person attempts to amend the obtainment and the role of the organ exercising the sovereignty - consisting of the National Assembly; the Council of Ministers; and Courts, which distorts the spirit of the Constitution and the people expressing through the national referendum. Additionally, the Constitutional Court also has the jurisdiction to review the constitutionality of law both before the promulgation of the law, or, Priori Control, and after the promulgation of the law, or, Posteriori control.

3.3 The Counter Corruption

In the consideration by the House of Representatives, the Senate, or a committee concerning any proposal, submission of a motion or commission of an act, which results in director indirect involvement by members of the House of Representatives, senators or members of a committee in the use of the appropriations, shall not be permitted. In case, the Constitutional Court decides on the complaint and is of opinion that there is any commission infringing the law, that commission shall be ineffective and the membership of person committing such commission shall be deemed to have been terminated and to have been revoked the right to apply for candidacy in an election. Furthermore, in case, the Council of Ministers executes or gives approval or acknowledges such commission but fails to restrain, Ministers shall vacate office en masse and their rights to apply for candidacy in an election shall also be revoked. Also, Ministers shall be liable to pay the amount of money with interest. Additionally, the Constitutional Court has power and duty to take decision on the termination of membership of a Minister, a member of the House of Representatives, and a Senator.

3.4 Adjudication on powers and duties of State organs

The Constitutional Court has jurisdiction to rule on question concerning powers and duties

of the House of the Representatives, the Senate, the National Assembly, and the Council of Ministers, or Independent Organs. This means such organ may solely wonder about their powers and duties without any disputes of conflicts pertaining to the respective powers and duties between them, such organ can submit a motion to the Constitutional Court. This authority of the Constitutional Court is an " Advisory Power" in addition to the adjudication. Additionally, the Constitutional Court also has authority to review the constitutionality of commission which a person whose recognized rights and liberties under the Constitution are violated.

3.5 The stipulation of ethical standard

In order to oversee and review person exercising State power and Political Conflict of interest, the Constitutional Court and Independent Organs shall jointly stipulate the ethical standard. The standard shall cover the preservation of national honour and interest, also, specify the categories of infraction or non – fulfillment of the standard that are grave.

3.6 The Constitutional Complaint

It is the most important to protect the fundamental rights by the Constitutional Court of the Kingdom of Thailand with the way of the constitutional complaint. A person whose rights or liberties guaranteed by the Constitution are violated, has the right to submit a petition to the Constitutional Court for a decision on whether such action is contrary to or inconsistent with the Constitution. So, the constitutional complaint complements the possibility of the concrete judicial reviews in an important manner.

4. The Research on the Justice Administration Development of the Constitutional Court of the Kingdom of Thailand

This research compares between the Constitutional Court of the Kingdom of Thailand and the Constitutional Court or the Supreme Court of the foreign countries, for example, Austria ; Germany ; Korea ; U.S.A. ; Canada ; Singapore ; France and China.

For the research result can be illustrated into 3 important sectors as follows :

First, the Organization Model. This study is to the facilitate the formation of a system of state authority that would securely provide the resolutions of the issues of the Supremacy of the Constitution, the Liberal Democracy and the protection of the fundamental Human Rights. Now, Thailand has the twenty Constitution since 1932 that Thailand has the first Constitution. During eighty - five years, Thailand has the organization model to safeguard the Constitution for four models. These are the Parliamentary System, the Supreme Court System, the Constitutional Council System and the Constitutional Court. Because of the organization functions, the independence organization and the suitability of social and culture, the best model of the Constitutional review is "the Constitutional Court" that establishs in Thailand in 1997 and it has 19 years old. In terms of the Constitutional Court judges, the qualifications

and the terms in office should to similar to the constitutional Court judges in the worldwide and take for 9 years term. In addition, the excellent law clerks or judicial clerks are the most important to support for each judge and sets up the Research and Development Institute as well.

Second, the Procedure Cases. The Concept of the natural justice should to provide in the Organic Act on Rules and Procedures of the Constitutional Court. The principle of the natural justice consists of the right to an adequate hearing (audi alteram partem) and the right to an impartial decision maker or the rule against bias (nemo iudex in causa sua). The Constitutional court trial exercises in the "Inquisitorial System" that the Constitutional Cases should to be met in the time to prepare case, the access to relevant information, the right to present case orally or writing, the right to cross - examine witnesses, the right to reasoned decision and the positive judge action. The Rapporteure Judge should to build for case management strategy that the same as Germany, U.S.A., France and Korea Republic. In addition, the Contempt of the Constitutional Court and the safeguards for the administration of justice should to provide in the Organic Act on Rules and Procedures of the Constitutional Court. Nevertheless, the right to a fair, public hearing and critize in academic after judgement should be balanced for the trial operation case.

Finally, the Administration Justice. There are 4 elements of the administration justice that consist of Men, Money, Material and Management so called 4 M's. In 19 years of the Constitutional Court of the Kingdom of Thailand, It has the budget problem in each year because of the government interference by cutting budget for the administration court. For this research solution, the historical of the Federal Constitutional court of the Republic of Germany should to study in practice. The Federal Constitutional Court of the Republic of Germany is the "Constitutional Organ" and it has the specific budget act that so called the Federal Budgetary Act 1969 (Bundeshaushaltsordnung). This act guarantees the Constitutional Court budget that it has power for requesting directly to the House of the Representative (Bundestag) if the executive branch cuts its budget without reasons. It is the best example for the Federal Constitutional Court of the Republic of Germany attacks for getting this act for 18 years (1951 - 1969). And also, the Electronic Constitutional Court (E - Court) should to decide for case management in aspect to ensure efficiency, fairness and non - discrimination and ensure that the people to have access to justice process without delay and dose not have to bear excessive expenses.

5. Conclusion

I, my research, recommend that the Justice Administration Development of the Constitutional Court of the Kingdom of Thailand should to develop in terms of the Organization Structure, the Rules and Procedures of the Constitutional Court and the Administration Justice in accordance with "the Rule of Law" that A.V. Dicey, the father of the Rule of Law concept, offers 3 main aspects.

No man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary courts of the land. In this sense, the rule of law is contrasted with every system of government based on the exercise by persons in authority of wide, arbitrary, or discretionary powers of constraint;

No man is above the law; every man and woman, whatever be his or her rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals; and

The general principles of the constitution the result of judicial decisions determining the rights of private persons in particular cases brought before the courts.

Now, the Constitutional Court of the Kingdom of Thailand is 19 years old and we deeply confirm that we have still continued to " Adhere the Rule of Law, Uphold Democracy and Protect rights and Liberties of the People"

Thank you for your kind attention.

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International Human Rights Norms and Constitutional Adjudication : Convergence and Divergence

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International Human Rights Norms and Constitutional Adjudication : Convergence and Divergence

History, Practice, and Experience from the Implementation of Human Rights in Indonesia

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The Constitutional Court of the Republic of Indonesia

History, Practice, and Experience from the Implementation of Human Rights in Indonesia

Seoul, November 1st 2017

A. Introduction

Humanity principle or in the current terminology called as Human Rights, has been a topic of discussion since the establishment of Indonesian constitution in 1945. As a country which has been colonialized, Indonesia comprehends the terms “independence”. Furthermore, the colonialization experienced by Indonesia also contributes to the understanding of humanism and justice. It is reflected on the first paragraph of the preamble of Indonesian Constitution called as the 1945 Constitution of the Republic of Indonesia, which states: “Whereas Independence is truly the right of all nations and therefore colonialization in the world shall be abolished, as it is not in accordance with humanity and justice”.

The humanity principle held by Indonesian founders becomes a basic principal to establish Indonesia which is free from colonialism and as basic principal to choose a republic as its form of government. The republic as its form of government is chosen as the realization of the principle of the form of the nation which is established by the values and principles of democracy. The reason behind the choice is in a republic, the people have rights to elect and to be elected in order to be involved in the state government. This concept about democracy is part of human rights and constitutional rights of the people in order to decide their own destiny and to decide their government which is established based on the concept of sovereignty of the people.

The concept of sovereignty of the people is conducted/run by Indonesia until 1998. This concept is evaluated when discussing the amendment of Indonesian Constitution in 1999-2002. The realization of that principle (sovereignty of the people) through the democracy process conducted in 1955-1998, is considered as not enough to assure the human rights protection, limitation of power, law enforcement, and constitution. The reason is in reality, the implementation of democarcy will only bring up majority group as the winner and the main stakeholder of the government. Therefore, the truth delivered through the implementation of the concept of democracy is dominated by a particular group’s interest. On the other

hand, interest of the minority is not always useless in the state administration. Furthermore, there is no assurance that the mayority will always do the righ choices/acts and assure the protection for the minority. Therefore, the concept of sovereignty of the people in Indonesian Constitution is completed by the principle of the sovereignty of the norm (constitutionalism).

B. Human Rights' Assurance in Constitution and the Role of the Constitutional Court

As a common constitutional principle applied in various countries, one of the elements that has to be conducted by the country with the idea of constitutionalism is the assurance of human rights protection in the constitution. The amendment of the paradigm in Indonesian Constitution in 1999-2002 strengthen the assurance of human rights protection. This can be done by inserting one chapter about human rights in the amendment of the 1945 Constitution. The values of human rights inserted in the Indonesian Constitution is the adaptation of the values in the Universal Declaration of Human Rights adopted by the United Nation in 1948. Moreover, to assure the protection of the constitutional rights of the people, a Constitutional Court is established/founded. It is based on the Article 24 paragraph (2) of the 1945 Constitution.

Based on the Article 24C paragraph (1) and (2), the Constitutional Court is authorized: 1) to review the law towards the Constitution; 2) to decide the disputes about the authority of state institutions whose rights are given by the Constitution; 3) to decide the dissolution of political parties; 4) to decide the dispute over the result of the elections; 5) to decide the People Representative Council's judgement/decision related to allegation of violation by the President and/or Vice President based on the Constitution. By using those rights, the Constitutional Court is not only known as the guardian of the constitution, it is also known as the protector of the constitutional rights of the people. The are several reasons behind those names. The first, in relation to the righ of judicial review, if theres is any article, paragraph, part of or the whole part of the law which is considered contradicting the 1945 Constitution and violating the constitutional rights of the people, that matter can be submitted/petititoned to the Constitutional Court to be reviewed so it can be cancelled.

Since the establishment of the Constitutional Court in August 13, 2003 until now, there were approximately 1.703 norms of laws have been reviewed. From the total amount of the petitions which are granted, the majority of the petitions were cases directly related to the constitutional rights of people. For instance, the education budget which finally will relates to the right of education, regulations about labours' rights in companies, protection about constitutional rights of people about regulations related to customary law, the price control of the staple goods such as fuel whose regulation has to be regulated by the government, the people's rights to reach the spring (to get frsh water), and others verdicts. In relation to rights to decide the dispute over the result of the elections, the Constitutional Court's role is to keep the process of democracy to be in line with the constitution. The protection of constitutional

rights conducted by the Constitution Court is the right to vote and the right be a candidate in a process of general election.

The establishment of constitution especially in protection of constitutional rights of people is the consequence for choosing the consitutional paradigm by the founder of the 1945 Constitution. The constitutional values and norms will be "living". This means the constitutional values and norms will always evolving into new systems based on the constitutional practice in daily life. Therefore, constitution not only needs to be understood textually, but also contextually as a living document and evolving, following the current condition and needs and following the change of norms.

C. Norm of International Human Rights in Laws an Regulations in Indonesia

The development of concepts of human rights has brought a fundamental change toward the point of view on international and national laws. The development of human rights is inseparable from the desire of the international community to establish a humanistic legal system and taking into account the rights of individuals. There are at least four views about values of human rights, those are absolute universal view, relative universal view, absolute particularistics view, and relative partcularistics view.

The absolute universal view considers the human rights as universal values which are formulated in the documents of human rights and the profile of social and culture which attach to each nation are not considered. This triggers conflicts to blame each other since the concept of human rights of each country is considered similar as a moral obligation related to the international documents about human rights.

The relative universal view considers the human rights as a universal problem with exception and limitation based on the foundation of international law. This view admits the existence of the foundation of international law which can limit the human rights, and admits that the human rights is not always absolute. It happens when the exception is given by the foundation of the international law.

The absolute particularistics view considers the human rights as a problem of a particular nation. This view shows a chauvinistik which presents rejections toward international documents and sometimes triggers selfishness, defensive, and pasive if it is related to human rights.

Relative particularistics view considers human righst as universal and national problems of each nation. This view presents balance between the view of human rights from national scope and the view of human rights based on international documents. This balance happens after being accepted by the culture of the nation itself.

As a sovereign state which upholds humanity values, Indonesia keeps following the news about human rights in this world. Indonesian people is part of United Nation (UN) who obligate morally to conduct the Universal Declaration about Human Rights as it has been set by the UN, and to conduct other international instuments related to the human rights which accepted by Indonesia. As a concrete from the assurance for the human rights, Indonesia has established Law No. 39 Year 1999 about the Human Rights, and Law No.26 Year 2000 about the Human Rights Court. Indonesia also has ratified the International Convenant on Civil and Political Rights and the International Convenant on Economic Social and Cultural Rights. The ratification is done through the Law No. 11 Year 2005 and the Law No. 12 Year 2005. Several other international conventions also have been ratified by Indonesia, such as the Convention Against Torture, the Convention Against Trafficking, Convention on the Elimination of All Forms of Discrimination Against Women, and some other conventions.

Although Indonesia has been active enough to provide acceptance and protection toward human rights, respect for the sovereignty of a country and non-intervention principle must be put forward. The reason is factually every country has their own values and cultures that should be respected. Basically the protection and assurance toward the human rights are countries' obligation/responsibility. This basically will relate to the sovereignty of the countries. However, the soverignty does not mean that the country is free from the responsibility. Therefore, a country has to be responsible for any violation toward the sovereignty.

In context violation of human rights, especially a case about Gross Violation of Human Rights, Indonesia sees that the complementary principle is an international public law which has to used as a reference. The establishment of complementary principle in the international public law has an important meaning in the development of international law. The international communities have found an appropriate way to face the violation of human rights, especially to face the gross violation of human rights. The gross violation one is considered as an international crime which shocks the international civilization.

The complementary principle holds an important and strategic role in connecting the national interest (the sovereignty of a country) and the international interest in eliminating the international crime. For instance, is a discussion about the Rome Statute 1998 or currently known as the International Criminal Court. The complementary principle has been accepted by all the members of the convention and accepted as one of the best ways to overcome a deadlock between ccountries (member of the convention) which keep their sivereignty and ignore the intervention of the international institution to the home affair business and the countries which ignore the absolute sovereignty of a particular country.

The complementary principle is considered as the efficient way where the is involvement of the international people toward the gross violation in a country without ignoring the sovereignty of their countries. This even can strengthen the sovereignty and authority of the

country by giving chance the countey to solve their own national problem first.

D. CONCLUSION

The respect and the fulfillment of the Human Rights value is the responsibility of every country/nation including the people. A different point of view toward the values of human rights which are local and typical of a particular country has to be put as complementary and cannot be used as an excuse to fulfill toward the assurance and protection of the human rights (which is considered as universal). Although the implementation of the Human Rights needs to respect the sovereignty of each country, this implicates the responsibility of that country to the international people. The crime or the violation towards human rights done by a particular nation or country, is basically a violation toward the humanity in general (hostis humanis generis). Therefore, the protection and the fulfillment towards the human rights are absolute and need to be fulfilled by all the country without any exception.

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International Human Rights Norms and Constitutional Adjudication : Convergence and Divergence

The Constitutional Globalization in Korea

2nd PT : Ilwon Kang

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The Constitutional Globalization in Korea

Ilwon Kang
Justice, Constitutional Court of Korea

Ⅰ. Introduction

The Korean legal system is unique. It is a mixture of the American and the Continental legal system. Korea adopted the civil law system during the period of Japanese colonial rule which extended from 1910 to 1945. Korea also experienced the common law system during the period of American military government from 1945 to 1948. The Founding Constitution of Korea was established on July 17, 1948.

Koreans suffered the Korean War from 1950 to 1953. After the War, Korea was one of the poorest countries in the world. Since then Koreans have experienced a rapid social change and economic growth. Now, Korea is a member of the Organization for Economic Cooperation and Development and the G-20 major economies.

As society changed dramatically, Korea has adopted nine constitutional amendments. With these amendments, Koreans experienced presidential and parliamentary system. Also, Korea has adopted various kinds of constitutional adjudication system. Since Koreans had little experience in the western legal culture, Korea has consulted the experience of the western countries for judicial reforms. It became a kind of tradition to consult the international and foreign law for the adjudication of cases in the Korean courts including the Constitutional Court.

In this paper the Korean experience of the constitutional adjudication system will be overviewed. And the practice of judicial citation of international and foreign law will be analyzed. It will show the current situation of constitutional globalization in Korea.

Ⅱ. Constitutional Adjudication System in Korea

1. The Founding Constitution

In Korea, when the Founding Constitutional Bill was drafted, there was a dispute over the constitutional adjudication system. The nominee for the first Chief Justice of the Korean

Supreme Court argued that the power of judicial review should belong to the ordinary courts. But scholars who were in charge of drafting the Bill insisted it would be improper to adopt the American system since many judges' credibility suffered in their collaborating with the Japanese government during the colonial period. So the final version adopted the European style of constitutional adjudication.

The Founding Constitution created the Constitutional Committee which had a power of judicial review over Acts passed by the National Assembly. The Article 81 of the Founding Constitution stated, when the judgment in any case was premised on the constitutionality of law, the court should refer such question to the Constitutional Committee and should render judgment in accordance with the decision thereof. However, the Supreme Court had the jurisdiction to finally decide whether administrative orders, regulations, and administrative acts were consistent with the Constitution. This arrangement is an example of a mixture of the American and the Continental legal system.

The Chairperson of the Constitutional Committee should be the Vice President. Five justices of the Supreme Court and five members of the National Assembly should serve as Members of the Committee. At that time the Supreme Court consisted of a Chief Justice and five Justices. A decision holding unconstitutionality should require a two thirds majority vote of the Committee.

From 1948 to 1961, there were six cases referred to the Constitutional Committee for judicial review. The Committee rendered a decision of unconstitutionality in two cases in 1952. Considering the fact that constitutional adjudication was entirely new to Korea, it was remarkable that the Committee found the Acts of the National Assembly unconstitutional in the middle of the Korean War.

The first case the Committee found a pending law unconstitutional was about the Agricultural Land Reform Act. According to this Act the government could sue a farmer who failed to pay the price of the allotted land, and the appeal to the decision of the court of first instance could be made only to the Appellate Court. The Committee declared that the right to have his/her case heard by the Supreme Court is a basic right of the people. Therefore the Act which made the Appellate Court the court of last resort deprived the people of their right to appeal to the Supreme Court.

The second case was also related to the right to trial. When the Korean War broke out, the government issued the Special Decree on Punishment of Crimes under National Emergency. The Decree provided that adjudication of crimes which committed during the state of emergency was limited to the district court and no appeal allowed. The Constitutional Committee found that the presidential Decree which prohibited appeal to emergency criminal trials was unconstitutional.

2. The Second Republic

The Student Revolution of April 19, 1960 overthrew the first President Rhee's regime. The Constitution of the Second Republic went into effect on June 15, 1960. The new Constitution adopted a parliamentary system. This was the first and the only instance Korea turned to a parliamentary cabinet system instead of a presidential system.

The Constitution of the Second Republic introduced the Constitutional Court. This Court had jurisdiction over (1) review as to the constitutionality of law, (2) final interpretation on the Constitution, (3) dispute as to jurisdiction among the State authorities, (4) dissolution of political party, (5) impeachment trial, (6) litigation on the election of the President, Chief Justice and Justices of the Supreme Court.

The Constitutional Court would be composed of nine Judges. The President, the Supreme Court, and the House of Councilors should designate three Judges respectively. The tenure of the Judge should be six years and three of the Judges should be replaced every two years.

The Constitutional Court Act was passed on April 17, 1961. However, before the Constitutional Court was organized, May 16 coup led by General Park broke out and the Constitutional Court Act became nullified. Although the Constitutional Court of the Second Republic could not be formed, it played an important role of reference in the formation of the current Constitutional Court.

3. The Third Republic

After 2 year military rule, a new Constitution was adopted and Korea returned to a presidential system. The Constitution of the Third Republic introduced the American style judicial review. The ordinary courts were authorized to review the constitutionality of statutes. The Supreme Court had the power to decide with finality the constitutionality of a law when this was prerequisite to a trial.

During the Third Republic, economic development was placed a higher priority on protection of civil rights. The executive branch led by the strong President was much more powerful than the judicial branch. The Supreme Court failed to exercise its new power of judicial review.

However there was an important case the Supreme Court exercised its power of judicial review. According to the State Tort Liability Act, members of the armed forces who died in action or injured in the performance of their official duties were barred from seeking damages from the government in the event that they or their family had received indemnity in the form of accident compensation or annuity as determined by other codes. In 1971 the Supreme Court held this law unconstitutional on the grounds that the purposes of accident compensation and tort remedies were totally different.

This judgment invoked fury of the President and the executive branch since the Korean government was suffering fiscal pressure. Korea entered the Vietnamese War from 1964 to 1973 and thousands of military personnel died or injured in action. At that time Korean economy was too weak to guarantee full compensation for persons killed or injured in battle. In 1972 the Constitution was amended and the limitation of state tort liability was stipulated in the Constitution. The paragraph 2 of Article 26 of the 1972 Constitution read "in case a person on active military service, or an employee of the military forces, a public official of the police, and others as defined by law, suffers damages in connection with the execution of official duties such as combat action and training, he or she shall not be entitled to claim against the State or public entity for compensation on grounds of unlawful acts of public officials done in the exercise of official duties, except for compensation as determined by law." With this amendment of the Constitution the State Tort Liability Act survived the judgment of unconstitutionality.

4. The Fourth and Fifth Republic

According to the Constitution of 1962 the presidency was limited to two terms. In 1969 the constitutional amendment was forced through the National Assembly to allow President Park to seek a third term. President Park was re-elected in the 1971 presidential election. But the ruling party was defeated in the parliamentary elections and the opposition party had a power to pass constitutional amendments. President Park declared a state of national emergency in December of that year. The National Assembly was dissolved and the Constitution was suspended. A draft prepared by the Emergency State Council was submitted to a national referendum and the Constitution was amended in December 1972.

The 1972 Constitution reintroduced the Constitutional Committee. This was a decision made in reaction to the experience during the third republic when some members of the judiciary had rendered decisions finding statutes unconstitutional in opposition to the will of the executive. Reintroduction of the Constitutional Committee was designed to reduce the adjudication of constitutional issues to a nominal agency, and thereby hollow out the power of constitutional justice. The Constitutional Committee was composed of 9 members appointed by the President, 3 of whom were nominated by the National Assembly, and another 3 designated by the Chief Justice of the Supreme Court. No review of the constitutionality of a statute has been made in this Committee.

The economy continued to flourish under the authoritarian rule. However students and activists for democracy continued demonstrations and protests for the abolition of the 1972 Constitution. In the midst of political turmoil, President Park was assassinated in 1979. After the assassination of President Park, General Chun took a power and declared martial law in May 1980. In September of that year, Chun was elected president by indirect election. The amendments to the Constitution were established by national referendum in October 1980. The new Constitution maintained the presidential system and the Constitutional Committee.

President Chun succeeded in economic and foreign policies. However, because of lack of legitimacy, the public trust in the government was low.

5. The Current Constitution

In June 1987, more than a million students and citizens participated in the nation-wide anti-government protests. As a result both ruling party and the opposition announced their own drafts for a new Constitution. For the first time in Korean history, a proposal for constitutional revision was prepared through negotiations and cooperation between the government and the opposition parties. After passing the National Assembly, the proposal was put to a national referendum. The proposal was consented and promulgated in October 1987.

It was the first time that the revision took place as a result of the people's demand for a system in which they could freely choose their own government. Under this current Constitution democracy in Korea has been fully realized. During the revision process, different political factions expressed different views on how to structure the system of constitutional adjudication. As negotiations progressed, the ruling party and the opposition eventually agreed to establish an independent Constitutional Court.

The Constitutional Court is composed of 9 justices appointed by the President. Among the justices, 3 shall be appointed from persons selected by the National Assembly and 3 appointed from persons nominated by the Chief Justice of the Supreme Court. The Constitutional Court has jurisdiction over (1) the constitutionality of a law upon the request of the ordinary courts, (2) impeachment, (3) dissolution of a political party, (4) competence disputes between State agencies, between State agencies and local governments, and between local governments, (5) constitutional complaint.

According to the Constitution and the Constitutional Court Act, any person may file a constitutional complaint when any of his or her fundamental rights has been violated by an action or omission from the public power. A constitutional complaint was unfamiliar to Koreans and the people expected the new Constitutional Court to be a relatively quiescent institution. However, the Court has become the embodiment of the new democratic constitutional order of Korea. The Constitutional Court is routinely called on to resolve major political conflicts and issues of social policy. Since its establishment in 1988, the Court has rendered about 32,000 decisions among them more than 95% of cases were constitutional complaints. The Constitutional Court is consistently rated one of the most trusted and influential institutions in Korea by public.

Ⅲ. The Constitutional Globalization in Korea

1. The Adoption of Constitutionalism in Korea

All states have constitutions which consist of a set of rules structuring government and

limiting its power. All democratic states have constitutions which declare the rule of law, a separation of power, and protection of human rights. All human beings shall be assured of inherent dignity and have fundamental and inviolable human rights. Constitutions of democratic states share same idea of constitutionalism.

The globalization of constitution develops the concept of global constitutionalism. The construction of some international organizations, such as the European Union and the World Trade Organization not to mention the United Nation, strengthens the idea of global constitutionalism. The United Nations Charter is called as a constitution of the international community.

Until the late nineteenth century Korea insisted the policy of seclusion under the influence of China. The defeat of China in the first Sino-Japanese War forced Korea to open its border under the influence of Japan. The Japanese government wanted to separate the Korean dynasty from China. So Japanese urged Koreans to accept the idea of constitutionalism. In 1895 the Korean dynasty declared the 14 Guiding Principles of the Nation which may be viewed as the first modern constitution of Korea. However the system of government was an absolute monarchy.

After the Japanese occupation in 1910, a military and diplomatic campaign for independence started. During this campaign many Korean activists learned the western democracy and global constitutionalism. In 1919 the Provisional Government of Korea established in Shanghai, China, and the Provisional Constitution of the Republic of Korea was promulgated. The Provisional Constitution declared the sovereignty of the people, parliamentary representation, separation of power, guarantee of basic rights, and the rule of law. This Constitution was a provisional one but a very modern written constitution. The members of the Provisional Government were deeply influenced by the Paris Peace Conference and the Fourteen Points of Woodrow Wilson.

2. Constitutional Globalization in Korea

Global constitutionalism has exerted a deep impact on the Korean constitutional justice. Korea had no sooner accepted the constitutional adjudication system than independence was achieved. Korea was one of the earliest adopters of the judicial review in the world. During the Japanese colonial rule there was no rule of law but rule by law. Since Koreans had no experience in the constitutional adjudication, the Constitutional Committee of the first Republic heavily relied on the foreign and international jurisprudence. Judicial citation of foreign and international law became a tradition in Korean constitutional justice.

There are 84 rapporteur judges who are doing research for the nine Justices. One of their main roles is to explore the foreign and international law. As a result the decisions of Korean Constitutional Court contain more citation of foreign and international law than any other

decisions of the Constitutional Courts or equivalent bodies of other countries.

In particular, the Korean Constitutional Court has used many international human rights law instruments in various cases. Those human rights instruments include the Universal Declaration of Human Rights, the UN based human rights treaties mentioned below, the ILO conventions and recommendations, and other soft law documents produced by the treaty bodies such as the UN Human Rights Committee. More than 120 references have been made to those international human rights law instruments in about 70 decisions rendered by the Korean Constitutional Court since its inception in 1988. The important decisions valuable to mention are as follows.

A. Judicial Citation of International Law

(1) The United Nations

Korea became a full member of the United Nations in 1991. Since then Korea has ratified many important multilateral treaties proclaimed by the UN, such as International Covenant on Civil and Political Rights, International Covenant on Economic, Social and Cultural Rights, Convention on the Elimination of All Forms of Discrimination against Women, Convention on the Rights of the Child and so on. The Constitutional Court of Korea has applied these treaties to protect basic rights of people.

(a) 2004 Hun-Ma 670, Aug. 30, 2007

The Constitutional Court confirmed the unconstitutionality of the Regulation of the Ministry of Labor for Foreign Industrial Trainees which allowed employers not to apply the important articles of the Labor Standards Act to foreign industrial trainees. In this decision the Court invoked International Covenant on Economic, Social and Cultural Rights. According to Article 7 of the Covenant the Sates Parties to the Covenant should recognize the right of everyone to the enjoyment of just and favorable conditions of work.

(b) 2001 Hun-Ma 728, May 26, 2005

The Constitutional Court held unconstitutional the act of a prison officer who kept defendants handcuffed during the investigation procedure by public prosecutors. In this case the Court cited Standard Minimum Rules for the Treatment of Prisoners. The Article 84 of the Rules says unconvicted prisoners are presumed to be innocent and shall be treated as such.

(c) 2001 Hun-Ba 96, July 24, 2003

The Promotion Act for Employment of the Disabled made it a duty of business owners to employ the disabled more than one percent of total employees. The Constitutional Court found this Act constitutional mentioning the Vocational Rehabilitation (Disabled) Recommendation (No. 99) of the International Labour Organization.

(d) 98 Hun-Ma 363, Dec. 23, 1999

The Act for Supporting Veterans created a system of mandatory additional points for veterans that gave veterans, mostly men, great favor in employment examinations for both public and private sectors. The Constitutional Court held the additional points for veterans were so high that this system discriminated against women and in favor of men. The Court consulted Convention on the Elimination of All Forms of Discrimination against Women and the other international treaties on abolition of various forms of discrimination.

(2) The Venice Commission

Korea became a full member of the European Commission for Democracy through Law (better known as the Venice Commission) in 2006. With this membership the Constitutional Court of Korea has been able to enhance its understanding of the international trend in the rule of law and the constitutional protection of basic rights. Main reference documents of the Venice Commission are very important resources for decision making of the Court.

The Ministry of Justice of Korea requested adjudication on dissolution of the United Progressive Party in 2013, alleging that the objectives and activities of the Party were against the basic democratic order of the Republic of Korea. Article 8 of the Constitution states that if the purposes or activities of a political party are contrary to the fundamental democratic order, the Government may bring an action against it in the Constitutional Court for its dissolution, and the political party shall be dissolved in accordance with the decision of the Constitutional Court. In dealing with this case, the Constitutional Court consulted the Guidelines of the Venice Commission on prohibition and dissolution of political parties and analogous measures (CDL-INF(2000) 1). The Court ordered dissolution of the United Progressive Party according to Article 8 of the Constitution (2013 Hun-Da 1, Dec 19, 2014).

(3) Others

The Wildlife Protection Act allowed the import of endangered species with official authorization but prohibited the use of endangered species against the condition for permission. The owner of black bears argued this Act violated his property right. The Constitutional Court held this Act constitutional. The Court cited the Convention on International Trade in Endangered Species of Wild Fauna and Flora as one of the reasons for its decision (2012 Hun-Ba 431, Oct. 24, 2013).

The Utility Model Act stipulated that if a holder of utility model right did not pay a registration fee within a certain period of time the utility model right would be extinguished. The Constitutional Court found this Act constitutional citing the Paris Convention for the Protection of Industrial Property (2001 Hun-Ma 200, Apr. 25, 2002).

B. Judicial Citation of Foreign Law

It is a custom of the Korean Constitutional Court to research relevant foreign law in all important cases. The results of this research are often cited in decisions. A judicial citation of foreign law is a common practice in Korea. Especially the decisions of the European Court of Human Rights are very important reference material for the Korean Court. Since there is no regional court for protecting human rights in Asia, the Korean Court often consult to the case law of the European Court of Human Rights.

When a family of a critical patient asked to stop a life extension treatment and allow passive euthanasia, the Constitutional Court answered the Government has no duty to enact a law which allows passive euthanasia. In this case the Court cited Pretty v. United Kingdom, ECHR (2002) no. 2346/02 (2008 Hun-Ma 385, Nov. 26, 2009). In the case related to the Legal Aid Act, the Constitutional Court mentioned Golder v. United Kingdom, ECHR (1975) no. 4451/70, Feldbrugge v. Netherlands, ECHR (1986) no. 8562/79, and Airey v. Ireland, ECHR (1979) no. 6289/73 (99 Hun-Ba 74, Feb. 22, 2001).

Also the Korean Constitutional Court made references to the Hirst v. United Kingdom decision of the European Court of Human Rights along with other constitutional decisions from Canada, South Africa, Australia, and France in order to decide provisions prohibiting prisoners from voting unconstitutional (2012Hun-Ma 409, Jan. 28, 2014).

Ⅳ. Conclusion

Korea is a leading country in a field of constitutional justice in Asia. The Korean constitutional adjudication system has had a decisive effect on the adoption of judicial review system in many Asian countries. The culture, social structure, and economic situation of Asia are significantly different from those of Europe and the U.S.A. The Korean experience in constitutional globalization is a valuable asset for the Asian people.

The Constitutional Court of Korea has been very active in securing meaningful ways of assisting newly democratized countries in their efforts to implement a constitutional adjudication system. With the leading role of the Korean Court, the Association of Asian Constitutional Courts and Equivalent Institutions as a regional forum for constitutional adjudicative Institutions in Asia has come into existence in 2012. Now there are sixteen member states in the AACC.

Also, participation in the Venice Commission has enabled the Korean Court to take its responsibility more seriously as the constitutional court of a country with a thriving constitutional system. The third World Congress of the World Conference on Constitutional Justice which was held in Seoul in 2014 marked a turning point of development of the Constitutional Courts of Korea and Asian neighbors. President Park Han-Chul of the Korean Court proposed to promote discussions on international cooperation in human rights including the possibility of establishing a human rights court in Asia. The World Congress adopted the

Seoul Communiqué which contains the proposal of President Park.

A human rights court in Asia will be a historical monument to enhancement of protection of human rights in Asia. To achieve this goal the Constitutional Court of Korea shall play an important role. The constitutional globalization in Asia is very crucial for the establishment of durable peace and rule of law in this region.

한국에서의 입헌주의의 세계화[1)]

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Ⅰ. 도입

한국의 법 제도는 영미법계와 대륙법계가 혼합된 독자적인 형태를 따르고 있다. 한국은 1910-1945년 일제강점기에 대륙법계를 도입하였으며, 1945-1948년 미군정기에 영미법계를 경험하였다. 한국의 제헌 헌법은 1948. 7. 17.에 제정되었다.

한국 국민은 1950-1953년에 6.25 전쟁을 겪었으며, 한국은 전쟁으로 인해 세계 최빈국이 되었다. 그 이후 한국 국민들은 급격한 사회 변화와 경제성장을 경험했으며, 현재 한국은 OECD와 G20의 회원국으로 활동 중이다.

사회의 급격한 변화로 한국은 총 9번의 헌법개정을 거쳤다. 헌법개정으로 대통령제와 의원내각제를 경험하였으며, 다양한 헌법재판제도를 도입한 바 있다. 서양의 법문화에 대한 경험이 거의 없는 한국은 사법개혁 시 서방국가의 경험을 참고해 왔으며, 헌법재판소 등 한국 사법기관의 재판에서 국제법과 외국법을 참조하는 것은 일종의 전통이 되었다.

이 글에서는 우선 한국의 헌법재판제도를 개괄하고자 하며, 이어 국제법 및 외국법의 인용 사례에 대해 구체적으로 살펴볼 텐데, 이를 통해 한국 헌법재판의 세계화를 확인할 수 있을 것이다.

Ⅱ. 한국의 헌법재판제도

1. 제헌 헌법

한국에서는 제헌 헌법안이 기초되었을 당시 어떠한 헌법재판제도를 도입할 지에 관한 논쟁이 있었다. 대법원장 지명자는 위헌법률심판 권한이 일반법원에 있다고 주장한 반면, 헌법안 기초를 담당하던 학자들은 과거 일본정부와의 관계로 인한 법관의 신뢰성 문제가 있으므로 영미법 제도 도입이 부적절하다고 주장했다. 한국은 결국 유럽식 헌법재판제도를 도입하게 되었다.

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1) 이 원고는 영문으로 작성된 문서를 번역한 것임.

제헌 헌법은 국회 제정 법률에 대한 위헌심판권을 가진 헌법위원회를 설립하였다. 제헌 헌법 제81조에 따르면, 법률의 위헌여부가 재판의 전제가 될 경우 해당 법원은 이 문제를 헌법위원회에 제기하고 위원회 결정에 따라 판결을 내려야 한다. 그러나 행정명령, 행정규칙 및 행정입법의 위헌여부에 대한 최종결정 권한은 대법원이 가지고 있었다. 이것은 영미법과 대륙법의 혼합적 체계를 보여주는 한 가지 예로 볼 수 있다.

헌법위원회는 부통령이 위원장이 되었으며, 대법원 대법관 5인과 국회의원 5인의 위원으로 구성되었다. 대법원은 대법원장과 5인의 대법관으로 구성되었으며, 헌법위원회의 위헌결정 정족수는 2/3이상이었다.

1948-1961년간 헌법위원회에 제기된 위헌법률심판 청구건수는 총 6건이었으며, 1952년에 2건의 위헌결정이 있었다. 당시 헌법재판제도가 처음으로 도입되었던 점을 감안하면, 헌법위원회가 6.25 전쟁 중 국회에서 제정한 법률을 위헌이라고 판단한 것은 놀라운 사실이다.

헌법위원회의 최초 위헌결정은 농지개혁법에 관한 것으로, 농지개혁법에 따르면 정부는 유상분배 받은 농지의 대가를 지불하지 못한 농부를 기소할 수 있으며, 1심법원의 판결에 대한 항소는 고등법원에만 제기할 수 있었다. 위원회는 대법원에 재판을 청구할 수 있는 권리를 국민의 기본권으로 보아 고등법원을 최종 법원으로 정한 것은 국민의 상고권을 박탈하는 것과 같음을 밝혔다.

위헌결정이 있었던 두 번째 사건도 재판청구권에 관한 것이었다. 6.25 전쟁 발발 당시 정부는 '비상사태하 범죄처벌에 관한 특별조치령'을 발표했는데, 이 특별조치령에 따르면 국가 비상사태 하에서 행해진 범죄의 심판은 지방법원 관할로 항소가 허용되지 않았다. 헌법위원회는 비상사태 하의 범죄 심판에 대한 항소를 금지하는 이 대통령령이 위헌이라고 결정하였다.

2. 제2공화국

1960년 4. 19 혁명으로 이승만 정권이 무너졌다. 한국 제2공화국 헌법은 1960. 6. 15. 발효되었으며 이 신 헌법에 따라 의원내각제가 도입되었는데, 한국이 대통령제가 아닌 의원내각제를 채택한 것은 이 때가 처음이자 유일하다.

제2공화국 헌법에 따라 헌법재판소가 설치되었다. 당시 헌법재판소는 1) 위헌법률심판, 2) 헌법의 최종적 해석, 3) 국가기관 간 권한쟁의심판, 4) 정당해산심판, (5) 탄핵심판, (6) 대통령, 대법원장 및 대법관 선거소송 심판의 권한을 가졌다.

헌법재판소는 9인의 재판관으로 구성되었는데, 대통령, 대법원 및 참의원이 각각 3인을 지명해야 했다. 재판관 임기는 6년으로 재판관 3인은 2년마다 개선되었다.

헌법재판소법이 1961. 4. 17. 통과되었으나, 헌법재판소는 실제 구성되기 전 박정희 장군이 이끈 5.16 쿠데타로 인해 폐지되었다. 비록 제2공화국에 헌법재판소가 세워지지는 못하였으나, 당시 경험은 현 헌법재판소가 형성되는 데 중요한 역할을 하였다.

3. 제3공화국

2년간의 군사정권이 끝나고 새로운 헌법이 채택되었으며, 한국은 다시 대통령제로 돌아갔다. 제3공화국 헌법은 영미법계의 위헌법률심판 제도를 수용하였으며, 이에 따라 위헌법률심판의 권한이 일반법원에 주어졌다. 대법원은 법률의 위헌여부가 재판의 전제가 될 때 이에 대한 최종적 결정을 내릴 수 있었다.

제3공화국의 경제성장은 시민적 권리의 보호에 앞서는 우선순위로 간주되었다. 강력한 대통령이 이끄는 행정부는 사법부보다 훨씬 더 강력한 힘을 발휘하였고, 대법원은 새롭게 얻은 위헌법률심판권을 행사하지 못하였다.

그러나 대법원이 위헌법률심판권을 행사했던 중요한 사건이 하나 있다. 당시 국가배상법에 따르면 직무집행 중 전사, 순직하거나 공상을 입은 군인은 본인 또는 그의 유족이 다른 법령 규정에 의해 재해보상금이나 연금을 지급받은 경우 국가에 대해 구상청구를 할 수 없었다. 1971년 대법원은 재해보상금과 손해배상의 취지가 전혀 다르다는 이유로 국가배상법에 대해 위헌판결을 내렸다.

당시 한국 정부는 재정적 압박을 받고 있던 터라 위의 대법원 판결은 대통령과 행정부의 분노를 샀다. 한국은 1964-1973년 베트남전에 참전하였고, 수 천명의 한국 군인이 사망하거나 부상을 입었다. 당시 한국 경제는 전쟁 사망자나 부상자를 위한 온전한 보상을 제공할 여력이 없었다. 1972년 헌법이 개정되었고 헌법에 국가배상 책임의 한계가 명시되었다. 1972년 헌법 제26조 제2항은 "군인, 군무원, 경찰공무원 기타 법률이 정하는 자가 전투, 훈련 등 직무집행과 관련하여 받은 손해에 대하여는 법률이 정하는 보상 외에 국가 또는 공공단체에 공무원의 직무상 불법행위로 인한 배상은 청구할 수 없다"고 규정하였고, 헌법개정으로 이 국가배상법은 합헌 판결을 받게 되었다.

4. 제4, 5공화국

1962년 헌법에 따르면 대통령 임기는 2회로 제한되었는데, 1969년 박정희 대통령의 3선을 위한 헌법개정이 강행되어 국회를 통과하였다. 박정희 대통령은 1971년 대선에서 재선되었으나, 집권여당이 총선에서 패배하고 야당이 헌법개정을 통과시킬 수 있는 힘이 생기자 박정희 대통령은 같은 해 국가비상사태를 선포하였다. 국회는 해산되고 헌정이 중단되었다. 비상국무회의에서 헌법개정안을 의결하여 국민투표에 부쳐졌으며, 1972년 12월 헌법이 개정되었다.

1972년 헌법은 헌법위원회의 재설치를 규정했다. 이것은 제3공화국 당시 행정부의 의지에

반하여 사법부가 법률의 위헌판결을 내렸던 경험에서 비롯되었다. 헌법위원회를 재설치한 이유는 위헌심판권을 이름뿐인 기관에 부여하여 헌법재판 기능을 유명무실하게 만드는 데 있었다. 헌법위원회는 대통령이 임명한 9인, 국회에서 지명한 3인과 대법원장이 지명한 3인의 위원으로 구성되었는데, 이 때 단 한 건의 위헌법률심사도 이루어지지 않았다.

독재정권 하에서 경제는 계속 번영해 나갔다. 그러나 민주주의를 외치는 학생과 운동가들은 1972년 헌법의 폐지를 주장하는 시위를 계속했다. 이러한 정치적 소용돌이 속에 박정희 대통령은 1979년 암살되었다. 이후 전두환 장군이 집권하여 1980년 5월 계엄령을 선포하였고, 같은 해 9월 전두환 장군은 간접선거로 대통령에 선출되었다. 1980년 8월 국민투표로 헌법개정이 확정되었는데, 이 헌법은 대통령제와 헌법위원회를 존치를 규정했다. 전두환 대통령은 경제, 외교정책에서 성공적이었으나 정당성 결여로 정부에 대한 국민의 신뢰는 낮았다.

5. 현행 헌법

1987년 6월, 100만 명이 넘는 학생과 시민들이 전국적 반정부 시위에 참여하였다. 그 결과 여당과 야당 모두 각각 새로운 헌법개정안을 발표하였다. 한국 역사상 최초로 정부와 야당 사이의 협상과 협력을 토대로 한 헌법개정안이 작성되었다. 이 개정안은 국회 통과 이후 국민투표에 부쳐졌으며, 투표자의 찬성을 얻어 1987년 10월 공포되었다.

자유롭게 정부를 선택할 수 있는 체제를 열망하는 국민들의 요구로 헌법개정이 이루어진 것은 처음이었다. 현행 헌법에 따라 한국의 완전한 민주주의가 실현되었다. 헌법개정 과정에서, 각 정파에서는 헌법재판제도를 어떻게 구성할 지에 대해 각기 다른 의견을 개진하였다. 여당과 야당은 협상 끝에 독립된 헌법재판소 설치에 합의하였다.

헌법재판소는 대통령이 임명하는 9인의 재판관으로 구성되며, 그 중 3인은 국회에서 선출되고 다른 3인은 대법원장이 지명하는 것으로 결정되었다. 헌법재판소는 1) 일반법원 제청에 의한 위헌법률심판, 2) 탄핵, 3) 정당해산, 4) 국가기관간, 국가기관과 지자체간, 또는 지자체간의 권한쟁의, 5) 헌법소원에 대한 심판권을 가진다.

헌법과 헌법재판소법에 따르면, 공권력의 작위 또는 부작위에 의해 기본권이 침해되었을 때 권리를 침해 받은 개인은 헌법재판소에 헌법소원을 제기할 수 있다. 한국 국민들에게 헌법소원은 아직 생소한 것이었으며, 국민들은 신설된 헌법재판소가 비교적 조용한 기관이 될 것으로 예상했다. 그러나 헌법재판소는 새로운 한국 민주 헌법질서의 상징이 되었다. 헌법재판소는 주요 정치적 분쟁과 사회정책 문제를 해결해야 하는 임무를 많이 맡게 되었다 헌법재판소는 1988년 설립된 이래 총 32,000 여 건에 대한 결정을 내렸으며, 그 중 95% 이상이 헌법소원 사건이었다. 헌법재판소는 또한 여론조사 결과에서 신뢰도와 영향력이 가장 높은 국가기관으로 계속 선정되고 있다.

Ⅲ. 한국 헌법재판의 세계화

1. 한국 입헌주의의 도입

전 세계의 모든 국가들은 정부를 조직하고 그 권한을 제한하는 일련의 규칙을 담은 헌법을 가진다. 모든 민주국가는 법치주의, 권력분립 및 인권보호를 천명하는 헌법을 가지고 있다. 모든 인간은 본질적 존엄성과 불가침의 기본권을 보장받으며, 민주국가의 헌법은 입헌주의라는 동일한 이념을 기초로 한다.

헌법의 세계화는 세계적 입헌주의(global constitutionalism)라는 개념을 발전시켰다. 유엔을 비롯하여 유럽연합 및 세계무역기구 등 국제기구의 탄생은 세계적 입헌주의를 강화해 왔으며, 오늘날 유엔헌장은 국제사회의 헌법이라고도 불린다.

19세기까지 한국은 중국의 영향력 아래 쇄국정책을 고수했다. 청일전쟁의 중국 패배로 한국은 일본에 의해 강제로 문호를 개방해야 했다. 한국을 중국으로부터 분리시키고자 한 일본 정부는 조선으로 하여금 입헌주의를 받아들이게 했다. 1895년 조선은 한국 최초의 근대 헌법이라고 볼 수 있는 홍범 14조를 선포하였다. 그러나 사실상 실제 정부 체계는 절대군주제와 같았다.

1910년 일제강점기 이후 독립을 위한 군사, 외교 활동이 시작되었다. 이 활동 중 많은 한국 운동가들이 서구 민주주의와 세계적 입헌주의에 대해 알게 되었다. 1919년 한국 임시정부가 중국 상해에 수립되었으며, 임시헌법이 선포되었다. 당시 임시헌법은 국민의 주권, 의회 대표주의, 권력분립, 기본권 보장과 법치주의를 천명했는데, 비록 임시헌법이기는 했으나 매우 근대적인 성문헌법의 형태를 갖추었다. 당시 임시정부 의원들은 파리강화회의와 미국 대통령 우드로 윌슨의 14개조 평화원칙으로부터 큰 영향을 받았다.

2. 한국 헌법재판의 세계화

세계적 입헌주의는 한국의 헌법재판에 큰 영향을 미쳤다. 한국은 헌법재판제도를 도입한 이후 머지않아 독립을 쟁취했다. 한국은 세계에서 위헌법률심사를 일찍 도입한 나라들 중 하나이다. 일제시대에는 법의 지배(rule of law)가 아닌 법에 의한 지배(rule by law)를 받았다. 한국은 헌법재판 경험이 부재하여, 제1공화국 헌법위원회는 외국과 국제 법리에 상당부분 의존할 수밖에 없었다. 따라서 외국법 및 국제법의 인용은 한국 헌법재판의 전통이 되었다.

현재 한국 헌법재판소에는 총 84인의 연구관들이 9인의 재판관을 위한 연구를 수행하고 있다. 연구관의 주요 직무 중 하나는 외국법과 국제법을 연구하는 것이다. 따라서 한국 헌법재판소의 결정에는 다른 나라 헌법재판기관의 결정보다 외국법과 국제법이 더 많이 인용되고 있다.

특히 한국 헌법재판소는 다양한 사건에서 많은 국제인권법을 활용하여 왔는데 세계인권선언, 아래에서 보는 바와 같이 유엔 차원에서 만들어진 인권협약, ILO 협약 및 권고, 유엔 인권

이사회와 같은 국제인권협약상 기구가 만든 자료들이 여기에 포함된다. 한국 헌법재판소는 1988년 설립된 이래 약 70건의 결정에서 120여 차례 이와 같은 국제인권법을 인용하였다. 이와 관련하여 언급될 만한 주요 사례는 다음과 같다.

A. 국제법의 사법적 인용

(1) 유엔

한국은 1991년 유엔의 정회원이 되었으며, 이후 시민적 및 정치적 권리에 관한 국제규약, 경제적, 사회적 및 문화적 권리에 관한 국제규약, 여성에 대한 모든 형태의 차별철폐에 관한 협약, 아동권리협약 등 유엔이 공표한 여러 주요 다자조약을 비준했다. 한국 헌법재판소는 국민의 기본권 보호를 목적으로 이 조약들을 적용하고 있다.

(a) 2004헌마670(2007. 8. 30. 선고)

헌법재판소는 근로기준법 근로기준 중 주요사항을 외국인 산업연수생에 대해서만 적용되지 않도록 한 노동부 예규를 위헌으로 결정했다. 헌법재판소는 이 사건에서 경제적, 사회적 및 문화적 권리에 관한 국제규약을 인용하였다. 동 규약 제7조에 따르면 당사국은 공정하고 유리한 근로조건을 모든 사람이 향유할 권리를 가지는 것을 인정해야 한다.

(b) 2001헌마728(2005. 5. 26. 선고)

헌법재판소는 피의자신문을 받을 때 교도관이 청구인의 수갑을 채운 상태에서 피의자조사를 받도록 한 행위가 위헌이라고 결정하였다. 이 사건에서 헌법재판소는 '피구금자 처우를 위한 최저기준 규칙'을 인용하였는데, 동 규칙 제84조는 유죄판결을 받지 아니한 피구금자는 무죄로 추정되고 무죄인 자로서 처우되어야 한다고 규정하고 있다.

(c) 2001헌바96(2003. 7. 24. 선고)

장애인고용촉진등에관한법률에 따라 사업주는 총 고용인의 1% 이상을 장애인으로 고용해야 할 의무가 있다. 헌법재판소는 장애인의 고용촉진에 관한 국제노동기구(ILO) 권고 제99호를 언급하며 장애인고용촉진등에관한법률을 합헌으로 결정하였다.

(d) 98헌마363(1999. 12. 23. 선고)

헌법재판소는 공·사기업체 채용시험에 응시하는 제대군인에게 가산점을 부여하는 제도를 규정하는 제대군인지원에관한법률에 대해, 이 가산점제도가 제대군인에 해당하는 대부분의 남성을 위하여 여성을 차별한다고 결정하였다. 이 과정에서 헌법재판소는 여성에 대한 모든 형태의 차별철폐에 관한 협약 등 다양한 형태의 차별 폐지에 관한 국제조약을 참조하였다.

(2) 베니스위원회

한국은 2006년 법을 통한 민주주의 유럽위원회(베니스위원회)의 회원이 되었다. 한국 헌법

재판소는 베니스위원회 활동을 통해 법치주의와 헌법의 기본권 보호 관련 국제동향에 대한 이해를 제고할 수 있게 되었다. 베니스위원회의 주요 문서는 헌법재판소의 의사결정에 있어 매우 중요한 참고자료가 되었다.

한국 법무부는 2013년 통합진보당의 목적과 활동이 한국의 민주적 기본질서에 반한다고 주장하며 통합진보당의 해산심판을 청구하였다. 헌법 제8조에 따르면 정당의 목적과 활동이 민주적 기본질서에 위배될 때에는 정부는 헌법재판소에 그 해산을 제소할 수 있고, 정당은 헌법재판소의 심판에 의하여 해산된다. 헌법재판소는 이 사건 심사에서 '정당활동의 금지와 정당해산 등 조치에 관한 베니스위원회의 가이드라인(CDL-INF(2000) 1)'을 참조하였으며, 헌법 제8조에 따라 통합진보당의 해산을 명하였다(2013헌다1, 2014. 12. 19. 선고).

(3) 기타

야생동·식물보호법은 허가를 받아 수입 또는 반입된 국제적멸종위기종은 그 수입 또는 반입 목적외의 용도로 사용할 수 없다고 규정하고 있는데, 반달가슴곰의 소유자인 청구인은 이 법이 자신의 재산권을 침해한다고 주장하였다. 헌법재판소는 이 사건에서 합헌 결정을 내렸는데, 판단이유에서 멸종위기에 처한 야생동식물종의 국제거래에 대한 협약을 인용하였다(2012헌바431, 2013. 10. 24. 선고).

헌법재판소는 산업재산권에 관한 파리조약을 인용하면서 실용신안권자가 납부기한 내에 등록료 납부의무를 이행하지 않는 경우 실용신안권을 소멸시키는 내용의 실용신안법은 합헌이라고 결정하였다(2001헌마200, 2002. 4. 25. 선고).

B. 외국법의 사법적 인용

모든 주요 사건에서 관련 외국법을 연구하는 것은 한국 헌법재판소의 관례이며, 이 연구 결과는 많은 경우 재판소 결정에 인용된다. 외국법이 사법적으로 인용되는 것은 한국에서 흔히 볼 수 있는 관행이다. 특히 유럽인권재판소의 결정은 한국 헌법재판소의 중요한 참고자료가 된다. 아시아에는 인권보호를 위한 지역인권재판소가 없기 때문에 한국 헌법재판소는 유럽인권재판소의 판례를 참조하는 경우가 많다.

중태에 빠진 환자의 가족이 연명치료를 중단하고 소극적 안락사 허용을 요청한 사건에서, 헌법재판소는 정부가 소극적 안락사를 허용하는 법을 제정할 의무가 없다고 결정하였다. 헌법재판소는 이 사건(2008헌마385, 2009. 11. 26. 선고)에서 유럽인권재판소의 'Pretty v. United Kingdom' 사건(2002년, 제2346/02호)을 인용하였다. 아울러 법률구조법 관련 사건에서는 유럽인권재판소의 'Golder v. United Kingdom' 사건(1975년, 제4451/70호), 'Feldbrugge v. Netherlands' 사건(1986년, 제8562/79호) 및 'Airey v. Ireland' 사건(1979년, 제6289/73호)을 언급하였다(99헌바74, 2001. 2. 22. 선고).

또한 헌법재판소는 수형자의 투표권을 금지한 법률조항에 대하여 위헌 판단을 하면서 유럽인권재판소의 'Hirst v. United Kingdom' 판결을 비롯하여 캐나다, 남아프리카공화국, 호주, 프랑스의 헌법 판례를 참고하였다(2012헌마409, 2014. 1. 28. 선고).

IV. 결론

한국은 아시아에서 헌법재판 분야의 선도국으로 자리매김하고 있다. 한국의 헌법재판제도는 여러 아시아 국가가 위헌법률심판 제도를 도입하는 데 결정적인 역할을 했다. 아시아의 문화, 사회구조 및 경제상황은 유럽과 미국의 경우와 크게 다르다. 한국 헌법재판의 세계화는 아시아 국민들의 소중한 자산이라고 할 수 있다.

한국 헌법재판소는 헌법재판제도를 도입하고자 하는 신생 민주국의 실효적 지원방안을 확보하기 위해 매우 적극적으로 노력해 왔다. 한국 헌법재판소의 주도적 역할 하에 아시아 헌법재판기관을 위한 지역협의체인 아시아헌법재판소연합이 2012년 발족되었다. 현재 아시아헌법재판소연합의 회원국은 16개국이다.

아울러 베니스위원회에서의 활동과 참여로 인해 한국 헌법재판소는 선진적 헌법재판기관으로서의 책임의식을 가지게 되었다. 2014년 서울에서 개최된 세계헌법재판회의 제3차 총회는 한국을 비롯한 아시아 헌법재판기관의 발전에 있어 전환점이 되었다. 박한철 한국 헌법재판소장은 아시아 인권재판소 설립 가능성 등 국제적 인권협력 논의의 증진을 제안하였으며, 이 제안을 담은 서울 커뮤니케가 제3차 총회에서 채택되었다.

아시아 인권재판소는 아시아 인권보호 증진의 역사적 기념비가 될 것이며, 한국 헌법재판소는 이를 실현하기 위해 중요한 역할을 할 것이다. 아시아 헌법재판의 세계화는 역내 지속적 평화와 법치주의 확립에 매우 중요하다.

Session 3-1

International Human Rights Norms and Constitutional Adjudication : Convergence and Divergence

The Progress of Constitutionalism in Turkey

3rd PT : Hasan Tahsin Gökcan

Justice,
The Constitutional Court of the Republic of Turkey

THE PROGRESS OF CONSTITUTIONALISM IN TURKEY

The Turkish constitutional history goes back as far as the beginning of the 19th century. First constitutional document was put into effect as a result of an agreement between the Sultan of Ottoman Empire and the local rulers, restricting the authority of the former in favor of the latter. Its significance lies in the fact that it was the very first time that the authority of Sultan was restricted. This was followed by royal decrees in 1839 and 1856, granting certain fundamental rights to subjects of the Empire, including to religious minorities, as well as adopting certain principles and limitations with respect to the exercise of ruling power.

In 1876, the first written constitution in the history of the Ottoman Empire was adopted. This Constitution, although remained in force for a short time, recognized certain basic legal principles and fundamental human rights. It also prescribed a parliament with two chambers, an executive body, and judiciary in consistent with the modern governance system. Despite all these significant steps, the Sultan retained the ultimate authority to exercise ruling power.

The first constitution of modern Turkey was enacted in 1921, during the war of independence. It was rather a short constitution, declaring that "sovereignty is vested in the nation without any condition," and adopting "the principle of self-determination and government by the people."

After the proclamation of the Republic in 1923, a new Constitution was adopted. It was amended several times to enshrine the principle of secularism and to recognize women's right to vote and to be elected.

A new constitution was adopted in 1961, and it introduced significant innovations. It established a constitutional court and strengthened the fundamental rights and freedoms by providing certain safeguards and restricting powers of the executive. Accordingly, the Turkish Constitutional Court was established with this constitution 55 years ago.

The current Turkish Constitution was adopted in 1982.

The progress of constitutionalism gained momentum in Turkey after the turn of the 21th

century. In the first decade of the century, the constitution was amended several times for the advancement of the scope and protection of the fundamental human rights and freedoms. In 2001, based on a wide consensus, Article 13 of the Constitution, which defined limitation regime of human rights, was amended in order to eliminate general restriction grounds. Also it was stipulated that restrictions must be in conformity with the principle of proportionality and that they must not impinge upon the essence of the rights.

The 2004 amendment was also a major step for the advancement of the protection of human rights. With the consensus of the ruling and opponent party, Article 90 of the Constitution has been amended to stipulate that duly ratified international agreements on human rights shall prevail over domestic law in case of a conflict. Thereby, international human rights instruments, including the European Convention of Human Rights, gained a constitutional base in Turkey, which made it possible for ordinary courts and the constitutional Court to take those instruments into account.

The individual application mechanism emerged as the continuation of constitutionalism in Turkey. Indeed, the adoption of individual application remedy was the landmark point in this regard. In 2010, a paragraph was added to Article 148 of the Constitution, providing that everyone may apply to the Constitutional Court on the grounds that one of the fundamental rights and freedoms that are under joint protection of the European Convention and Constitution has been violated by public authorities.

Upon the introduction of the individual appeal remedy into the Turkish legal system, the Constitutional Court has been actively and directly involved in the protection and promotion of the fundamental human rights and freedoms. The individual remedy system in Turkey has also been regarded as a successful example by the international authorities. Most notably, the European Court of Human Rights considers the Turkish individual application system as an effective remedy, which must be exhausted before lodging an application before the Strasbourg Court.

After the introduction of the individual application mechanism, the Constitutional Court is no longer an institution merely making constitutional review of the laws. Rather, it has become a judicial tribunal which has a bearing on the daily lives of the individuals, directly deals with the incidents and thereby influences the society.

The individual application mechanism has thereby led to a paradigm shift in the Turkish constitutional jurisdiction. The Constitutional Court started rendering decisions and judgments both in the constitutionality review and constitutional complaint within the “right-based” paradigm which gives priority to the protection of the fundamental rights and freedoms. In other words, the Court prioritized the interests of individual rather than state, expanding the realm of human rights and freedoms. Through the individual application judgments, the fundamental principles such as the rule of law was implemented in a concrete

and effective manner.

Accordingly, the Turkish Constitutional Court leveraged its individual appeal jurisdiction to further constitutionalism. Indeed, the Court's right-based approach also served to raise public awareness and capacity building in this regard. The notion of the rule of law and human rights has been digested by other state institutions such as lower courts as well as by the society.

It must be noted, at this point, that the individual application before the Constitutional Court is not an ordinary remedy. This mechanism is an extraordinary remedy of a secondary nature which may be resorted to in the event that the alleged right violations could not be eliminated through the ordinary remedies. As emphasized in the judgments of individual applications, respect for the fundamental rights and freedoms is a constitutional obligation entrusted to all bodies of the State. It is primarily upon the state institutions to refrain from violating human rights or to restore if the violation has occurred.

Accordingly, the individual application may turn into a trap within the constitutionalism process if it is not regarded as a subsidiary remedy. Constitutional courts are not able to address and restore all human rights violations one by one in a given country. This would simply lead to an overwhelming work load for Constitutional Courts which would cause dysfunction of the mechanism in the long run. Even though Constitutional Courts would be able to address every violation, this is still not desirable because the ultimate aim of constitutionalism is to establish a profound understanding and practice of the rule of law and human rights that would eliminate the violations at the first place. Likewise, the individual application system aims to build a sound human rights system and to guarantee its functioning by resolving most serious and chronicle issues.

Therefore, as the Turkish example reveals, the individual application remedy is a very important and positive factor in terms of constitutionalism. It allows the application of legal principles enshrined in constitutions to concrete cases, and thereby provides an effective protection of human rights. Although the recognition and protection of human rights depend on the political will to some extent, individual application remedy involves judicial actors to contribute to this process by employing legal means as well as by playing a transformative role in the long run.

At the regional level, the European Human Rights System provides a successful example. It should be noted that the European system also owes its success to the individual appeal remedy to a great extent. First, scholars point out that the countries with individual appeal remedies follow a more successful track in terms of constitutionalism and integration to the regional system. Further, it has been suggested that the European Convention may be regarded as the Constitution of Europe, and the European Court serves as a final judicial tribunal at the regional level to ensure that the exercise of public power in European countries

is Convention-compliant.

I want to conclude my presentation by emphasizing the importance of the constitutional justice and especially the individual appeal remedy in terms of constitutionalism and human rights protection. Constitutional courts serve their oversight roles through individual examinations very effectively, as shown by successful examples at the state and regional level. Therefore, it may be advisable for Asian states that lack individual appeal remedy to establish such systems in order to provide sound human rights protection.

Thank you for your attention!

Session 3-1

International Human Rights Norms and Constitutional Adjudication : Convergence and Divergence

Legislation of the Republic of Uzbekistan on Correlation of the Norms of the Constitution with the Norms of the International Treaties

4th PT : Bakhtiyar Mirbabaev

Chairman,
Constitutional Court of the Republic of Uzbekistan

Тезисы выступления председателя Конституционного суда Республики Узбекистан Бахтияра Мирбабаева на международном симпозиуме, 31 октября – 1 ноября 2017 г., г.Сеул

ЗАКОНОДАТЕЛЬСТВО РЕСПУБЛИКИ УЗБЕКИСТАН О СООТНОШЕНИИ НОРМ МЕЖДУНАРОДНЫХ ДОГОВОРОВ С НОРМАМИ КОНСТИТУЦИИ

Уважаемые дамы и господа!

В первую очередь хотелось бы выразить благодарность организаторам данного международного симпозиума и пожелать успехов в деятельности Секретариата по исследованиям и развитию Ассоциации азиатских конституционных судов и эквивалентных институтов. Думаю, что его плодотворная деятельность будет способствовать развитию конституционного судопроизводства, поощрению демократии, прав и свобод человека в азиатском регионе.

Уважаемые коллеги!

Мы живем в эпоху глобализации и интенсивной интеграции, охвативший практически все страны мира. Развиваются взаимоотношения между государствами, расширяется сотрудничество по всем направлениям, в связи с чем большими темпами увеличивается договорно-правовая база этих отношений, то есть увеличивается число международных договоров. В таких условиях вопросы соотношения Конституции страны с нормами международного права становятся фундаментальными как по своей теоретической, так и практической значимости.

В связи с этим хотелось бы коротко упомянуть существующие теории соотношения национального и международного права. Так, в науке международного права имеется два подхода к соотношению международного и внутригосударственного права: монистический и дуалистический.

В силу первого, международное и национальное право находятся в системном единстве. Это говорит о том, что на территории государства непосредственным действием обладают одновременно и национальные нормативно-правовые акты, и

нормы международного права, что выражается, к примеру, в обязательности и тех, и других для применения судами при разрешении споров.

Дуализм же исходит из того, что системы международного и национального права самостоятельны и автономны, и, хотя они, несомненно, воздействуют друг на друга определённым образом, каждая из них обладает верховенством лишь в определенной сфере отношений. В первом случае – это взаимодействие государств, во втором – правопорядок в пределах конкретной территории.

В то же время, необходимо заметить, что такое деление весьма условно, поскольку ни одно государство, на наш взгляд, нельзя отнести в чистом виде к монистической или дуалистической теории и соотношении международного и внутригосударственного права.

В связи с этим я хочу остановится на вопросе соотношения норм международных договоров и норм Конституции Республики Узбекистан.

В преамбуле Конституции отмечается, что народ Узбекистана принимая Конституцию признает приоритет общепризнанных норм международного права. Преамбула, как вводная часть Конституции Республики Узбекистан, определяет идеологические основания, исходные принципы, вытекающие из общечеловеческих ценностей. Она выступает в качестве ориентира, помогающего лучше понять структуру государства, его цели и задачи, способствует верному толкованию и правильному применению статей Конституции. Соответственно все статьи Конституции должны истолковываться через призму провозглашённых в преамбуле исходных принципов.

В статье 17 Конституции отмечается, что внешняя политика исходит из общепризнанных принципов и норм международного права. А как известно, одним из принципов международного права является принцип добросовестного выполнения обязательств по международному праву (pacta sunt servanda). Данный принцип закреплен в Уставе ООН[1)] , преамбула которого подчеркивает решимость членов ООН «создать условия, при которых могут соблюдаться справедливость и уважение к обязательствам, вытекающим из договоров и других источников международного права». Согласно пункту 2 статьи 2 Устава, «все Члены Организации Объединённых Наций добросовестно выполняют принятые на себя по настоящему Уставу обязательства, чтобы обеспечить им всем в совокупности права и преимущества, вытекающие из принадлежности к составу Членов Организации». Декларация о принципах международного права[2)] 1970 года устанавливает, что каждое государство обязано добросовестно выполнять свои обязательства в соответствии с

1) http://www.un.org/ru/charter-united-nations/

2) http://www.un.org/ru/documents/decl_conv/declarations/intlaw_principles.shtml

общепризнанными принципами и нормами международного права.

Между тем, согласно статье 15 Конституции в Республике Узбекистан признается безусловное верховенство Конституции и законов Республики Узбекистан. В соответствии со статьей 16 ни один закон или иной нормативно-правовой акт не может противоречить нормам и принципам Конституции. Следовательно, в правовой системе нашей страны нормы Конституции имеют безусловный приоритет, то есть можно говорить о примате норм Конституции. В случае противоречия норм нормативно-правового акта нормам Конституции и признания в установленном порядке их неконституционными, они прекращают свое действие.

В статье 109 Конституции, посвященной полномочиям Конституционного суда, предусмотрено, что Конституционный суд определяет соответствие Конституции Республики Узбекистан межгосударственных договорных и иных обязательств Республики Узбекистан.

Исходя из смысла данной статьи и ее системной связи с другими статьями можно сделать вывод о том, что Конституция имеет безусловное верховенство и в отношение международных договоров Республики Узбекистан.

Необходимо отметить, что в реализация указанной нормы статьи 109 Конституции в отношение международных договоров может привести к некоторым проблемам практического характера. Можно представить ситуацию, когда Конституционным судом та или иная норма действующего международного договора Республики Узбекистан признана не соответствующей Конституции. В этом случае государство будет стоять перед дилеммой с одной стороны исполнение международного договора будет противоречить Конституции, с другой неисполнение международного договора будет противоречить принципу pacta sunt servanda. Как известно, согласно статье 27 Венской конвенции о праве международных договоров 1969 года участник не может ссылаться на положения своего внутреннего права в качестве оправдания для невыполнения им договора. Единственным вариантом в этом случае будет выход из такого международного договора. Но как известно, выход из международного договора также требует определенного времени. И в течение этого времени государство будет вынуждено нарушать Конституцию или принцип международного права.

В то же время необходимо отметить, что международный договор не может действовать на территории государства непосредственно, по факту своего существования, он начинает регулировать внутригосударственные отношения именно после выражения государством согласия на его обязательность для данного государства. Так, в силу положений Закона «О международных договорах Республики Узбекистан» такое согласие может выражаться путем подписания договора, ратификации договора, утверждения договора, присоединения к договору. При выражении согласия государство изъявляет свою волю о принятии на себя определенных обязательств,

которые оно, в принципе, мог бы не принимать. При должной осмотрительности государство вообще может исключить для себя возможность коллизии норм его Конституции и международного договора.

Учитывая изложенное с 1 июня 2017 года юрисдикция Конституционного суда была расширена. Теперь Конституционный суд определяет соответствие Конституции Республики Узбекистан законов о ратификации международных договоров до их подписания Президентом Республики Узбекистан. То есть появилась возможность оспаривать конституционность международных договоров до их вступления в силу.

Согласно статье 14 Закона «О международных договорах Республики Узбекистан» ратификации подлежат международные договоры Республики Узбекистан:

- о сотрудничестве и взаимной помощи;
- об основах межгосударственных отношений;
- по вопросам, затрагивающим обороноспособность Республики Узбекистан;
- о взаимном отказе от применения силы или угрозы силой;
- мирные договоры и договоры о коллективной безопасности;
- о территориальном разграничении Республики Узбекистан в межгосударственных союзах, международных организациях и иных объединениях;
- договоры, исполнение которых требует изменения действующих или принятия новых законов, а также устанавливающие иные правила, чем те, которые содержатся в законодательных актах Республики Узбекистан.

Таким образом, начал действовать механизм, который призван обеспечить с одной стороны соответствие международных договоров положениям Конституции Республики Узбекистан, с другой стороны соблюдение Республикой Узбекистан принципа добросовестного выполнения обязательств, принятых международным договором.

Таким образом, законодательство Республики Узбекистан как бы разрешил имеющеюся проблему в этой сфере. Теперь Конституционный суд будет определять конституционность международных договоров до их вступления в силу. На данном этапе при возникновении коллизии между конституционными положениями и положениями международного договора следует руководствоваться нормами Конституции. Признание Конституционным судом нормы международного договора несоответствующей Конституции повлечет ее изменение.

Соотношение норм международных договоров Республики Узбекистан и с нормами национального законодательства более ясен. Поскольку подавляющее большинство законов Республики Узбекистан и других нормативно-правовых актов предусматривает

правило о том, что в случае расхождения правил международного договора Республики Узбекистан и нормативно-правового акта, то применяются правила международного договора. Например, согласно статье 7 Гражданского кодекса Республики Узбекистан если международным договором или соглашением установлены иные правила, чем те, которые предусмотрены гражданским законодательством, применяются правила международного договора или соглашения.

В случае расхождения нормы международного договора с нормой национального законодательства, применяется норма международного договора. Однако это не означает, что норму национального законодательства необходимо отменить, поскольку с прекращением действия нормы международного договора норма национального законодательства может вновь применяться.

В целом можно констатировать, что однозначно разрешить вопрос о соотношении международного права и Конституции, с учетом всего изложенного, весьма непросто. На наш взгляд, данная проблема требует более глубокого изучения и четкого регулирования как на национальном, так и на международном уровне.

Надеюсь, что Секретариат по исследованиям и развитию Ассоциации не оставит без внимания такие вопросы и внесет свою лепту в научную разработку данной проблемы.

Благодарю за внимание.

Text of the speech of the Chairman of the Constitutional Court of
the Republic of Uzbekistan Bakhtiyar Mirbabaev
at the international symposium,
October 31 - November 1, 2017, Seoul

LEGISLATION OF THE REPUBLIC OF UZBEKISTAN ON CORRELATION OF THE NORMS OF THE CONSTITUTION WITH THE NORMS OF THE INTERNATIONAL TREATIES

Dear Ladies and gentlemen,

First of all, I would like to express my gratitude to the organizers of this international symposium and wish success in the activities of the Secretariat for Research and Development of the Association of Asian Constitutional Courts and Equivalent Institutions. We believe that its fruitful work will contribute to the development of constitutional adjudication, the promotion of democracy, protection of human rights and freedoms in the Asian region.

Dear colleagues!

We live in an era of globalization and intensive integration that has embraced all countries of the world. Relations between states are developing, cooperation is expanding in all directions, in connection with which the contractual and legal base of these relations is growing at a greater rate, that is, the number of international treaties is growing. In such conditions, the issues of the correlation between the Constitution of the country and the norms of international law become fundamental both in terms of their theoretical and practical significance.

In this regard, I would like to briefly mention the existing theories of the correlation of national and international law. So, in the science of international law there are two approaches to the correlation of international and domestic law: monistic and dualistic.

According to the first, international and national law are in a systemic unity. This suggests that both national legal acts and norms of international law have direct effect on the territory of the state, which is expressed, for example, in the binding nature of both, for application by courts in settling disputes.

Dualism, however, proceeds from the premise that the systems of international and

national law are independent and autonomous, and although they undoubtedly influence each other in a certain way, each of them has supremacy only in a certain sphere of relations. In the first case – this is the interaction of states, in the second – the rule of law within a particular territory.

At the same time, it must be noted that such a division is very conditional, since no state, in our view, can be attributed in its pure form to a monistic or dualistic theory and the correlation of international and domestic law.

In this regard, I want to expand on the issue of the correlation between the norms of international treaties and the norms of the Constitution of the Republic of Uzbekistan.

In the preamble of the Constitution of Uzbekistan it is noted that the people of Uzbekistan adopting the Constitution recognize the priority of universally recognized norms of international law. The preamble, as an introductory part of the Constitution of the Republic of Uzbekistan, defines ideological grounds, the initial principles arising from universal human values. It serves as a guide, which helps to better understand the structure of the state, its goals and objectives, contributes to the correct interpretation and correct application of the articles of the Constitution. Accordingly, all articles of the Constitution should be interpreted through the prism of the basic principles proclaimed in the preamble.

Article 17 of the Constitution states that foreign policy of Uzbekistan is based on universally recognized principles and norms of international law. And as you know, one of the principles of international law is the principle of fulfillment of the obligations in good faith (pacta sunt servanda). This principle is enshrined in the UN Charter, the preamble of which emphasizes the determination of the members of the UN "to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained". According to Article 2, paragraph 2, of the Charter, "All Members, in order to ensure to all of them the rights and benefits resulting from membership, shall fulfill in good faith the obligations assumed by them in accordance with the present Charter". The Declaration on the Principles of International Law of 1970 establishes that each state is obligated to fulfill its obligations faithfully in accordance with generally recognized principles and norms of international law.

Meanwhile, according to Article 15 of the Constitution, the Republic of Uzbekistan recognizes the unconditional supremacy of the Constitution and laws of the Republic of Uzbekistan. In accordance with Article 16, no law or other normative legal act can contradict the norms and principles of the Constitution. Consequently, in the legal system of our country, the norms of the Constitution have an unconditional priority, that is, one can speak of the primacy of the norms of the Constitution. If the provisions of the normative legal act contradict the norms of the Constitution and this provisions are held unconstitutional, they cease to be effective.

Article 109 of the Constitution, dedicated to the powers of the Constitutional Court, provides that the Constitutional Court determines the compliance of the Constitution of the Republic of Uzbekistan with interstate treaty and other obligations of the Republic of Uzbekistan.

Based on the meaning of this article and its systemic connection with other articles, it can be concluded that the Constitution has unconditional supremacy in relation to the international treaties of the Republic of Uzbekistan.

It should be noted that in the implementation of this provision of Article 109 of the Constitution in relation to international treaties can lead to some problems of a practical nature. It is possible to imagine a situation where the Constitutional Court has found that a certain provision of the current international treaty of the Republic of Uzbekistan is not in conformity with the Constitution. In this case, the state will face a dilemma, on the one hand, the implementation of the international treaty will be contrary to the Constitution, on the other, failure to comply with the international treaty will contradict the principle of pacta sunt servanda. As is known, according to Article 27 of the Vienna Convention on the Law of Treaties of 1969, a participant can not invoke the provisions of his domestic law as an excuse for not fulfilling his contract. The only option in this case will be to withdraw from such an international treaty. But as you know, the withdrawal from the international treaty also requires a certain amount of time. And during this time the state will be forced to violate either the Constitution or the principle of international law.

At the same time, it should be noted that an international treaty can not act on the territory of the state directly, upon its existence, it begins to regulate intra-state relations precisely after the state expresses its consent to its bindingness for that state. So, by virtue of the provisions of the Law “On international treaties of the Republic of Uzbekistan”, such consent can be expressed by signing a treaty, ratifying a treaty, approving a treaty, acceding to a treaty. When expressing consent, the state expresses its will to assume certain obligations that, in principle, it could not accept. With due diligence, the state generally can exclude the possibility of conflict between the norms of its Constitution and the international treaty.

From June 1, 2017, the jurisdiction of the Constitutional Court has been expanded. Now the Constitutional Court determines the compliance with the Constitution of the Republic of Uzbekistan of the laws on the ratification of international treaties before they are signed by the President of the Republic of Uzbekistan. That is, it became possible to challenge the constitutionality of international treaties before they come into force.

According to Article 14 of the Law “On International Treaties of the Republic of Uzbekistan”, the following international treaties of the Republic of Uzbekistan are subject to ratification:

- on cooperation and mutual assistance;
- on the fundamentals of interstate relations;
- on issues affecting the defense capability of the Republic of Uzbekistan;
- on the mutual refusal to use force or threat with force;
- Peace treaties and agreements on collective security;
- on the territorial delimitation of the Republic of Uzbekistan in interstate unions, international organizations and other associations;
- treaties, the implementation of which requires changing the existing or the adoption of new laws, as well as establishing other rules than those contained in the legislative acts of the Republic of Uzbekistan.

Thus, this mechanism is designed to ensure, on the one hand, the compliance of international treaties with the provisions of the Constitution of the Republic of Uzbekistan, on the other hand, the observance by the Republic of Uzbekistan of the principle of pacta sunt servanda.

Now the Constitutional Court will determine the constitutionality of international treaties before they come into force. At this stage, if there is a conflict between constitutional provisions and the provisions of an international treaty, the norms of the Constitution will prevail. Recognition by the Constitutional Court of the norms of an international treaty that does not comply with the Constitution will entail its change.

The correlation between the norms of international treaties of the Republic of Uzbekistan and with the norms of national legislation is more clear. As the overwhelming majority of the laws of the Republic of Uzbekistan and other normative-legal acts provide for the rule that in the event of divergence of the rules of the international treaty of the Republic of Uzbekistan and the normative legal act, the rules of the international treaty are applied. For example, according to Article 7 of the Civil Code of the Republic of Uzbekistan, if an international treaty or agreement stipulates other rules than those provided by civil law, the rules of the international treaty or agreement are applied.

In the event of a discrepancy between the norms of an international treaty and the norm of national legislation, the norm of an international treaty is applied. However, this does not mean that the norm of the national legislation should be repealed, since with the termination of the norm of the international treaty the norm of the national legislation can be applied again.

In general, taking into account all the above we can state that it is not easy to resolve the issue of the correlation of international law and the Constitution. In our opinion, this problem requires more in-depth study and clear regulation both at the national and international levels.

I hope that the Secretariat for Research and Development of the Association will address such questions and will contribute to the scientific development of this problem.

Thank you for your kind attention.

Session 3-2

International Human Rights Norms and Constitutional Adjudication : Convergence and Divergence

Chair : Mohammad Qasim Hashimzai,

President, Independent Commission for Overseeing the Implementation of the Constitution of Afghanistan

1st PT : Sylvain Oré

President,
African Court on Human and Peoples' Rights

2nd PT : Martin Nettesheim

Professor,
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Session 3-2

International Human Rights Norms and Constitutional Adjudication : Convergence and Divergence

The Role of the African Court in Shaping Constitutional Adjudication in Africa: Promises for a Continental Judicial Dialogue

1st PT : Sylvain Oré

President,
African Court on Human and Peoples' Rights

FIRST INTERNATIONAL SYMPOSIUM OF THE ASSOCIATION OF ASIAN CONSTITUTIONAL COURTS AND EQUIVALENT INSTITUTIONS

PRESENTATION BY THE HONOURABLE SYLVAIN ORÉ, PRESIDENT OF THE AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS ON

"THE ROLE OF THE AFRICAN COURT IN SHAPING CONSTITUTIONAL ADJUDICATION IN AFRICA: PROMISES FOR A CONTINENTAL JUDICIAL DIALOGUE"

under Session 3 "International Human Rights Law and Constitutional Adjudication: Convergence and Divergence"
SEOUL, 1 NOVEMBER 2017

Greetings by protocol

- Honourable Justice Kim Yi-Su, Acting President of the Constitutional Court of Korea, in your capacity as host of the present symposium
- Honourable Chief Justices and Presidents of Constitutional Courts and equivalent institutions of Asian states attending this gathering
- Distinguished guests and participants
- All protocol duly observed

Vote of thanks

It is my utmost honour and privilege to take the floor before this distinguished audience on an occasion like this where highest judicial officers like yourselves, and members of the academia gather to discuss the past, present and future of constitutionalism in Asia. In the true African tradition, I wish to begin my presentation by thanking the President of the Constitutional Court of Korea Honorable Justice Kim Yi-Su for making it possible for the African Court not only to visit the Constitutional Court of Korea but also to attend this very important gathering. I would also like to extend my appreciations to Honourable Justice Kim Chang Jong who followed up on the discussions that we had during the courtesy call that he paid to me at the seat of the African Court in Arusha, Tanzania.

I am Sylvain Oré, a citizen of Ivory Coast. I have been a barrister in my country since

1998 and was elected as a Judge of the African Court in 2010 for a term of four years. I am currently serving a second and last term of six years but also a term of two years as President of the Court. Before taking you to the substance of my presentation, allow me to say a few words about the African Court.

The African Court was established by the African Union to complement the work of the African Commission on Human and Peoples' Rights in protection human rights in Africa. The Court was created in 1998 but officially started its operation in 2006 after the 15 ratifications required had been made by State parties to the Protocol creating the institution. The Court is composed of 11 judges including currently 5 Lady Justices. It has jurisdiction to consider cases of violation of human rights guaranteed not only in the African Charter on Human and Peoples' Rights but also in any other international human rights instruments ratified by the state concerned. With respect to access, individuals and NGOs can file cases directly to the Court only when the Respondent state has ratified the Protocol but also made a special declaration to that effect. To date while 30 African states have ratified the Protocol, only 8 of those have made the declaration. Since its inception, the Court has received 155 contentious applications, and 12 requests for advisory opinions; it has completed 32 of those cases, and delivered 11 judgments and 6 advisory opinions.

With this brief introduction of myself and the African Court, I believe my presentation will be delivered to a more informed and context-conscious audience. Now, let me turn to the topic of the session, which is "international human rights law and constitutional adjudication: convergence or divergence". From that general topic, I chose to address you on a more specific connected question that is the role of the African Court in shaping constitutional adjudication in Africa in the light of a continental judicial dialogue. I will therefore begin by sharing with you a few illustrations of a new trend of the African Court sending signals to domestic courts including constitutional bodies. I will then shed the light on the potential for dialogue be it that national courts with a constitutional mandate or inclination have begun to converse with the African Court whether directly or through their state as an international legal entity.

PART 1: How the African Court has begun to shape human rights adjudication in African national (constitutional) courts

After receiving the list of participants, I decided to amend my presentation slightly at least with respect to the preliminary issues in relation to the relationship between international law and constitutional law; and more specifically between international courts and domestic courts. With the high level audience of constitutional law practitioners, judicial officers and academics gathered in this forum, I do not deem it necessary to provide an elaborate background analysis on the application or enforcement of public international or human rights law in the municipal sphere.

Allow me to only recall certain key pillars on the state of knowledge and practice in that field with a focus on constitutional law. First, it is now established that the monism and dualism dichotomy regarding the relationship between international and national law is more academic than practical. The trend is that in many dualist states courts have applied international law including through direct reliance. On the other hand, monist countries that are known to apply international law without an act of parliament have declined to do so on dualist grounds such as lack of publication in the official gazette or reciprocity. A second lesson learnt from the interaction of international and national law, especially constitutional law, is the supremacy conflict between the two sets of norms. Although there is wide evidence that international law has significantly eroded the supremacy of the constitution, daily pronouncements by constitutional courts around the world remind us that the quandary remains unsolved.

Africa has not escaped that trend and the recently concluded trial of Hissene Habré by the African Extraordinary Chambers provided a vivid illustration of how the supremacy struggle between international and national law and courts can lead to deadlock in the administration of justice. The refusal of Senegal courts and executive authorities to implement international law directly in a monist context caused the trial of Hissene Habré to be delayed for more than a decade. A similar experience was that of the Tribunal of the Southern African Development Community (SADC). After it handed down judgment in the matter of Michael Campbell v Zimbabwe, the legality of the Tribunal was challenged and the High Court of Zimbabwe declined to implement on the ground that the international judgment was contrary to the Constitution of Zimbabwe.

Against that background of the relationship between international and constitutional law, the angle of my analysis today will shed more light on the jurisprudential approach to the impact of international law on constitutional law. A handful of cases decided by the African Court lend themselves very well to a discussion on that approach.

◈ Right to political participation: Christopher Mitikila v Tanzania

I begin with a case that has arguably had the most direct impact on constitutional conversation between the African Court and municipal law. In the case, the Applicant alleged that provisions of the Constitution of the United Republic of Tanzania, which obligate candidates to presidential and parliamentary elections to be sponsored by political parties violate his freedom of association and political participation in the African Charter and other international instruments.

Having established the violations, the Court ordered the Respondent to amend its Constitution accordingly. Analysed through a more comprehensive and contextualised lense, the judgment of the Court in this case has further implications than a change in the constitution. While the judgment will not be enforced by domestic courts or be used by them

to finalise the case, it will impact further constitutional law related adjudication in domestic courts. In a way, this kind of impact could serve to domestic lend means to domestic courts to avoid their findings facing the quandary of opposing international pronouncements. The interesting development is that Tanzania took some steps towards the implementation of that judgment but did not comply finally due to internal constraints.

◈ Freedom of the press and rights of journalist: Norbert Zongo v Burkina Faso

This case began domestically when investigative journalist Zongo and his companions were burnt in their car allegedly because Zongo was to release a report on corruption practices involving the brother to the then president of the republic. For over a decade, proceedings before domestic courts were either stalled or moved at a very slow pace. In their Application before the African Court, beneficiaries of the late journalist and his companions alleged mainly the violation of the right to life, that of one's cause to be heard and freedom of expression especially the right of journalists to freely perform their profession. In dealing with the violation of the right to life as an exception raised by the Respondent the Court took the position in a preliminary ruling that it lacked temporal jurisdiction. The Court found so because it considered that deprivation of life is an instant and not a continued violation and the assassination occurred prior to the operation of the Court. Conversely, the Court found that the Respondent violated both the right to have one's cause heard and freedom of journalist.

Although the Court did not issue any order for the Respondent to amend its constitution, fair trial, freedom of expression and the rights of journalists have corresponding provisions in most constitutions and that of the Respondent it not an exception. It follows that through this decision, the interpretation of those corresponding rights in either ordinary or constitutional domestic judicial fora will be impacted. This potential impact and conversation are of a crucial necessity in a post revolution and political transition era in Burkina Faso, where domestic courts have had to reactivate various rights violations proceedings that were stalled under the former regime. Such long unresolved judicial sagas including the case of assassination of Burkina former president Thomas Sankara and actually the reopening and conclusion of the trial of the accused in the Zongo assassination case. Indeed, the latter case has been reinstated in implementation of the African Court judgment. Here, one may as well contemplate reliance on or consideration of African Court pronouncements to avoid repeated international litigation and condemnation.

Although it is different in nature and scope, another case, which illustrates potential impact on constitutional adjudication involves Freedom of expression and decriminalisation of press offences. I refer to the case of Issa Lohé Konaté v Burkina Faso. In the instant case, Konaté was sentenced to time in jail, to a fine and his newspaper was suspended for months with significant income lost. This was as a result of articles that he published in newspapers and where he referred to the prosecutor as a corrupt official who collided with thugs. Due

to space constraints, I will only highlight the key findings of the judgment. In determining whether the Respondent's acts amounted to a violation, the Court undertook a proportionality and necessity test. It ultimately found that the sentences imposed were not proportional nor necessary mainly on the ground that public authorities or persons holding public offices should be prone to a greater level of criticism than ordinary citizens. The Respondent was ordered to expunge prison sentences for defamation from its laws, and amend other sentences in line with proportionality. Various monetary orders were also made, which the Respondent reportedly implemented.

Distinguished participants, as you can foresee, the Konaté judgment carries similar potential as the one in Zongo not only in terms of enforcing the orders in the domestic system but also with respect to subsequent related cases that will arise in municipal courts namely the Constitutional Court.

The last case that I would like to expand on in this discussion has to do with democracy, elections and political participation.

◈ Political participation and independence of electoral commissions: APDH v Côte d'Ivoire

The Applicant in this case is an NGO that brought to scrutiny the Law establishing the Electoral Commission of Ivory Coast alleging that it violates equality and the principle of independence for being unbalanced in its composition. The main issue for determination was whether an electoral commission whose members originate in a large majority from the executive or the ruling coalition does exhibit the features of independence and impartiality prescribed by the African Charter on Democracy. The Court took the view that in assessing independence of such a body public perception is paramount rather than statutory independence. The Respondent was thus ordered to bring the Law in line with the provisions of the Democracy Charter.

While the change ordered was legislative and not constitutional, future impact is unavoidable. This so first because the same issues had been for determination before the Constitutional Council of Ivory Coast prior to the case before the Africa Court. Second, and as a result of implementation of the African Court judgment, review of the new (amended) Law will lead to constitutional review, which cannot ignore the findings of the African Court. It is notable that the African Court decision in this matter also appears to have performed a function of review of constitutional law against international human rights obligations.

Finally, without too much emphasis, the Court delivered various judgments in cases involving fair trial rights where it dealt in particular with the issue of whether review of judgment and constitutional petitions can be considered as remedies to be exhausted under the admissibility provisions in article 56 of the African Charter. The Court has consistently

found that where the alleged violations had already been examined as part of domestic proceedings up to the Appeal Court, the Applicant are not compelled to recourse to review or constitutional petition as remedies. Such finding may have a fundamental bearing on the determination of subsequent fair trial rights cases in ordinary courts but also of constitutional rights violation cases in constitutional adjudicatory bodies in Tanzania. The cases I refer to include Alex Thomas, Mohamed Abubakari and Christopher Jonas all against the United Republic of Tanzania.

We can with assurance propose as the jurisprudence of the African Court stands today that, decisions made by the Court have resulted directly or indirectly in state either amending their constitutions or adjusting other laws to meet international obligations in a way that impact constitutional law, constitutional practice and domestic human rights and constitutional adjudication.

I now turn to the second part of the discussion where I undertake to show that whether current or potential, a trend begins to cristalise of domestic courts responding to signals of the African Court or starting a conversation with the Court on its international pronouncements. In this second part, I also refer to cases adjudicated in other African regional courts.

PART 2: Conversations from Domestic - Constitutional - Courts to the African Court: Current and Potential Signals

In African constitutional law literature, cases do not abound of national constitutional courts initiating an active dialogue with regional courts. In any event, this has not occurred as far as the African Court is concerned although the Court is of a relatively recent existence. What is certain as discussed in part 1 of this paper is that passive conversation is unavoidable. However, it may be argued that conversation initiated by domestic actors to regional courts is only a matter of time, granted that the trend illustrated in the first part of this discussion continues to grow.

Having said that, one may argue that the premises of municipally led conversation are taking shape. In the past two years, Respondent States have requested the Court to interpret its judgments in a handful of what could be seen as catalytic conversation cases. In those instances, the Court has had as a preliminary admissibility finding to ascertain that the request for interpretation was for the purpose of facilitating the execution of the main judgments. While this implied dialogue may be said to directly involve only the executive arm of government, the unitary nature of states under international law makes room for an indirect conversation with domestic courts. For instance, if and where the African Court concludes in an interpretation judgment that a specific step must be taken, which involves an action by domestic courts, the latter cannot shy away from abiding by the international obligations of the state. This scenario is certainly illustration by an interpretation judgment issued by the Court in September this year where it took the view in the case of Abubakari v Tanzania that

"all necessary measures" to be undertaken by the Respondent to "remedy the violations" do not exclude the release of the Applicant.

It is true that at this relatively early stage of operation of the African Court, states cooperation is still affirming and resistance is not excluded as it is the case in all other international and regional human rights systems. I wish to refer here to a current trend whereby some Respondent states have declined implementing provisional measures ordered by the African Court on the ground that such measures tend to reverse the final findings of superior domestic courts. That instance is applicable mainly in cases involving the imposition and execution of death sentences in Tanzania. Through various means, the African Court is using extra-judicial dialogue to explain the import of the mechanism of provisional measures which only seek to maintain the status quo until the merit of the matter is considered to avoid irreparable harm or to render the final international decision obsolete.

At the end of this second part, I bring in two cases decided in the Court of Justice of the Economic Community of West African States (ECOWAS), which illustrates an emerging conversation from domestic courts of constitutional jurisdiction. This is only to show that the trend to dialogue and conversation is not only continental but also sub-regional. The first case is that of Hissene Habré, which I referred to at the start of this paper. In that case, after the ECOWAS Court and the International Court of Justice found that Senegal had a duty in international law to prosecute Hissene Habré or hand him over to another willing country for prosecution, Senegal effected amendments to its domestic law including the constitution to make the concerned international crimes justiciable in domestic courts. It must be noted that Hissene Habré was not tried by an international court but by a kind of hybrid court in the form of Extraordinary Chambers operating within the Senegalese domestic courts system. The second that I wish to refer to is that of CDP v Burkina Faso where the Constitutional Council of that country expressly referred to the judgment of the ECOWAS Court, which found that the electoral law providing for a blank disqualification of members or supporters of the previous regime violated the right to political participation.

With these examples from the sub-regional level, I will now conclude the discussion.

CONCLUSION

Honourable Justices, Distinguished Colleagues and participants, that is the state of the relationship between international human rights adjudication and domestic constitutional adjudication in Africa. Like I clearly indicated, the trends highlighted cannot be said to be either final or established. However, these trends are clearly delineated and they are growing. What can be stated with no doubt is that, since its inception, the African Court has been working to shape African human rights law, litigation and adjudication at both supranational and national levels.

It is important to mention that impact, conversation and dialogue have been made possible by the recent advent of a body of norms which stand between traditional public international law with a focus on human rights and constitutional law. Regional treaties on democracy, elections, and good governance have been adopted with the inclusion of a myriad of provisions that are no less than constitutional law principles. Some have argued that Africa now has regional constitutions. If it does, then it could now as well be claimed, as I have attempted to demonstrate in the ongoing discussion, that the African Court and other supranational courts of a similar mandate are operating as regional constitutional courts.

It is my belief that while cooperation will always experience bumps, the trend to an increased conversation and convergence will affirm over the years. One already operational mechanism that lends itself to this positive occurrence is the African Continental Judicial Dialogue organised every two years by the African Court under the aegis of the African Union. The Dialogue gathers judges of the constitutional and supreme courts of all African countries as well as judges of the sub-regional and continental human rights or regional integration adjudicatory bodies. In the spirit of judicial dialogue, I wish to end my presentation by making a request to the Asian Association of Constitutional Courts and Similar Bodies that we start a conversation for cooperation between our respective regional initiatives. The next African Judicial Dialogue will be held in 2019 and we could make use of the next two years to start building the bridge for what in my view will be a most benefiting cooperation.

Before I avail myself for further interactions on my presentation, allow me to reiterate my appreciation and that of the entire African Court to the President of the Constitutional Court of Korea, Honorable Justice Kim Yi-Su, for making my participation in this Symposium possible. I have no doubt that this is the beginning of an era of fruitful cooperation between our institutions.

Thank you for your kind attention.

Sylvain ORÉ

Session 3-2

International Human Rights Norms and Constitutional Adjudication : Convergence and Divergence

Good Human Rights Governance : Which Agenda should a Supranational Human Rights Court have?

2nd PT : Martin Nettesheim

Professor,
University of Tübingen

Prof. Dr. Martin Nettesheim

"Good Governance" through a Supranational Human Rights Court: What rights should be enforced by a supranational court?

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Supranational judicial human rights protection through an international court is a specific and particular form of constitutionalism. A human rights regime, the enforcement of which is placed in the hands of a Court of Law, serves to depoliticize disputed issues. It involves a shift in decision-making responsibilities. In that regime, decisions regarding such issues are no longer taken by the political representatives of the participating Member States. Rather, they will be moved to a special forum organized according to the judicial rules of a trial. Decision-making responsibility thus lies in the hands of independent judges who serve as bearers of an independent and representa- tive office, are responsible for the common good, and decide on the basis of the law, but emphatically do not do so within a specific political discourse. If we talk about the constitutionalization of human rights within a supranational court system, we are talking about a form of "governance". The question is: What does good human rights governance through an international court look like?

Ⅰ. Need for a political conception of human rights

Any form of supranational rule - including that of supranational rule by judges - needs to be justified. If human rights are to be fundamental, inalienable, binding, and unbreakable, it is tempting to assume that they should be anchored in considerations of morality. In fact, human rights are often described as an expression of moral necessity. Human rights courts arethen seen as acting as agents that codifiy morality in the positivity of a legal order. The anchoring of human rights in the realm of morality seems to remove the problem of justification and validity. But anyone who is aware of the fragility of moral lines of argument and deduction in an age of ethical pluralism will recognize this as a rather precarious foundation. The moralization of the human rights discourse, as it is evident in Europe, is therefore a cause for concern. On the one hand, it is not sufficiently robust; on the other hand, it is insufficiently sustainable. A cultural construct such as human rights cannot be justified on the basis and as a consequence of a line of transcendental-universalist arguments. Human rights are not rooted in a (moral) transcendent world - even if one agrees that there are ethical notions that claim to justify why certain human rights can claim universal validity. The "orthodox" derivation of human rights from morality may be motivating and guiding for the indi- vidual participant in the human rights discourse. However, a supranational human rights system cannot be based solely on such considerations.

The justification of supranational judicial human rights protection in the form of justice achieved through a supranational court can only be achieved politically. Some observers take the view that it is a dangerous weakening of the idea of human rights to argue that an institutionalized legal human rights system cannot be anchored more firmly than in the political will of the respective legitimizing institutions and Member States; they consider such an argument would relativize the notion of universal hu- man rights. However, in the modern post-transcendental world universal systems of moral justification are no longer available that could justify the establishment and existence of such a legal system in an undisputable and undeniable way. In the post- transcendental world, it must be accepted as a given that it is

impossible to base the legitimization of political rule, but also of limitations on the exercise of political rule, on ideas and instances above political will.

Ⅱ. Human rights "governance" as a progressive realization of a political vision or as a binding and effective limitation of state sovereignty

If it is correct that supranational judicial human rights protection is a form of constitutionalized governance, it needs legitimizing justification. It can only be reasonably justified if the institutional, procedural and material aspects of such rule are taken into account in their entirety. Who decides on the applicability of a human rights document, in which procedure is it decided, and which rights are enforced and how? The questions can only be answered teleologically, in other words, with a view to the political objectives pursued with the establishment of the protection regime.

1. Human rights policy through the formulation of political perspectives, aims, and visions

Constitutional theory always oscillates between political-visionary thinking and effec- tive organization of political power. This also applies to the constitutional theory of human rights protection. Anyone who considers mechanisms of supranational human rights protection must therefore first and foremost answer the question of whether he or she aims primarily to establish a political human rights culture, leading to the gradual internalization of a human rights culture by the holders of governmental office and by the members of society with the consequence that human rights arguments emerge as an orientation pattern and political standard, or whether he or she wishes in the first instance to establish an effective judicial institution.

The protection of human rights never merely represents an existing consensus. The establishment of a human rights protection regime thus always has a future-oriented educational effect. Human rights documents can be drafted with the intent of providing arguments in the political struggle for the direction and path of political govern- ance. The regime should then gradually bring about changes in the consciousness and behavior of institutional and individual actors, by shaping the conditions, circumstances and values in the political realm in terms of human rights. If this is considered to be the main purpose of a human rights system, the provisions of a human rights catalogue must be understood as a formulation of objectives and future goals, even if they speak of "rights", whose realization must be given priority by the states. It is perfectly possible to understand the wording of the Universal Declaration of Human

Rights (1948) as such a formulation of objectives. The authors of the declaration first and foremost sought to define a vision for which the signatory states take responsibility with a view towards the individual persons. An essential part of this vision was to create a human rights culture within the signatory states. Institutional enforcement of these ideas on the basis

of positive law and hard rights was not foreseen. A similar regulatory technique is sometimes used in the area of social and ecological human rights provisions. Here as well the provisions of a human rights document define an optimal social or ecological state to be achieved and impose the obligation on the addressed state to prioritize achievement of such a state, but by means of gradual reali- zation. Institutionalized enforcement is often not envisaged here either. Even if there is a judicial "control" or a monitoring system, it will be limited to the monitoring and supervision of the realization process of the desired status.

When establishing a system of supranational human rights protection, the first and most important question that arises is therefore the question of whether this system should serve in its entirety, primarily, or at the very least as a matter of priority to en- force human rights provisions that formulate an objective in this sense and assign responsibilities accordingly.

The establishment of a system of supranational human rights protection, which aims above all to bring about and politically safeguard a par- ticular human rights culture, is particularly suitable where there are no established, jointly agreed standards among the negotiating states, or where there are at least con- siderable differences. Thus, in a region where legal, cultural and social differences are considerable, the creation of such a more teleologically oriented and politically implemented system could be a first step towards the realization of a regional human rights system that is to be strengthened at a later date. In this case, the circle of mate- rially recognized “rights” (in the sense of formulating objectives) can be rather broad. Particulate interests, concepts, standards, and values (such as “Asian values”) can be easily included.

The position of a supranational human rights tribunal would be rather weak in the system described above, and the right to standing by individuals would be limited. The supranational judicial institution would not be able to impose hard and enforcea- ble limits on the exercise of sovereignty. In the procedural organization, the aim of creating a political and social human rights culture would have to be given particular importance. One could also think of creating a more predominantly political forum to strengthen such a human rights culture. In the course of the longer-term development, it would then be an organic process to consider whether the position of the human rights court should be gradually strengthened and human rights “governance” thus expanded.

2. Human rights governance through strict and enforceable limits of state sovereignty

A second approach, which is to be distinguished in an ideal-typical way from the approach described above, is to create human rights which are “enforced” by a judicial institution with effective decision-making power, resulting in a strict legal limitation of state sovereignty. This approach implies the creation of true supranational decision-making power. It will only be possible to implement where there is already a human rights culture that enables the political representatives of the states concerned to submit to such an external constraint.

There are wide differences in the answer to the question of which rights should be thus enforced. Evidently, the aim cannot be to create as many such rights as possible. The unbridled proliferation of human rights, which is promoted among some participants of the human rights discourse, must clearly be rejected. Many supporters of human rights protection seem to believe that the quality of a human rights protection system improves on concert with increases in the breadth, density, and depth of the human rights regimes. According to this viewpoint, the success of a protection regime can be measured by the extent of its material scope and juridical enforceability. The expansion of the European Convention on Human Rights (ECHR) through constant addition of new rights would then be a pure success story. Only recently has it become clear in Europe that the juridicization of political issues, on the basis of an ever more active jurisprudence of the European Court of Human Rights (ECtHR), comes at a cost. Accordingly, recently Protocol No. 15 has been adopted, which calls on the ECtHR to respect the Member States' room for manoeuver in decision-making. However, this invitation is diffuse and vague; it is up to the members of the Court to decide whether and how to comply with the invitation. The extension of human rights protection regime based on the ECHR means that the ECtHR deals with questions of how to frame a good live in many cases, as opposed to the protection of fundamental interests against grave infringements (see Martin Nettesheim, Liberaler Verfassungsstaat und gutes Leben, 2017, ISBN: 978-3-506-78849-8).

Creating as many rights as possible cannot be the solution. Not every question of social justice or prudent policy is a human rights issue and should not be handed over to a supranational court. Some participants in the human rights debate attempt to develop the realm of human rights on the basis of a rationale argument based on principles. ***John Rawls***, for example, has tried to develop principles that the members of the international community must reasonably agree to respect. His conception does not lead to more than an international minimum level of protection, because it assumes that the infringement of rights entitles other states to intervene. Ultimately, an argument based on the principles of reason falls short of the mark, and it does not do justice to the challenges.

Rather, it seems prudent to use a perspective in formulating rights that are to be protected and enforced by supranational jurisdiction, which not only focuses on the individual autonomy and private interests of individual persons; it is always also important to keep an eye on public autonomy, i. e. the freedom of democratic self-determination within each state. In concrete terms, this means that the “governance” of a supranational human rights court should extend above all to the safeguarding of those goods, values, and interests where there is general consensus that they are of such fundamental concern to deserve protection. On the other hand, an institution such as a supranational human rights court has to show restraint when it comes to contingent issues of a purely political nature. This approach refers thus, in the final analysis, back to the legal-cultural views prevailing in the states that are subject to the court’s jurisdiction. The consideration of international experience and the adherence to the standards existing elsewhere are possible and meaningful, but do not force the simple

adoption of the existing human rights documents. Ultimately, the states that submit to a human rights jurisdiction must ask themselves from their respective per- spectives what freedoms, values and interests of the people they consider to be so im- portant and significant that they want to submit to supranational jurisdiction in order to avert imminent dangers, and hence "bind their hands".

Ⅲ. What rights should a Human Rights Court enforce?

The realization of this approach requires a more differentiated formulation of a human rights catalogue than is usually the case. It is a consequence of the moralization of the human rights discourse that rights of very different nature are, in many cases, assigned the same status, validity and binding force and the same need for enforcement through an supranational human rights court. According to this view, the different "generations" of human rights, that have emerged over the last few decades, differ as to the time of their creation, but not with regard to their moral and juridical status. It is assumed that all these rights are transcendentally anchored; that all rights strive for positivization and juridification. By assigning all human rights to the same class of rights, they take part in the same legitimizing approach. This has practical and tech- nical consequences. It is clearly visible in the European catalogues of human and fundamental rights where rights are regularly listed indiscriminately next to each other and subjected to the same restrictive clauses. This does not do justice to the different status of these rights.

In a post-orthodox human rights catalogue, based on a political idea of human rights protection, I believe it would be necessary to distinguish between three categories of human rights. The distinction would then also have to be reflected in the institutional- ization of a human rights court.

a) A first category is formed by human rights protecting those values and interests of the individuals, which are of such importance for the personality and autonomy, that any violation by the state or by third parties in any way is intolerable. In almost all parts of the world, a "human rights culture" has developed which is characterized by the fact that people see each other as fellow human beings who are no longer subjected to certain treatments because such treatments are simply regarded as "intolerable". I am referring to the sentiments and the emotionality that ***Richard Rorty*** has placed at the heart of his human rights theory. This layer of elementary human rights today includes, first and foremost, the human being's right to be recognized as a legal person. In the Western understanding of human rights, this also includes the protection of the physical integrity and elementary self-determination of the human being, as well as the protection against serious discrimination in areas of fundamental importance for the personality and identity of the subject. Governmental and private acts, that touch upon non-negotiable values and interests and must therefore be prevented in an absolute manner are, to name some examples, arbitrary killing and torture, severe impairments of human dignity, such as degrading conditions of imprisonment, and other violations of the physical

immunity and self-determination of human beings. Such behaviours do not seem unbearable to us because a moral philosopher has succeeded in establishing a protective ban on the basis of a transcendental argument and in declaring it universally valid. Rather, it is an attitude and a position of conscience on which the will to acknowledge the vulnerability of the other, weaker person is based. This attitude of conscience can only be brought about through personal experiences and the confrontation with personal accounts of suffering. Even within a cultural group there are very different reasons and motives why respect should be shown to the other person. In terms of human rights policy, it is indifferent and should be ignored, why one comes to the conclusion that an intolerable treatment of fellow man must be prevented: because men and women are seen as a creature of God, because he or she is respected as an equal, because he or she is particularly sensitive to pain and suffering, etc. Of course, the patterns of orientation in this respect are different in every culture. It seems to me, however, that global processes of understanding and interdependence have today led to the emergence of a common horizon that certain violations of the fundamental integrity of human beings are intolerable everywhere.

In the process of establishing a human rights court in Asia, the question would have to be asked as to which human rights practices are considered intolerable by the parties to the treaty in the sense described above. This realm would define the primary and most important area of jurisdiction of a future supranational human rights court. It is to be contemplated whether the jurisdiction should extend to private violators, given the fact that in the area dealt with here it is unlikely to matter whether the impact is caused by the state or private individuals. In classical technique of human rights documents, the individual provisions are usually limited to the description of their protective scope, ratione materiae and ratione personae. One could consider whether it would be possible to go beyond this technique of the typical human rights documents, by describing prohibited actions of infringement from a legal point of view. In any case, the barriers to access to a human rights tribunal in this area should be low, standing should be given liberally, and its enforcement effectiveness high.

b) Protection of fundamental rights is typically not aimed at the protection of the political majority. Human rights provisions are not needed to enable the majority to enforce their ideas of a just and good life. If a human rights document provides special protection for certain particular forms of good life, this may of course be the expression of political esteem and recognition; the German Basic Law, for example, has particularly accentuated the value of a life of marriage. In this respect, an Asian human rights document could well seek to make positive use of Asian values. The declaration of values, practices and interests of the majority may also be an attempt to safeguard against future political attempts to effect change. Such definitions therefore have an trans-or inter-temporary content. Obviously one should exercise caution in the human rights “nobilititation” of currently unendangered practices and institutions.

At the heart of every human rights document, however, should be the definition of those

areas, where those in need of protection - the minority - need legal protection to effectively nurture and realize their different ideas of good life. According to the modern understanding it is the responsibility of the individual to decide which form of life to value and to practice. This decision is highly individual, fluid, and always revisable. In principle, it is necessary and sufficient to grant freedoms, which safeguard the individual decision in these matters. The granting of these rights of freedom expresses the will of the respective majority to exercise tolerance. The formulation of liberty rights can be pursued abstractly; it can also identify areas of special need for protection. Especially in a democratic state, however, not every use of freedom requires human rights protection. Human rights regimes, which are primarily concerned with safeguarding the individual's freedom, accept the fact that particular individuals are only registered generally in their atomistic personhood. By now, this notion has become problematic for many. The question of whether it is sufficient to meet human rights expectations merely by granting negative freedom to realize the individual's idea of good living, is now often denied. Serious voices argue that it is also necessary to establish claims for recognition and equal treatment of a particular identity. It is therefore also conceivable that certain identities should receive special support in a human rights document.

Anyone who deals with the positive affirmation of human rights in a human rights document must also ask to what extent the decision on questions of distribution should be withdrawn from the political sphere and constitutionalised through the positivization of human rights. There is no doubt that any effort to develop substantive principles of distributive justice must use a particularist language.

c) Finally, a third level of human rights protection has emerged with a focus on the protection of individual interests in areas of functional importance. Just to mention some areas: It is of central importance to decide whether and how human rights should govern and control the sphere of the exercise of public autonomy (democracy). There is no universal human right to democracy. However, in the Western liberal understanding of human rights, which is contingent in this respect, the right to public autonomy is a necessary element of well-developed system of human rights protection. It must be secured and effectively activated with accompanying rights (freedom of expression, freedom of assembly). Even in these states, however, the right is only granted to its own citizens; political power is largely free in deciding who is to become a citizen. A post-fundamentalist understanding of human rights will be concerned with the question of the extent to which citizens and other persons affected by state power should be given the opportunity to monitor and control representative public officials over human rights. Even in Western fundamental rights thinking, the statements on this matter are widely divergent.

The second major functional area, the organization of which will typically be considered through the lens of human rights protection, is the market, with particular emphasis on the legal status of people within the markets. The question of how far human rights protection should go here depends largely on functional considerations about how markets should be

organized, and which freedom the government should have in the organization and control of the market activity. The human rights catalogues of Western liberal provenance regularly contain a guarantee of entrepreneurial freedom. However, already the scope of application is typically defined functionally.

For example, the corresponding guarantee in the German constitution does not apply to cross-border trade. Functional considerations on how markets should function and what kinds of market players should have a position to organize markets also dominate the question of how far property protection should extend to large corporate property. Further examples could easily be cited.

Other functional areas, such as environmental protection through environmental human rights, can also be easily identified. These categories of human rights have one thing in common: they concern systems of governmental and social functions that are highly relevant to individuals, but which must be organized in accordance with functional prerogatives and principles that cannot easily be mapped into individual “rights”. The granting of rights - apart from cases with a highly individualized dimension-can therefore, as a rule, only have the function of initiating proceedings: the right to have the issue reviewed by a human rights court. Practical experience shows that the court decision then often results in a rationality check of the functional decisions taken by the political powers. The court's decisions are typically influenced or even characterized by political and legal-cultural perceptions. The need for the establishment of international human rights protection with strong effectiveness is low here.

Ⅳ. Conclusions

Constitutional theory is not moral argument. Human rights constitutionalism is also not moral theory, especially when it comes to positive and justiciable human rights. Constitutional human rights theory deals with the institutionalization of political rule in a positive legal system. Anyone who talks about constitutionalized human rights speaks about a form of “governance”. The perspective addressed in this article thus differs markedly from the perspective chosen by political philosophy. In political theory, many discussants engage in the attempt to build an underlying foundation for a legal-cultural construct, frequently but not always on the basis of transcendental and presumably universal principles. However, the law by definition is concerned with distinguishing between spheres of competence and spheres of decision-making.

Which questions should be decided by a supranational court outside the political process, and which questions should be dealt with within that process? Of course, the legal discourse can also make use of transcendental reasoning approaches. It can try to immunize the decisions made by a court by describing them as an expression of transcendental knowledge. Moreover, dealing with transcendental approaches (such as those of Plato and Kant) is not

meaningless, because it recalls a utopia that can be aspired to, but never redeemed. However, it will not be possible to develop a rational answer to the relevant questions in this way.

The perspective chosen here is thus also clearly different from some human rights policy discourses, in which human rights are seen as a trump card, so that questions of what is right and what is good are negotiated without any reconnection into the sphere of politics. A human rights order that is drafted in accordance with positive law and enforceable by the courts always has a dual nature. The human rights of such an order are Janus-faced, because they can always be used as a political argument in po- litical discourse, but at the same time they also impose external boundaries on this discourse and point out limits (see Martin Nettesheim, Die Janus-Köpfigkeit des Menschenrechtsschutzes, in: SNU Asia-Pacific Law Institute (ed.), Global Constitutionalism and Multi-layered Protection of Human Rights, 2016, pp. 473-494).

Any form of human rights "governance" must first and foremost deal with its relationship to politics. Institutional, procedural and material dimensions must be read together. It must be a matter of establishing an appropriate balance here. It is also important to distinguish between different functional and application areas of rights.

This should then also be reflected in the formulation of a human rights catalogue.

Prof. Dr. Martin Nettesheim

"Good Governance" durch überstaatlichen Menschenrechtsgerichtsbarkeit: Welche Rechte sollten von einem überstaatlichen Gerichtshof durchgesetzt werden?

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Überstaatlicher gerichtsförmiger Menschenrechtsschutz ist eine entwickelte Form des Konstitutionalismus. Ein Menschenrechtsregime, dessen Durchsetzung in die Hand eines Gerichtshofs gelegt wird, dient der Entpolitisierung streitiger Entscheidungslagen. Es bringt eine Verlagerung von Entscheidungszuständigkeiten mit sich. In dem Regime werden Entscheidungen nicht mehr von den politischen Repräsentanten der teilnehmenden Mitgliedstaaten getroffen. Sie werden in ein besonderes Forum verlagert, das nach den justizförmigen Regeln eines Gerichtsprozesses organisiert wird. Die Entscheidungsverantwortung liegt in den Händen von Richtern, die repräsentativ, gemeinwohlverantwortlich und am Maßstab des Rechts, aber eben nicht innerhalb eines politischen Diskurses entscheiden. Wer über die Konstitutionalisierung der Menschenrechte spricht, spricht damit über eine Form der **"**governance**"**. Die Frage ist: Wie sieht gute menschenrechtliche **"**governance**"** aus?

Ⅰ. Notwendigkeit einer politischen Konzeption der Menschenrechte

Jede Form supranationaler Herrschaft – auch eine solche durch Richter – ist rechtfertigungsbedürftig. Wenn Menschenrechte fundamental, unveräußerlich, verbindlich und unverbrüchlich sein sollen, liegt es nahe, sie in der Moral verankern zu wollen. In der Tat werden Menschenrechte vielfach als Ausdruck moralischen Müssens bezeich- net. Menschenrechtsgerichte agieren danach als Agenten, die die Moral im Recht zur Positivität führen. Die moralische Gründung der Menschenrechte scheint das Geltungsproblem aufzuheben. Wer sich vor Augen führt, wie brüchig moralische Herund Ableitungen in einem Zeitalter des ethischen Pluralismus sind, wird hierin aber nur scheinbar eine feste Grundlage erblicken. Die Moralisierung des Menschenrechtsdiskurses, wie sie nicht zuletzt in Europa zu beobachten ist, stößt deshalb auf Bedenken. Sie ist einerseits zu wenig tragfähig; andererseits greift sie zu kurz. Ein kulturelles

Konstrukt wie die Menschenrechte läßt sich nicht als transzendental-universalistisch geltend begründen. Menschenrechte wurzeln damit nicht in einer (moralischen) transzendenten Welt – auch wenn es Ethiken gibt, die zu begründen beanspruchen, warum bestimmte Menschenrechte Geltung beanspruchen können. Die "orthodoxe" Herleitung von Menschenrechten mag für den einzelnen Teilnehmer am Menschenrechtsdiskurs motivierend und anleitend sein. Ein überstaatliches Menschenrechtssystem lässt sich aber nicht hierauf stützen.

Die Rechtfertigung eines überstaatlichen gerichtsförmigen Menschenrechtsschutzes kann nur politisch erfolgen. Teilweise sieht man in dem Hinweis, dass ein institutionalisiertes Menschenrechtssystem nicht tiefer verankert werden kann als im politischen Willen der jeweiligen Trägerund Mitgliedstaaten, eine gefährliche Schwächung der Idee der Menschenrechte. Eine Welt der Gründe, die die Einrichtung eines solchen Systems erzwänge und unbestreitbar rechtfertigen könnte, gibt es in der modernen post-transzendentalen Welt aber nicht mehr. In der post-transzendentalen Welt muss die Unmöglichkeit, Herrschaft

und auch die Begrenzung von Herrschaft auf Instanzen hinter dem politischen Willen zurückführen zu können, als unabänderbar akzeptiert werden.

Ⅱ. Menschenrechtliche “governance” als politische Vision oder als harte Begrenzung staatlicher Hoheitsgewalt

Wenn es richtig ist, dass überstaatlicher gerichtsförmiger Menschenrechtsschutz eine Form konstitutionalisierter Herrschaft ist, lässt sich über seine Rechtfertigung nur sinnvoll diskutieren, wenn zugleich die institutionelle Seite, die prozedurale Seite und die materielle Seite in den Blick genommen werden. Wer entscheidet über die Anwendung des Menschenrechtsdokuments, in welchem Verfahren geschieht dies, und welche Rechte werden in welcher Weise durchgesetzt? Die Fragen lassen sich nur teleologisch beantworten, also mit Blick auf die politischen Ziele, die man mit der Ein- richtung des Schutzregimes verfolgt.

1. Menschenrechtspolitik durch Formulierung von Zielvorstellungen

Konstitutionelles Denken bewegt sich immer zwischen politisch-visionärem Denken und effektiver Herrschaftsorganisation. Das gilt auch für das Menschenrechtsdenken. Wer über Mechanismen des überstaatlichen Menschenrechtsschutzes nachdenkt, muss daher zunächst und vor allem die Frage beantworten, ob es vor allem um die Herstellung einer politischen Menschenrechtskultur gehen soll, in der die Staatsorgane und die Mitglieder der Gesellschaft menschenrechtliche Orientierungsmuster und Standards verinnerlicht haben, oder ob es vor allem um effektive juridische Herrschaftsorganisation geht.

Der Menschenrechtsschutz bildet niemals nur einen schon bestehenden Konsens ab. Die Errichtung eines menschenrechtlichen Schutzregimes hat damit immer einen zukunftsgerichteten edukatorischen Effekt. Menschenrechtsdokumente können sich damit begnügen, Argumente im politischen Kampf um die Richtung und den Weg poli- tischen Regierens zu liefern. Das Regime soll dann schrittweise Bewusstseins-, Verhal-tens-und institutionelle Veränderungen herbeiführen, indem es die Zustände, Gegebenheiten und Werte im politischen Raum menschenrechtlich prägt. Wird dies als Hauptzweck eines Menschenrechtssystems angesehen, müssen die Bestimmungen eines Menschenrechtskatalogs auch dann, wenn sie von „Rechten“ sprechen, als Zielformulierung verstanden werden, deren Verwirklichung den Staaten prioritär aufgegeben wird. Es ist ohne weiteres möglich, die Formulierungen in der Allgemeinen Erklärung der Menschenrechte (1948) als derartige Zielformulierungen zu begreifen. Es ging den Verfassern der Erklärung zunächst und vor allem darum, eine Vision zu umschreiben, für deren Verwirklichung die Unterzeichnerstaaten gegenüber den Menschen eine Verantwortung übernehmen. Wesentlicher Bestandteil dieser Vision war es, in den Unterzeichnerstaaten eine Menschenrechtskultur hervorzubringen. Eine institutionelle Durchsetzung dieser Vorstellungen auf der Grundlage harter Rechte war nicht vorgesehen. Entsprechende Verantwortlichkeiten für die Verwirklichung von Zielzuständen finden sich in vielen Menschenrechtsbestimmungen, die einen herbeizuführenden sozialen

oder ökologischen Zustand umschreiben und dem adressierten Staat die Verpflichtung auferlegen, diesen Zustand schrittweise herbeizuführen. Eine institutionalisierte Durchsetzung ist auch hier häufig nicht vorgesehen. Selbst wenn es eine gerichtliche "Kontrolle" oder ein Monitoring-System gibt, werden diese vor allem auf die Überwachung und Kontrolle des Realisierungsprozesses der Verwirklichung des angestrebten Zustands beschränkt sein.

Die erste und vorrangige Frage, die sich bei der Errichtung eines Systems des überstaatlichen Menschenrechtsschutzsystems stellt, ist damit die Frage, ob dieses System ganz, vor allem oder jedenfalls vorrangig der Durchsetzung von Menschenrechtsbestimmungen dienen soll, die in diesem Sinne eine Zielvorstellung prioritären Handelns formulieren und diesbezüglich Verantwortlichkeiten zuweisen. Die Errichtung eines Systems des überstaatlichen Menschenrechtsschutzes, das vor allem darauf abzielt, erst einmal eine bestimmte Menschenrechtskultur hervorzubringen und politisch abzusichern, kommt insbesondere dort in Betracht, wo noch keine gefestigten gemeinsam konsentierten Standards ("human rights culture") existieren oder jedenfalls erhebliche Unterschiede bestehen. In einer Region, in der die rechtskulturellen und gesellschaftlichen Differenzen groß sind, kann sich die Schaffung eines solchen eher teleologisch ausgerichteten und politisch verfasstes System Gerade auch als erster Schritt auf dem Weg der Verwirklichung eines später dann zu stärkenden regiona- len Menschenrechtssystems anbieten. In diesem Fall kann der Kreis der materiell an- erkannten "Rechte" (im Sinne von Zielformulierungen) eher weit gefasst werden. Partikulare Besonderheiten (wie etwa "asian values") können ohne weiteres mit aufgenommen werden.

Die Stellung eines überstaatlichen Menschenrechtsgerichtshofs wäre in dem beschriebenen System eher schwach, die Möglichkeit der Anrufung durch die Menschen nur begrenzt möglich. Der überstaatlichen Kontrollinstitution würde nicht die Möglichkeit gewährt, der Ausübung von Hoheitsgewalt harte und durchsetzbare Grenzen ziehen zu können.

In der Verfahrensorganisation müsste dem Ziel, eine politische und gesellschaftliche Menschenrechtskultur zu erzeugen, von besonderer Bedeutung geschenkt werden. Man könnte auch an die Schaffung eines eher politischen Forums zur Verstärkung der Menschenrechtskultur denken. Im Zuge der längerfristigen Entwicklung wäre zu überlegen, ob die Stellung des Menschenrechtsgerichts schrittweise gestärkt wird und so die menschenrechtliche "governance" ausgebaut wird.

2. Menschenrechtspolitik durch harte und durchgesetzbare Begrenzung staatlicher Hoheitsgewalt

Ein anderer und jedenfalls idealtypisch zu unterscheidender Ansatz läuft darauf hinaus, Menschenrechte zu schaffen, die durch eine institutionalisierte Gerichtsbarkeit mit effektiver Entscheidungsgewalt in Form harter rechtlicher Begrenzung der staatlichen Hoheitsgewalt "durchgesetzt" werden. Dieser Ansatz läuft auf die Schaffung echter supranationaler

Entscheidungsgewalt hinaus. Er wird sich nur dort realisieren lassen, wo bereits eine Menschenrechtskultur besteht, die es den politischen Repräsentanten der betroffenen Staaten ermöglicht, sich einer derartigen äußeren Bindung zu unterwerfen.

In der Frage, welche Rechte auf diese Weise durchgesetzt werden sollen, bestehen weite Unterschiede. Sicher ist jedenfalls, dass es nicht das Ziel sein kann, möglichst viele Rechte zu schaffen. Der ungezügelten Proliferation von Menschenrechten, der teilweise das Wort geredet wird, ist eindeutig eine Absage zu erteilen. Viele Anhängerdes Menschenrechtsschutzes scheinen der Auffassung zu sein, dass die Qualität eines Menschenrechtsschutzsystems in dem Umfang steigt, in dem die Breite, Dichte und Tiefe des menschenrechtlichen Geltungsanspruchs zunimmt. Der Erfolg eines Schutzregimes ist dieser Sichtweise zufolge daran zu messen, wie umfangreich der richterliche Wirkbereich ist. Der Ausbau der EMRK durch Ergänzung um immer neue Rechte wäre danach eine reine Erfolgsgeschichte. Erst in jüngerer Zeit erkennt man in Europa, dass die Juridizifierung politischer Fragen mit einem Preis verbunden ist. Inzwischen hat man mit dem Protokoll Nr. 15 reagiert, das den EGMR auffordert, mitgliedstaatliche Entscheidungsspielräume zu respektieren. Diese Aufforderung ist allerdings diffus und vage; es bleibt den Mitgliedern des Gerichts überlassen, ob und wie sie der Aufforderung nachkommen. Die Ausweitung des europäischen Menschenrechtsschutzes hat zur Folge, dass sich der EGMR vielfach mit Fragen des guten Lebens befasst.

Es kann also nicht einfach darum gehen, möglichst viele Rechte zu schaffen. Nicht jede Frage sozialer Gerechtigkeit oder kluger Politik ist eine Menschenrechtsfrage und darf einem überstaatlichen Gericht überantwortet werden. Manche Teilnehmer der Menschenrechtsdiskussion unternehmen den Versuch, den Wirkbereich der Menschenrechte auf der Grundlage einer prinzipiengeleiteten Vernunftsargumentation zu entwickeln. Bekanntlich hat sich etwa John Rawls darum bemüht, Prinzipien zu entwickeln, auf deren Beachtung sich die Mitglieder der internationalen Gemeinschaft vernünftigerweise einigen müssen. Seine Konzeption weist nicht mehr als einen internationalen Minimalschutz aus, weil er davon ausgeht, dass die Verletzung der Rechte andere Staaten zur Intervention berechtigt. Letztlich verkürzt wird eine Argumentation, die sich auf Prinzipien der Vernunft stützt, den Herausforderungen aber nicht gerecht.

Sinnvoll erscheint es vielmehr, sich bei der Formulierung der Rechte, die von einer überstaatlichen Gerichtsbarkeit geschützt und durchgesetzt werden sollen, einer Perspektive zu bedienen, die nicht nur die individuelle Autonomie und die privaten Interessen des Menschen im Blick hat. Es ist immer auch die öffentliche Autonomie, also die Freiheit demokratischer Selbstbestimmung im Staat, im Blick zu behalten. Dies bedeutet konkret, dass sich die “governance” eines überstaatlichen Menschenrechtsgerichtshofs vor allem auf die Sicherung jener Güter, Werte und Interessen erstrecken sollte, über deren Schutzwürdigkeit als fundamentale Anliegen allgemeiner Konsens besteht. Demgegenüber hat eine solche Institution Zurückhaltung zu zeigen, soweit es um kontingente Fragen politischer Natur geht.

Der damit vorgeschlagene Ansatz verweist also letztlich wieder auf die rechtskulturellen Anschauungen zurück, die in den Staaten herrschen, die sich der Gerichtsbarkeit unterwerfen.

Die Berücksichtigung internationaler Erfahrungen und die Anlehnung an die andernorts bestehenden Standards sind dabei möglich und sinnvoll, zwingen aber nicht zur Übernahme des Bestehenden. Letztlich müssen sich die Staaten, die sich einer Menschenrechtsgerichtsbar keit unterwerfen, aus ihrer jeweiligen Sicht fragen, welche Freiheiten, Werte und Interessen der Menschen sie für so wichtig und bedeutsam halten, dass sie sich zur Abwehr drohender Gefahren der überstaatlichen Gerichtsbarkeit unterwerfen wollen und so ihre “Hände binden.”

Ⅲ. Welche Rechte sollte ein Menschenrechtsgerichtshof durchsetzen?

Die Sicherung dieses Anliegens verlangt eine differenziertere Ausformulierung eines Menschenrechtskatalogs, als dies üblicherweise der Fall ist. Es ist eine Folge der Moralisierung des Menschenrechtsdiskurses, dass den Menschenrechten vielfach der gleiche Status, die gleiche Geltung und Verbindlichkeit und auch gleiche Durchset zungsbedürftigkeit durch einen überstaatlichen Menschenrechtsgerichtshof zugeschrieben werden. Die verschiedenen “Generationen” der Menschenrechte, die sich in den letzten Jahrzehnten herausgebildet haben, unterscheiden sich dieser Sichtweise zufolge nur im Zeitpunkt ihrer Entstehung, nicht aber in ihrem moralischen bzw. juridischen Status. Alle Rechte werden transzendental verankert; alle Rechte streben nach Positivierung und Juridifizierung. Indem alle Menschenrechte der gleichen Klasse von Rechten zugeordnet werden, nehmen sie an dem gleichen Legitimationsansatz teil. Dies hat praktische Folgen. Gerade in den europäischen Menschenund Grundrechtskatalogen werden die Rechte regelmäßig unterschiedslos aneinander gereiht und den gleichen Schrankenbestimmungen unterworfen. Damit wird man dem unterschiedlichen Status der Rechte nicht gerecht.

In einem Menschenrechtskatalog wäre meines Erachtens zwischen drei Kategorien von Menschenrechten zu unterscheiden. Die Unterscheidung wäre dann auch institutionell abzubilden.

a) Eine erste Kategorie bildet die menschenrechtliche gerichtsförmige Sicherung jener Schutzgüter, Werte und Interessen des Menschen, die von solcher Bedeutung für die Personalität und Autonomie des Menschen sind, dass jede Verletzung durch den Staat oder durch Dritte als schlechterdings unerträglich erscheint. In beinahe allen Teilen der Welt hat sich inzwischen eine “human rights culture” herausgebildet, die dadurch gekennzeichnet ist, dass Menschen einander als Mit-Menschen ansehen, denen bestimmte Behandlungen nicht mehr zugefügt werden dürfen, weil dies schlicht als nicht “erträglich” angesehen wird. Ich spreche damit jene Ebene der Emotionalität an, die Richard Rorty in das Zentrum seiner Menschenrechtstheorie gestellt hat. Zu dieser elementaren Menschenrechtsschicht gehört heute zunächst der Anspruch des Menschen, überhaupt als Rechtsperson anerkannt zu werden. Im westlichen Menschenrechtsverständnis gehört hierzu darüber hinaus der Schutz

der körperlichen Integrität und elementaren Selbstbestimmung des Menschen, ferner auch der Schutz vor schweren Diskriminierungen in Bereichen der grundsätzlichen Lebensführung. Poli- tisch unverhandelbar und menschenrechtlich unbedingt zu verhindern sind, um einige Beispiele aufzuzählen, die willkürliche Tötung und Folter, schwerster Beeinträchtigungen der Menschenwürde, etwa durch erniedrigende Haftbedingungen, darüber hinaus andere Verletzungen der Körperlichkeit und Selbstbestimmung des Menschen.

Derartige Verhaltensweisen erscheinen uns nicht deshalb unerträglich, weil es einem Moralphilosophen gelungen ist, ein schützendes Verbot transzendental verankern und als universell gültig auszuweisen. Es ist vielmehr eine Gewissenshaltung, auf die sich der Wille zur Anerkennung der Schutzbedürftigkeit des anderen schwächeren Menschen stützt. Diese Gewissenhaltung kann nur durch persönliche Erfahrungen und die Konfrontation mit Erzählungen hervorgebracht werden. Schon innerhalb eines Kulturkreises gibt es ganz unterschiedliche Gründe und Motive, warum dem jeweils anderen Menschen Respekt erwiesen soll. Es ist menschenrechtspolitisch gleichgültig und sollte ausgeblendet werden, warum man zu der Einschätzung kommt, eine unerträgliche Behandlung des Menschen müsse unterbunden werden: weil man den Menschen als Geschöpf Gottes ansieht, weil man ihn als Gleichen achtet, weil man besonders schmerzempfindlich und sensibel ist etc. Natürlich sind die diesbezüglichen Orientierungsmuster in jedem Kulturkreis andere. Es scheint mir aber, als ob globale Verständigungsund Verflechtungsprozesse heute dazu geführt haben, dass sich jedenfalls in Grundfragen ein gemeinsamer Horizont herausgebildet hat.

In dem Prozess, der zur Schaffung einer Menschenrechtsgerichtsbarkeit in Asien angestoßen wird, wäre zu fragen, welche menschenrechtlichen Verhaltensweisen im Kreis der Vertragsparteien als so unerträglich angesehen werden, dass ein supranati- onaler Gerichtshof zur Bekämpfung und Untersagung eingesetzt werden soll. Gerade in dem grundlegenden Bereich dürfte es allerdings keine Rolle spielen, ob eine Beeinträchtigung durch den Staat oder Private bewirkt wird. In der klassischen Grundrechtstechnik werden regelmäßig nur Schutzbereiche formuliert. Man könnte überlegen, ob man rechtstechnisch auf die Formulierung von Schutzbereichs-Eingriffs- Relationen übergeht. Jedenfalls müssten die Zugangshürden zu einem Menschenrechtsgerichtshof in diesem Bereich niedrig und seine Durchsetzungseffektivität hoch sein.

b) Grundrechtsschutz zielt nicht auf Mehrheitsschutz ab. Menschenrechtliche Vorkehrungen, um der Mehrheit die Durchsetzung ihrer Vorstellungen vom guten Leben zu ermöglichen, bedarf es nicht. Wenn ein Menschenrechtsdokument bestimmte partikulare Formen des guten Lebens besonders absichert, kann darin natürlich der Ausdruck politischer Wertschätzung und Anerkennung liegen; das deutsche Grundgesetz hat etwa die Lebensform der Ehe in besonderer Weise ausgezeichnet. Es kann darüber hinaus auch um den Versuch gehen, sich gegen spätere politische Änderungsbestrebungen abzusichern. Derartige Festlegungen haben damit vor allem einen intertemporären Gehalt. Insofern könnte sich ein asiatisches Menschenrechtsdokument durchaus um die Positivierung der etwaiger “asian

values" bemühen.

Im Zentrum eines jeden Menschenrechtsdokuments sollte aber die Frage stehe, in welchen Bereichen die – sich in der Minorität befindlichen - schutzbedürftigen Menschen einer rechtlichen Absicherung der Möglichkeit bedürfen, ihre jeweils unterschiedlichen Vorstellungen vom guten Leben effektiv pflegen und realisieren zu können. Dem neuzeitlichen Verständnis obliegt die Entscheidung, welcher Lebensform man anhängt, dem Individuum. Die Entscheidung ist hochgradig individuell, fluide, immer revidierbar. Grundsätzlich ist es notwendig und hinreichend, diese Entscheidung über die Gewährung von Freiheitsrechten abzusichern. In der Gewährung dieser Freiheitsrechte drückt sich der Wille der jeweiligen Mehrheit aus, Toleranz walten zu lassen. Die Formulierung von Freiheitsrechten kann abstrakt verfolgen; sie kann auch Bereiche besonderer Schutzbedürftigkeit identifizieren.

Gerade in einem demokratischen Staat bedarf allerdings nicht jeder Freiheitsgebrauch der menschenrechtlichen Absicherung. Menschenrechtsregime, die sich vor allem der Sicherung der Freiheit des Individuums widmen,, nehmen es in Kauf, dass er einzelne nur in seiner atomistischen Vereinzelung registriert wird. Hieran stört man sich inzwischen vielfach. Die Frage, ob es den menschenrechtlichen Erwartungen bereits genügt, wenn negative Freiheit zur Verwirklichung der jeweiligen individuellen Vorstellung vom guten Leben gewährt wird, wird heute vielfach verneint. Gewichtige Stimmen machen geltend, dass es darüber hinaus der Begründung von Ansprüchen auf Anerkennung und Gleichbehandlung einer bestimmten Identität bedürfe. Denkbar ist es daher auch, dass bestimmte Identitäten eine besondere Förderung erfahren.

Wer sich mit der Positivierung von Menschenrechten befasst, muss sich auch der Frage stellen, inwieweit die Entscheidung von Fragen distributiver Verteilung der politischen Sphäre entzogen und über die Verrechtlichung in Menschenrechten konstitutionalisiert werden sollen. Es steht außer Frage, dass sich jede Bemühung, gehaltvolle Grundsätze distributiver Gerechtigkeit zu entwickeln, einer partikularistischen Sprache bedienen muss.

c) Auf einer dritten Ebene bewegt sich schließlich der menschenrechtliche Funktionsschutz bestimmter Lebensbereiche. Von zentraler Bedeutung ist dabei die Entscheidung, ob und wie der Bereich der Ausübung öffentlicher Autonomie (Demokratie) gewährleistet werden soll. Es gibt kein universelles Menschenrecht auf Demokratie. Im – insofern aber kontingenten – westlich-liberalen Menschenrechtsverständnis gehört das Recht auf öffentliche Autonomie bekanntlich zu den notwendigen Elementen eines entwickelten Menschenrechtsschutzes. Es muss mit Begleitrechten abgesichert und effektiviert werden (Meinungsäußerungsfreiheit, Versammlungsfreiheit). Aber auch hier wird das Recht nur den eigenen Staatsbürgern zugestanden; die politische Gewalt ist in der Entscheidung, wer zum Staatbürger gemacht wird, weitgehend frei. Einem post-fundamentalistischen Menschenrechtsverständnis wird es um die Frage gehen, in welchem Umfang Bürgern die Möglichkeiten der Kontrolle und Steuerung repräsentativer Amtsträger über Menschenrechte gewährt werden soll. Auch im

westlichen Grundrechtsdenken fallen die Aussagen hierüber weit auseinander.

Der zweite große Funktionsbereich, über dessen menschenrechtliche Absicherung (durch supranationale Gerichtsbarkeit) nachgedacht werden muss, ist die Rechtsstellung der Menschen im Markt. Die Frage, wie weit der Menschenrechtsschutz hier gehen soll, hängt stark von funktionalen Überlegungen darüber ab, wie Märkte organisiert sein sollen und welcher Raum der staatlichen Marktordnung und–steuerung eingeräumt werden soll. In den Menschenrechtskatalogen westlich-liberaler Provenienz findet sich regelmäßig eine Garantie der unternehmerischen Freiheit. Schon der Schutzbereich wird dabei aber funktionalistisch definiert. So gilt etwa die entsprechende Garantie in der deutschen Verfassung nicht für den grenzüberschreitenden Handel. Auch in der Frage, wie weit der Eigentumsschutz jedenfalls des großen Unternehmenseigentums reichen soll, dominieren funktionale Überlegungen darüber, wie Märkte funktionieren und welche Stellung Marktakteure haben sollen.

Weitere Funktionsbereiche, wie etwa den Schutz der Umwelt durch “environmental rights”, lassen sich unschwer identifizieren. Dieser Kategorie der Menschenrechte ist gemeinsam, dass es um staatliche und gesellschaftlichen Funktionssysteme geht, die zwar eine hohe Relevanz für die einzelnen Menschen aufweisen, die aber nach Funktionsgesetzen zu organisieren sind, die sich in einzelnen “Rechten” nicht abbilden lassen. Die Gewährung von Rechten kann – von Einzelfragen abgesehen – daher regelmäßig nur Anstoßfunktion haben: Das Recht ermöglicht es, einen Menschenrechtsgerichtshof zur Überprüfung zu veranlassen. Die Praxis zeigt, dass die Entscheidung dann häufig auf eine Rationalitätsprüfung der von der politischen Gewalt getroffenen Funktionsentscheidungen hinausläuft. Die Entscheidung des Gerichts ist häufig von politischen und rechtskulturellen Vorverständnissen geprägt. Der Bedarf für die Schaffung eines internationalen Menschenrechtsschutzes mit starker Effektivität ist hier gering.

Ⅳ. Folgerungen

Konstitutionelles Denken ist nicht moralisches Denken. Auch Menschenrechtsdenken ist jedenfalls dann, wenn es um positive und justiziable Menschenrechte geht, nicht moralisches Denken. Konstitutionelles Menschenrechtsdenken beschäftigt sich mit der Institutionalisierung von Herrschaft in einer positiven Rechtsordnung. Wer über konstitutionalisierte Menschenrechte spricht, spricht über eine Form der “governance”. Die damit angesprochene Perspektive unterscheidet sich deutlich von jener Perspektive, die die politische Philosophie wählt. Während es dort vielfach darum geht, ein rechtskulturelles Konstrukt als universal geltend zu begründen, geht es dem Recht zunächst darum, Zuständigkeitsund Entscheidungssphären zu unterscheiden. Über welche Fragen soll durch einen überstaatlichen Gerichtshof außerhalb des politischen Prozesses entscheiden werden, und welche Fragen sollen in diesem Prozess verhandelt werden? Natürlich kann sich auch der Rechtsdiskurs transzendentaler Begründungsansätze bedienen. Er kann die getroffenen Entscheidungen zu immunisieren versuchen, indem er sie als Ausdruck transzendentaler

Erkenntnis ausweist. Die Beschäftigung mit transzendentalen Ansätzen (etwa jenen von Plato und Kant) ist zudem nicht sinnlos, weil damit eine Utopie in Erinnerung gerufen wird, die angestrebt, nie aber eingelöst werden kann. Eine rationale Antwort wird man auf die relevanten Fragen so aber nicht entwickeln können.

Die hier gewählte Perspektive unterscheidet sich damit auch deutlich von manchen menschenrechtspolitischen Diskursen, in denen die Menschenrechte als Trumpf angesehen werden, mit denen über Fragen des Richtigen und Guten unter Umgehung der Politik verhandelt wird. Eine positivrechtlich verfasste und gerichtlich durchsetzbare Menschenrechtsordnung hat immer eine Doppelnatur. Die Menschenrechte einer solchen Ordnung sind janusköpfig, weil sie immer als politisches Argument im politischen Diskurs verwandt werden können, zugleich aber auch diesem Diskurs von außen Bindungen auferlegen und Grenzen aufzeigen.

Jede Form der menschenrechtlichen “governance” muss sich zunächst und vor allem mit ihrem Verhältnis zur Politik befassen. Institutionelle, prozedurale und materielle Dimension müssen zusammen gelesen werden. Es muss darum gehen, hier ein angemessenes Verhältnis zu schaffen. Weiterführend ist es, dabei verschiedene Funktions-und Geltungsbereiche von Rechten zu unterscheiden. Dies sollte dann auch in der Formulierung eines Menschenrechtskatalogs abgebildet werden.

Session 4

Necessity of Communication and Cooperation among Constitutional Courts and Equivalent Institutions : Focusing on Expert and Guest suggestions

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Session 4

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A Possible Cornerstone for an Asian Human Rights Court :

The Deliberative Nature of the Dialogue between Comparative Constitutional Law and International Human Rights Law (a.k.a. Global Human Rights Law)

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A Possible Cornerstone for an Asian Human Rights Court:

The Deliberative Nature of the Dialogue between Comparative Constitutional Law and International Human Rights Law (a.k.a. Global Human Rights Law)

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1. Introduction

The idea of an Asian human rights court is not new.[1)] On the contrary, it has been discussed in vain in Asia for several decades.[2)] However, other regional courts are flourishing, and even the idea of a world court dedicated to human rights is re-emerging.[3)] It seems that the recent transnational sharing of human rights documents (at constitutional and international levels) in courts and outside courts by domestic courts (particularly apex courts such as constitutional courts and supreme courts) and regional courts now creates a possible cornerstone for an Asian human rights court. Moreover, the establishment of the ASEAN Intergovernmental Commission on Human Rights (AICHR) suggests that it would be possible to create a transnational system to address human rights even in Asia. In light of this new environment,

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1) Tae-Ung Baik, Emerging Regional Human Rights Systems in Asia (Cambridge University Press, 2012); Tan Hsien-Li, The ASEAN Inter-Governmental Commission on Human Rights (Cambridge University Press, 2011).

2) What Asia is or which area in Asia has been a problematic question from the beginning. The article uses the classification used by the Office of the United Nations High Commissioner for Human Rights (OHCHR), which includes the following countries in the Asia-Pacific group: Afghanistan, Australia, Bangladesh, Bhutan, Brunei Darussalam, Cambodia, China, Cook Islands, Democratic Republic of Korea, Fiji, India, Indonesia, Iran, Japan, Kiribati, Lao People's DR, Malaysia, Maldives, Marshall Islands, Micronesia, Mongolia, Myanmar, Nauru, Nepal, New Zealand, Niue, Pakistan, Papua New Guinea, Palau, Philippines, Republic of Korea, Samoa, Singapore, Solomon Islands, Sri Lanka, Thailand, Timor-Leste, Tonga, Tuvalu, Vanuatu, Vietnam (41 countries in total). There is a problem with categorization. For example, the Association of Asian Constitutional Courts (see 3.5) includes members such as Azerbaijan, Kazakhstan, Kyrgyzstan, the Russian Federation, Tajikistan, Turkey, and Uzbekistan, which are not included in the abovementioned Asia-Pacific group.

3) <http://www.worldcourtofhumanrights.net> (visited 31 March 2016).

it is time to revisit the following questions: Would an Asian human rights court be useful? Is it necessary and feasible?

This article explores the possible cornerstones for an Asian human rights court. First, we briefly examine the achievements and problems of the United Nations (UN) human rights treaties. Subsequently, we explore the advantages and disadvantages of a regional court of human rights by examining the experiences of the European Court of Human Rights (ECtHR), which is one of the most successful regional human rights organization. In other words, what are the differences between regional human rights courts and the UN human rights treaty bodies? The former can accept individual complaints and make binding judgments, while the latter can assess national human rights reports, give recommendations, receive individual communications, and provide opinions (views); however, none of these are binding. Thus, it is necessary to evaluate the prospect and problems with the existing UN human rights regime. Is the UN human rights system sufficient for implementing human rights? What can an Asian human rights court contribute in terms of the realization of human rights?

Subsequently, the article examines the feasibility of an Asian human rights court and the present development of constitutionalism in Asia to determine its cornerstone. Of particular interest is the current situation of transnational sharing of human rights documents at courts of all levels. Although the use of comparative law in the human rights context is still controversial, its current usage can be viewed from a new perspective in which domestic and international bills of rights are intertwined to take the form of comparative human rights law, comparative international law, or even global human rights law. Moreover, the constitutional system and international system can be re-conceptualized to create a multi-layered protection system for human rights.

2. What Have the UN Human Rights Treaties Achieved? The Problem of Implementation

2.1 Achievements

The UN has constantly produced human rights documents since the Universal Declaration of Human Rights was adopted in 1948. The international community has obtained nine core international human rights instruments so far: International Convention on Elimination of All Forms of Racial Discrimination (ICERD, adopted in 1965 and entered into force in 1969); International Covenant on Civil and Political Rights (ICCPR, adopted in 1966 and entered into force in 1976); International Covenant on Economic, Social and Cultural Rights (ICESCR, adopted in 1966 and entered into force in 1976); Convention on the Elimination of All Forms of Discrimination against Women (CEDAW, adopted in 1979 and entered into force in 1981); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT, adopted in 1984 and entered into force in 1987); Convention on the Rights of the

Child (CRC, adopted in 1989 and entered into force in 1990); International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICMW, adopted in 1990 and entered into force in 2003); International Convention for the Protection of All Persons from Enforced Disappearance (CPED, adopted in 2006 and entered into force in 2010); Convention on the Rights of Persons with Disabilities (CRPD, adopted in 2006 and entered into force in 2008).[4] Taking into account the fact that it is usually very difficult for the international community to reach consensus on any issue in general and human rights issues in particular, the establishment of those treaties is already a great achievement of the post-World War II period.

The ratification of the treaty is another criterion for assessing the success of each human rights treaty. Seven core human rights treaties have been ratified by around 80-90% of the member states of the UN. (See Table 1.) Especially, the CRC was ratified by 99% of the member states. We should emphasize that the accumulated UN human rights instruments are broader and more detailed than the bills of rights in national constitutions.

Table 1: UN Core Human Rights Treaties

	UN Human Rights Treaties	State Party	State Party (%)	Signatory	No Action
1	ICERD	177	90	6	14
2	ICCPR	168	85	7	22
3	ICESCR	164	83	6	27
4	CEDAW	189	96	2	6
5	CAT	159	81	10	28
6	CRC	196	99	1	0
7	ICMW	48	24	18	132
8	CPED	51	26	51	95
9	CRPD	163	82	24	11

Moreover, each treaty has a monitoring body for implementation: Committee on the Elimination of Racial Discrimination (CERD) for ICERD; Human Rights Committee (CCPR) for ICCPR; Committee on Economic, Social and Cultural Rights (CESCR) for ICESCR; Committee on the Elimination of Discrimination against Women (CEDAW) for CEDAW; Committee against Torture (CAT) for CAT; Committee on the Rights of the Child (CRC) for CRC; Committee on Migrant Workers (CMW) for ICMW; Committee on Enforced Disappearances (CED) for CPED; Committee on the Rights of Persons with Disabilities (CRPD) for CRPD. Each committee has various functions including receiving individual communications.

4) There are 18 UN human rights treaties if additional protocols are included.

2.2 Problems

How fully have these UN treaties been implemented in reality is another question. There are fundamental obstacles and practical problems for their implementation.

First, national governments are assumed to be responsible for the implementation of international human rights treaties. In other words, international institutions are subsidiary. National governments are assumed to have some discretion. In reality, it is still unimaginable to think of an international institution that can play the role of a national government.

Second, constitutional institutions, particularly older entities such as legislative, executive, and judiciary bodies, are not designed to take into account human rights treaties during the course of their business, despite the requirement that "each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status" (Article 2 of the ICCPR). That is why the Paris Principles encourage the establishment of national human rights institutions.[5)] Yet, some courts start to refer to foreign and international human rights sources (See 5.).

Third, the measures that treaty bodies can use to encourage and persuade national governments to implement human rights instruments are limited. In particular, the issue of legal binding has been problematic. Since recommendations provided by treaty organs are not legally binding, governments can easily ignore them. It is also problematic that some countries fail to submit national reports or submit them only after a long delay. Conversely, treaty bodies also have problems addressing national reports on time. Individual communication is a more specific measure by which a victim can directly take recourse. However, such individual communication must be accepted by ratification of separate optional protocols. It is true that the precedents (views) of the treaty organs are still less developed than those of the ECtHR. The rich case law of the European Convention on Human Rights (ECHR) is incomparable. Moreover, Asian countries are very reluctant to ratify any of the optional protocols that enable individual communication. For example, only seven of the 41 Asian countries have ratified the Optional Protocol to the ICCPR: Australia, Maldives, Nepal, New Zealand, Philippines, Republic of Korea, and Sri Lanka (17%). The Optional Protocol to the ICCPR itself was ratified by 59% of the member states. Thus, the percentages of nations ratifying the optional protocols are much lower than those of nations ratifying the treaties. Only the ICCPR-OP and CEDAW-OP managed to obtain over 50% ratification (Table 2 and 3). This proved that governments want to avoid external criticism in specific cases. On the other hand, this fact ironically shows that it is more difficult for governments that have not ratified the optional protocols of individual communications to accept a regional

5) Principles relating to the Status of National Institutions (The Paris Principles) adopted by General Assembly resolution 48/134 of 20 December 1993.

court of human rights whose judgment is legally binding, such as the European Court of Human Rights. If a government cannot accept the individual communication system of an existing treaty, how can governments be expected to support a regional court? On this point, it is necessary to take a new approach to a regional human rights court. (See 5.) The more effective a regional human rights court is, greater is the degree of resistance that can be expected from states. How can this dilemma be solved? An examination of the European experience with its regional human rights court can be useful for tackling this issue.

Table 2: Ratification of Optional Protocols (Individual Communication except for CAT-OP)

	Optional Protocols	State Party	State Party (%)	Signatory	No Action
1	ICCPR-OP	115	58	4	78
2	ICESCR-OP	21	11	26	151
3	CEDAW-OP	106	54	14	77
4	CAT-OP (Regular Visits)	81	41	17	99
5	CRC-OP	26	13	28	144
6	CRPD-OP	87	44	30	81

Table 3: Declarations for the Application of Procedures

	Declarations for the Application of Procedures	State Party
1	ICRED: Art 14 (Individual Communication)	57
2	ICESR-OP: Art 11 (Inquiry)	4
3	CAT: Art 20 (Inquiry and Report)	144
4	CAT: Art 22 (Individual Communication)	66
5	CADAW-OP: Arts 8–9 (Inquiry and Report)	102
6	CRC-OPIC: Art 13 (Inquiry)	16
7	CRPD-OP: Arts 6–7 (Inquiry)	86
8	CED: Art 31 (Communication)	19
9	CED: Art 33 (Visit)	45

3. European Experiences: Significance of gradual development and a multi-layered system

3.1 Gradual Development

It is a naive illusion to believe that if Asia installed a regional human rights court such as the present ECtHR, human rights problems would be dealt with more efficiently and effectively. However, it is also a mistake to assume that the ECtHR resembled the present

Court from the beginning. On the contrary, when the ECtHR was established, it was quite different from its present form. The ECHR started with about ten Contracting Parties that shared some values and ideas, particularly on human rights, the rule of law, and democracy.[6] For the Court's implementation, these parties chose a prudent, two-layered system: the European Commission on Human Rights (hereinafter the Commission) and the European Court of Human Rights (the commissioners of the Commission and judges of the ECtHR worked as a part-timer). Individuals could submit applications only to the Commission, but not to the Court. Only the Commission and the Contracting Parties could appeal to the ECHR. Moreover, the Contracting Parties were free to decide whether to accept individual applications to the Commission and the jurisdiction of the ECtHR. Therefore, it was possible not to be challenged by individuals at the Court until the fundamental reform of the ECtHR in 1998. This two-layered system was a compromise between the states that supported individual complaints as an effective remedy for victims of human rights violations and those that defended national sovereignty. The compromised result showed that it was extremely difficult for sovereign states to accept the idea that a state could be sued by an individual at an international court, and that the state had to accept the Court's judgment.[7] When considering the feasibility of an Asian human rights court, this earlier stage of the ECtHR must be taken into account. If this was such a difficult path for Western European countries, what driving force would make these countries accept the idea, albeit in a highly mitigated form?

3.2 The Driving Force behind Acceptance of the Court

Past and future threats pushed Europe (Western Europe) to make a radical decision at that time. The past was World War II and Nazism.[8] The unwanted future was the possibility of World War III during the Cold War, which would have been a nuclear war. To prevent such a fearful future, the people of Europe collected their knowledge and wisdom and created the Council of Europe (and the ECHR) and later created the European Economic Community (the EEC which developed to became the EU). Therefore, when considering the feasibility of an Asian court of human rights, the interesting question arises of identifying a potential driving force in the Asian context. (See 4.)

Several points must be noted. First, in Europe, the number of potential members is smaller, and differences among members are smaller, so reaching consensus is relatively

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6) The preamble of the European Convention on Human Rights clearly stipulates that "the governments of European countries which are likeminded and have a common heritage of political traditions, ideals, freedom and the rule of law to take the first steps for the collective enforcement of certain of the rights stated in the Universal Declaration." The original ten States are France, Italy, the United Kingdom, Belgium, the Netherlands, Sweden, Denmark, Norway, Ireland, and Luxemburg.

7) Ed Bates, The Evolution of the European Convention on Human Rights: From Its Inception to the Creation of a Permanent Court of Human Rights (Oxford University Press, 2010); Collected Edition of the Travaux Préparatoires of the European Convention on Human Rights, 8 Vols. (Martinus Nijhoff, 1975–1985).

8) See, the Preamble of the Statue of the Council of Europe (Convinced that the pursuit of peace based upon justice and international co-operation is vital for the preservation of human society and civilization).

easier. For Asia, starting a regional court with more than forty countries at one time would be a formidable challenge.[9] Second, addressing how to address the past is essential. It should be noted that Europe started to foster economic cooperation by establishing the EEC in 1958; this developed into the present EU as a unique economic and political partnership of 28 European countries.[10] The idea that countries that trade with each another become economically interdependent and so more likely to avoid conflict is applicable to any region. Third, many universal concerns about the future of the world already exist. For example, climate change is transnational. The influence of temperature increase in coming decades will have a devastating effect on some tropical regions of Asia. More urgently, since some Asian countries (particularly China) have developed economically and become global manufacturing powers, environmental pollution has become a great concern. Therefore, it seems that there is no uniquely Asian concern, but universal concerns such as climate change and financial crisis are likely to have an especially great impact on Asia.

3.3 The Role of the Individual Complaint

What made it possible to change the two-layered semi-judicial system into the present Court, which is a single permanent court that now plays the role of a human rights court with confidence and authority? Interestingly it is accumulation of the individual applications that produced the extremely rich human rights case law of the ECtHR. It should be emphasized that the Strasbourg case law provides important ideas for solutions not only for applicants of particular cases (victims), but also for other Contracting Parties and even non-member states.[11] Since the Court started its operations in 1959, individual applications have constantly increased. In 2015, 40,650 applications were allocated to a judicial formation and 823 judgments were delivered in respect of 2,441 applications. It seems that being sued at Strasbourg has become part of the daily business of national governments, although some governments find it difficult to comply with some exceptional cases. (See 3.4.)

3.4 Success, Pushback, and Dialogue

The ECtHR is often praised as the jewel in the crown among systems for protecting human rights. However, its success has not been effortless. The Strasbourg Court has faced incessant criticism. There are two separate, intertwined concerns.

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9) Susan H. Williams (ed.), Social Difference and Constitutionalism in Pan-Asia (Comparative Constitutional Law and Policy) (Cambridge University Press, 2014).

10) The history and achievement of the EU provides important impetus for academics in Asia. For example, Tamio Nakamura et al., Higashi Ajia Kyodotai Kenshoan [A Draft Charter for East Asia Community] (Showado Publisher, 2008) and Tamio Nakamura (ed.), East Asian Regionalism from a Legal Perspective (Routledge, 2009).

11) For the influence of the ECtHR beyond Europe, see, Akiko Ejima, Emerging Transjudicial Dialogue on Human Rights in Japan: Does It Contribute to the Production of a Hybrid of National and International Human Rights?, 14 Meiji Law Review (Meiji Law School) 149 (2014).

One of these is the Court's heavy caseload. With a population of 800 million people and 47 Contracting Parties, it is not difficult to imagine the volume of applications rushed to Strasbourg. Many of these are repetitive cases. For example, many countries share the problem of delays in judicial proceedings. It is easy to expect that if an application concerning judicial delay wins at Strasbourg and the same problem is common in a particular country, thousands of similar applications from that country will head to Strasbourg if the delay is caused by structural problems in the domestic judicial system. Therefore, resolving this problem requires complete judicial reform at a national level.[12] Moreover, the judgment of the ECtHR is not sufficient for changing domestic structural problems. If this change is not executed by the domestic government, possible actions by the Court are limited even though the Committee of Ministers supervises the execution.[13] The same problem occurs with the issue of prisoners' right to vote. This became one of the most controversial confrontations between the ECtHR and some Contracting Parties such as the UK and Russia. In 2005, the Court held that a British blanket ban on prisoners' right to vote violated Article 3 of the First Protocol to the ECHR.[14] Then, about two and a half thousand prisoners in Britain brought cases related to this to Strasbourg. The ECtHR delivered a pilot judgment to address these clone cases by confirming the same conclusion in Greens and M.T. v. the United Kingdom.[15] However, members of the House of Commons (a lower house of the Parliament) expressed strong opposition to any legislative attempt to execute the ECtHR's judgment by passing a majority resolution. The judgment has not yet been executed, and it is unlikely that the UK will execute it soon.

The phenomenon reveals another concern: democratic legitimacy. How extensively can the ECtHR strike down domestic decisions, particularly domestic legislation passed through a democratic process of national governments?[16] The British case shows that the idea of national sovereign decision-making remains strong.[17] However, it is also interesting to note that the issue of prisoners' right to vote does not necessarily trigger the same response in

12) See the Pinto Law in Italy.

13) The supervision is based on the pride and reputation of each Contracting Party, which would like to be seen among the like-minded countries that respect rule of law, democracy, and human rights. In other words, it would be embarrassing for a Contracting Party to see its own cases repeatedly put on an agenda of the Committee of Ministers. Therefore, if a Contracting Party does not care, the only measure the Committee of Ministers can take is to end the Contracting Party's membership, which is too severe a penalty to be practical.

14) Hirst (No2.) v. the United Kingdom (No.2), judgment of 6 October 2005.

15) *Greens and M.T. v. the United Kingdom*, judgment of 23 November 2010.

16) Strictly speaking, the judgment of the ECtHR does not have a power to strike down the domestic legislation. However, member states have dutifully executed most of the ECtHR's judgments so far.

17) Recently Russia also expressed the similar attitude after its constitutional blanket ban (a ban on voting rights is part of the Constitution) was ruled as a violation by the ECtHR. See, Anchugov and Gladkov v. Russia, judgement of July 4, 2013.

other countries, such as Austria, Ireland, Latvia, and Liechtenstein, which passed legislation to allow prisoners to vote without particular difficulties.

In the present difficult situation, the Court seems to be very keen on improving the efficiency and effectiveness of its system by installing new working methods such as priority rule and a pilot judgment procedure. Simultaneously, further organizational reforms have been taking place, such as a single-judge formation (and an establishment of a new filtering section), new inadmissibility criteria, and an infringement proceeding. Moreover, new reforms based on treaties are ongoing. A new Protocol 15 will introduce a reference to the principle of subsidiarity and the doctrine of the margin of appreciation in the preamble of the ECHR. It also reduces from six to four months the time limit within which an application may be made to the Court following the date of a final domestic decision. Another new protocol, Protocol 16, will allow the highest courts and tribunals of a state party to request advisory opinions from the Court on questions of principle relating to the interpretation or application of the rights and freedoms defined in the Convention or the protocols thereto.

In addition, the ECtHR is eager to promote all kinds of dialogue. At the beginning of every judicial year, the Court invites a judge of a domestic apex court or a judicial minister to give a speech, and the president of the Court regularly visits member states and meets his or her local counterparts. Moreover, judges from the ECtHR frequently appear at academic conferences and generously offer their insights.

Those interactions between the ECtHR and member states show that the regional human rights protection system itself has been developing steadily in an on-going process and stands on a cornerstone constructed not from one piece of solid stone, but from a multilayered organic structure whose solidity relies on the present belief and efforts of its people. The present backlash against the ECHR and even the EU shows that the past does not guarantee the present. For example, the present UK government is planning to "scrap" the Human Rights Act of 1998 that gives effects to rights protected in the ECHR. Even Home Secretary Theresa May said the UK should quit the ECHR.[18] Meanwhile, the UK is also planning to hold a national referendum on its membership in the EU (BREXIT).[19]

3.5 The Venice Commission and Constitutional Courts

The role of The European Commission for Democracy through Law (hereinafter Venice Commission) in judicial dialogue should not be forgotten. The Venice Commission is the Council of Europe's advisory body on constitutional matters. It was established in 1990 by

18) Theresa May: UK should quit European Convention on Human Rights, BBC, 25 April 2016.

19) HM Government, Why the Government believes that voting to remain in the European Union is the best decision for the UK, <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/515068/why-the-government-believes-that-voting-to-remain-in-the-european-union-is-the-best-decision-for-the-uk.pdf> (visited 25 April 2016).

18 Council of Europe member states to facilitate the transformation of the former communist countries into countries with "human rights, rule of law and democracy." The role of the Venice Commission is to provide legal advice to its member states and, in particular, to help states wishing to bring their legal and institutional structures into line with European standards and international experience in the fields of democracy, human rights and the rule of law. Although the opinions of the Venice Commission are not legally binding, their effect is substantial.[20] The commission presently includes 61 member states, consisting of 47 member states from the Council of Europe and 14 other countries (Algeria, Brazil, Chile, Costa Rica, Israel, Kazakhstan, the Republic of Korea, Kosovo, Kyrgyzstan, Morocco, Mexico, Peru, Tunisia, and the USA). There are one associate member (Belarus) and five observers (Argentina, Canada, the Holy See, Japan, and Uruguay). Association of Constitutional Courts using the French Language, the European Union, the Palestine National Authority and South Africa have special status. Therefore, the commission does not represent Europe alone. The homepage of the Venice Commission provides a database of world constitutions and constitutional judgments (CODICES).

Furthermore, since 1996, the Venice Commission has played an important role in promoting judicial dialogue by establishing cooperation among a number of regional or language-based groups of constitutional courts, in particular, the Conference of European Constitutional Courts, the Association of Constitutional Courts using the French Language, the Southern African Judges Commission, the Conference of Constitutional Control Organs of Countries of New Democracy, the Association of Asian Constitutional Courts and Equivalent Institutions, the Union of Arab Constitutional Courts and Councils, the Ibero-American Conference of Constitutional Justice, and the Conference of Constitutional Jurisdictions of Africa.[21] Above all, the World Conference on Constitutional Justice, whose Secretariat is the Venice Commission, offers a global forum for judicial dialogue between constitutional judges. The conference unites almost a hundred constitutional courts and councils and supreme courts in Africa, the Americas, Asia, and Europe. This demonstrates the potential for building networks beyond each region.

In 2014, the Third Congress of the World Conference on Constitutional Justice was held in Seoul. The Seoul Communiqué adopted at the Congress revealed an initiative of the Constitutional Court of the Republic of Korea to promote discussions on human rights co-operation, including the possibility of establishing an Asian human rights court based on international human rights norms, in order to enhance human rights protection in the

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20) Wolfgang Hoffmann-Riem, The Venice Commission of the European Council – Standards and Impact, 25(2) European Journal of International Law (2014) 579.

21) The Association of Asian Constitutional Courts and Equivalent Institutions consists of 16 member states: Afghanistan, Azerbaijan, Indonesia, Kazakhstan, Republic of Korea, Kyrgyzstan, Malaysia, Mongolia, Myanmar, Pakistan, Philippines, Russian Federation, Tajikistan, Thailand, Turkey, and Uzbekistan (16 members).

region.[22] An Asian human rights court is not only a concern of Asian countries and people, but also for those outside Asia.

4. The Development of Constitutionalism in Asia

The preceding background leads to the following questions: What could be a driving force for an Asian human rights court? Who can promote a firm vision and drive an effort to protect and promote human rights? What can be the cornerstone for establishing and maintaining an Asian human rights court? As previously mentioned, it is problematic that the definition of Asia is so ambiguous and diverse. Probably the most realistic definition of Asia is the residual area after Europe, Africa, and the Americas are removed from the world map. However, this passive definition is not meaningful for identifying a driving force. Can this residual area have a driving force on a specific cause? Perhaps a smaller region with more similarities could share a common driving force. The ASEAN is a good example. Then what about Asia as a larger area? This seems more difficult. For example, the chairman's statement at the 10th East Asia Summit at Kuala Lumpur in 2015 (Our People, Our Community, Our Vision)[23] does not mention human rights, rule of law, nor democracy (it referred to democracy only when mentioning the UN reform).

However, it is possible to start from what Asian countries have in common. It should be borne in mind that many Asian sovereign states were born after WWII with new constitutions. This means that most of the constitutions acknowledged the Universal Declaration of Human Rights and other international human rights documents. Therefore, it is not surprising that most of their constitutions are influenced by international human rights treaties, although some have direct effects and others indirect and hidden effects. Furthermore, the recent nation-building and constitution-making are likely to take place under observation by the international community and particularly international organizations. Those constitutions themselves are likely to mention international human rights treaties and/or at least international law. Therefore, their influence is more visible. It is also important to emphasize that domestic bills of rights must be realized and maintained by constitutional institutions: the legislative, executive, and judiciary bodies. This constitutional arrangement itself is more or less a transplant of Western models or a mixture of indigenous and imported models. It must be noted that in Europe it took many centuries to institutionalize the ideas of democracy and rule of law (for example, the parliament and the court) and principles (for example universal suffrage, independence of the judiciary, and due process). Imagine how difficult it would be to develop a concept for a parliament or court when no such bodies exist. Now people are likely to take for granted the concept of a parliament, the selection process for members of the parliament, what it is required to do, and what is not allowed to do. However, written constitutions cannot guarantee the realization of their content. It is not surprising that some

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22) <http://www.venice.coe.int/wccj/seoul/WCCJ_Seoul_Communique-E.pdf> (visited 31 March 2016).

23) <http://www.mofa.go.jp/mofaj/files/000113422.pdf> (visited 30 March 2016).

states have difficulty in implementing democracy and rule of law. However, the gap between the reality and theory of the constitutional document is not necessarily unique to Asia. Despite Asia's short period of experience with democratic or semi-democratic constitutions, the present emerging constitutional developments in Asia can be appreciated from a perspective of constitutionalism. These developments may have the potential to provide a possible cornerstone for an Asian human rights court.[24] Moreover, once an Asian court is established, it can work as a defender of constitutionalism.

Several points must be noted in the development of constitutionalism. First, the development of constitutional review is significant. For example, the active practice of constitutional review in South Korea and Taiwan coincides with trends elsewhere, particularly in Europe.[25] Even the more discreet Japanese judicial review endeavors to explore a new horizon with respect to foreign law and international human rights treaties.[26] Despite the differences among countries, which are often over-emphasized, old and new human rights issues have similarities. When a domestic court tries to answer difficult questions, foreign and international sources could be helpful for exploring possible solutions. The aforementioned European experiences reveal that the judicial dialogue between national and European courts can be a helpful foundation for global human rights law and relevant not only for Europe, but also for other areas (for example, the Canadian court refers to the ECtHR case law). The globalization of judicial review in Asia and elsewhere may provide a stable cornerstone for an Asian human rights court. Therefore, criticism of the use of foreign and international human rights case law must be seriously addressed. (See 5.)

Second, the movement toward democratization is re-emerging in a different context in which new instruments, such as the internet and SNS, are available. It is too early to evaluate the outcome of such movements. So far, movements such as the Arab Spring and Umbrella Movement have not been sufficient for implementing democracy. Yet, taking into account the fact that almost all Asian states have installed a certain prototype of democracy (a government is elected by individuals with equal suffrage), even in the Asian context, undemocratic governments find themselves in a difficult position within the Asian and international communities.[27]

Thirdly, the relationship between economic development and rule of law in the globalized

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24) See, Albert H. Y. Chen (ed.), Constitutionalism in Asia in the Early Twenty-First Century (Cambridge University Press, 2014) and Wen-Chen Chang et al., Constitutionalism in Asia (Hart Publishing, 2014).

25) See Tania Groppi and Marie-Claire Ponthoreau (eds.), The Use of Foreign Precedents by Constitutional Judges (Hart Publishing, 2013).

26) Ejima, supra note 11. For diversity of the Asian courts, see, Jiunn-Rong Yeh and Wen-Chen Chang (ed.), Asian Courts in Context (Cambridge, 2014).

27) Wen-Chen Chang et al, supra note 24.

world cannot be underestimated.[28] The concept of rule of law exists not only at the domestic level, but at the international level. These interactions occur more frequently because of international or transnational business transactions and the increase in the number of international norms and international institutions. This environment has the potential to support the development of rule of law in domestic courts, which facilitates adoption of an Asian human rights court as a part of a mechanism to ensure rule of law.

5. The Deliberative Nature of International Human Rights Treaties in Courts and Re-conceptualizing Constitutional, Regional, and International Institutions for Human Rights (A Multi-Layered Protection System)

Because of the globalization of constitutional law and international law, many bills of rights in domestic constitutions and international human rights treaties overlap to a large degree. Domestic courts and regional courts face similar questions. It is imaginable that a judge facing a difficult issue would feel inclined to refer to their precedents, even if they hold outside his or her own jurisdiction. Such judicial dialogue has been attested in much academic research.[29] However, there has been criticism that the use of foreign resources is "undemocratic, selective (cherry-picking), and misleading." [30]

There are two points to be addressed on this matter. First, reference to foreign sources can create a foundation for an Asian constitutional court. The situation previously described (See 3.) induces some domestic judges to freely cite other foreign laws, case law, and international human rights treaties. This encourages judges to see human rights issues from a more global perspective, which may help when addressing global concerns.

Second, the existence of an Asian human rights court would promote reference to international human rights treaties. It is also imaginable to refer to various practices of other countries concerning the interpretation of treaties. The emergence of rich case law from the ECtHR based on its authority leads the domestic courts of ECHR member states to refer frequently to Strasbourg case law. How many domestic courts are willing to face the embarrassing situation of their conclusions being later overturned by the Strasbourg Court?

It is time to examine the criticism of referring to foreign sources. First, is it undemocratic for a domestic judge to refer to international human rights treaties? Here, it is important

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28) Machiko Kanetake and André Nollkaemper, The Rule of Law at the National and International Levels: Contestations and Deference (Hart Publishing, 2016).

29) See, Groppi and Ponthoreau, supra note 25.

30) Sandra Fredman, "Foreign Fads or Fashions? The Role of Comparativism in Human Rights Law" (2015) 64 ICLQ 631.

to differentiate between ratified international human rights treaties and foreign law.[31] The judiciary is a part of the government under international obligation to the international human rights treaties it ratifies. If treaties are ratified according to a constitutional arrangement, which is usually approval by the legislature, referring to ratified international human rights treaties is not undemocratic. If a country adopts a constitutional arrangement in which a ratified treaty automatically becomes a part of domestic law, ignoring those treaties can be seen as unconstitutional.

Secondly, is reference to international human rights treaties selective (cherry-picking)? This is actually a more serious problem. For example, in 2013, the Supreme Court of Japan for the first time cited foreign law and international human rights treaties, including the specific recommendations of the Human Rights Committee and the Committee of the Rights of the Child when it invalidated a discriminatory clause against children born out of wedlock in the Civil Code.[32] Taking into account the extremely deferential attitude of the Supreme Court of Japan toward the legislature, it is understandable that the Supreme Court referred to international recommendations because they could strengthen the Court's reasoning. However, in 2015, the Supreme Court ignored the recommendations of UN human rights bodies when addressing the constitutionality of another controversial clause in the Civil Code.[33] This selectiveness can be criticized as cherry-picking. It is now necessary to establish a consistent theory and methodology for referring to international human rights treaties.

There are two approaches on how to provide a theoretical foundation for applying international human rights treaties in courts. First, it is possible to strengthen the binding effect of human rights treaties. It is generally believed that the decisions of UN human rights bodies, such as recommendations, opinions, and general comments, are not binding. However, if domestic institutions such as the judiciary, legislative, and executive bodies try to faithfully implement the obligations under the human rights treaties, treaties may take on a quasi-binding effect. The accumulation of opinion and recommendations as precedent contributes to enhancing a de facto binding effect. Thus, if an Asian human rights court is established, it would be possible to render a regional human rights treaty binding. The question is how to make the government change its present attitude (minimalism in implementation). Therefore, the first approach is still too optimistic.

Second, a more realistic prescription is to treat international human rights treaties as

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31) This does not mean foreign law is irrelevant. On the contrary international human rights treaties and foreign bills of rights are related to each other.

32) Decision of the SCJ (Grand Bench), 4 September 2013, 67(6) Minshu 1320.

33) Two separate judgments of the SCJ (Grand Bench), 16 December 2015, 2234 Hanji 38 and 2284 Hanji 20. For other examples of selectiveness, see, Fredman, supra note 30, 632.

deliberative resources.[34] When the court makes a judgment (decision), it is necessary for a decision to be based on sound reasons. Imagine there are sound reasons A, B, and C and weak reasons D and E. If the court decides based on D and E only, it is easy to criticize its decision as wrong because the court failed to take into account other reasons, such as A, B, and C, despite the fact that they appeared more persuasive. It is not necessary to evaluate the strength of reasons D and E. The quality of the decision can be ensured by checking the process. How thoroughly are the reasons explored? In the aforementioned decision of the Supreme Court of Japan in 2013, all the possible reasons were examined thoroughly. Therefore, we can conclude that the 2013 conclusion is persuasive. In contrast, the 2015 judgments ignored some recommendations of the human rights treaty bodies. Therefore, the degree of persuasiveness of the 2015 judgments is lower than that of the 2013 decision.

It must be noted that a deliberative approach itself does not guarantee a single right answer. This requires a system of circulation in which no issues of human rights are overlooked until the issue is resolved or ceases to be a problem. In other words, opportunities for deliberation must be systematically secured for everyone. Thus, it is necessary to re-conceptualize all existing institutions at the domestic, regional, and international levels as multi-layered systems for human rights protection. The European protection system for human rights is already a good example of this model.[35]

Take the example of a child born out of wedlock. Until the first half of the 20th century, it was common for domestic civil law to distinguish children born in and out of wedlock. In the 1960s, European countries started to abolish this distinction. This was confirmed by the judgment of the ECtHR in Marckex v. Belgium in 1979.[36] However, this judgment did not have the force to change the legislation of other countries' discriminatory legislation. First, "The domestic margin of appreciation thus goes hand in hand with a European supervision";[37] and second, if an individual fails to bring a case to the Court, his or her problem cannot be addressed. This was true for French citizens until Mazurek v. France in 2000, in which the ECtHR ruled that the French discriminatory legislation violated the ECHR; thus, the French government changed the law.[38] However, people under French jurisdiction had to wait 21 years, which revealed a limitation of the regional human rights protection system. However, the system continues to work to guarantee opportunities for

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34) Fredman, supra note 30, 640.

35) In this context, the protection system not only included the ECHR but also the EU and other international related institutions. It is also important to include NGOs and private sectors in terms of a problem discovery and implementation.

36) Marckx v. Belgium, judgment of 13 June 1979.

37) Handyside v. the United Kingdom, judgment of 7 December 1976, para. 49 and the Sunday Times v. the United Kingdom, judgment of 26 April 1979, para 8.

38) Mazurek v. France, judgment of 1 February 2000.

deliberation to any victim wherever she or he lives within the jurisdiction of the ECHR. Moreover, a trickle effect of one system can have an impact beyond its jurisdiction. The aforementioned 2013 decision of the Supreme Court of Japan was indirectly influenced by the ECtHR case law just described.[39] Thus, a particular regional court impacts more than just a particular region. In the future, an Asian human rights court can play an important role in maintaining as active a circulation as possible.

What would be the advantage of such a multi-layered system? First, the existence of such a system can contribute to gathering and sharing information concerning human rights beyond any borders. Second, it can offer opportunities for new perspectives. Imagine an example in which some countries already address a particular human rights problem without negative consequences. This can present an opportunity for other countries to rethink their own problems. Third, people who belong to certain minority groups have more difficulty expressing their voices effectively because of the volume of people. However, by understanding that the same minority concerns exist in every country at regional or international levels, the minority can make a substantial presence. This can explain NOGs that work globally to raise their profiles in the international community. Fourth, as long as the system can maintain an active awareness of the issues, it would be possible to solve the problems. Fifth, such a system works to prevent human rights violations by any government by securing a minimum standard. Sixth, such a system works as a good detector of emerging human rights issues.

6. Conclusions

The way to an Asian human rights court is probably still long and indirect. However, the difference between the 1950s and the present (probably even the 1990s and the present) is that an increasing number of developments in constitutional and international practices can be interpreted as a doorway to an Asian human rights court. In particular, the development of judicial review and interaction between different courts at the domestic, regional, and international levels can accelerate further developments. Moreover, one can argue that some Asian countries that have developed economically have an obligation to the rest of the world. An Asian human rights court would not only serve Asia, but would also serve as a missing piece in the jigsaw puzzle of the global human rights system. The establishment of an Asian court can thus develop a degree of protection that operates on a global scale. Thus, such a court can help the Asian region fulfill its responsibilities in a globalized world.

39) For details, see, Ejima, supra note 11, 166.

Session 4

Necessity of Communication and Cooperation among Constitutional Courts and Equivalent Institutions : Focusing on Expert and Guest suggestions

Globalized Constitutional Decision-making : a Way to Make Judicial Networks in Asia

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Globalized Constitutional Decisionmaking: A Way to Make Judicial Networks in Asia

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I. Self-understanding as an Asian

Legal experts in human rights commonly point out that only Asia does not have human rights protection system through regional human rights institutions. Mostly these notions purport to have a working human rights court in Asia comparable to European Court of Human Rights, Inter-American Court of Human Rights, and African Court on Human and People's Rights. No one would deny that an effective human rights institution can systematically level the peaceful life of the Asians up to a considerable extent, considering the European's experiences with the European Court. No Asian can have plainly positive prospects to build our common court when looking at the past and the present of Asia, likewise.

Advised by the difficulties and hurdles of setting up an organized human rights court in Asia, this article will not reiterate the necessity of the regional protection system or the effectiveness of the international court system for human rights. It tries to concentrate on network development process of the Association of Asian Constitutional Courts and Equivalent Institutions for further level of organization at this very moment. Looking only up the long-term target may frustrate ourselves with its distance from where we are. However, it does not mean that the writer abandon a common court system in Asia for the ultimate human rights protection as a long term project. The Asian Court should be the alternative.

The discussion of network development should be stressed especially at the current point when the member states are favorable to form a consensus but not certainly convinced. In this sense, communications to find similarity and difference from each other as Asian should be required, because we did not share the same motive for a cooperative human rights protection

institution like the Europeans and the others. We the Asians have been traumatized by the history of the world powers' interventions in terms of sovereignty, and not been perfectly healed yet. This situation is quite disadvantageous for adopting a intervening international organization to a member state. Human rights became a world language for peace, but the Asians think still much on sovereignty. We should accept this positional nature as a precondition for our debate.

II. Networks for Globalized Constitutionalism

1. Network Development through Openness

A network is propelled by mutual trust. Trust comes from knowledge. To know each other, we should open ourselves and communicate. Sharing the member states' constitutional experiences is the key. If a member state has a hard time finding a solution for a hard case regarding human rights, it may consult with the other member state's decision. If a member state's option deserves for criticism, the others may learn a lesson from it. Through this continuing process, the member states will understand the other's human rights sensitivity.

To make sure this legal cooperation, the members should be active to introduce their own constitutional decisions regarding human rights openly in a common language. Each state's landmark decisions should be informed with no distortion. The member states should not be hesitate to show their difficulties and limitations to follow the international human rights standard. Statistical reports for citing the human rights norms in a constitutional case should be shared. Competitive composition between members for the compliance of the international human rights rules will be beneficial to all. To make things happen, the members should fill the network database with practical information.

Furthermore, the member state's constitutional courts should take more open stance toward international standard of human rights. Human rights decisions should be decided on the ground of not only member state's constitution but also the international laws of human rights. Active members like South Korea should play a leading role. Honestly, the Korean Constitutional Court has not positively cited the international norms to decide a fundamental rights case. Strict separation of jurisdiction between the domestic law and international rules has been manifested. International laws regarding human rights have never worked as a binding rule in the Constitutional Court cases. Things are changing recently in the Court, but international rules can be at least a practical secondary source in a constitutional decisionmaking. Preferably, a member state's rule and decision can be a secondary source, as well. Justice Stephen Breyer in the U.S. Supreme Court, which is notorious for sustaining American law's prior position for jurisdiction, emphasized many possible merits for referring to a foreign country's rule best suited for special issues, such as death penalty, abortion.[1)]

1) Stephen Breyer, The Court and the World, Knopf, 2015.

2. Is Human Rights Matter Universal to the Asians?

To make the networks stronger, we should draw a common commitment to the matter of human rights. In many asian countries, economic growth has preceded individual human rights. Although many states changed their stances, there are still many others who take the wealth seriously. We cannot blame their position because being richer can be a human rights matter to them. Value judgment is the one we should be careful to take. The network should start with accepting diversity.

Considering political matter in human rights cases usually make the cooperative network hard in the international level. Many human rights cases arise in terms of political suppression. Foreign countries or international organizations cannot easily intervene domestic political matters. The network cannot provide a cure-all for this matter, but can lead a way to go together. Citing and introducing the other member state's judicial decisionmaking for a special human rights issue in courts may stimulate a certain country's politics related with the issue. If the country starts to feel a peer pressure, it is a success at the incipient step. AACC is a good platform to practice the theory. If the judiciaries of member states lead the politics, we may find possibility for the advent of a genuine regional human rights court in Asia.