AACC SRD Research

Jurisdictions and Organization of AACC Members

AACC SRD
AACC Secretariat for Research and Development

Constitutional Court of Korea

Preface

This book marks the first research publication of the Secretariat for Research and Development (SRD) of the Association of Asian Constitutional Courts and Equivalent Institutions (AACC). It contains the introductory overview of the jurisdictions and organization of AACC member institutions and results of the 1st Research Conference of the AACC SRD (29 May – 1 June 2018).

AACC SRD annually selects a research topic to work on and hosts a regular conference that brings together institutions of constitutional justice from across the Asian region to discuss matters of constitutional adjudication, fundamental rights and principles of constitutionalism. In doing so, AACC SRD aims to generate one publication that will be of interest not just for AACC members, but the global research community. In addition, AACC SRD is building a stimulating environment for comparative constitutional research at its office in Seoul, where seconded officers from AACC member institutions are closely working together with AACC SRD staff on a daily basis, such as during the production of this research book.

The AACC is truly diverse, consisting of members from civil law and common law traditions, as well as members operating in environments which combine different legal traditions. The materials contained in this publication allow the reader to discover the similarities and differences between AACC member institutions, and can assist in developing insights for strengthening constitutional justice in the Asian region.

The introductory chapter lays out the context, production process and key contents of the book. The comparative tables allow a quick overview of the basic information of AACC member institutions. The AACC Member Fact Files contain detailed information on historical backgrounds, organizational matters, constitutional jurisdictions, and key cases. The Conference Summary Report enables the reader to revisit the presentations and key points of discussion at AACC SRD's 1st Research Conference.

I sincerely believe that this volume, together with future updated editions, can act as a permanent foundation to bring AACC members closer together, to enable the global community to engage further with the AACC, and to provide inspiration for research in the field of comparative constitutional law in Asia and beyond. I extend my deepest gratitude to the AACC member institutions and the staff at AACC SRD for making this publication possible.

Heon Jeong Kim
Secretary General
AACC SRD / Constitutional Court of Korea

Congratulatory Message

In this fitting month to bid farewell to the year 2018, I sincerely congratulate the Secretariat for Research and Development (SRD) of the Association of Asian Constitutional Courts and Equivalent Institutions (AACC) for reaping the harvest of hard work: its first research publication "Jurisdictions and Organization of AACC Members." Let me extend my sincere gratitude to the staff of the AACC SRD for their enthusiasm and dedication over the course of this year.

This book provides a comparative review of the jurisdictions and organizations of the AACC member institutions. The publication holds value and importance because it is unprecedented. It is an embodiment of relentless efforts put forward by the 16 AACC member institutions, not to mention the 1st Research Conference of the AACC SRD. I express my appreciation and congratulations to the AACC member institutions and the AACC SRD for their active engagement.

The AACC was established by Asian constitutional courts and equivalent institutions with the aim of ensuring basic human rights and promoting the development of democracy and rule of law in Asia through constitutional justice. It can be a strenuous task to fully achieve this goal, as Asia encompasses a diverse spectrum of culture, history and religion. However, I would like to quote an old Korean saying that 'a journey of a thousand miles begins with a single step.' I am confident that every footstep taken by the AACC member institutions, including the publication of this book, will strengthen the respect for human rights, democracy, and the rule of law in Asia.

As an AACC member institution that hosts the AACC SRD, the Constitutional Court of Korea shall duly endeavor to reach the Association's common objectives. I earnestly hope that this book will be a useful source of information for inquisitive minds who wish to understand AACC member institutions and constitutional justice in Asia.

Namseok Yoo
President
Constitutional Court of Korea

Contents

PART A.

INTRODUCTION:

CONNECTING INSTITUTIONS OF CONSTITUTIONAL JUSTICE IN ASIA

1. Background and context

1.1 Building AACC SRD

The 20th century witnessed the increased institutionalization of constitutional justice across the world. In the 21st century, this valuable achievement can be further secured and advanced. The Association of Asian Constitutional Courts and Equivalent Institutions (AACC) was established in July 2010 to promote this goal, particularly in the Asian region. According to Article 3 of the AACC Statute,[1] the AACC's objectives are the protection of human rights, the guarantee of democracy, the implementation of the rule of law, and the independence of constitutional courts and equivalent institutions. One vital step towards achieving these objectives is to increase the exchange of experiences and information among AACC members. The Secretariat for Research and Development (SRD) of the AACC provides a permanent platform for this process.

Current members of the AACC are the following 16 institutions of constitutional justice: The Independent Commission for Overseeing the Implementation of the Constitution (ICOIC) of Afghanistan, the Constitutional Court of Azerbaijan, the Constitutional Court of Indonesia, the Constitutional Council of Kazakhstan, the Constitutional Court of Korea, the Constitutional Chamber of the Supreme Court of the Kyrgyz Republic, the Federal Court of Malaysia, the Constitutional Court of Mongolia, the Constitutional Tribunal of Myanmar, the Supreme Court of Pakistan, the Supreme Court of the Philippines, the Constitutional Court of Russia, the Constitutional Court of Tajikistan, the Constitutional Court of Thailand, the Constitutional Court of Turkey, and the Constitutional Court of Uzbekistan.

In August 2016 a consensus was achieved among AACC members to establish the Secretariat for Research and Development (SRD) in Seoul, hosted by the Constitutional Court of Korea. The AACC SRD officially started its operations in January 2017, and held its inaugural Justices' Conference in 2017 (30 October – 2 November). Building on the Justices' Conference, the idea for this book took further shape during the preparations for AACC SRD's inaugural 2018 Research Conference. This important event, entitled *Jurisdictions and Organization of AACC Members*, was held in 2018 (29 May – 1 June) and set the research direction for AACC SRD and bears its fruits in this book.

The publication of this book is significant for AACC SRD. Not only is this book the first official research publication of AACC SRD, but its contents are specifically designed to begin to map out the jurisdictional powers and organizational design of individual AACC members in one volume. Since the current contents are solely based on the materials made available for the 2018 AACC SRD Research Conference, future updated and expanded editions of this publication are expected. For now, this publication serves as the foundation for further in-depth research at AACC SRD. AACC SRD's research output can connect AACC members and contribute to the global debate on constitutionalism. This introductory chapter highlights the context, process and potential of this book.

1.2 Connecting AACC members

The Asian continent is diverse, and so is the membership of the AACC. Dotted across Asia, going from East to West, reaching even what may be simultaneously referred to as European parts of the world, AACC member institutions are located in Seoul, Manila, Ulaanbaatar, Jakarta, Putrajaya, Bangkok, Naypyidaw, Bishkek, Islamabad, Astana, Tashkent, Kabul, Dushanbe, Baku, Ankara and St. Petersburg. Diverse geographical locations are combined with diverse histories, cultures, economies, politics, societies, as well as legal systems and constitutional institutions. One key task of AACC SRD is to

[1] Available on the AACC SRD website (About Us / AACC SRD), at: http://www.aaccrd.org/en/main.do.

assist AACC members in identifying commonalities and differences within the AACC framework, and together work on overcoming challenges and realizing opportunities in improving constitutional justice in the Asian region. This can be facilitated by identifying valuable research topics, convening productive research events, running the AACC SRD secondment program, and producing useful research output to encourage further discussion.

AACC SRD's main research field is comparative constitutional law. Drawing on the diversity of the AACC members, the potential for generating knowledge via a comparative approach is promising. AACC SRD focuses on a number of research themes of comparative constitutional law. They include constitutional adjudication, fundamental rights and key concepts of constitutionalism, such as the rule of law and the separation of powers. The primary vehicle in driving AACC SRD's research forward is the annual AACC SRD Conference. It may either take the form of a Research Conference, where participants are primarily research officers, or it may take place as a Justice-level Conference. The aim is that each conference will result in an AACC SRD publication. In addition to generating new publications, annual conferences may also review the publication of a previous conference, thus enabling the continuous and steady improvement of AACC SRD publications. This book is the direct result of the AACC SRD's 2018 Research Conference, which primarily focused on different mechanisms of constitutional adjudication and organizational aspects of AACC members. However, with a small collection of case summaries contained in the respective *AACC Member Fact Files*, coupled with a special presentation on the freedom of speech in the digital age by the Malaysian delegate,[2] a basis has also been established for future research on fundamental rights. Not only do AACC members come together during an AACC SRD Conference to exchange ideas, but the connections made at the annual conferences are retained and strengthened via the production process and publication of the conference materials.

Another vital connection between AACC members is the AACC SRD secondment program. Counteracting the great geographical distances of the Asian continent, the presence of seconded officers from AACC members at the AACC SRD in Seoul greatly contributes to AACC SRD's research capacity. The current seconded officers from Indonesia and Mongolia regularly give presentations at AACC SRD's research meetings, as well as provide briefings to a wider audience of Rapporteur Judges at the Constitutional Court of Korea. During the production process of this book, the two seconded officers currently stationed at AACC SRD played a major role in checking and editing the contents of the respective fact files from their home institutions. AACC SRD staff could directly speak to them on a daily basis for ideas, knowledge and input. The secondment program enriches not just the daily work of the AACC SRD, but also specifically strengthens the research output of AACC SRD, such as this book. This book in turn strengthens the connection between AACC member institutions.

1.3 Joining the global debate

While one aim of AACC SRD is to further connect AACC members to each other, another aim is to connect the AACC to other regional organizations and the global research community as a whole. The Republic of Korea is a full member of the Venice Commission, and Justices and staff of the Constitutional Court of Korea regularly attend meetings of the Venice Commission and contribute to its publications. Guest speakers from the European Court of Human Rights (ECtHR) and the Venice Commission provided insightful presentations and discussion at the 2018 AACC SRD Research Conference.[3]

In 2017, the President of the African Court on Human and Peoples' Rights attended AACC SRD's Justices' Conference as a guest speaker. Awareness of regional developments

[2] See Session VI of the Conference Summary Report contained in this book.

[3] Brief summaries of all conference presentations can be found in the Conference Summary Report contained in this book.

in other continents assists AACC SRD in finding the most suitable research topics. By establishing links with other regional associations and organizations of constitutional justice, AACC SRD engages with the newest developments of constitutional justice at a global level. This book in turn can be a useful resource for regional organizations of other continents to gain a better understanding of current developments in Asia.

During the 2017 Justices' Conference of AACC SRD, a panel of guests from legal academia was invited to provide an external perspective to the discussions. At the 2018 Research Conference of AACC SRD potential improvements in conference methodology were discussed. Future AACC SRD Research Conferences may vary in format depending on the conference theme. Links with the academic world will greatly benefit the work of AACC SRD. Not only can AACC SRD draw on the growing academic literature on constitutional law, especially in the Asian context, AACC SRD can contribute to this literature by making available primary material from AACC members that will be of interest to the academic community. That is one key aim of this book.

This conference book therefore not only serves to connect AACC members, but also can act as a foundation for further engagement in the global debate on constitutionalism. It is a debate that is already happening within the framework of other regional networks and organizations of constitutional justice, as well as in global academia. This book gathers together fact files from AACC members, and presents a useful collection of information on the organization, jurisdictions, and cases from across a large number of constitutional courts and equivalent institutions in Asia. The following explains the process of compiling this set of valuable materials.

2. Method and process

2.1 "Starting the engine"

As one of the Research Conference participants from the Constitutional Court of Indonesia remarked, the 2018 AACC SRD Conference "started the engine". The key purpose behind AACC SRD's idea for the conference theme was to establish a baseline of shared knowledge between the AACC members about each other. Possessing such shared knowledge contributes to the development of further understanding of AACC members, and the identification of more specific research topics of common interest in the future. The rationale and purpose of the conference was published in a concept paper, entitled "Concept and Materials",[4] and distributed together with a conference invitation to AACC members in February 2018. The aim of publishing the conference materials was clearly stated in the concept paper. This book is therefore the fulfilment of this aim.

During the run-up to the Research Conference in May 2018, AACC SRD gathered two sets of materials ready for discussion during the conference. The first set of materials was the *AACC Member Fact Files*. The second set of materials was a collection of presentation papers or presentation slides. While the individual presentations during the Research Conference were made using the second set of materials, these in turn were themselves based on the fact files. Also, the detailed fact files were available during the Research Conference to aid deeper discussion. During the discussion sections of Sessions I to V of the Research Conference, AACC member participants and guests from the Council of Europe were able to raise questions regarding the fact file contents and discuss specific topics of interest that were presented in the fact files. These fact files form the core of this book, whereas the presentation papers or presentation slides are available in full on the AACC SRD website.[5] However, short summaries of the conference

[4] Available on the events page of the AACC SRD website (Events / Conferences / 1st Research Conference of the AACC Secretariat for Research and Development), at: http://www.aaccrd.org/en/main.do.

[5] Available in the archive section of the Database of the AACC SRD website (Database / Conference /

presentations and issues that were discussed during the Research Conference can be found in the Research Conference Summary Report contained in this book.

Most AACC members were able to attend and/or provide conference materials. Due to previously scheduled commitments, the Constitutional Court of Uzbekistan was unable to attend and unable to submit materials for the conference. However, as previously mentioned, this publication may be revised and updated in the future, and AACC SRD welcomes contributions from all AACC members. The *AACC Member Fact Files* contained in this book are purely based on materials that were made available by AACC members for the 2018 AACC SRD Research Conference.

2.2 Compiling fact files

In the process of gathering the fact files for the Research Conference, AACC SRD provided AACC members with a template to draft their respective fact files. The aim was to provide a coherent set of headings and to request a range of specific content which would allow the future reader of the fact files to easily engage with the contents and conduct comparative research. Due to the inevitable institutional and jurisdictional differences between AACC members, the template served mainly as a guide. To what extent AACC members choose to follow the template, was up to the AACC members themselves. In addition to the template, a draft fact file of the Constitutional Court of Korea was distributed to AACC members in February as an example.

The template distributed in February 2018 to AACC members suggested the inclusion of the following content: 1) a short introduction briefly covering the history and the legal basis underpinning the institution; 2) the institution's organization, especially the composition of the bench, the appointment system, procedures and staff for constitutional research, and key points on the administration of the institution; 3) available jurisdictions at the institution, especially providing information on relevant key legal provisions, purpose of the jurisdiction, causes for requests, and the variation in types of decision and effect of the decisions; 4) an appendix providing case statistics since the establishment of the institution as well as statistics showing recent trends over the last five years. Ideally, the case statistics are followed by a small collection of case summaries. As mentioned, the template was encouraged to be used as a guide, but to what extent AACC members followed the suggested headings and content was up to the individual AACC member.

After the Research Conference, AACC members who participated at the Research Conference or had submitted relevant materials were given the opportunity to update and edit their respective fact files ready for the publication of this book. After the resubmission process by AACC members who chose to update their fact files was complete, AACC SRD reviewed all available fact files and edited only in terms of language, style and format. The factual accuracy of each fact file is therefore the responsibility of each respective AACC member institution. To assist the reader, AACC SRD inserted a cover page for each fact file, which contains a brief summary detailing some factual highlights, as well as a short content outline of the fact file. The respective fact file summaries are modified versions of the presentation summaries as contained in the Conference Summary Report. The bulk of this book consists of direct contributions from AACC member institutions, and AACC SRD is proud to have received such numerous contributions for its inaugural Research Conference and first research publication.

Overall, the gathered fact files enable a quick overview over the most important characteristics of AACC member institutions, focusing on the suggested headings in the template distributed by AACC SRD. Limited variations as to the structure of the received fact files were of course inevitable on account of the diversity of institutional arrangements of AACC members. Such variation was not only expected, but was welcomed, since the aim of this first edition of the book was to first gain an overview

1st Research Conference), at: http://www.aaccrd.org/en/main.do.

of this institutional and jurisdictional diversity in the AACC. Only by having mapped out key similarities and differences, can AACC SRD proceed with further projects, such as categorising its future case law database according to different constitutional jurisdictions available among AACC members. The primary aim of this first book project has thus been achieved.

2.3 Drafting additional materials

In addition to the fact files, this book contains three additional parts. First, this introductory chapter aims to highlight the context, production process and potential of this book, while also giving the reader who is unfamiliar with AACC SRD a quick overview of this organization's work. Second, comparative tables provide some quick introductory information regarding the current 16 AACC member institutions. Third, this book also contains a Conference Summary Report, which provides snapshots of the respective presentations and discussions that took place at the 2018 AACC SRD Research Conference.

The three comparative tables focus on a general overview of AACC member institutions. Table 1 presents the full names of the member institutions, as well as the year of establishment and the number of judges or equivalent present at each institution. Table 2 provides details of the appointment process of each AACC member, also showing the appointment procedure of the Chief Justice or equivalent, as well as the term of office. Major similarities and differences are visible, and this provides impetus for future research. The purpose of comparative tables is to also provide the reader with a bird's-eye view of the most basic characteristics of these institutions. From the full names of the AACC member institutions it is clear that current member institutions of the AACC are institutionally diverse. AACC members include various types of institutions, such as constitutional courts, a constitutional council, a constitutional tribunal, a constitutional chamber of a supreme court, a "commission for the implementation of the constitution", and apex courts of the ordinary judiciary equipped with constitutional adjudicatory powers. Providing further information on the year of establishment, the total number of judges or equivalent, and the judicial appointment process and terms of office gives the potential reader an additional layer of general information on AACC members, preparing him/her for further in-depth engagement with the materials of this book.

Table 3 provides a member-specific overview of the powers and authorities enjoyed by AACC members. In this edition of the book AACC SRD has yet refrained from making generalised descriptions for available jurisdictions across the AACC. Even though some jurisdictions at some AACC members may be described in English via similar or identical terminology, the procedure and nature of these jurisdictions may actually vary significantly in practice, thus questioning the accuracy of commonly used specific terminology if used without further explanations. One of AACC SRD's main tasks for the future is to evaluate the functioning of specific jurisdictional powers in greater depth, and map out even more clearly the similarities and differences among them, especially those which terminologically seem identical, but in reality are very different when being applied at different institutions. The comparative tables in this book are based on information directly provided by the respective AACC members in their fact files, cross-referenced where appropriate with the legal texts underpinning the respective AACC member institutions.

Finally, this book also contains a Conference Summary Report of the AACC SRD's 2018 Research Conference. This will enable the reader to understand the event from which this book has its origins. In the form of short abstracts, the Report provides snapshots of the contents of each presentation that was given, as well as some of the key points of the discussions during each of the six sessions. This is an additional resource to the *AACC Member Fact Files*. The Report is an additional resource also in the sense that it contains contributions, briefly summarised, by guests from the Council of Europe. Also, the summary for Session VI contains a short summary of a special presentation by the delegate from the Federal Court of Malaysia, which focused on the topical and very

important issue of freedom of speech in the digital age. After the first draft of the Conference Summary Report was completed, AACC members and guests had the opportunity to make modifications and additions, checking the factual accuracy of its contents. What is presented in this book is the final version of the Conference Report after this checking process by conference participants, while keeping the format of providing snapshots of the respective presentations, keeping within a specified word limit. In sum, these additional materials of the book, combined with the fact files, promise to make available materials of great interest and potential for the study of comparative constitutional law in Asia.

3. Getting to know AACC members

3.1 Understanding different contexts

It is a major undertaking to map out the background, organization and jurisdictions of institutions of constitutional justice in Asia. In this final section of the introductory chapter, the aim is to provide a brief comparative summary of the fact files to aid the reader in gaining an understanding of the differing contexts in which the AACC member institutions originated, observing the varying organizational options the AACC member institutions have chosen, and to appreciate the jurisdictional diversity that exists among AACC members. The order of these three sub-sections mirrors the contents structure of the *AACC Member Fact Files*.

The context within which each AACC member institution was established varies greatly, and has direct institutional consequences. An interesting example is the Supreme Court of the Philippines, the AACC member with the longest history. It was established in 1901 while the Philippines was still under the rule of the USA. The "judicial organization established by the Act was conceived by the American lawyers in the Philippine Commission and was patterned in its basic structures after similar organizations in the United States... The Anglo-American legal system under which the Supreme Court of the Philippine Islands was expected to operate was entirely different from the old Spanish system the Filipinos were familiar with. Adjustments had to be made; hence, the decisions of the Supreme Court during its early years reflected a blend of both the Anglo-American and Spanish systems."[6] Today's legal basis for the Supreme Court of the Philippines is the 1987 Constitution.

The establishment of some AACC member institutions in the 1990s occurred specifically within the context of the end of the Soviet Union. Russia's Constitutional Court was established in 1991. The Constitutional Court of Azerbaijan was established in 1998, finding its legal basis in the Constitution adopted in 1995. Other examples are the Constitutional Court of Tajikistan (1995), the Constitutional Court of Uzbekistan (1995), and the Constitutional Council of Kazakhstan (1996). In the case of Kyrgyz Republic, a constitutional court was established in 1993. However, major political changes occurred over the next two decades, partly leading to the establishment of a new institution of constitutional justice in 2013, the Constitutional Chamber of the Supreme Court of the Kyrgyz Republic.

Other AACC member institutions also came into being following their own respective national democratic movements. They include, for example, the Constitutional Court of Korea (1988), the Constitutional Court of Mongolia (1992), the Constitutional Court of Thailand (1997/2007),[7] and the Constitutional Court of Indonesia (2003). The

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6 See *Section A1. History* of the AACC Member Fact File of the Supreme Court of the Philippines.

7 Even though the Constitutional Court of Thailand was first established in 1997, the current Constitutional Court of Thailand was established in 2007 and retains its functions under the 2017 Constitution. For Thailand's AACC Member Fact File section on case statistics since establishment, the Constitutional Court of Thailand provides statistics starting from 1997.

Constitutional Court of Turkey was established in 1961 and underwent some changes in 1982.[8] Major institutional changes to the Turkish Constitutional Court occurred in 2010, when it introduced the jurisdiction of individual complaint, formally exercising this jurisdiction starting from 2012. The Constitutional Tribunal of Myanmar came into being after recent political reforms were introduced. Myanmar's 2008 Constitution mandated the establishment of the Constitutional Tribunal, and the latter officially started operating in 2011. The Independent Commission for Overseeing the Implementation of the Constitution (ICOIC) of Afghanistan was set up within the context of the re-establishment of the Afghan state and the introduction of the new Afghan Constitution of 2004. The ICOIC was formally established in 2010.

Some AACC members have clear historical origins in the process of decolonization from the British Empire. In 1947 British India underwent what is known today as the Partition of India, one of the consequences of which was the birth of the state of Pakistan. In 1956, the Supreme Court of Pakistan was established. This institution succeeded the Federal Court, which itself was the successor to the Federal Court of India.[9] In Southeast Asia, even though what we today know as Malaysia gained independence from the United Kingdom in 1957, the Privy Council of the United Kingdom remained the final instance of appeal in the Malaysian legal system until 1985. Thereafter, the function of the highest court of appeal was exercised by the Supreme Court of Malaysia until 1994. This is because after major judicial reforms, the Supreme Court was renamed the Federal Court of Malaysia in 1994. The *AACC Member Fact File* submitted by the Federal Court of Malaysia provides case statistics starting from 1994.

From the above it is clear that AACC members consist of institutions which operate in civil law and common law environments, as well as within contexts that may be described as hybrid environments. Due to particular political and historical circumstances, some possess unique powers and authorities, at least within the AACC context. It is this rich diversity evident among the AACC members which makes the enterprise of comparative constitutional research within the AACC particularly worthwhile.

3.2 Observing organizational options

Another way to comparatively observe AACC members is to take note of organizational differences. Within the context of the *AACC Member Fact Files*, two aspects can be highlighted. First is the composition and appointment process of the judges/members of AACC institutions (hereafter "judges"). Great variations are visible in terms of the number, composition and background of the judges, their length of terms in office, as well as the steps involved from nomination to appointment. Second, one can observe differences in how constitutional research is organized, and at what stages input from research officers is required during the adjudication process. Another noticeable issue is of course the different terminology used for similar functions across AACC members.

Various models for judicial appointment exist. Examples of a system of cooperation can be found in the AACC member institutions of Afghanistan, Azerbaijan and Russia, where one branch of government enjoys the sole right to propose candidates for appointment, while another branch of government is tasked with providing or withholding consent. For the appointments to succeed, cooperation between the two branches of the government is necessary. In contrast, appointment systems in some other countries involve more than two branches of government and also specifically secure representation from various branches of government. For example, AACC members in countries such as Indonesia, Korea and Mongolia conduct an appointment process where different branches of the state have the right to respectively nominate a certain number

8 Due to changes made to the Constitutional Court of Turkey in 1982, the AACC Member Fact File of the Constitutional Court of Turkey understandably provides case statistics starting from 1982. Therefore the information on the time of establishment for this institution listed in this book is presented as 1961/1982.

9 See *Section A1. History* of the AACC Member Fact File of the Supreme Court of Pakistan.

of candidates. Other systems of judicial appointment also exist within the AACC context, such as with the involvement of a specialised commission, for example in Pakistan and the Philippines.

Other aspects of judicial appointment can be subject to fruitful comparative research. For example, some AACC member institutions impose requirements for a relatively diverse professional background for members of the bench, such as in Thailand. In the context of the term of office, some AACC member institutions have a term limit of 5 years, such as in Myanmar, whereas others provide for a term of 12 years, such as in Turkey. Whether fixed terms are renewable is another issue of interest. Other AACC institutions do not specify a fixed term, and instead impose a fixed retirement age, such as in Malaysia. Interestingly, at some institutions the term of office for the Chief Justice or equivalent is shorter than that of the other members of the bench. Two examples are Indonesia and the Kyrgyz Republic. The above are just a selection of examples. For further details, see Table 2.

Whether a dedicated department of constitutional research exists, and how many research staff are employed, vary from institution to institution across the world. That is also the case within the AACC context. Prominent examples of the existence of large numbers of research staff, who are directly involved in assisting the process of constitutional adjudication, are the Constitutional Court of Korea and the Constitutional Court of Turkey. Taking the Constitutional Court of Korea as an example, around 64 Constitution Research Officers (CRO), also known as Rapporteur Judges (hereafter Rapporteur Judges), assist the Justices in the delivery of judgements. Some of them are directly allocated to work with individual Justices, while others are not assigned to Justices and instead work within specific groups focusing on a certain subject area, such as civil liberties, property rights or social rights. The Rapporteur Judges are also organized separately from the Secretariat of the Constitutional Court of Korea. This is in contrast, for example, to the organization of constitutional research at the Constitutional Court of Indonesia. In Indonesia, staff directly engaged in constitutional research are called Researchers, and they operate within the organizational unit called the Research Center. This Research Center itself operates under the authority of the Secretary General of the Constitutional Court of Indonesia. Another point of contrast is that Researchers at the Constitutional Court of Indonesia are respectively assigned to work with one particular Justice, two Researchers are assigned to each Justice.

It is clear that the English translations for the terminology used for similar functional units of constitutional courts across the world can be very different. This is also apparent within the AACC. As evident from the above, the English terminology used for staff engaged in research can vary. Reading through the *AACC Member Fact Files* one will find further differences in organizational terminology. For example, the title given to the most senior public officer assisting the institution's Chief Justice (or equivalent) with the administration of the court can differ from AACC member to AACC member. They include terminology such as the Secretary General (e.g. Korea), the Chief Registrar (e.g. Malaysia), or the Clerk of Court En Banc (e.g. the Philippines). Such differences in terminology of course may reflect differences in qualifications and functions, and also express varying nuances on account of different legal traditions. One must therefore be aware of the range of, as well as the background to differing terminology for similar (and/or equivalent) organizational units. Terminology matters. This is also especially the case when conducting comparative research on the jurisdictions enjoyed by institutions of constitutional justice.

3.3 Appreciating jurisdictional diversity

Readers of the fact files in this book who keep broad definitions of constitutional jurisdictions in mind will notice that across the AACC, the majority of member institutions enjoy the powers of abstract review and the resolution of competence disputes. Individual access to constitutional justice also ranks relatively high. A significant number of members also exercise the powers of concrete review, or what may be

described as an equivalent function. However, only a minority of AACC members exercises the power of impeachment or party dissolution. In addition, some AACC members have unique approaches, at least within the AACC context, to protecting fundamental rights and constitutional justice. One prominent example is the *amparo* in the Philippines, which is a characteristic not directly shared by other AACC members, but which is shared by the Constitutional Court of Spain and many judicial institutions in Latin America. Since AACC members include civil law and common law members, as well as members who operate in what may be described as hybrid environments, the functional comparison of constitutional jurisdictions must be taken with care.

Also, as mentioned earlier in Section 2.3 and in Section 3.2, the complexity of finding the most fitting terminology can affect the accuracy of making a precise functional comparison. Therefore as a first step, Table 3 provides an overview of jurisdictions of AACC members as described by AACC members themselves in their respective fact files. Conducting comparative analysis of specific jurisdictions across AACC members is an immediate future task of AACC SRD. Future AACC SRD Research Conferences may systematically analyse functionally equivalent jurisdictions of AACC member institutions, and precisely and accurately present in detail the practical similarities and differences. Such an undertaking fulfils the dual task of AACC SRD as discussed in Section 1 of this chapter: Connecting AACC members by fostering deeper mutual understanding, and developing research material that is of interest to the global research community.

Comparative study of available jurisdictions in the AACC may be of particular interest in the following contexts. If one institution of constitutional justice is currently seeking to transition from one type to another, such as transitioning from a commission to a constitutional court, gaining a comprehensive overview of the powers of a variety of other similar institutions operating in similar environments will be of great benefit. Another example would be where an institution may be in the process of expanding or modifying its available jurisdictions. This may be in the context of introducing one particular jurisdiction such as impeachment or party dissolution. Furthermore, expanding jurisdictions may involve efforts to strengthen a certain aspect of constitutional justice as a whole, such as improving individual access to constitutional justice. Drawing on such information and experiences across AACC members, the comparative study of constitutional jurisdictions can extend to observing the range of protected fundamental rights and the application of specific legal doctrines and constitutional principles.

Appreciating the diversity of constitutional jurisdictions also entails the understanding of different effects of the decisions of AACC member institutions, as well as the range of available remedies. AACC SRD therefore encouraged AACC members to use the fact file template provided by AACC SRD, which contains a specific section detailing the effects of decisions. Some AACC members have utilised this template, while others have explained the effects of their decisions in other sections of their respective fact files. One key issue in this context is, for example, the power to issue judgements proclaiming conditional constitutionality or conditional unconstitutionality. Institutions which are able to render such judgements may have experienced both the advantages as well as disadvantages of such powers. This subject can therefore be another theme for in-depth research at AACC SRD in the future. Theoretical advantages and disadvantages can be explored in conjunction with the concrete practical experiences of AACC member institutions who exercise the power to render such decisions. Again, this book can provide a good starting point for comparative research in this field within the AACC context.

The above suggestions for research are just examples. Readers who thoroughly engage with the wealth of materials available in this book will be able to find various other potential research themes. That is also the task of AACC SRD. In producing this book, AACC SRD has established its own foundational materials for further research, as well as having taken further steps in connecting AACC members and in providing a useful resource for the global research community.

PART B.

AACC MEMBERS: COMPARATIVE TABLES

Table 1. Overview of AACC member institutions

State	AACC member institution	Year established[10]	No. of Justices or equivalent
Afghanistan	Independent Commission for Overseeing the Implementation of the Constitution (ICOIC)	2010	7
Azerbaijan	Constitutional Court	1998	9
Indonesia	Constitutional Court	2003	9
Kazakhstan	Constitutional Council	1996	7
Korea, Rep.	Constitutional Court	1988	9
Kyrgyz Rep.	Constitutional Chamber of the Supreme Court	2013	11
Malaysia	Federal Court	1994	14
Mongolia	Constitutional Court[11]	1992	9
Myanmar	Constitutional Tribunal of the Union	2011	9
Pakistan	Supreme Court	1956	17
Philippines	Supreme Court	1901	15
Russia	Constitutional Court	1991	19
Tajikistan	Constitutional Court	1995	7
Thailand	Constitutional Court	1997/2007	9
Turkey	Constitutional Court	1961/1982	15
Uzbekistan	Constitutional Court	1995	7

Table 2. Judicial appointment procedures and terms of office

AACC Member	Appointment procedure	Term of office[12]
Afghanistan: ICOIC	*President:* Elected internally by the majority votes of the ICOIC members	4 years
	Members: By the State President with the endorsement by the House of the People	4 years
Azerbaijan: Constitutional Court	*Chairperson:* By the State President from among the Constitutional Court Justices	15 years
	Justices: By the Parliament upon the submission of the State President	15 years

[10] Thailand: Even though the Constitutional Court of Thailand was first established in 1997, the current Constitutional Court of Thailand was established in 2007 and retains its functions under the 2017 Constitution. For Thailand's AACC Member Fact File section on case statistics since establishment, the Constitutional Court of Thailand provides statistics starting from 1997. Turkey: Due to changes made to the Constitutional Court of Turkey in 1982, the AACC fact file of the Constitutional Court of Turkey understandably provides case statistics starting from 1982. Therefore the information on the time of establishment for this institution listed in this book is presented as 1961/1982.

[11] Also known as the Constitutional Tsets.

[12] Mandatory retirement ages, if any, are only included in this table in the absence of a specified time period for the term of office. Please refer to the respective fact files for further details.

AACC Member	Appointment procedure	Term of office
Indonesia: Constitutional Court	*Chief Justice:* Elected from and by the Constitutional Court Justices	2 years and 6 months
	Justices: Designated by the State President, 3 proposed by the Supreme Court, 3 by the People's Representative Council, and 3 by the State President	5 years
Kazakhstan: Constitutional Council	*Chairperson:* By decree of the State President	6 years
	Members: 2 by the State President, 2 by the Upper House of Parliament (Senate), 2 by the Lower House of Parliament (Majilis)	6 years
Korea, Rep.: Constitutional Court	*President:* By the State President from among the Constitutional Court Justices, with the consent of the National Assembly	Not defined[13]
	Justices: All 9 Justices are appointed by the State President, but among them 3 are selected by the National Assembly and 3 are nominated by the Supreme Court Chief Justice	6 years
Kyrgyz Rep.: Constitutional Chamber of the Supreme Court	*Chairperson:* Elected by and from among the Judges of the Constitutional Chamber	3 years
	Judges: Elected by Parliament on the representation of the State President, based on the competitive selection by the Council on the Selection of Judges	7 years
Malaysia: Federal Court	*Chief Justice and Justices:* By the King (Yang di-Pertuan Agong), acting on the advice of the Prime Minister, after consulting the Conference of the Rulers	Retirement at 66 years of age
Mongolia: Constitutional Court	*Chairperson:* Elected by and from among the Constitutional Court Members	3 years
	Justices: The State Great Hural (Parliament) shall appoint 9 members of the Court upon the nomination of 3 candidates by the State Great Hural, 3 candidates by the State President, and remaining 3 candidates by the Supreme Court	6 years
Myanmar: Constitutional Tribunal	*Chairperson:* State President, with the approval of the Union Parliament (Pyidaungsu Hluttaw), chooses from among the members of the Constitutional Tribunal	5 years

[13] The term for the President of the Constitutional Court of Korea is neither specifically defined in the Constitution nor in the relevant legislation. Since the President of the Constitutional Court simultaneously serves as a Justice of the Court, the term as President of the Court is usually interpreted as matching the term he/she serves as a Justice of the Court.

AACC Member	Appointment procedure	Term of office
	Members: State President submits a candidate list to the Union Parliament (Pyidaungsu Hluttaw) for approval, candidates being 3 chosen by the State President, 3 by the Speaker of the Lower House of Parliament (Pyithu Hluttaw), and 3 by the Speaker of the Upper House of Parliament (Amyotha Hluttaw)	5 years
Pakistan: Supreme Court	*Chief Justice:* State President appoints the most senior Judge of the Supreme Court as Chief Justice of Pakistan	Retirement at 65 years of age
	Judges: By the State President via the appointment procedures of the Judicial Commission of Pakistan	Retirement at 65 years of age
Philippines: Supreme Court	*Chief Justice and Justices:* By the State President from a list of at least three nominees prepared by the Judicial and Bar Council for every vacancy	Retirement at 70 years of age
Russia: Constitutional Court	*President:* By the Council of the Federation from amongst the members of the Constitutional Court upon nomination put forward by the State President	6 years
	Judges: By the Council of the Federation through a secret ballot upon nomination put forward by the State President	Retirement at 70 years of age
Tajikistan: Constitutional Court	*Chairperson and Justices:* Elected by the Majlisi Milli (upper chamber of Parliament) on representation of the State President	10 years
Thailand: Constitutional Court	*President*: Elected from and by the Justices of the Constitutional Court, appointed by the King with the counter-signature of the President of the Senate	7 years
	Justices: By the King, from 5 persons via election and 4 persons via selection - Election: 3 senior and experienced judges from the Supreme Court (internal election), 2 experienced judges from the Supreme Administrative Court (internal election) - Selection by the Selection Committee for Justices of the Constitutional Court: 1 qualified and experienced person from legal academia, 1 qualified and experienced person from political science or public administration academia, 2 qualified persons obtained by selection from persons holding or having held a position not lower than Director-General or a position equivalent to a head of government agency, or a position not lower than Deputy Attorney General	7 years

AACC Member	Appointment procedure	Term of office
Turkey: Constitutional Court	*President:* Elected from and by the members of the Constitutional Court by absolute majority *Justices*: 3 via election by Parliament and 12 via appointment by the State President - Elected by Parliament: 2 from and nominated by the Court of Accounts (three candidates for each vacancy); 1 nominated by the heads of the bar associations from among self-employed attorneys (three candidates) - Appointed by the State President: 3 from and nominated by the Court of Cassation (three candidates for each vacancy); 2 from and nominated by the Council of State (three candidates for each vacancy); 3 nominated by the Council of Higher Education from among the teaching staff in the fields of law, economics and political science; 4 from among high level executives, self-employed attorneys, senior judges and public prosecutors, or rapporteurs (at least five years' experience at the Constitutional Court)	4 years 12 years
Uzbekistan: Constitutional Court	*Chairperson and Judges:* By the Senate (upper house of the Supreme Assembly), upon the representation by the State President of candidates from legal and political science academia	5 years

Table 3. Jurisdictions

AACC Member	Jurisdictions / powers / authorities / obligations[14]
Afghanistan: ICOIC	1. Interpretation of the Constitution, at the request of the President, National Assembly, Supreme Court and the Government 2. Overseeing the compliance of the actions of the President, Government, National Assembly, Judiciary, Offices, Governmental and Non-governmental institutions with the provisions of the Constitution 3. Providing legal advice in case of issues arising from the Constitution to the President and National Assembly 4. The study of laws for finding out their contradictions with the Constitution and to present the findings to the President and National Assembly in order to take necessary measures for their elimination

[14] This table comprehensively compiles a list of constitutional jurisdictions, sometimes referred to as powers, authorities or obligations, of AACC member institutions as indicated in the Fact Files. Terminology is closely aligned with the headings and subheadings of the relevant sections of the submitted Fact Files or reflect relevant legal provisions. Further in-depth research on jurisdictions of AACC members is a key future task of AACC SRD.

AACC Member	Jurisdictions / powers / authorities / obligations
	5. Presenting specific proposals to the President and National Assembly in regards to taking necessary measures concerning the development of legislation in cases where the Constitution has ruled 6. Presenting the report to the President in the event of violation from the provisions of the Constitution 7. Approval of by-laws and relevant guidelines
Azerbaijan: Constitutional Court	1. Constitutional review of legislation 2. Disputes over compatibility of laws and rules and regulations with the rules of higher hierarchy 3. Impeachment 4. Competence disputes between legislative, executive and judicial powers 5. Review and confirmation of the results of elections of President and Parliament of the Republic of Azerbaijan 6. Constitutional complaint
Indonesia: Constitutional Court	1. The review of laws against the Constitution 2. Competence dispute 3. Dissolution of political parties 4. Disputes concerning the results of general elections 5. Opinion of the DPR on the allegation of violation committed by the President and/or the Vice President
Kazakhstan: Constitutional Council	1. Official interpretation of norms of the Constitution 2. Review of the constitutionality of laws passed by the Parliament before they are signed by the President, as well as international treaties prior to their ratification 3. Consideration on compliance with the Constitution of resolutions of the Parliament and its Chambers 4. Consideration of appeals of courts which find that a law or other normative legal act has infringed the constitutional rights and freedoms of the person and citizen 5. Decision on disputes over the correctness of conducting the elections of the President of the Republic, deputies of Parliament, and nation-wide referendum 6. Issuing a judgment on the observance of the established constitutional processes in case of early release or dismissal from a position of the President of the Republic 7. Consideration of the appeal for passing of the additional resolution and initiation of review of earlier passed resolution of the Constitutional Council 8. Passing by the Constitutional Council of the address on constitutional legality in the Republic to the Parliament

AACC Member	Jurisdictions / powers / authorities / obligations
Korea, Rep.: Constitutional Court	1. Constitutional review of legislation 2. Impeachment 3. Dissolution of a political party 4. Competence dispute 5. Constitutional complaint
Kyrgyz Rep.: Constitutional Chamber of the Supreme Court	1. Constitutional oversight of the laws and other normative regulatory acts 2. Constitutional oversight of the international agreements which have not entered into force for the Kyrgyz Republic 3. Constitutional oversight of the draft law on changes to the Constitution
Malaysia: Federal Court	1. Original jurisdiction a) Determining the validity of legislation b) Deciding over disputes between the States of the Federation or between the Federation and a State 2. Appellate jurisdiction 3. Referral jurisdiction 4. Advisory jurisdiction
Mongolia: Constitutional Court	1. Whether or not the laws, decrees or other decisions by the State Great Hural or by the President, as well as the Government decisions and international treaties to which Mongolia is a State Party, are in conformity with the Constitution 2. Whether or not the national referendums or any decisions by the Central Electoral Authority regarding the elections to the State Great Hural or its members and to the President, are in conformity with the Constitution 3. Whether or not the President, the Speaker or members of the State Great Hural, the Prime Minister or the members of the Government, the Chief Justice, or the Prosecutor General, have committed a breach of the Constitution 4. Whether or not there is justification for removal of the President, the Speaker of the State Great Hural and the Prime Minister, and for the recall of the members of the State Great Hural

AACC Member	Jurisdictions / powers / authorities / obligations
Myanmar: Constitutional Tribunal	1. To interpret the provisions under the Constitution 2. To vet 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 3. To vet 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 4. To decide 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 a Self-Administered Area and among the Self-Administered Areas 5. To decide 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 6. To vet and decide matters intimated by the President relating to the Union Territory 7. To perform the functions and duties conferred by laws enacted by the Pyidaungsu Hluttaw
Pakistan: Supreme Court	1. Original jurisdiction a) Resolution of competence disputes b) Enforcement of fundamental rights as prescribed by Art. 184(3) of the Constitution 2. Appellate jurisdiction 3. Advisory jurisdiction 4. Power to transfer cases 5. Issue and execute binding directions, orders or decrees
Philippines: Supreme Court	1. Exercise original jurisdiction over cases affecting ambassadors, other public ministers and consuls, and over petitions for *certiorari*, prohibition, *mandamus*, *quo warranto*, and *habeas corpus* 2. Review, revise, reverse, modify, or affirm on appeal or certiorari, as the law or the Rules of Court may provide, final judgments and orders of lower courts in: a) All cases in which the constitutionality or validity of any treaty, international or executive agreement, law, presidential decree, proclamation, order, instruction, ordinance, or regulation is in question b) All cases involving the legality of any tax, impost, assessment, or toll, or any penalty imposed in relation thereto c) All cases in which the jurisdiction of any lower court is in issue d) All criminal cases in which the penalty imposed is *reclusion perpetua* or higher e) All cases in which only an error or question of law is involved

AACC Member	Jurisdictions / powers / authorities / obligations
Russia: Constitutional Court	1. Reviews laws and normative acts, internal treaties, and international treaties which have not yet entered into force 2. Resolves competence disputes 3. Upon complaints on violation of constitutional rights and freedoms reviews the constitutionality of a law applied by a court in a particular case where a judicial decision entered into force 4. Upon requests of courts reviews the constitutionality of a law subject to be applied by the respective court in a particular case 5. Official interpretation of the Constitution of the Russian Federation 6. Adopts opinion on the observance of a prescribed procedure for charging the President of the Russian Federation with the high treason or with commission of another grave crime 7. Resolves the question of the possibility to execute a decision of an interstate body for the protection of human rights and freedoms 8. Reviews the constitutional conformity of referenda
Tajikistan Constitutional Court	1. Review laws, legislative resolutions, and normative legal acts 2. Review international treaties which have not yet entered into force 3. Review proposed changes and amendments to the Constitution, and bills and other issues submitted for national referendum 4. Applications by citizens, who see their constitutional rights and freedoms violated, to review the constitutional conformity of the relevant law, other legal act, or governing explanations of the plenums of the Supreme Court and the Higher Economic Court, used by state or public bodies, and courts in a particular case 5. Exercise of other powers defined by the Constitution, the Constitutional Law and other legislative acts 6. Resolve competence disputes between the government authorities
Thailand: Constitutional Court	1. To consider and adjudicate on the constitutionality of a law or bill 2. To consider and adjudicate on a question regarding duties and powers of the House of Representatives, the Senate, the National Assembly, the Council of Ministers or Independent Organs 3. Other duties and powers: protection of people's rights and liberties 4. Other duties and powers: consideration and adjudication on qualifications of the person holding a political position

AACC Member	Jurisdictions / powers / authorities / obligations
Turkey: Constitutional Court	1. Constitutional review of legislation 2. Individual application 3. Dissolution of political parties 4. Financial audit of political parties 5. Trying the President, Ministers, and other high-level State Officials for Offences related to the Office 6. Review of the lift of Parliamentary immunity
Uzbekistan: Constitutional Court	1. Review compliance with the Constitution of Uzbekistan of laws and legislative resolutions, decrees of the President of the Republic, enactments of the government and local bodies of state authority, interstate treaties and other obligations of Uzbekistan 2. Review compliance of the Constitution of Karakalpakstan to the Constitution of Uzbekistan, and the laws of Karakalpakstan to laws of Uzbekistan 3. Interpret the norms of the Constitution and laws of Uzbekistan 4. Hear other cases relating to its competence in accordance with the Constitution and laws of Uzbekistan

PART C.

AACC MEMBERS: FACT FILES

1. Afghanistan

Independent Commission for Overseeing the Implementation of the Constitution (ICOIC)

Summary

Established in 2010, the Independent Commission for Overseeing the Implementation of the Constitution (ICOIC) of Afghanistan has 7 members. They are nominated by the President of the Republic and receive a vote of confidence from the legislature. The ICOIC President is elected from and via the members through internal elections and serves for a period of 4 years. Each ICOIC member also heads up a respective department. In addition to the General Secretariat, there are 6 professional departments. Access to the ICOIC is only permitted to an enumerated number of state institutions. The jurisdictions of the ICOIC are the following: To interpret the constitution at the request of the President of the Republic, the National Assembly, the Supreme Court, and government; to oversee the compliance of governmental and non-governmental institutions with the provisions of the Constitution; to provide legal advice to the President and National Assembly in relations to constitutional matters; to conduct research, for example finding contradictions of laws with the Constitution and suggest measures to resolve such contradictions; present specific proposals concerning the development of legislation in response to rulings regarding the Constitution; reporting to the President in the event of violations of constitutional provisions; and the approval of by-laws and relevant guidelines.

Content

A. Introduction

A1. History

Independent Commission for Overseeing the Implementation of the Constitution of Afghanistan (ICOIC) was established within the state of the Islamic Republic of Afghanistan in 2010 and it is fully independent in its activities. The ICOIC's goal is to intensify and institutionalize a constitutional-state-based regime. For achieving this goal, the ICOIC according to the provisions of the Constitution oversees compliance of actions of the state President, the three branches of the government, and all governmental and non-governmental institutions with the provisions of the Constitution.

A2. Basic Texts

The basis for the Independent Commission for Overseeing the Implementation of the Constitution (ICOIC) is Article 157 of Afghanistan's Constitution, according to which the independent commission for supervision of the implementation of the constitution shall be established in according with the provisions of the law. Members of this commission shall be appointed by the state President with the endorsement of the House of People.

ICOIC since its establishment functions in accordance by its own law.

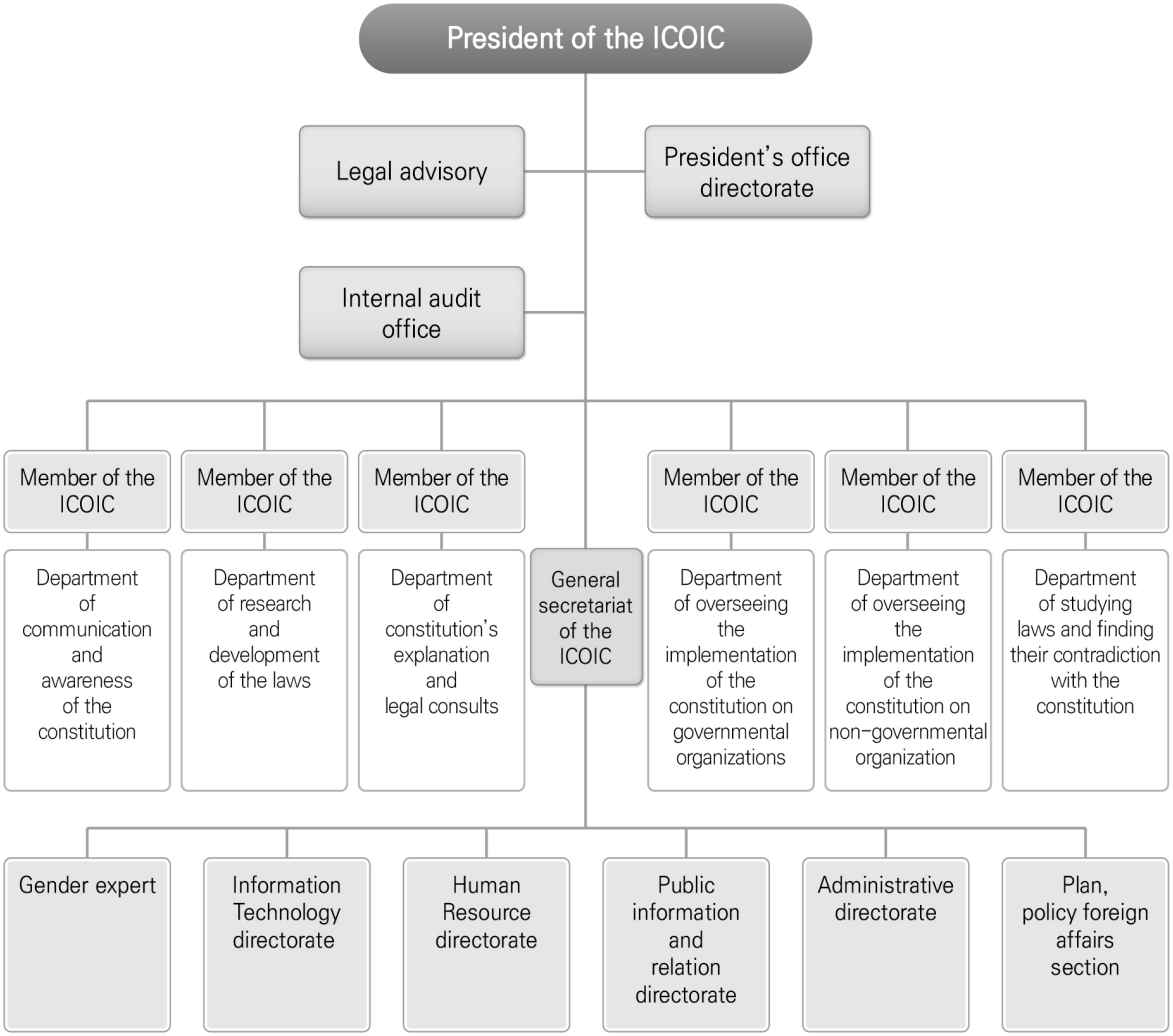
This law which has been endorsed by parliament, contains 17 Articles.

The Commission is independent and functions in accordance with the Constitution, within the framework of the state of the Islamic Republic of Afghanistan.

In accordance with this law the Commission has seven members.

The members are nominated by the state President and receive a vote of confidence from the parliament.

B. Organization



B1. President

The President of the ICOIC is elected through internal election for the period of 4 years.

The President of the ICOIC is elected through internal elections by the majority votes of the members. The President of the ICOIC chairs the Council of members.

The President represents the ICOIC in external and internal meeting sessions in international forums. He also chairs the regular and extraordinary sessions of the ICOIC.

He is in charge of the budget and has certain power in appointing and promoting administrative staff of the ICOIC.

The ICOIC has a Deputy President and a Secretary, who are elected through a secret voting process with the majority votes of the ICOIC members. The Deputy President and the Secretary are elected for one year each. The Deputy President and the Secretary can be nominated for the subsequent year.

The Deputy President and the Secretary can be dismissed from their duties in the following cases:

- Inability to perform his/her duties.
- Non-execution of their duties on time.

Limits on responsibility and authority of the President, Deputy President and the Secretary are determined in the terms of reference of the ICOIC.

B2. Members

According to Clause 1, Article 4 of the ICOIC law, the Commission, including its President consists of seven members, including both men and women, who are appointed by the Afghan President with the endorsement of the House of People.

The men or women who are appointed as a member of the ICOIC shall have the following qualifications:

1. Shall be a citizen of Afghanistan.
2. Shall have higher education in legal studies or Islamic jurisprudence in level of master or its equivalent.
3. At least 5 years equal practical work experience.
4. Well-known background.
5. 35 years old.
6. Shall not have been convicted by court, for crimes against humanity, crimes or deprivation of civil rights.
7. Shall not be member of any political parties and organizations during his term of duty.

Member of the ICOIC will lose his/her membership in the following conditions:

1. In cases of incurable and durable illness which prevent performance of duties or losing the civil rights.
2. Written resignation and its acceptance by Afghan President.
3. Employment in other duties during the membership of the Commission (teaching in higher education institutes is exempted from this provision).
4. In case of violation from one of conditions in Article 5 of this law.
5. In case of abuse of official position and disobedience of duty and successive excuse accordance with the domestic duties rules.

ICOIC promotes its functions through six professional departments. Each department is chaired by the head of department and its experts. Each department in accordance with its regulations oversees the implementation of the Constitution by the President, Government, National Assembly, Supreme Court and other governmental and non-governmental institutions and also they provide legal advice and consultation to the President and National Assembly in connection to the Constitution, moreover present specific proposals to the President in connection to the promoting of the laws. The most important function of the ICOIC is to present a report to the President when coming across violations and non-applications of any provision of the Constitution. The following personalities and institutions can refer cases of constitutional points to the ICOIC.

1. The President
2. Parliament

3. Supreme Court
4. Human Rights Independent Commission
5. The Administrative Reform Commission
6. Independent Election Commission

One of these important cases which was sent to the ICOIC by the President was on election problems in the general election for the Parliament, which was delayed due to security problems.

ICOIC resolved the problem which was created by the two chambers of the Parliament, as a result of the ICOIC advice. Now the elections of the National Assembly will go ahead.

ICOIC is trying now to amend its law, so that the ICOIC will be able to review and consider private applications involving the non-application and violation of the Constitution.

The ICOIC in order to promote its administrative functions has a Secretariat headed by the General Director.

The staff of the ICOIC are employed through a merit-based competitive procedure.

B3. The ICOIC Professional Departments

To carry out professional affairs, the ICOIC has six professional departments. Each of the professional departments is led by a member of the ICOIC.

The professional departments are as follows:

- **Department of Overseeing the Implementation of the Constitution in Government Institutions:** Oversight of the centres and places deprived of liberty in 23 provinces of the country in regards to observation of the fundamental rights of the citizens enshrined in the Constitution. Presenting report of 72 cases of violation of fundamental rights of the citizens (enshrined in chapter two of the constitution) in some of the centres and places deprived of liberty to the Commission and to the President's Office of the Islamic Republic of Afghanistan. Oversight of the health and educational sectors in Kabul and Provinces in order to observe the implementation of the provisions of the Constitution.

- **Department of Overseeing the Implementation of the Constitution in Organizations and Non-governmental Institutions:** Oversight of the implementation of the provisions of the Constitution in 107 organizations and non-governmental offices which includes health centres, higher education institutes, teacher training centres and institutes, schools, social organizations, NGOs, law firms, and private companies. In total, 453 cases of violations of the provisions of the Constitution were identified and specific recommendations in order to prevent the repetition of such violations were given to the authorized relevant authorities.

- **Department of the Explanation of the Constitution and Legal Advice:** Presenting of 80 opinions and legal advice in regards to the issues arising from the Constitution to the President's Office, National Assembly, Judiciary, Independent Human Rights Commission, Independent Administrative Reform and Civil Service Commission and Independent Election Commission based on the ICOIC Law.

- **Department of Research and Law Development:** Presenting proposals for codification, adjustment and modification of 20 forecast laws in the Constitution

to the relevant departments to further strengthen the rule of law, which fortunately, a number of them are passed by the Parliament.

- **Department of Studying Laws and Finding of the Contradictions against the Constitution:** Finding of 33 cases of contradiction in the statutory laws, regulations and uniform circulars against the provisions of the Constitution. To eliminate such problems, the cases of contradiction, at the instruction of the ICOIC, were reported to the relevant authorities.

- **Department of Communication and Constitutional Awareness:** Launching of workshops concerning constitutional awareness in 11 provinces and 31 central Bureaus. A number of thirteen thousand individuals were directly acquainted by these workshops with the benefits, rights, protection as well as other values and principles enshrined in the constitution. Distribution of 150 constitution booklets, 1200 of constitutional journals and 2300 constitutional year books to the various governmental and non-governmental institutions.

B4. General Secretariat of the ICOIC

General Secretariat is made to carry out the administrative affairs of the Commission.

General Secretariat carries out its duties according to the provisions of the law and the ICOIC internal procedure which is approved by the ICOIC.

General Secretariat is made of Human Resource Department, Planning Department, Finance and Administrative Department, Department of Public Information and Communication, Department of Information Technology, Department of General Registry and Communication, and Gender Specialist.

C. Jurisdictions

According to Article 8 of the ICOIC law, the ICOIC has the following duties and authorities in order to provide a better oversight of the implementation of the Constitution:

1. Interpretation of the Constitution, at the request of the President, National Assembly, Supreme Court and the Government;
2. Overseeing the compliance of the actions of the President, Government, National Assembly, Judiciary, Offices, governmental and non-governmental institutions with the provisions of the Constitution;
3. Providing legal advice in case of issues arising from the Constitution to the President and National Assembly;
4. The study of laws for finding out their contradictions with the Constitution and to present the findings to the President and National Assembly in order to take necessary measures for their elimination;
5. Presenting specific proposals to the President and National Assembly in regards to taking necessary measures concerning the development of legislation in cases where the Constitution has ruled;
6. Presenting the report to the President in the event of violation from the provisions of the Constitution;
7. Approval of by-laws and relevant guidelines.

Annex: Examples of issues dealt with by the ICOIC

Election issues 2016

The following is in regard to issues of election which caused friction between two organs of the state in Afghanistan.

When Parliament was considering an amendment of the election law, a question was raised on the legal status of procedural election law (the Law on the Organization, Duties and Competence of Election Commission) querying whether it is a distinct law separate from the main election law or whether they are part and parcel of each other?

It should be noted that the election of the Lower House of the Parliament was not held on time as provided by Article 83 of the Constitution which states:

"The work period of the House of People shall terminate, after the disclosure of the result of election, on the first Saratan (22nd July) of the fifth year and the new parliament shall commence work."

It should be noted that the situation in the country in recent years was so dramatically changed making the government unable to hold election on time.

Looking at words of the above article of the Constitution though it sets the date of election, subsequent words describe that the term of office of the delegates ends following the declaration of the results of the newly held election.

The said paragraph, obviously guarantees the continuation of the work of the legislative organ of the state, disallowing non-existence of one organ of the state even for a short period.

The President had no choice but to extend the term of office of the MPs.

The situation then improved in the country and the government decided to hold election, issued a legislative decree and brought some changes in the procedural election law (the Organization, Duties and Competence of the Independent Election Commission).

In accordance with Article 109 of the Constitution any amendment to the election law cannot be remitted to the Parliament in the last year of the MPs term of office.

The members of the Parliament argued that procedural election law is a distinct law and it does not come within the meaning of the above article of the Constitution and hence it should be remitted to the Parliament.

The case was referred to the ICOIC for the expression of legal opinion.

The facts of the case were as follows:

The government issued a legislative decree on procedural election law amending a number of its provisions.

The amendment law was remitted to Parliament.

The Lower House rejected the amendment and the Upper House endorsed it. The joint committee did not reach to any conclusion.

Article 100 of the Constitution provides:

“If one house rejects decisions of the other, a joint commission composed of an equal number of members from each house shall be formed to solve the difference.

The decision of the commission, after endorsement by the President, shall be enforced.

If the joint commission does not solve the difference, the decision shall be considered rejected. In such a situation, the House of the People shall pass it with two-third majority in its next session.”

The case was remitted to the ICOIC for expression of opinion in the light of Constitution.

The ICOIC stated that as the above article of the Constitution quite specifically provides that if the joint committee does not reach any conclusion, then the bill or, in this case the legislative decree, shall be regarded as rejected and hence the Government is free to issue another legislative decree.

The last clause of article 100 does not apply on this case as the Lower House (House of People) by no decision of the joint committee has already reached to their aim which was 'Rejection' of the decree, therefore there is no need for further voting on the bill as stated in the last clause of article 100.

The ICOIC further stated that as the parliamentarians are in the last year of their term of office the new legislative decree on the basis of article 109 of the Constitution cannot be included in the work agenda of this Parliament. The ICOIC added that the substantive and organizational laws are both election laws and are part and parcel of each other.

The ICOIC further stated that the first legislative decree should not have been sent to the Parliament or included in the list of their work agenda.

As a result of ICOIC’s expression of opinion the President issued another legislative decree on the election and now the Independent Election Commission is working to hold parliamentary election in a few months’ time.

Inquiries of ministers by the legislature

One of the other problematic issues which caused friction between the two organs of the state during the past year is the issue of summoning, questioning and impeaching the government ministers and other officials by the Parliament.

The Afghan Constitution in Article 92 provides:

"The House of people, on the proposal of twenty percent of all the members, shall make inquiries from each Minister:

If the explanations given are not satisfactory, the House of People shall consider the issue of no-confidence vote.

The no-confidence vote on a Minister shall be explicit, direct, as well as based on convincing reasons. The vote shall be approved by the majority of all members of the House of People.”

Considering this article four points can be noted:

1. The words, “each Minister” obviously means that the inquiries restricted to only Ministers, and no other officials of the government can be subjected to the issue of no confidence vote.
2. The sentence “on the proposal of twenty percent of all members" in particular the word “all". Whether it means all members should be present during the voting for no-confidence vote and for that matter when a request for inquiry from a minister is on issue the twenty percent of the figure 249 members (composition of the House of people) should be present?
3. Regarding the words ‘The no-confidence vote shall be explicit, direct, as well as based on convincing reasons’, the question here is who is to consider and decide that the above essentials are met? The Parliament or other organs of the State?
4. Who is authorized to remit such issues for consideration to the relevant legal authorities?

The first question, on whether other officials apart from ministers can be summoned by the House of People and subjected to the inquiries within the meaning of article 92 of the Constitution or ministers only, was remitted to the ICOIC by the office of the President.

This situation arose when the House summoned the Attorney General for inquiries.

The terminology of the question was as follows:

Which authorities, in considering of article 92 of the Constitution, can be subjected to inquiries including impeachment, by the House of People?

The ICOIC stated that despite the fact that Article 92 of the Constitution has given to the commissions of both House the power of questioning the Government members, Article 103 of the Constitution clarifies the situation and states that both Houses of Parliament can summon the Government members.

Meanwhile Article 71 of the Constitution considers Government to be composed of ministers who under the chairmanship of the President discharge their duties. Therefore, the Houses of the Parliament have no power to summon the Attorney General.

Although article 92 of the Constitution has empowered the Lower House of the Parliament to impeach ministers and withdraw their vote of confidences, to broaden the above provision to cover other officials of the government, has no base in the constitution.

The ICOIC further stated and said: as the Attorney General Office is an independent organ of the State and conduct their activities independently, hence their activities cannot be questioned by other organs. Moreover, the Attorney General office discharges quasi-judicial functions similar to the judiciary. Therefore, no one to be allowed to interfere in their functions.

The first question which proved to be problematic has not yet been resolved. The practice of the parliament continues to be of the majority of the figure 249 (the composition of the House) to be present during the voting.

Constitutional justice

In Constitutional Justice the concept of the rule of law is explained and defended as an ideal of constitutionalism, and the general principles of public law are set in the broader

perspective of legal and political philosophy. Here one should seek to identify the common elements of a shared constitutional framework that provides the foundations in each case of a liberal democratic legal order.

The common foundations include certain constraints in the exercise of state power. These constraints are embodied in the relationship between citizens and state, including freedom of speech and conscience, civil disobedience, procedural fairness, administrative justice, the right of silence, and equal protection of equality before the law.

Legislative supremacy is qualified by a counter balancing judicial sovereignty, ensuring the protection of procedural fairness and equality.

Obviously most of the constitutions, in theory embody the above qualities. However, Constitutional justice emphasizes actual implementation. Here the role of constitutional courts, and for the purpose of Afghanistan the ICOIC, becomes obvious. These institutions are the guarantor of constitutional justice.

2. Azerbaijan

Constitutional Court

Summary

The Constitutional Court of Azerbaijan was established in 1998 on the basis of the Constitution adopted in 1995. The Chairperson of the Constitutional Court is appointed by the state President from among the Justices of the Court. Justices are appointed by the Parliament upon submission by the state President. In including the Chairperson, the full bench consists of 9 Justices. The term of office for the Justices is 15 years and may not be renewed, and the retirement age is 70. The final decision making body regarding the administration of the Constitutional Court is the Council of Justices. The total number of staff at the Court is 161. Administrative affairs are managed and supervised by the Secretary General, who works under the direction of the Chairperson of the Court. The Registry of the Court includes Departments responsible for the following areas: Constitutional Law, International Law and International Cooperation, Criminal and Administrative Law, Civil Law, Human Rights and Organizational and Analytical Work, Reception of Citizens and Complaints, Legal Support and Systematization of Legislation, and Protocol and Public Relations. The Constitutional Court of Azerbaijan exercises a wide variety of jurisdictions: 1) Constitutional review of legislation; 2) Resolution of disputes regarding the compatibility of laws and rules and regulations with rules of a higher hierarchy; 3) Impeachment; 4) Competence disputes between the legislative, executive and judicial powers; 5) Review and confirmation of the results of elections of the President and Parliament; 6) Constitutional complaint.

Content

A. Introduction

A1. History

The Constitutional Court of the Republic of Azerbaijan is the supreme body of constitutional justice on the matters attributed to its jurisdiction by the Constitution of the Republic of Azerbaijan. The Constitutional Court is an independent state body and does not depend in its organizational, financial or any other form of activity on any legislative, executive and other judicial bodies, local self-government bodies as well as legal and physical persons. Basic objectives of the Constitutional Court are the ensuring of the supremacy of the Constitution of the Republic of Azerbaijan and protection of individual's fundamental rights and freedoms.

The Constitutional Court was set up on 14 July 1998. The legal basis for the activity of the Constitutional Court is the Constitution of the Republic of Azerbaijan adopted on 12 November 1995 (with modifications introduced as a result of referendum held on 24 August 2002), interstate agreements that Azerbaijan Republic is a party to, Law "On Constitutional Court" adopted on 23 December 2003, other laws and the Rules of Procedure of the Constitutional Court.

Articles 86, 88, 102, 103, 104, 107, 130, 153 and 154 of the Constitution regulate the issues of Court's formation and functioning. The functioning of the Constitutional Court shall be based on the principle of supremacy of the Constitution of the Republic of Azerbaijan as well as principles of independence, collegiality and publicity.

The Constitutional Court adopts decisions on correspondence of laws, decrees and other normative legal acts to the Constitution and laws of the Republic of Azerbaijan. Constitutional Court of the Republic of Azerbaijan gives interpretation of the Constitution and laws of the Republic of Azerbaijan based on petitions of the President of the Republic of Azerbaijan, Parliament of the Republic of Azerbaijan, Cabinet of Ministers of the Republic of Azerbaijan, Supreme Court of the Republic of Azerbaijan, Prosecutor's Office of the Republic of Azerbaijan and Supreme Council of Nakhichevan Autonomous Republic.

The current total number of staff at the Court is 161.

A2. Basic Texts

- Constitution of the Republic of Azerbaijan (enacted 1995, last amended 2016): Article 130
- The Law of the Republic of Azerbaijan on Constitutional Court (lost effect 1997, enacted 2003, last amended on 6 March 2018)

B. Organization

B1. Chairman

Appointed by the President of the Republic from among the Justices of the Constitutional Court, he or she represents the Constitutional Court, takes charge of its

affairs and directs and supervises public employees under his or her authority.

The Chairman of the Constitutional Court chairs the Council of Justices and presides over the Full Bench of the Constitutional Court, establishes the scope of competence of the Vice-Chairman of the Constitutional Court and the composition of chambers. He or she also has authority on personnel management. In case the position becomes vacant due to an unforeseeable event, Vice-Chairman of the Constitutional Court will be acting Chairman according to the procedure set forth in the Constitutional Court Act.

The treatment and remuneration of the Chairman of the Constitutional Court is regulated in the Constitutional Court Act.

B2. Justices

Number of Justices: 9

Appointed by the Parliament of the Republic of Azerbaijan upon submission of the President of the Republic.

The Justices exercise jurisdictions in judgments as a member of either the full bench or a panel. As members of the Council of Justices, they exercise voting rights on important matters concerning the administration of the Constitutional Court.

The term of Justices shall be fifteen years and may not be renewed. The retirement age of a Justice is 70. No Justice can be removed from his or her office against his or her own will, unless impeached or criminally sanctioned with a sentence of imprisonment.

B3. Council of Justices

The final decision making body regarding the administration of the Constitutional Court is the Council of Justices. It is composed of nine Justices, including the Chairman of the Constitutional Court as the Chairman. The Council requires attendance of at least six Justices, and the majority vote to make decisions. The Chairman or any other Justice may put a matter to a vote.

The matters decided by the Council of Justices include matters concerning the enactment and amendment of the Constitutional Court Rules and issues concerning the presentation of opinions on legislation related to the organization, personnel affairs, operation, adjudication procedure and other functions of the Constitutional Court. Examples include determination of official emblem and stamp of the Constitutional Court, dress of the justices, budget requests, and expenditure of reserve funds and settlement of accounts. The Council also decides on other matters brought up by the President of the Constitutional Court.

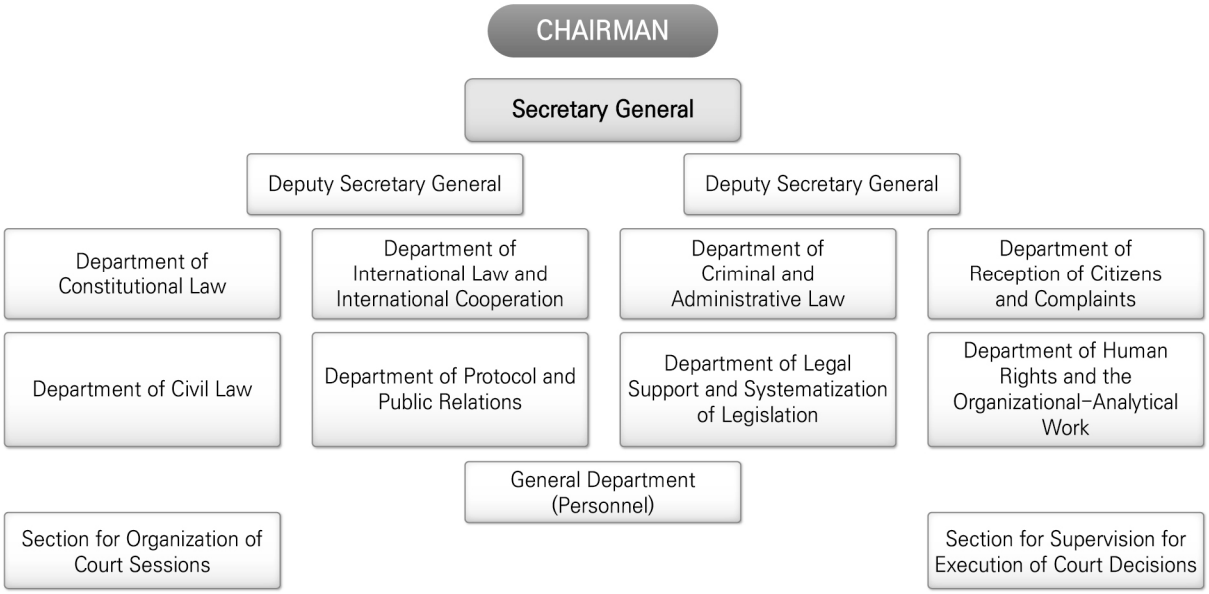
B4. Departments

The Court's administrative affairs are managed and supervised by the Secretary General. The Secretary General, under the direction of the Chairman, oversees the work of the Registry of the Court, directs and supervises its employees. The Deputy Secretary General assists the Secretary General and shall act on behalf of the Secretary General should he or she be unable to perform his or her duties due to unforeseeable circumstances.

The Registry of the Court is comprised of following:

- Department of Constitutional law
- Department of International Law and International Cooperation
- Department of Criminal and Administrative Law
- Department of Civil Law
- Department of Human Rights and the organisational and analytical work
- Department of Reception of Citizens and Complaints
- Department of Legal Support and Systematization of Legislation
- Department of Protocol and Public Relations

Constitutional Court of Azerbaijan: Organization Chart



The preliminary study of submitted complaints as to their conformity with requirements of the law is done by members of the Registry of the Constitutional Court via the procedure specified in the Internal Charter of Constitutional Court.

In connection with inquiries and requests submitted to the Constitutional Court one or several Rapporteur Judges from among justices of the Constitutional Court are appointed for preparation of session on preliminary study of complaints. Rapporteur Judges shall carry out the following measures:

1. Collect the documents and materials which are necessary for examination of a matter by the Constitutional Court;
2. Demand documents of state and self-government bodies, materials and cases which are relevant to the matter;
3. Submit an inquiry or complaint to parties, or other type of document to the interested subjects and get their written opinion on the matter concerned;
4. Organize the summon of witnesses, experts or other persons for session;
5. Realize other necessary measures for examination of matter;
6. Prepare the report on the matter concerned.

In connection with the case to be examined by the Constitutional Court the Rapporteur Judge can give any task to the Staff of the Constitutional Court. In connection with preparation of session the Rapporteur Judge shall carry out all measures on behalf of the Constitutional Court.

C. Jurisdictions

According to Article 130 (III) of the Constitution of the Republic of Azerbaijan, The Constitutional Court of the Republic of Azerbaijan, shall have jurisdiction over the following:

1. Based on a request submitted by authorized bodies shall resolve the conformity of laws and other normative acts with the Constitution of the Republic;
2. Based on a request submitted by authorized bodies shall resolve the compatibility of laws and rules and regulations with the rules of higher hierarchy;
3. Interpret the Constitution and laws of the Republic of Azerbaijan on the basis of requests submitted by the authorized bodies;
4. Impeachment;
5. Disputes regarding the division of competences between the legislature, the executive and the judiciary;
6. Review and confirmation of the results of elections of President and Parliament of the Republic of Azerbaijan;
7. Constitutional complaint as prescribed by Law;
8. Other powers as provided for in the Constitution.

C1. Constitutional review of legislation

- **Key legal provisions:** Constitution (Article 130), Law on Constitutional Court (Articles 32, 52, 60).

- **Purpose:** Preventing violation of the constitutional provisions and rights granted by the Constitution, assuring its efficacy, their stability and preservation. The constitution is therefore the direct and exclusive criterion for the decisions of Constitutional Court.

- **Causes for requests:** The request (inquiry) on constitutionality of legal acts can be submitted to Constitutional Court by the President of the Republic of Azerbaijan, Parliament of the Republic of Azerbaijan, Cabinet of Ministers of the Republic of Azerbaijan, Supreme Court of the Republic of Azerbaijan, Prosecutor's Office of AR and Parliament of Nakhichevan Autonomous Republic on the matters provided for by part III of Article 130 and part IV of Article 130 of the Constitution of the Republic of Azerbaijan as well as by Ombudsman of the Republic of Azerbaijan on the matters provided for by part VII of Article 130 of the Constitution of the Republic of Azerbaijan.
  Ordinary courts (except Supreme Court as noted above) shall only request Constitutional Court to Interpret the Constitution and laws.

- **Procedures**
  - **Request procedure:** Requests (inquiries) shall be submitted to Constitutional Court in written form. The inquiry shall be signed by the authorized person. If the inquiry is submitted by a collective body, then it shall be signed by its head. Issues on admissibility of requests (inquiries) shall be examined at sessions of the Panels of the Constitutional Court. Requests found admissible shall be examined on the merits at the sessions of the Full Bench of the Constitutional Court. In connection with inquiries and requests submitted to Constitutional Court one or several Rapporteur-Judges shall be appointed for preparation of session on preliminary study of complaints. The Full Bench of the Constitutional Court shall terminate the proceedings on a case if any grounds to reject the admission of a request for proceedings are discovered

during the session or the request is recalled. As a rule, the examination on the merits of a request by the Constitutional Court shall be commenced within 60 days after its admission for proceedings.

- **Decisions and effect:** According to Article 130.9 of the Constitution of the Republic of Azerbaijan, the decisions of Constitutional Court shall have binding force on the territory of the Republic of Azerbaijan. Decisions of the Constitutional Court shall be binding after their adoption. Decision of the Full Bench of the Constitutional Court shall be final and cannot be cancelled, changed or officially interpreted by any organ or official person. Official persons who do not comply with decisions of the Constitutional Court shall bear the responsibility via the procedure specified by the legislation of the Republic of Azerbaijan.

C2. Disputes over compatibility of laws and rules and regulations with the rules of higher hierarchy

- **Key legal provisions:** Constitution (Article 130), Law on Constitutional Court (Articles 32, 52).

- **Purpose:** Review of compatibility of laws and rules and regulations with the rules of higher hierarchy ensure the uniform implementation of the Constitution and laws of the Republic of Azerbaijan.

- **Causes for requests:** President of the Republic, the Parliament, the Cabinet of Ministers, the Supreme Court, the Prosecutor's Office of the Republic, and the Supreme Council of the Autonomous Republic of Nakhchivan may request the Constitutional Court to review the compatibility of rules and regulations with the laws of higher hierarchy.

- **Procedures:** President of the Republic, the Parliament, the Cabinet of Ministers, the Supreme Court, the Prosecutor's Office of the Republic, and the Supreme Council of the Autonomous Republic of Nakhchivan send a request to the Constitutional Court to review the compatibility of rules and regulations with the laws of higher hierarchy. The simple majority is required to make a decision on compatibility of laws and rules and regulations with the rules of higher hierarchy.

- **Decisions and effect:** The decisions of the Constitutional Court shall have binding force on the territory of the Republic of Azerbaijan. Decisions of the Constitutional Court shall be binding after their adoption. Official persons who do not comply with decisions of the Constitutional Court shall bear the responsibility via the procedure specified by the legislation of the Republic of Azerbaijan.

C3. Impeachment

- **Key legal provisions:** Constitution (Article 107), Law on Constitutional Court (Articles 59).

- **Purpose:** The purpose of impeachment is not personal punishment, but rather to maintain constitutional order through the removal of an unfit official from a position of public trust.

- **Causes for requests:** If the President of the Republic of Azerbaijan commits a serious crime, the issue of his/her removal from office may be submitted to the

Milli Majlis of the Republic of Azerbaijan at the initiative of the Constitutional Court of the Republic of Azerbaijan on the basis of an opinion of the Supreme Court of the Republic of Azerbaijan presented within 30 days.

- Procedures
  - **Procedure of impeachment motion:** According to part I of Article 107 of the Constitution, in case if the President commits the grave crime the Constitutional Court may bring an initiative to dismiss the President from office. The proposal concerning impeachment shall be submitted by not less than 3 Judges of the Constitutional Court. Within the period of 3 days after proposal was submitted the session of the Full Bench of the Constitutional Court shall be called to examine this matter. If Constitutional Court finds this proposal groundless, the majority of 5 Judges shall adopt a decision about that. If the proposal is found well-grounded, the Full Bench of the Constitutional Court shall submit the matter to the Supreme Court of the Republic of Azerbaijan in order to receive an opinion as to whether the President has committed the grave crime. A decision on this matter shall be adopted by the majority of 6 Judges of Constitutional Court. Within 30 days after receipt of a matter, the Supreme Court of the Republic of Azerbaijan shall examine it and provide Constitutional Court with the written opinion. If Constitutional Court comes to conclusion that no grave crime was found in the actions of the President of the Republic of Azerbaijan, the matter shall be considered as settled. Full Bench of the Constitutional Court by majority of 7 Judges can adopt a decision as to bringing an initiative on impeachment of the President of the Republic of Azerbaijan in connection with the presence of a grave crime in his/her actions. This decision shall be immediately sent to the Parliament. If the Parliament adopts a resolution on impeachment this resolution and the application that was adopted on its basis shall be immediately sent to the Constitutional Court.

  - **Procedure of impeachment adjudication:** Having received the resolution of the Milli Majlis of the Republic of Azerbaijan, the Constitutional Court shall verify within 7 days whether the requirements of the Constitution and relevant laws of the Republic of Azerbaijan were observed at the adoption of this resolution. The decision of Constitutional Court supporting the resolution of the Parliament of the Republic of Azerbaijan shall be adopted by majority of not less than 7 Judges.

- **Decisions and effect:** The said resolution shall be signed by the Chairman of the Constitutional Court of the Republic of Azerbaijan. If the Constitutional Court of the Republic of Azerbaijan within one week does not support the signing of the resolution, the latter shall not enter into force. A resolution on the removal of the President of the Republic of Azerbaijan from office shall be adopted within 2 months of the Constitutional Court's submission to the Parliament of the Republic of Azerbaijan. If the resolution is not adopted within the said term, then the accusations against the President of the Republic of Azerbaijan shall be considered to have been rejected.

C4. Competence disputes between legislative, executive and judicial powers

- **Key legal provisions:** Constitution (Article 130), Law on Constitutional Court (Articles 32, 53).

- **Purpose:** When conflicts arise between executive, legislative and judicial powers checks and balances between public powers, but also risks paralyzing an

important government function. This may pose a threat to the fundamental rights of citizens, which calls for a systematic coordinating mechanism.

- **Causes for requests:** The claimant may request adjudication on competence, if the respondent's action or inaction of which the competence or scope is in controversy, infringes or is clearly in danger of infringing the competence conferred to the claimant by the Constitution.

- **Procedures:** The matter concerning the inquiry on the disputes with regards to separation of powers among the Legislature, Executive and Judiciary shall be brought to sessions of the Panels of Constitutional Court within 15 days and ruling on admissibility or inadmissibility for examination shall be adopted. The adjudication on competence dispute shall be held within 30 days after admission of the request.

- **Decisions and effect:** The ruling on admissibility or inadmissibility for examination of an inquiry shall be sent on the day of its adoption to the body or official person who submitted an inquiry. Decision on separation of authorities between the Legislature, Executive and Judiciary shall enter into force from the date of its publication.

C5. Review and confirmation of the results of elections of President and Parliament of the Republic of Azerbaijan

- **Key legal provisions:** Constitution (Article 130), Law on Constitutional Court (Articles 54, 56).

- **Purpose:** Review and confirmation of the results of elections of the President of the Republic and the Parliament by the highest judicial authority ensures the legitimacy of the executive and legislative authorities.

- **Causes for requests:** According to Article 86 of the Constitution of the Republic of Azerbaijan, the Constitutional Court shall verify and approve the accuracy of the results of elections of deputies to the Milli Majlis of the Republic of Azerbaijan. In accordance with Article 102 of the Constitution Results of elections of the President of the Republic of Azerbaijan are officially announced by Constitutional Court of the Republic of Azerbaijan.

- **Procedures:** The Central Election Commission of the Republic requests the Constitutional Court to review and confirm the results of elections. The Full Bench of the Constitutional Court shall study the documents on the results of elections and shall require from Supreme Court or courts of appeal instance of the Republic of Azerbaijan information on examined applications concerning the protection of electoral rights. The concurrence of five or more Justices is required to make a decision on review of the results of the elections. The Constitutional Court shall officially declare the information on results of elections of the President of the Republic of Azerbaijan within 14 days from the day of voting.

- **Decisions and effect:** Decisions on the confirmation of results of elections enter into force from the date of its announcement.

C6. Constitutional complaint

- **Key legal provisions:** Constitution (Articles 130), Law on Constitutional Court

(Articles 34, 52).

- **Purpose:** Restoration of the violated human rights at the constitutional level.

- **Causes for requests:** Any person who claims that his or her fundamental rights which are guaranteed by the Constitution has been violated by an exercise or non-exercise of state power, may file a constitutional complaint to the Constitutional Court.

- Procedures
  - Period of request for adjudication:
    - ✓ **Filed under Article 34.4.1:** The constitutional complaint shall be filed within six months after the final decision in the judicial process has been made.
    - ✓ **Filed under Article 34.4.2:** The constitutional complaint shall be filed within three months from the moment of violation of individual's access to court.

  - Matters to be stated on the request for adjudication:
    - ✓ Indication of the case, information of the complainant and his or her counsel, the fundamental right(s) which has been allegedly infringed, the causes for infringement including the exercise and non-exercise of state power, reasons for the request and title and date of the disputed act and other necessary matters.

  - **Prior review:** The preliminary study of submitted complaints as to their conformity with requirements provided for in Article 34.6 of the Law shall be implemented by the Staff of the Constitutional Court via the procedure specified in the Internal Charter of Constitutional Court. In connection with inquiries and requests submitted to Constitutional Court as well as in accordance with Article 36.1 one or several Rapporteur-Judges shall be appointed for preparation of session on preliminary study of complaints. A Panel of Constitutional Court Justices shall hold preliminary examination of the complaint within 30 days and decide on its admissibility. If the complaint is inadmissible the complainant shall be informed within 7 days. If the complaint is declared admissible, the Full Bench shall launch its examination within 60 days.

  - **Presentation of opinions by interested agencies:** State agencies or public organizations which have interests in adjudication on a constitutional complaint may present to the Constitutional Court a written opinion on the adjudication.

- Decisions and effect

  - **Content of adjudication:** There are three types of rulings on the complaint.
    - ✓ Rejection: The request is irrational and unfounded.
    - ✓ Dismissal: The request was made unlawfully.
    - ✓ Upholding: Five or more Justices deem the request to have reason(s) and is justified.

  Complaints found admissible by the Constitutional Court shall be examined on the merits at the sessions of the Full Bench of the Constitutional Court. As a rule, the examination on the merits of an inquiry or complaint by the Constitutional Court shall be commenced within 60 days after its admission for proceedings. Decision of the Full Bench of the Constitutional Court shall be the written document adopted at the sessions of the Full Bench of the Constitutional Court and shall contain the conclusions of the Constitutional Court obtained as a

result of examination of the constitutional case on merits. Judges of the Constitutional Court who disagree with descriptive-motivational or conclusive parts of the decision of the Constitutional Court may express the dissenting opinion in written form. The dissenting opinion of a Judge shall be published along with the resolution of the Constitutional Court.

- **Effect of decision:** Decision of the Full Bench of the Constitutional Court shall be final and cannot be cancelled, changed or officially interpreted by any organ or official person.

Annex

Annex 1. Case Statistics

1-1. Since establishment (1998- July 2018)

Type		Total	Constitutionality of Statutes[1]	Impeachment	Dissolution of a Political Party	Competence Dispute	Constitutional Complaint
							Sub total
Filed			17	-	-	2	9,573
Decisions settled by Full Bench		378*	17**			2	147
Decided by Full Bench	Unconstitutional[2]						139
	Unconformable[3]	4					
	Conditionally Unconstitutional[4]						
	Conditionally Constitutional[5]	6					
	Constitutional						
	Upholding[6]						8
	Rejected						3,542
	Dismissed						5,884
	Other						4
	Withdrawn						
Pending		10					

* Total number of decisions of Constitutional Court including decisions adopted based on requests and inquiries filled by all bodies authorized to apply to Constitutional Court.

** In accordance with Article 130 of the Constitution of the Republic of Azerbaijan among the courts only the Supreme Court can request the verification of constitutionality of laws. Other courts shall apply to the Constitutional Court for interpretation of Constitution and other legislative acts. 34 inquiries by the Supreme Court and 94 requests by other courts of ordinary jurisdiction on interpretation were settled by the Constitutional Court.

1) This type of "Constitutionality of Statutes" case refers to the constitutionality of statutes cases brought by ordinary courts, i.e., any court other than the Constitutional Court.

2) "Unconstitutional": Used in Constitutionality of Laws cases.

3) "Unconformable": This conclusion means the Court acknowledges a law's unconstitutionality but merely requests the Parliament to revise it by a certain period while having the law remain effective until that time.

4) "Conditionally Unconstitutional": In cases challenging the constitutionality of a law, the Court prohibits a particular way of interpretation of a law as unconstitutional, while having other interpretations remain constitutional.

5) "Conditionally Constitutional": This means that a law is constitutional if it is interpreted according to the designated way. This is the converse of "Unconstitutional, in certain context". Both are regarded as decisions of "partially unconstitutional".

6) "Upholding": This conclusion is used when the Court accepts a Constitutional Complaint which does not include a constitutionality of law issue.

1-2. Last five years (2013-2017)

2013

Type		Total	Constitutionality of Statutes[1]	Impeachment	Dissolution of a Political Party	Competence Dispute	Constitutional Complaint
							Sub total
Settled		21	1				10
Decided by Full Bench	Unconstitutional[2]						8
	Unconformable[3]						
	Conditionally Unconstitutional[4]						1
	Conditionally Constitutional[5]						1
	Constitutional						
	Upholding[6]						
	Rejected						
	Dismissed						
	Other						
	Withdrawn						
Pending							

2014

Type		Total	Constitutionality of Statutes[1]	Impeachment	Dissolution of a Political Party	Competence Dispute	Constitutional Complaint
							Sub total
Settled		31	3				15
Decided by Full Bench	Unconstitutional[2]						10
	Unconformable[3]						
	Conditionally Unconstitutional[4]						
	Conditionally Constitutional[5]						
	Constitutional						
	Upholding[6]						3
	Rejected						
	Dismissed						
	Other						
	Withdrawn	3					
Pending							

2015

Type		Total	Constitutionality of Statutes[1]	Impeachment	Dissolution of a Political Party	Competence Dispute	Constitutional Complaint
							Sub total
Settled		24					13
Decided by Full Bench	Unconstitutional[2]						9
	Unconformable[3]						
	Conditionally Unconstitutional[4]						
	Conditionally Constitutional[5]	1					
	Constitutional						
	Upholding[6]						2
	Rejected						
	Dismissed						
	Other						
	Withdrawn	2					
Pending							

2016

Type		Total	Constitutionality of Statutes[1]	Impeachment	Dissolution of a Political Party	Competence Dispute	Constitutional Complaint
							Sub total
Settled		24					19
Decided by Full Bench	Unconstitutional[2]						15
	Unconformable[3]						
	Conditionally Unconstitutional[4]	3					
	Conditionally Constitutional[5]						
	Constitutional						
	Upholding[6]						3
	Rejected						
	Dismissed						
	Other						
	Withdrawn	3					
Pending							

2017

Type		Total	Constitutionality of Statutes[1]	Impeachment	Dissolution of a Political Party	Competence Dispute	Constitutional Complaint
							Sub total
Settled		24					30
Decided by Full Bench	Unconstitutional[2]						16
	Unconformable[3]						
	Conditionally Unconstitutional[4]						
	Conditionally Constitutional[5]	1					
	Constitutional						
	Upholding[6]						
	Rejected						
	Dismissed						
	Other						
	Withdrawn						
Pending							

Annex 2. Cases

▸ **Identification**

a) Country, b) Name of the Court, c) Date of decision given, d) Number of the decision, e) Jurisdiction, f) Title of the decision

▸ **Summary**

Case 1.

▸ **Identification**

a) Azerbaijan, Republic / b) Constitutional Court / c) 26-05-2017 / d) Constitutional complaint / e) Verification of compliance of some regulatory legal acts

▸ **Summary**

Citizen of the United Kingdom of Great Britain and Northern Ireland, G.M. Clark appealed to the Constitutional Court of the Republic of Azerbaijan and requested to verify the upholding of the judicial act temporarily restricting the right to leave the country and the measure of the restriction of the right to leave the country, as well as the compliance of the relevant regulatory legal acts with the Constitution of the Republic

of Azerbaijan and the provisions of Protocol No 4 to the Convention "For the Protection of Human Rights and Fundamental Freedoms".

In the appeal and the attached documents it was indicated that by the Resolution of Baku City Sabail District Court dated August 14, 2014, R. Ahmadova's claim for alimony against G.M. Clark was satisfied and alimony payment in the amount of 1/2 of his earnings and other income were deducted and provided to the claimant. The court issued enforcement document dated September 15, 2014.

By the Resolution of Baku City Nasimi District Court dated September 4, 2015, the presentation of executive officer of the Nasimi District Executive Office on the temporary restriction of the right to leave the country was provided to satisfy the claim in the enforcement document, and the right of debtor G.M. Clark to leave the country was temporarily restricted.

In his appeal to the Constitutional Court, the applicant stated that the above-mentioned Resolution of the Baku City Nasimi District Court and the fact of upholding of the measure of temporary restriction of his right to leave the country by the executive officer shall not comply with the requirements of Part 3 of the Article 28 and Part 2 of the Article 71 of the Constitution, paragraphs 3 and 4 of the Article 2 of Protocol No 4 to the Convention.
The Full Bench of the Constitutional Court, in connection with the appeal, noted that according to Part 3 of the Article 28 of the Constitution, everyone legally being on the territory of the Republic of Azerbaijan may travel without restrictions, choose the place of residence and go beyond the territory of the Republic of Azerbaijan.

The rights provided in this regulation are important elements of human freedom and are essential for the development of a person. Their unreasonable restriction can lead to a violation of other constitutional rights and freedoms of a person.

These rights are also reflected in a number of international and legal human rights documents.

In accordance with the Article 12 of the International Covenant "On Civil and Political Rights", everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence; everyone shall be free to leave any country, including his own; the above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order, public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant; no one shall be arbitrarily deprived of the right to enter his own country.

Also in accordance with Article 2 of the Protocol No 4 to the Convention, everyone lawfully within a State's territory may move freely within that territory and choose their residence there. Everyone may leave any country including their own. No restrictions shall be placed on the exercise of these rights other than such as are in accordance with law and are necessary in a democratic society in the interests of national security or public safety, for the maintenance of public order, for the prevention of crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

It was also noted in the Decision that the General Records adopted by the UN Human Rights Committee No. 27, dated November 2, 1999 on Article 12 of the International Covenant, states that restrictions imposed on the rights provided for in that article should not undermine the principle of freedom of movement. To consider these restrictions to be reasonable, they should be envisaged by the law and should be necessary to achieve the objectives mentioned in Article 12, paragraph 3 of the

Covenant in the democratic society and should comply with all other rights set out in the Covenant. States should always be guided by the principle that these restrictions do not address the essence of the law under consideration when adopting laws that contain restrictions permitted by Article 12, paragraph 3 of the Covenant. The restrictive measures should comply with the principle of proportionality; they should be suitable for the performance of defense functions; among all means which may lead to the desired results, they should be the least restrictive and should be proportionate to protected interests. The principle of proportionality should be followed not only in the legislation in which the relevant restriction is envisaged, but also in the administrative and judicial authorities within the framework of the application of that law.

Some of the decisions of the European Court of Human Rights have shown that any measure restricting the right of freedom of movement should be consistent with the law and should pursue one of the legitimate aims outlined in Article 2, paragraph 3 of the Protocol No 4 to the Convention, should be compulsory in a democratic society, that is, to meet the criteria of proportionality (Battista v. Italy, judgment dated December 2, 2014, § 37; Stamose v. Bulgaria, judgment dated November 27, 2012, § 30; Bartik v. Russia, judgment dated December 21, 2006, § 46 Decisions).

Taking into consideration the above-mentioned legal positions, the Full Bench of the Constitutional Court decided that the grounds for causing the temporary restriction of the right of the debtor to leave the country as provided for in Article 84-1 of the Law of Republic of Azerbaijan "On Execution" and in Part 2 of " Instruction on the rules for applying by the executive of the temporary restriction of the right to leave the country" approved by the Decree of the Collegium of the Ministry of Justice of the Republic of Azerbaijan dated April 22, 2013 shall be considered to be corresponding to Part 3 of the Article 28 and Part 2 of the Article 71 of the Constitution of the Republic of Azerbaijan, as it meets, constitutional principles of the legal certainty and proportionality.

Courts should pay particular attention to the reasoning that such a measure would serve the timely and proper execution of the court decision in a presentation by the executive officer on the temporary restriction of the right of the debtor to leave the country within a certain period of time.

When looking at such a presentation, the courts should thoroughly, fully and objectively investigate all cases of the lawsuit and justify the necessity of applying the restriction in the judicial act.

When hearing the issue of temporary restriction of the right of Clark Gordon Morris to leave the country in judicial or administrative procedure, the legal positions specified in the descriptive-grounding part of the Decision of the Full Bench of the Constitutional Court of the Republic of Azerbaijan should be taken into account.

Case 2.

- **Identification**

a) Azerbaijan, Republic / b) Constitutional Court / c) 20-07-2017 / d) Constitutional complaint / e) Verification of conformity of the decision of Administrative-Economic Board of the Supreme Court of the Republic of Azerbaijan

- **Summary**

It gets evident from the complaint and the attached documents that by the decision of the Dubai Court of Appeal of the United Arab Emirates dated May 30, 2016, “Triada General Trading” LLC and F. Bayramov together were assigned the commitments to repay

the debt to claimant “Skiddaw” LTD, to pay a fine of annual 9% from July 23, 2015 until the full payment is completed, and the amount of 1000 dirhams for court fees and expenses.

According to the contract concluded on May 27, 2016 between "Skiddaw" LTD and Sabina Hasanli, all substantive rights of "Skiddaw" LTD from "Triada General Trading" LLC and F.Bayramov have been transferred to S.Hasanli.

Afterwards, S.Hasanli submitted a petition to the Supreme Court of the Republic of Azerbaijan through the Ministry of Justice of the Republic of Azerbaijan and asked for the recognition and enforcement of the decision of Dubai Court of Appeal in the territory of the Republic of Azerbaijan.

By the ruling of the Administrative-Economical Board of the Supreme Court of November 8 2016, S. Hasanli's petition was secured and it was resolved for recognition and enforcement of the decision of the Dubai Court of Appeal in the territory of the Republic of Azerbaijan.
F. Bayramov substantiated his constitutional complaint by the fact that, Articles 138.3, 465.1.2, 466.0.1, 466.0.2, 467.2 and 476.0.1.2 of the Civil Procedure Code of the Republic of Azerbaijan have not been properly applied by the Administrative-Economical Board of the Supreme Court, and his rights to property and judicial protection as defined in Article 60.1 of the Constitution of the Republic of Azerbaijan were violated.

According to the legal position established by the Full Bench of the Constitutional Court, the right to judicial protection, in addition to being among fundamental human and civil rights and freedoms, also acts as a guarantee of other rights and freedoms provided for in the Constitution. Judicial guarantee on the one hand specifies the right of everybody to appeal to the court for the restoration of violated rights and freedoms, and on the other hand the duty of courts to consider and adopt a fair decision on them.

At international standards in the field of human rights, independent, impartial and fair defense of human rights and freedoms by courts is defined as their inalienable and indefeasible right.
Thus, according to Article 8 of the “Universal Declaration of Human Rights”, Article 6 of the Convention for the “Protection of Human Rights and Fundamental Freedoms”, and Article 14 of the International Covenant on “Civil and Political Rights”, each human person reserves a right of fair and judicial scrutiny by a competent, independent and impartial tribunal established by law, in the course of examining any charge of crime against him / her or in the determination of his rights and obligations in any civil proceedings.

The Full Bench of the Constitutional Court noted that, the terms for recognition and enforcement of the resolutions of foreign courts which execution is required, are provided for in Articles 458 and 465 of the Civil Procedure Code. According to the mentioned Articles, the resolutions of foreign courts are recognized and executed in the Republic of Azerbaijan in cases stipulated by the laws of the Republic of Azerbaijan or by the international treaties to which the Republic Azerbaijan is a party to, and not contradicting with the law of the Republic Azerbaijan, or on the basis of reciprocal understanding.

The Full Bench of the Constitutional Court decided that the ruling of the Administrative-Economical Board of the Supreme Court of the Republic of Azerbaijan of November 8, 2016 on the enforcement and recognition of the decision of the Dubai Court of Appeal of the United Arab Emirates of May 30, 2016 in the Republic of Azerbaijan, should be considered invalid due to the non-conformity with the Article 60.1 of the Constitution of the Republic of Azerbaijan and Articles 458, 462 and 465 of the Civil Procedure Code of the Republic of Azerbaijan; to reconsider the case, in

accordance with this Decision, in the manner and period defined by the Civil Procedure Code of the Republic of Azerbaijan.

Case 3.

- **Identification**

a) Azerbaijan, Republic / b) Constitutional Court / c) 25-01-2017 / d) Constitutional complaint / e) Verification of conformity of some provisions of the Law of the Republic of Azerbaijan "on social security of children who have lost their parents and were deprived of parental care"

- **Summary**

Javidan Gafarov having applied to the Constitutional Court of the Republic of Azerbaijan asks for verification of conformity of some provisions of the Law of the Republic of Azerbaijan "On social security of children who have lost their parents and were deprived of parental care" with Constitution of the Republic of Azerbaijan.

Apparently from the complaint, the applicant is 21 years old and he five-year student of the Medical University of Azerbaijan on a paid basis. J. Gafarov"s father has died on May 19, 2016, and mother is a disabled person of 1st group. The applicant has addressed to the administration of the Medical University of Azerbaijan with the purpose of application of the privileges provided by the law, having referred to lack of an opportunity to pay for education due to the above-mentioned reasons. Thus, according to Article 5.1 of the Law, children who have lost their parents and are deprived of parental care, studying at state higher educational institutions of all types at the master level of scientific organization established by relevant authority of executive power and also in municipal and private highest and secondary special educational institutions, as well as persons referred to them, shall be eligible for full state support until graduation from the relevant educational institution.

In the response letter to J. Gafarov it has been explained that, being the state higher educational institution, the Medical University of Azerbaijan is not authorized to exempt students from payment of education fee without legal justification. At the same time in the letter it has been noted that with the purpose to clarify this matter the address to the Ministry of Education of the Republic of Azerbaijan was sent.

In turn, the Ministry of Education of the Republic of Azerbaijan has specified in the letter that according to the Law, under the children who lost their parents and were deprived of parental care or persons equated to them (one parent is deceased, and another one is a disabled person of 1st and 2ndgroups) are understood children aged up to 18 years. From this point of view, the guarantees for education specified in Article 5 of the Law do not extend to persons who lost both parents and were deprived of parental care during having higher education (students of the II-VI courses at the age of 19-23 years).

However, the content of the Articles 1 and 5 of this Law read that also the persons that are not considered any more as children could use such privileges, i.e. persons aged up to 23 years who lost both parents being aged up to 18 years, and also deprived of care of both parents and students in presented in highest and secondary special educational institutions at master level in scientific organizations established by appropriate authority of executive power shall also be covered by this provision. However, these persons receive these privileges in case of loss of parents and deprivation of parental care aged up to 18 years.

According to the applicant the main objective of the Law consists in providing the state ensuring of social protection of the children who have lost parents and were deprived of parental care, and also the persons referred to them up to 23 years. That is, accepting a factor of deprivation of parental care as a basis, the state provides them with the state social protection. As a condition of use of social support is taking into account the deprivation of parental care only to persons aged up to 18 years, and providing a continuity of the right to education of other persons at the age of 18-23 years that have appeared in a similar situation is not provided.

According to the legal position formed by the Full Bench of the Constitutional Court, mainly to Article 42 of the Constitution, every citizen has the right to education. The state guarantees free obligatory secondary education. The system of education is under the state control. The state guarantees continuation of education for most gifted persons irrespective of their financial position. The state establishes minimum educational standards.

This right, has also found the reflection in a number of international legal documents on human rights.

According to Article 2 of the Protocol No. 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms, no person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.

The right to education has also been noted in the CESCR General Comment No. 13: The Right to Education (Art. 13) adopted on December 8, 1999. According to this position education is both a human right in itself and an indispensable means of realizing other human rights. As an empowerment right, education is the primary vehicle by which economically and socially marginalized adults and children can lift themselves out of poverty and obtain the means to participate fully in their communities. Increasingly, education is recognized as one of the best financial investments States can make.

The European Court of Human Rights (hereinafter referred to as the European Court) in this regard has noted that, unlike some other public services, education is the right which is directly protected by the Convention, and this fact should not be missed. Education is one of the most important public services in a modern State which not only directly benefits those using it but also serves broader societal functions. The court has noted that "in democratic society the right to education is necessary for maintenance of human rights and plays the main role" (decision of June 21, 2011 on case of Ponomaryovi v. Bulgaria, § 33).

The Full Bench of the Constitutional Court in this connection noted that the principle of social state provides for ensuring the fair social system as the legal commitment of the state. This principle proceeds from the Preamble of the Constitution that declares the adequate standards of living for everybody in accordance with the fair economic and social norms. Namely the effective social state policy ensures the establishment of peace and prosperity within society. Without disclosing the concept of the social state the Constitution envisages the development of economy based on the different types of ownership, and serves for the increasing the welfare of people. In order to recognize the state as the social one the Constitution contains the outlines and duties of social policy that is subject to the attention of the state. Thus, according to the provisions of the Constitution, the state undertook the commitment to set up the civil society, social security of a human being by the state in the conditions of a market economy as well as to respect the principle of social justice by means of policy implemented in the field of social and economic rights.

Taking into account the legal positions mentioned in the Full Bench of the Constitutional Court, non-covering by a concept of 12th paragraph of the Article 1 of the Law of the Republic of Azerbaijan "On social security of children who have lost their parents and were deprived of parental care" of persons deprived of maintenance of parents after 18 years who study at state higher educational institutions does not correspond with part I of the Article 25 of the Constitution of the Republic of Azerbaijan and in this connection it is necessary to recommend to the Parliament of the Republic of Azerbaijan to coordinate this norm with legal position reflected in a descriptive and motivation part of this Decision. Until the resolution in a legislative order of the issue specified in point 1 of a resolutely part of the present Decision, based on the requirement of part I of Article 25 of the Constitution in case the persons studying on a paid basis presently in the state higher educational institutions lose parental support after 18 years for the reasons specified in the 12th paragraph of Article 1 of the Law "On social security of children who have lost their parents and were deprived of parental care", repayment of their payment during education (up to 23 years age) has to be provided according to Article 38.3 of the Law "On Education".

Case 4.

- **Identification**

a) Azerbaijan, Republic / b) Constitutional Court / c) 22-12-2017 / d) Constitutional complaint / e) Verification of conformity of the decision of the Civil Board of the Supreme Court of the Republic of Azerbaijan to Constitution and legislation of the Republic of Azerbaijan

- **Summary**

Khagani Mammadov submitted the complaint to court asking to recognize the contract of May 26, 2008, concluded between "AQ Inshaatci Servis" LLC and Azar Mammadov as well as to recognizing as insignificant the contract December 10, 2013, signed by "AQ Inshaatci Servis" Limited Liability Company, Kamran Tariverdiyev.

Kh.Mammadov substantiated his claim by that on May 29, 2007, the contract on the order of real estate (residential area) was signed between him and "AQ Inshaatci Servis" LLC. According to that contract, "Inshaatci Servis" LLC undertook to transfer to him the 4-room apartment №. 2 with total area of 201 sq.m., on the 4th floor of the 1st building built in Nasimi district of Baku and he undertook to pay for the apartment. The financial reference issued by "AQ Inshaatci Servis" LLC confirms that he has fully paid the value of the apartment and did not have a debt to the LLC. Later, Kh.Mammadov have been informed that the apartment was given to K.Tariverdiyev according to the contract dated December 10, 2013, and the latter started repair works at the apartment. According to Kh.Mammadov, the contract with A.Mammadov was formal, aimed only to control the apartment.

The claim by Kh.Mammadov was partially satisfied by the decision of the Narimanov District Court of Baku dated May 26, 2016, and the contract for the residential area concluded between "AQ Inshaatci Servis" LLC and A.Mammadov was recognized invalid, the statement of claim was not satisfied in the remaining part. The mutual claim of "AQ Inshaatci Servis" LLC against Kh.Mammadov and A.Mammadov was completely satisfied.

By the decision of the Civil Board of Baku Court of Appeal dated September 19, 2016, Kh.Mammadov's claim was not satisfied, and the resolution of the court of first instance was kept in force.

By the decision of the Civil Board of the Supreme Court of the Republic of Azerbaijan, dated March 7, 2017, the resolution of the court of appeal instance was kept valid and unchanged.
Kh.Mammadov, in his complaint addressed to the Constitutional Court of Azerbaijan Republic, stated that the court of cassation did not comply with the requirements of procedural legal norms, made mistakes in the application and interpretation of the substantive law, and did not apply the applicable legal norm, as a result, accepting an illegal and unfounded court act on the case, it has violated his right to property and his right to a fair trial, as defined in Articles 13, 29 and 60 of the Constitution of the Republic of Azerbaijan.

Constitutional Court stated in its decision that according to Article 60.1 of the Constitution, administrative and judicial protection of everyone's rights and freedoms are guaranteed.

Judicial protection in international legal acts (Article 8 of the Universal Declaration of Human Rights, Paragraph 1 of Article 14 of the International Covenant on Civil and Political Rights, Paragraph 1 of Article 6 of the Convention for the "Protection of Human Rights and Fundamental Freedoms") is perceived by an independent judiciary as a means of effective restoration of rights based on a fair trial.

One of the most important elements of the right to a fair trial is the existence of the right to file a complaint or protest to the higher court against the acts of the lower court in the manner prescribed by the procedural legislation.

Ill-founded decisions and acts adopted by the courts of first instance may be appealed in the manner and cases provided for by the Civil Procedure Code.

The Full Bench of the Constitutional Court noted that excluding the court resolution without complying with the requirements of the law would give rise to a failure to admit it as a legal act of the fair trial.

The Civil Board of the Supreme Court, having considered the case on Kh.Mammadov's cassation complaint, has not paid attention to the fact that the court of appeal instance had not complied with the procedural legal norms and eventually had adopted a decision not qualified the requirements of Articles 416, 418.1 and 418.3 of the Civil Procedure Code. Therefore, it led to violation of the principle of effective restoration of rights based on a fair trial by an independent judiciary, which is one of the important elements of judicial protection of rights and freedoms of Kh.Mammadov set forth by Paragraph 1 of Article 60 of the Constitution.

In this regard, the Full Bench of the Constitutional Court noted that according to Article 337.1 of the Civil Code, the concluded transaction breaching the terms defined in this Code is invalid. Invalid transactions are divided into two groups - disputable transactions and insignificant transactions.

According to Article 339 of the Civil Code, transactions concluded with abuse of power, negotiation of the representative of one party with the other party in bad intention, deception and etc. methods are disputable transactions.

In case of dispute about the transaction, that transaction is considered invalid from the moment of its conclusion.

Insignificant transaction is an invalid transaction, regardless of whether it is considered invalid by the court. Invalid transaction does not lead to legal consequences, with the exception of the consequences related to its invalidity. This transaction is invalid from the moment of its conclusion (Articles 337.3 and 337.4 of the Civil Code).

In accordance with the above mentioned, the Full Bench of the Constitutional Court decided that the decision of the Civil Board of the Supreme Court of the Republic of Azerbaijan dated March 7, 2017, on the part regarding the invalidation of the contract on the order of real estate of May 29, 2007, concluded between "AQ Inshaatci Servis" Limited Liability Company and Khagani Mammadov, shall be considered as void because of non-compliance with paragraph 1 of Article 60 of the Constitution of the Republic of Azerbaijan, Articles 416, 418.1 and 418.3 of the Civil Procedure Code of the Republic of Azerbaijan. According to this decision, the part of the case should be re-examined via the procedure and within the period determined by the civil procedure legislation of the Republic of Azerbaijan.

3. Indonesia

Constitutional Court

Summary

The Constitutional Court of Indonesia was established in 2003 and consists of 9 Justices. According to Article 24C of the 1945 Constitution and Article 10 of the Constitutional Court Act, the Constitutional Court of Indonesia enjoys 4 authorities and 1 obligation. The authorities are the constitutionality review of laws against the Constitution, the resolution of competence disputes between state institutions, the dissolution of political parties, and the settlement of election disputes. The fifth jurisdiction which is described as an obligation rather than an authority is the adjudication on the alleged violation of the Constitution by the President and/or Vice President, which may lead to an impeachment. On questions of impeachment, the legislature of Indonesia has the final say, not the Constitutional Court. In terms of constitutional research, the Constitutional Court of Indonesia has the Center for Case Research and Case Analysis and Library Management. This Research Center is divided into two divisions: The Division of Research and Case Analysis, and the Library Management Division. Besides conducting research on law and constitutional issues, the Research Center is basically assigned with the task of assisting the Justices in deciding cases. There are various steps in which researchers provide substantial support. They include preliminary analysis of cases, in-depth study and analysis of the constitutional issues involved in the case, and assisting the Justices in the drafting of the legal opinion. If necessary, Focus Group Discussions (FGD) are held to gather further expert opinion to address issues that have not yet been addressed.

Content

A. Introduction

A1. History

In line with the momentum of the amendments to the 1945 Constitution during the reform era (1999-2002), the idea of establishing a Constitutional Court in Indonesia became increasingly stronger, reaching its peak in 2001, when the idea to establish a Constitutional Court was adopted in the amendments to the 1945 Constitution by the People's Consultative Assembly (MPR) as formulated in the provisions of Article 24 Paragraph (2) and Article 24C of the Third Amendment to the 1945 Constitution.

Subsequently, for the purpose of further elaboration and follow up the aforementioned mandate under the Constitution, the Government, together with the House of Representatives (DPR), conducted discussions on the Draft Law regarding the Constitutional Court. After conducting discussions for some time, the Draft Law was finally jointly agreed upon by the Government and DPR and was passed in the Plenary Session of DPR on August 13, 2003. On the same day, the Constitutional Court Law was signed by President Megawati Soekarnoputri and was promulgated in the State Gazette on the same day, and it was then named Law Number 24 Year 2003 regarding the Constitutional Court (State Gazette Year 2003 Number 98, Supplement to State Gazette Number 4316). So, August 13, 2003 was subsequently agreed upon by the Constitutional Court Justices as the birth date of the Constitutional Court of the Republic of Indonesia.

With Law Number 24 Year 2003 as the starting point, and with reference to the principle of balance among the branches of state powers, the recruitment of Constitutional Court Justices was conducted by three state institutions, namely the DPR, the President and the Supreme Court. After undergoing the selection stages according to the applicable mechanisms in each of the aforementioned institutions, each institution nominated three candidates for Constitutional Court Justice to the President to be stipulated as Constitutional Court Justices.

On August 15, 2003, the appointment of Constitutional Court Justices for the first time in Indonesian state administration history was stipulated in Presidential Decree Number 147/M Year 2003, followed by the pronouncement of the official oath of Constitutional Court Justices at the State Palace on August 16, 2003. After taking their oath, the Constitutional Court Justices immediately went to work, performing their constitutional duties as set forth in the 1945 Constitution.

The subsequent phase in the Court's history was the delegation of cases from the Supreme Court to the Constitutional Court as of October 15, 2003, marking the commencement of the Court's operational activities as one of the branches of judicial power pursuant to the provisions of the 1945 Constitution. The commencement of the Court's operational activities also marked the end of the Supreme Court's authority in exercising the authorities of Constitutional Court as mandated by Article III of the Transitional Provisions of the 1945 Constitution.

A2. Basic Texts

- Article 24C of the 1945 Constitution of the State of the Republic of Indonesia
- Article 7B Paragraph (1) of the of the 1945 Constitution of the State of the Republic of Indonesia

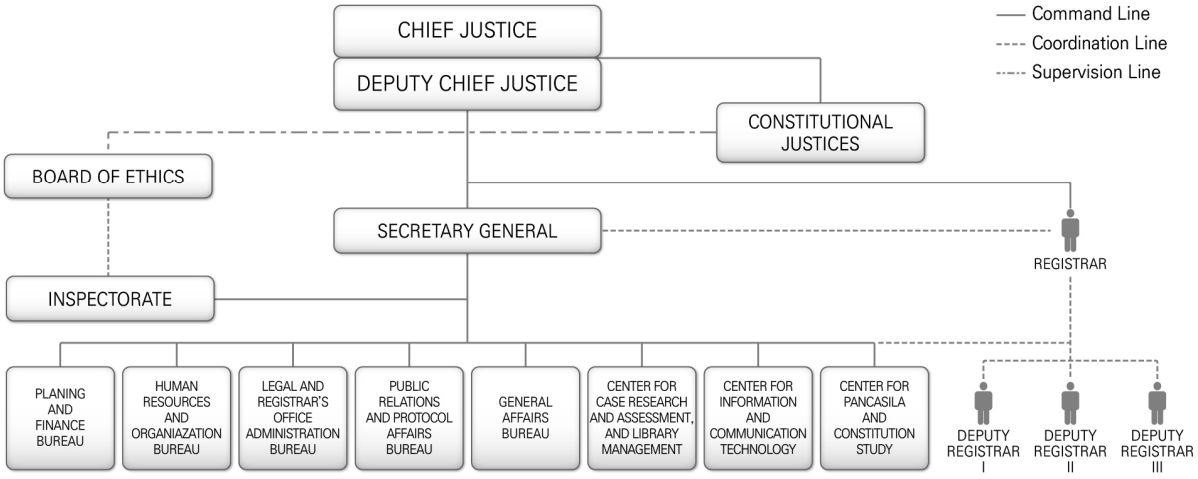
- Law of the Republic of Indonesia Number 24 Year 2003 Concerning The Constitutional Court As Amended By Law Number 8 Year 2011 Concerning The Amendment Of Law Number 24 Year 2011 Concerning The Constitutional Court Of The Republic Of Indonesia

B. Organization

The Constitutional Court shall consist of 9 (nine) Constitutional Court Justices as members to be stipulated by a Presidential Decree. The Constitutional Court's organizational structure shall consist of a Chief Justice concurrently acting as a member, a Deputy Chief Justice concurrently acting as a member, and 7 (seven) Constitutional Court Justices as members.

In implementing the constitutional duties, nine Constitutional Court Justices require general and judicial administrative support from government apparatuses. The Registrars' Office and General Secretariat shall be established at the Constitutional Court in order to provide assistance in the implementation of the Constitutional Court's tasks and authorities. The Secretary General of the Constitutional Court is carrying out technical administrative tasks. Meanwhile, the Court's Registrar is carrying out judicial administrative tasks.

ORGANIZATIONAL STRUCTURE OF THE CONSTITUTIONAL COURT OF THE REPUBLIC OF INDONESIA



B1. Chief Justice

B1.a. Nominating System

1. The Chief Justice and the Deputy Chief Justice of the Constitutional Court are elected from and by members of the Constitutional Court Justices for a term of office of 2 (two) years 6 (six) months. (Article 4, Paragraph (3), Law on Constitutional Court)
2. The Chief Justice and Deputy Chief Justice can be re-elected for the same position for another 2 (two) years 6 (six) months. (Article 4, Paragraph (3a), Law on Constitutional Court)

3. The Chief Justice and Deputy Chief Justice are elected in a meeting for the election of Chief Justice and Deputy Chief Justice. In detail, the procedure of meeting for the election will be as follows:
    a. The meeting is chaired by the oldest Constitutional Court Justice. (Article 4, Paragraph (4), Law on Constitutional Court)
    b. The meeting must be attended at least 7 (seven) Constitutional Court Justice. (Article 4, Paragraph (4a), Law on Constitutional Court)
    c. If there are less than 7 (seven) members, the meeting is suspended for 2 (two) hours maximum in order to meet the requirement on the attending members. (Article 4, Paragraph (4b), Law on Constitutional Court)
    d. If after 2 (two) hours the number of justices is still less than 7 (seven), the meeting will proceed. (Article 4, Paragraph (4c), Law on Constitutional Court)
    e. The decision in the meeting shall be made based on deliberation for consensus in order to achieve acclamation. (Article 4, Paragraph (4d), Law on Constitutional Court)
    f. If the meeting cannot achieve acclamation, the decision is made by independent and secret voting. (Article 4, Paragraph (4e), Law on Constitutional Court)
4. Before serving as a Chief Justice or Deputy Chief Justice. The candidates who get majority votes in the meeting should take an oath (if he/she is a Muslim) or make a pledge (for non-Muslims) according to his/her religion. (Article 21, Paragraph (3), Law on Constitutional Court)

B2. Justices

B2.a. Structure

1. The Constitutional Court of the Republic of Indonesia consists of 9 (nine) Constitutional Court Justices stipulated by a Presidential Decree. (Article 4, Paragraph (1), Law on Constitutional Court)
2. The Constitutional Court's organization structure consists of a Chief Justice concurrently acting as member, a Deputy Chief Justice concurrently acting as member, and 7 (seven) Constitutional Court Justices as members. (Article 4, Paragraph (2), Law on Constitutional Court)
3. The Constitutional Court's organization structure consists of a Chief Justice concurrently acting as member, a Deputy Chief Justice concurrently acting as member, and 7 (seven) Constitutional Court Justices as members. (Article 4, Paragraph (2), Law on Constitutional Court)
4. The Constitutional Court shall be composed of 9 (nine) persons who shall be constitutional justices and who shall be confirmed in office by the President, of whom 3 (three) shall be nominated by the Supreme Court, 3 (three) nominated by the House of Representatives, and 3 (three) nominated by the President. (Article 24C, Paragraph (3) of the 1945 Constitution of the State of the Republic of Indonesia)

B2.b. Term of Office

1. The Constitutional Court justices are state officials. (Article 5, Law on Constitutional Court)
2. The term of office of a Constitutional Court justice shall be 5 (five) years and he/she can be re-elected only for 1 (one) subsequent term of office. (Article 22, Law on Constitutional Court)

B2.c. Appointment of Constitutional Court Justices

Articles 15-21 of the Law on Constitutional Court[15]

1. Constitutional Court Justices must meet the following requirements:
    a. an Indonesian Citizen
    b. devout to God The Almighty and possess a noble character
    c. possess integrity and impeccable personality
    d. just
    e. is at least 47 (forty-seven) years of age and not more than 65 (sixty-five) years of page at the first time of appointment
    f. possesses the physical and mental ability to perform the tasks and implement the obligations
    g. has never been imposed with the criminal sanction of imprisonment by virtue of a court decision which has obtained full legal force
    h. is not currently declared bankrupt by virtue of a court decision
    i. holds a doctoral and master's degree with an undergraduate background based on higher education in law
    j. has at least 15 (fifteen) years of work experience in the field of law
    k. statesman who has mastered the constitution and state administration
2. Constitutional Court Justice candidates must also fulfil the administrative requirements by submitting the following:
    a. written statement on preparedness to serve as Constitutional Court Justice
    b. curriculum vitae
    c. submit a legalized photo-copy of diploma while presenting the original diploma
    d. report on the candidate's list of assets and source of income accompanied by valid supporting documents and legalized by the relevant institution
    e. Taxpayer's Registration Number (NPWP)
3. Constitutional Court Justices shall be prohibited from concurrently serving as:
    a. state official in another state institution
    b. member of a political party
    c. entrepreneur
    d. advocate
    e. civil servant
4. For the purpose of maintaining and enforcing integrity and an impeccable personality, justice, and statesmanship, Constitutional Court Justices shall be required to:
    a. comply with laws and regulations
    b. attend hearings
    c. implement properly the procedural law
    d. adhere to the Code of Ethics and Code of Conduct for Constitutional Court Justices
    e. treat disputing parties in a just, non-discriminatory, and impartial manner
    f. pass decisions in an objective manner based on facts and the law in an accountable manner
5. And Constitutional Court Justices shall be prohibited from:
    a violating the oath/pledge of office
    b accepting a gift or promise from the disputing parties, either directly or indirectly
    c issue an opinion or statement outside the hearing concerning a case currently being handled by him/her preceding a decision
6. The nomination of Constitutional Court Justice candidates shall be conducted in a transparent and participatory manner. (Article 19, Law on Constitutional Court)

[15] The following is a summary of the relevant legislative content.

7. Before becoming a Constitutional Court Justice, the candidate shall take an oath (for Muslims) or shall make a pledge according to his/her religion (for non-Muslims). The pronouncement of the oath or the pledge is conducted before the President.

B2.d. Dismissal of Constitutional Court Justices

Articles 23-27 and Articles 15-21 of the Law on Constitutional Court[16]

1. A Constitutional Court justice will be honorably dismissed for the following reasons:
    a. he/she passes away
    b. by voluntary resignation submitted to the Chief Justice of the Constitutional Court
    c. he/she has reached 70 (seventy) years of age
    d. he/she has reached the end of his/her term of office
    e. he/she suffers from a permanent physical or mental illness for 3 (three) months rendering him/her unable to perform his/her duties as substantiated by a written statement from a physician
2. A Constitutional Court Justice will be dishonorably dismissed in the event of the following:
    a. he/she is imposed with the criminal sanction of imprisonment based on a court decision which has obtained permanent legal force for having committed a criminal act which is punishable by the criminal sanction of imprisonment
    b. he/she commits an act of misconduct
    c. does not attend hearings, which is his/her duty and obligation, 5 (five) times in succession without valid reasons
    d. violates the official oath or of office
    e. intentionally delays the Constitutional Court from passing a decision within the time prescribed by Article 7B Paragraph (4) of the 1945 Constitution of the State of the Republic of Indonesia
    f. violates the prohibition of holding concurrent positions as intended in Article 17
    g. no longer meets the requirements for being a Constitutional Court Justice; and/or
    h. violates the Code of Ethics and Code of Conduct for Constitutional Court Justices
3. The request for a dishonorable dismissal shall be made after the Justice concerned has been given an opportunity to defend him/herself before the Honorary Council of the Constitutional Court.
4. A Constitutional Court Justice, prior to his/her dishonorable dismissal, shall be temporarily suspended from his/her position by Presidential Decree upon the request of the Chief Justice of the Constitutional Court, except for the reasons that he/she is imposed with the criminal sanction of imprisonment based on a court decision which has obtained permanent legal force.
5. Such temporary suspension shall be for a period of no longer than 60 (sixty) working days and may be extended for a further period of no longer than 30 (thirty) working days.
6. As from the time temporary suspension is requested, the Constitutional Court Justices concerned shall be prohibited from handling cases.
7. The dismissal of a Constitutional Court Justice shall be stipulated with a Presidential Decree upon request by the Chief Justice of the Constitutional Court.
8. The Presidential Decree for the dismissal of a Constitutional Court Justice shall be stipulated by no later than 14 (fourteen) working days as from the date on which the President receives the request concerned for dismissal.

[16] The following is a summary of the relevant legislative content.

B2.e. Procedural Law

Chapter V of the of the Law on Constitutional Court[17]

1. The Constitutional Court shall examine, adjudicate, and render a decision in a plenary hearing of the Constitutional Court with 9 (nine) Constitutional Court justices, except for extraordinary circumstances with 7 (seven) Constitutional Court justices which shall be presided over by the Chief Justice of the Constitutional Court.
2. In the event that the Chief Justice of the Constitutional Court is unable to preside over a plenary hearing as intended in paragraph (1), the hearing shall be presided over by the Deputy Chief Justice of the Constitutional Court.
3. In the event that at the same time both the Chief Justice and the Deputy Chief Justice of the Constitutional Court are both unable to preside, the plenary hearing shall be presided over by an ad hoc chairperson elected from among and by Members of the Constitutional Court.
4. Prior to conducting a plenary hearing, the Constitutional Court may form a panel of justices consisting of at least 3 (three) Constitutional Court justices to conduct examination the results of which are deliberated upon in the plenary hearing to render a decision.

B2.f. Authorities

Article 24C and Article 7B of the Constitution[18]

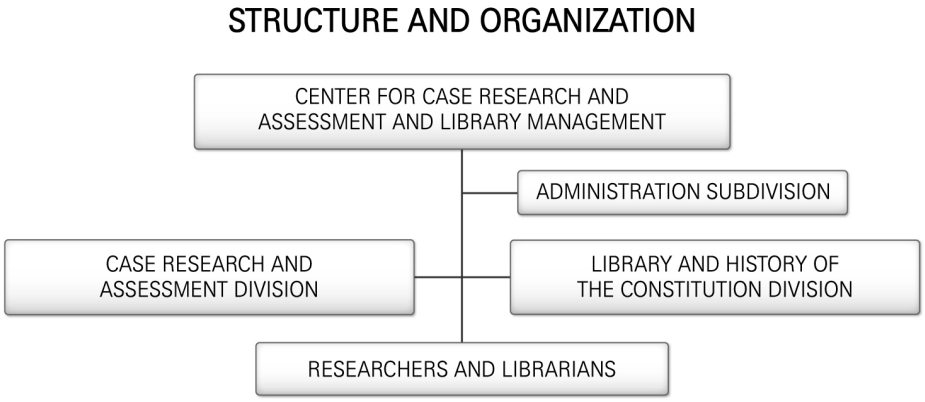
1. The Constitutional Court holds jurisdiction of first and final instance whose decisions shall be final in the following matters:
    a. the review of laws against the 1945 Constitution of the State of the Republic of Indonesia
    b. decide upon disputes related to the authorities of state institutions whose authorities are granted under the 1945 Constitution of the State of the Republic of Indonesia
    c. decide upon the dissolution of political parties
    d. decide upon disputes concerning the results of general elections
2. The Constitutional Court shall be obligated to pass a decision on the opinion of the DPR which alleges that the President and/or the Vice President have/has committed a violation of the law in the form of treason against the state, corruption, bribery, other serious criminal acts, or misconduct, and/or no longer fulfils the requirements as the President and/or the Vice President as intended in the 1945 Constitution of the State of the Republic of Indonesia.
3. The provisions as intended in paragraph (2) shall be as follows:
    a. treason against the state shall be criminal acts against the security of the state as provided for under law
    b. corruption and bribery shall be the criminal act of corruption or bribery as provided for under law
    c. other serious criminal acts shall be criminal acts subject to the criminal sanction of 5 (five) years or more
    d. misconduct shall be conduct which can potentially compromise the dignity of the President and/or the Vice President
    e. no longer fulfilling the requirements as the President and/or the Vice President shall be the requirements as set forth in Article 6 of the 1945 Constitution of the State of the Republic of Indonesia

[17] The following is a summary of the relevant legislative content.
[18] The following is a summary of the relevant provisions of the Constitution.

B3. Constitutional Research

B3.a. Structure

The Constitutional Court has one research center which is called Center for Research and Case Analysis and Library Management (the Research Center). The Research Center is headed by a Head of Research Center and is divided into two divisions which are the Division of Research and Case Analysis and the Library Management Division. The Research Center is also supported by an Administrative Subdivision.



B3.b. Main Duties and Functions

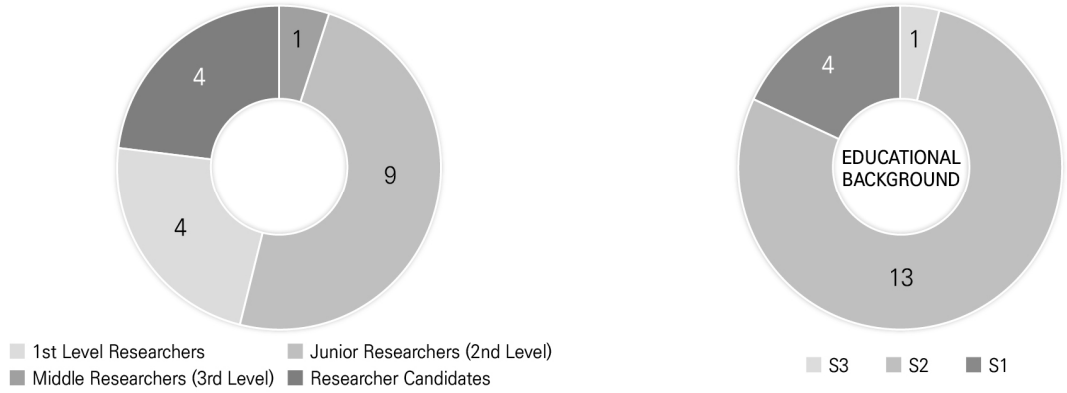
1. The Center for Research and Case Assessment, and Library Management has the functions of conducting research and case assessment, and managing the library and the constitution historical center through:
    a. Conducting research
    b. Cases assessment
    c. Preparing Justices' opinion concept
    d. Preparing and development of scientific papers
    e. Formulating interpretation of MKRI's verdicts over the 1945 Constitution
    f. Formulating jurisprudence
    g. Formulating legal theorem
    h. Monitoring and evaluating verdict's execution
    i. Managing library and the constitution historical center
2. To provide substantive materials to safeguard the Constitution through a modern and reliable court.
3. To continually improve the capacity building of the Center for Case Research and Assessment and Library Management in exercising the main duties and functions.
4. To improve the quality and quantity of substantial matters in the drafting of the Constitutional Court decisions through research, case research, case assessments and drafting of legal opinions.

B3.c. Researchers Profile

1. As of March 2018, there are 19 researchers in the Constitutional Court. However, 1 researcher is undertaking overseas study, which means the number of existing researchers at the Constitutional Court of Indonesia is currently only 18 researchers.
2. Of the 18 researchers, there is only 1 researcher who has obtained 3rd level

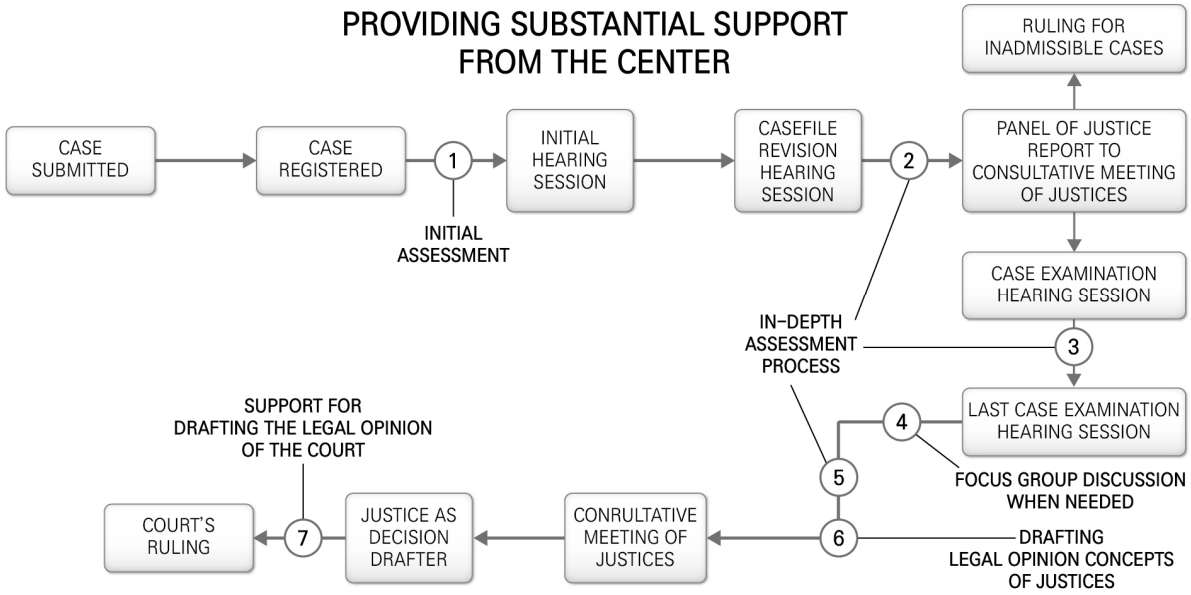
researcher level. Most of the researchers are at the 2nd level. The remaining 8 researchers are equally distributed as 1st level researchers and researcher candidates.

3. Almost similarly, in terms of educational background, 1 researcher has attained a doctoral degree (Strata 3), 13 have completed a master degree (Strata 2), and 4 researchers currently only hold bachelor degrees (Strata 1).
4. The 18 abovementioned researchers at all level are assigned to 9 (nine) justices. In short, 1 Constitutional Court Justice is supported by 2 researchers.



B3.d. Procedures in Providing Substantial Support

In providing substantial support to the Justices, there are several main steps in the process. *Step 1,* the researchers would provide preliminary analysis of cases that have been registered at the Court. The analysis would be submitted as an input for the Justices which can be used in the preliminary hearing. In the preliminary hearing, the Justices would scrutinize the petition, the qualification of the petitioner(s), the alleged constitutional loss they suffer and the argument on the unconstitutionality of the articles of the law submitted for a review. In this preliminary hearing, the Justices are obliged by the law (the Constitutional Court Law) to give suggestion to the petitioners to correct and make their petition clear. However, it is up to the petitioners whether they would take the advice or not. While the Justices are obliged to give the advice to the petitioners, the petitioners are not obliged to take the advice. *Step 2,* researchers would do an in-depth study and analysis on the constitutional issues of the case. The researcher would analyze every issue at hand including following up information obtained from the testimony of the president, parliament, experts and witnesses given during hearing sessions. *Step 3,* researchers would assist the Justices in drafting the legal opinion. In this step, there will be a series of discussions with the Justices in which the Justices would express their opinion to be drafted by the researchers.



B4. Court Administration

B4.a. Overview

Based on the stipulation of Article 7 of the Law on the Constitutional Court, "A registrars' office and general secretariat shall be established at the Constitutional Court in order to provide assistance in the implementation of the Constitutional Court's tasks and authorities." It implies that there are two supporting units in providing assistance to the execution of the Constitutional Court's tasks and authorities.

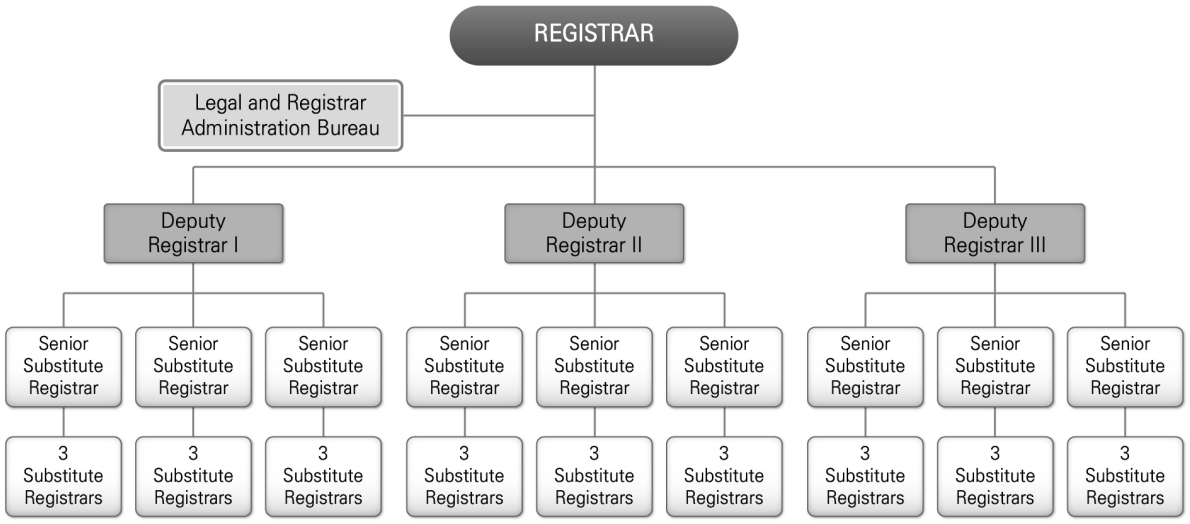
The function of the registrars' office is further elaborated in the stipulation of Article 7A of the same law stating that the main duties of the office is to provide technical judicial administrative support in order to realize the Court as an independent, impartial, and accountable judicial institution. This effort is done through the development of synergic relationship with the General Secretariat while maintaining their respective roles and functions, this condition is one of the factors why the Constitutional Court is able to become a model of justice for other judicial systems in Indonesia.

Considering its functional position, in executing the main duties, the registrars' office is also supported by the Legal and Registrars' Administration Bureau which falls under the supervision of the Secretariat General. The Legal and Registrar Administration has the duty to provide legal services, administrative management, facilities management, and technical supports to the court sessions.

B4.b. Organization

The Registrars' Office of the Constitutional Court has the main task of providing support in the field of judicial administration. The Registrar is in charge of handling various affairs, such as the registration of petitions filed by petitioners, examination of the completeness of petitions, the recording of complete petitions in the Book of Constitutional Cases Registration, as well as preparing and assisting with the implementation of the Court's hearings. The organizational structure of the Registrars' Office of the Constitutional Court consists of a number of functional positions of the Registrar. The Registrars' Office constitutes a supporting unit for Constitutional Court Justices in handling cases at the Constitutional Court.

REGISTRAR'S ORGANIZATIONAL CHART

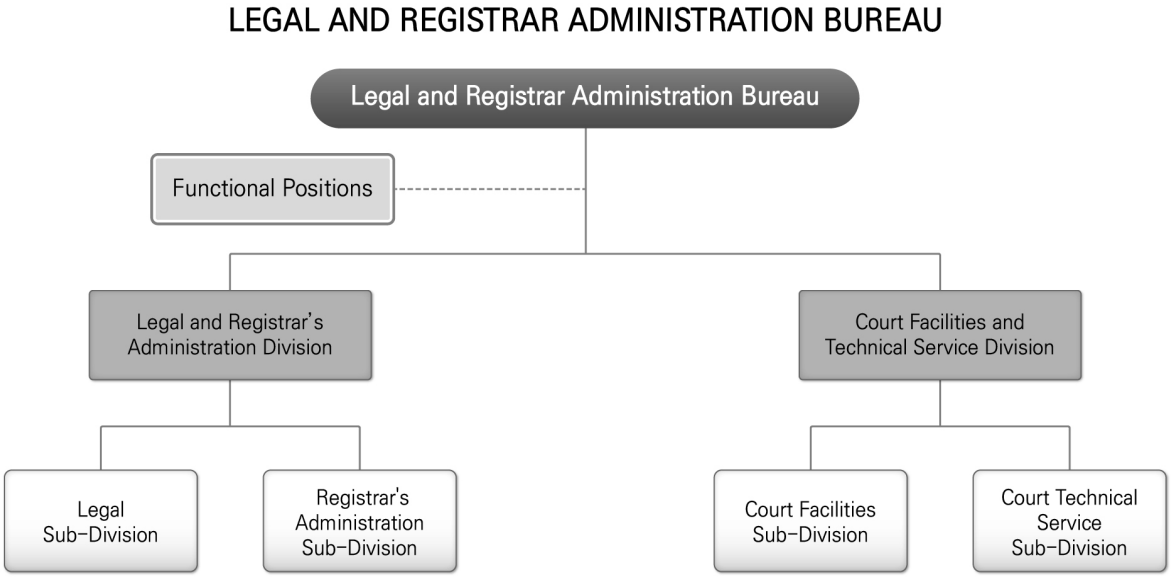


Below is a summary of the role of the Registrar's organization:

1. The administrative duties of the judiciary include:
    a. coordination of judicial technical services in the Constitutional Court
    b. guidance and implementation of case administration
    c. development of technical services of judicial activities in the Constitutional Court
2. The Registrars' Office has the authority:
    a. declare the request has met or has not fulfilled the completeness of the casefile
    b. records the completed application in the Constitutional Case Registration Book
    c. stipulate the date of the first hearing within a period of not more than 14 (fourteen) working days after the application is recorded in the Constitutional Case Registration Book
    d. stipulate the assignment of a substitute clerk in the service of a case and appoint a court official in the court service
3. The Deputy Registrar I has the duty of assisting the Registrar to carry out the guidance and implementation of the case administration which covers:
    a. conducting, managing and supervising the technical implementation of the judiciary in the preparation of the review of the petition and the summary of the petition
    b. coordination and guidance of case administration, consultation related to request, acceptance, recording, inspection, registration, issuance of certificate, cancellation of registration, preparation of panel of judges, composition of Substitute Registrars, and distribution of case file
    c. provision of court support and coordination of judges' panel in handling cases
    d. managing and supervising the execution of the Substitute Registrar's duties
    e. coordination with related institutions in handling cases
4. The Deputy Registrar II of the Court has the duty of assisting the Registrar to carry out the technical services of judicial activities covering:
    a. coordination and management of case administration, supervision of judicial technical implementation in preparation of court proceedings, and preparation of draft decision

b. management and supervision on the implementation of technical services of judicial activities in the administration of the trial, scheduling of hearings, the submission of a copy of the petition, the submission of a hearing, a written statement, a copy of the decision, the request of the minutes of the discussion of the Act, the preparation of the trial report, the drafter decree judgment, and loading of the decision in the State News
c. provision of court support and coordination of judges' panel in handling cases
d. management and supervision on the execution of the Substitute Registrar's duties

5. The Deputy Registrar III of the Court shall have the duty of assisting the Registrar to carry out the guidance of the settlement of the document of the case covering:
   a. coordination and guidance of case administration, carry out case data management and decision, and supervision of case administration settlement
   b. guidance and supervision of the completion of documentation of the case, compilation of judgments, judicial review, legal rules, legal interpretation, jurisprudence and compilation (*minutasi*) of judgments and case files
   c. carry out court support and coordination of judges' panel in handling cases
   d. guidance and supervision on the execution of the Substitute Registrar's duties
   e. Monitoring and evaluating the performance of the Substitute Registrar's duties and performance
6. The Senior Substitute Registrar has the duty of assisting the Registrar and the Deputy Registrars to carry out the technical tasks of the judiciary:
   a. conducting examination and review the application
   b. preparing a court summary (*resume*)
   c. compiling the Minutes of Proceedings
   d. preparing materials and drafting the decision
   e. conducting compilation (*minutasi*) of dossiers and submit to related work units
   f. compiling a summary of the verdict
   g. supervising the execution of duty of Substitute Registrar
   h. monitoring the preparation of the summary of the decision and the implementation of compiling (*minutasi*) case files of the Substitute Registrar's case
7. The Substitute Registrar has the duty of assisting the Registrar and the Deputy Registrars to carry out the technical tasks of the courts covering:
   a. conducting examination and review of the application
   b. preparing a court summary (*resume*)
   c. compiling the Minutes of Proceedings
   d. preparing materials and drafting the decision
   e. conducting compilation (*minutasi*) of dossiers and submit to related work units
   f. preparing the summary of the decision



Below is a summary of the role of the Legal and Registrar Administration Bureau:

1. The Legal and Registrar Administration Bureau has the duty to provide legal services, administer the court administration, and manage technical facilities and technical services of the court.
2. The Legal and Registrar Administration Division has the duty to administer the legal services and administration of the Registrars' Office.
3. The Court Technical Facilities and Services Division shall have the task of administering court facilities and conducting technical services of the proceedings.
4. The Legal Sub-Section has the duty of preparing advocacy materials, litigation, and implementation of legal aid services, regulation, and monitoring and evaluation of decision.
5. The Sub-Section of the Administration of the Registrar Office has the duty to administer the administration of the Registrar, and the implementation of Bureau's Administration.
6. The Sub-Section of the Court Facilities shall have the task of preparing the trial facilities and infrastructures, as well as the coordination of court safeguards.
7. Sub-Section of Technical Service of Court Sessions has duty of data processing case, management and service of minutes of trial, decision, document of case and preparation of report.

B5. Other

B5.a. Secretary General main tasks

The Secretary General is carrying out technical administrative tasks, and shall include the following: (1) coordination of administrative implementation within the General Secretariat and the Registrars' Office; (2) formulation of the plan and program for administrative technical support; (3) implementation of cooperation with the community and inter-institutional relations; (4) implementation of supporting facilities for court hearing activities; and (5) the implementation of other tasks assigned by the Chief Justice of the Constitutional Court in accordance with its field of tasks.

1. The Secretary General shall carry out administrative technical tasks of the Constitutional Court which includes:
    a. coordination of administrative implementation within the Registrars' Office and the General Secretariat
    b. the preparation of plans and administrative technical support programs
    c. implementation of cooperation with community and inter-agency relations
    d. the implementation of facilities support of the trial activities
    e. coordination and preparation of plans, programs, and budgets
    f. fostering and providing administrative support which includes administrative, judicial administration, administrative office and minutes, employment, finance, housekeeping, cooperation, public relations and inter-institutional relationships, leadership and protocol management, archives and documentation, fostering and structuring the organization and governance
    g. the implementation of providing facilities support of the trial activities
    h. the management of state property and the procurement of goods / services
    i. facilitation of the permanent secretariat of the Association of Asian Constitutional Courts and Equivalent Institutions (AACC)
    j. research and case studies, library management and constitutional history
    k. management of information and communication technology
    l. the implementation of Pancasila and Constitution education
    m. implementation of internal control
2. In performing its duties and functions, the Secretariat General shall have the authority:
    a. establishing the strategic plan, work program and budget of the Constitutional Court
    b. to stipulate organizational management and work procedures, human resources, finances, and state property
    c. sign a cooperation agreement
    d. establish rules, decisions and policy rules
3. Planning and Finance Bureau has the task of carrying out planning and evaluation, and financial management that includes:
    a. work program planning and budgeting, and performance evaluation
    b. financial management
    c. preparation of strategic plans, work programs and budgets
    d. evaluation and preparation of performance reports
    e. preparing materials for the preparation of plans, strategic plans, work programs and budgets
    f. preparation of performance evaluation materials, and preparation of performance reports
    g. implementation of verification of financial documents
    h. treasury management
    i. implementation of accounting and preparation of financial statements
    j. implementation of accounting and preparing financial reports, as well as administration of the Bureau
4. Bureau of Human Resources and Organization has the duty to carry out human resource management, and management of organizational structuring and governance, and facilitation of bureaucratic reform that includes:
    a. administrative management of judges and employees
    b. human resources development
    c. organizational structuring and governance, and facilitation of bureaucratic reform
    d. planning and development needs and personnel management system
    e. planning and development of human resource potential and capacity
    f. coaching and development of Non Civil Servants

g. preparation of organizational structuring and governance materials
h. preparation of facilitation materials for the implementation of bureaucratic reform, public service standards, and operational standards of procedures, and the implementation of Bureau's administration

5. The Public Relations Bureau and the Protocol have the duty of carrying out public relations and domestic cooperation, the AACC permanent secretariat and overseas cooperation, as well as the leadership and protocol governance including:
   a. the implementation of the permanent secretariat of the Association of Constitutional Courts in Asia and / or similar institutions and foreign cooperation
   b. implementation of leadership and protocol administration
   c. implementation of public relations
   d. implementation of domestic cooperation and inter-agency relations
   e. the implementation of Bureau's administration
   f. Implementation of coverage, news, and publishing, as well as the press
   g. preparation of agreements and implementation of cooperation in the country
   h. development of cooperation with institutions and institutions in the country
   i. implementing the permanent secretariat facilitation of the Constitutional Assembly seas and / or similar institutions
   j. implementation and development of foreign cooperation
   k. preparation of planning and coordination materials, website updates and management of fixed secretariat information
   l. administration, preparation of implementation materials and development of overseas cooperation and / or with international organizations
   m. the administration of the Chairman and Vice Chairman, Judge, and Secretary General
   n. protocol services for the activities of the head, court, and guests
6. The General Affairs Bureau has the duty to carry out housekeeping management, security, procurement, equipment and administration of State property which includes:
   a. management of household office and home office and management and maintenance of office building, and home office
   b. management of records, archives and expeditions
   c. the implementation of security within the Constitutional Court, the home office or the residence of the leadership of the Constitutional Court
   d. implementation of procurement of goods / services
   e. management of equipment, preparation of needs analysis, administration storage, distribution, maintenance and removal of State property
   f. implementation of the accounting and preparation of reports on state property, as well as the administration of the Bureau
7. Inspectorate is an element of supervisor who is under and responsible to the Secretary General who is tasked to carry out internal supervision and prevention of corruption in the Registrars' Office and General Secretariat covers:
   a. preparation of technical policy of internal supervision and prevention of corruption
   b. implementing of internal controls on performance and finances through audit, review, evaluation, monitoring, and other oversight activities on the performance of the duties and functions of the Registrar and the Secretariat General
   c. preventing of corruption and the development of systems and culture of integrity
   d. conducting of supervision, investigation, clarification, and / or examination of alleged irregularities in the Registrars' Office and the General Secretariat
   e. preparation of supervision reports

   f. holding of supervision for a particular purpose on the assignment of the Secretary-General
   g. management of equipment, preparation of needs analysis, administration, storage, distribution, maintenance and removal of State property
8. Information and Communication Technology Center has the task of implementing the management of information systems and data services, as well as the management of infrastructure, network and communications including:
   a. preparation of technical policies in the field of information and communication technology and data services
   b. management, utilization and development of information and application systems, data services, and information technology, communication and data development
   c. management, utilization and development of application systems
   d. management, utilization and development of infrastructure and communication networks
   e. guidance of information technology, communication and data
   f. security of information technology, communication and data
9. Pancasila and the Constitution Education Center have the duty to implement the education of Pancasila and the Constitution:
   a. planning and development of educational programs and curricula, as well as evaluation and reporting of the education on Pancasila and the Constitution
   b. education on Pancasila and the Constitution
   c. planning and development of educational programs and curricula
   d. development of faculty
   e. education of Pancasila and the Constitution
   f. implementation of evaluation and reporting of the education of Pancasila and the Constitution
   g. provision and maintenance of facilities and infrastructure, and internal security
   h. financial management, personnel administration, archives and documentation
   i. management of equipment, preparation of needs analysis, administration, storage, distribution, maintenance and removal of State property

C. Jurisdictions

As stipulated in the Article 24C Paragraph (1) and (2) of the 1945 Constitution and also in Article 10 Paragraph (1) of the Law on Constitutional Court, the Constitutional Court of the Republic of Indonesia shall possess the authority to try a case as final and binding and shall have the final power of decision in:

1. reviewing laws against the Constitution
2. determining disputes over the authorities of state institutions whose powers are given by this Constitution
3. deciding over the dissolution of a political party
4. deciding over disputes on the results of a general election

Also, the Constitutional Court:

5. shall possess the authority to issue a decision over a petition concerning alleged violations by the President and/or the Vice-President as provided by the Constitution

C1. The Review of Laws against the Constitution

1. Key legal provisions:
   - Article 24C Paragraph (1) and (2) of the 1945 Constitution.
   - Article 10 Paragraph (1), Article 50A, Articles 51-60 of the Law on the Constitutional Court.

2. Purpose:
   - To uphold the system of checks and balances in constitutional government and to safeguard the Constitution as the supreme law of the land.

3. Cause for request:
   - A petitioner shall be a party who claims that his/her/its constitutional rights and/or competency have been impaired by the entry into force of a law, namely:
     a) an individual person of Indonesian nationality
     b) a customary law community group insofar as it is still in existence and in conformity with development in society and the principles of the Unitary State of the Republic of Indonesia as prescribed by law
     c) a public or a private legal entity
     d) a state institution
   - The petitioner may file a request to review
     a) the formulation of the law concerned does not comply with the provisions of the Year 1945 Constitution of the State of the Republic of Indonesia; and/or
     b) the material substance of paragraph(s), article(s), and/or part(s) of the law concerned is/are considered to be contradictory to the 1945 Constitution of the State of the Republic of Indonesia.

4. Procedures:
   - The Filing of Petitions:
     a) Petitions shall be filed with the Constitutional Court in writing in the Indonesian language by the petitioner or his/her proxy.
     b) Petitions as intended in paragraph (1) shall be signed by the petitioner or his/her proxy in 12 (twelve) copies.
     c) Petitions which have been duly completed as intended in paragraph (2) shall be recorded in the Registry of Constitutional Cases and a receipt shall be given to the petitioners concerned. The Registry of Constitutional Cases shall indicate, among other things, notes regarding the completeness of administrative requirements including case Number, the date on which the petition case files were received, the name of the petitioner, and the main issue of the case concerned.
     d) The Constitutional Court shall determine the day of the first hearing within 14 (fourteen) working days as from the time at which the petition concerned is recorded in the Registry of Constitutional Cases.
   - Preliminary Examination:
     a) Prior to conducting a plenary hearing, the Constitutional Court may form a panel of justices consisting of at least 3 (three) Constitutional Court Justices to examine the main issue of the dispute, the Constitutional Court shall conduct an examination on the completeness and clarity of the substance of the petition.
     b) The results of which are deliberated upon in the plenary hearing to render a decision.
   - Court Hearing:
     a) Constitutional Court hearings are open to the public, except for the deliberation sessions of the Justices.

b) In the court hearing, Constitutional Court Justices shall include the following:
   - examination of the main issue of the petition
   - examination of written evidence
   - hearing the statements of the disputing parties
   - hearing witness statements
   - hearing expert statements
   - hearing related party statements
   - examination of the relevance of series of data, information, acts, conditions, and/or events to other means of evidence which may be used as indication
   - examination of other means of evidence in the form of information uttered, transmitted, received, or stored electronically by means of optical instruments or similar to such means of evidence

5. Decisions and effects:
   - The Constitutional Court may make a decision of constitutional nonconformity, conditional unconstitutionality, conditional constitutionality, or decide the case to be unconstitutional or constitutional.
   - Any statute or provision thereof decided as unconstitutional shall lose its effect from the day on which the decision is made.
   - The concurrence of six or more Justices is required to make a decision of unconstitutionality.
   - Any decision that statutes are unconstitutional shall bind the ordinary courts, other state agencies and local governments.

C2. Competence Dispute

1. Key legal provisions:
   - Article 24C Paragraph (1) and (2) of the 1945 Constitution.
   - Articles 61-67 of the Law on the Constitutional Court.

2. Purpose:
   - To avoid overlapping authorities between State Bodies and to uphold the principle of checks and balances between public powers.

3. Cause for request:
   - The petitioner shall be a state institution that considers its constitutional authority taken, reduced, obstructed, ignored, and / or harmed by other state agencies.
     a) the petitioner shall be a state institution whose authorities are granted under the 1945 Constitution of the State of the Republic of Indonesia, and which has a direct interest in the disputed authority(-ies)
     b) an individual person of Indonesian nationality
     c) a customary law community group insofar as it is still in existence and in conformity with development in society and the principles of the Unitary State of the Republic of Indonesia as prescribed by law
     d) a public or a private legal entity
     e) a state institution

4. Procedures:
   - The petitioner shall be obligated to describe clearly in its petition the petitioner's direct interest and to specify the authorities that are subject to the dispute concerned as well as to state clearly the state institution which constitutes the respondent.

- The Constitutional Court may issue a stipulation ordering the petitioner and/or the respondent to temporarily suspend the exercise of the authority(-ies) which is/are the subject of dispute until a decision of the Constitutional Court is available.

5. Decisions and effects:
   - In the event the Constitutional Court is of the opinion that the petition is well-founded, the injunction of the decision shall declare that the petition is granted.
   - In the event the Constitutional Court is of the opinion that the petitioner and/or the petition does not meet the requirements as mentioned in Number 4 above, the injunction of the decision shall declare that the petition cannot be accepted.
   - In the event the petition is granted, the Constitutional Court shall expressly declare that the respondent holds no authority to exercise the competency which is the subject of the dispute.
   - In the event the petition is not well-founded, the injunction of the decision shall declare that the petition is rejected.
   - If the Constitutional Court declares that a State organs holds no authority to exercise a competency, the respondent shall be obligated to implement the said decision within 7 (seven) working days as from the time at which the decision is received.
   - If the decision is not duly implemented within the timeframe as intended above, the respondent's exercise of the competency shall become null and void.
   - Decisions of the Constitutional Court concerning disputes over authorities shall be conveyed to the DPR, the Regional Representatives' Council (DPD), and the President.

C3. Dissolution of Political Parties

1. Key legal provisions:
   - Article 24C Paragraph (1) and (2) of the 1945 Constitution.
   - Article 68-73 of the Law on the Constitutional Court.

2. Purpose:
   - To safeguard the Constitution and to uphold the constitutional democratic system by making sure that the ideology, the principles, the objectives, the program and the activities of a political party are not in contradictory to the 1945 Constitution of the State of the Republic of Indonesia.
   - To provide a legal certainty for political parties as a means of protection from the unlawful and arbitrary decisions of the government.

3. Cause for request:
   - The petitioner shall be the Government who considers the ideology, the principles, the objectives, the program and the activities of a political party concerned, deemed to be contradictory to the 1945 Constitution of the State of the Republic of Indonesia.

4. Procedures:
   - The petitioner shall be obligated to describe clearly in its petition the ideology, the principles, the objectives, the program and the activities of the political party concerned, deemed to be contradictory to the 1945 Constitution of the State of the Republic of Indonesia.
   - The decision of the Constitutional Court concerning a petition for the dissolution of a political party must be passed within 60 (sixty) working days from the time at which the petition is recorded in the Registry of

Constitutional Cases.
- The decision of the Constitutional Court on the dissolution of a political party shall be conveyed to the political party concerned.

5. Decisions and effects:
   - In the event the Constitutional Court is of the opinion that the petition is well-founded, the injunction of the decision shall declare that the petition is granted.
   - In the event the Constitutional Court is of the opinion that the petitioner and/or the petition does not meet the requirements as mentioned in Number 4 above, the injunction of the decision shall declare that the petition cannot be accepted.
   - In the event the Constitutional Court is of the opinion that the petition is not well-founded, the injunction of the decision shall declare that the petition is rejected.
   - Implementation of the decision on the dissolution of a political party shall be effected by way of annulment of its registration at the Government.
   - The decision of the Constitutional Court shall be announced by the Government in the Official Gazette of the Republic of Indonesia within 14 (fourteen) days as from the time at which the decision is received.

C4. Disputes Concerning the Results of General Elections

1. Key legal provisions:
   - Article 24C Paragraph (1) and (2) of the 1945 Constitution.
   - Article 74-79 of the Law on the Constitutional Court.

2. Purpose:
   - To safeguard the people's sovereignty in the election of members of the People's Legislative Assembly, members of the Regional Representative Council, the President and the Vice-President, and members of the Regional People's Legislative Assembly, conducted directly, publicly, freely, secretly, honestly and fairly in the Unitary State of the Republic of Indonesia based on Pancasila and the 1945 Constitution of the State of the Republic of Indonesia.

3. Cause for request:
   - Petitioners shall be as follows:
     a) an individual Indonesian citizen competing in the general election as candidate member to the Regional Representatives' Council (DPD)
     b) a President and Vice President candidate pair competing in the general election for the presidency and vice-presidency
     c) a political party competing in the general election
   - A petition may be filed only to contest the determination of the results of the general elections conducted on a national scale by the General Elections Commission (KPU) which affect the following:
     a) the election of a candidate as member of the Regional Representatives' Council (DPD)
     b) the determination of the pair of candidates competing in the second round of the election for presidency and vice-presidency and the pair of candidates elected to the presidency and vice-presidency
     c) the seats won in an electoral district by a political party competing in the general election

4. Procedures:
   - An appeal may be filed within a period of 3 X 24 (three times twenty-four) hours as from the announcement by the KPU of the determination of the

results of the general election nationally.
- In the petition filed, the petitioner shall describe clearly the following:
  a) the error(s) in the ballot count as announced by the KPU and the result(s) thereof which the petitioner believes to be the correct result(s); and
  b) a request for the annulment of the ballot count as announced by the KPU and for the latter to determine the result(s) of the ballot count which the petitioner believes to be the correct result(s).
- The Constitutional Court shall convey a petition which has been recorded in the Registry of Constitutional Cases to the KPU within 3 (three) working days as from the time at which the petition is recorded in the Registry of Constitutional Cases.
- The decision of the Constitutional Court concerning a petition on a dispute on the results of the general election shall be rendered within a period of:
  a) 14 (fourteen) working days from the time at which the petition is recorded in the Registry of Constitutional Cases, in the case of elections for the presidency and vice-presidency;
  b) 30 (thirty) working days from the time at which the petition is recorded in the Registry of Constitutional Cases, in the case of the election of members to the DPR, the Regional Representatives' Council (DPD), and the Regional People's Legislative Assembly (DPRD).
- The decision of the Constitutional Court concerning a petition on a dispute on the results of the general election shall be rendered within a period of:
  a) 14 (fourteen) working days from the time at which the petition is recorded in the Registry of Constitutional Cases, in the case of elections for the presidency and vice-presidency;
  b) 30 (thirty) working days from the time at which the petition is recorded in the Registry of Constitutional Cases, in the case of the election of members to the DPR, the Regional Representatives' Council (DPD), and the Regional People's Legislative Assembly (DPRD).

5. Decisions and effects:
   - In the event the Constitutional Court is of the opinion that the petition is well-founded, the injunction of the decision shall declare that the petition is granted.
   - In the event the Constitutional Court is of the opinion that the petitioner and/or the petition does not meet the requirements as mentioned in Number 4 above, the injunction of the decision shall declare that the petition cannot be accepted.
   - In the event the petition is granted favor as intended to in paragraph (2), the Constitutional Court shall declare the annulment of the ballot count as announced by the KPU and shall determine the correct ballot count.
   - In the event the Constitutional Court is of the opinion that the petition is not well-founded, the injunction of the decision shall declare that the petition is rejected.
   - The decisions of the Constitutional Court on Disputes Concerning the Results of General Elections shall be final and binding.

C5. Opinion of the DPR on the Allegation of Violation Committed by the President and/or the Vice President

1. Key legal provisions:
   - Article 24C Paragraph (1) and (2) of the 1945 Constitution.
   - Article 80-85 of the Law on the Constitutional Court.

2. Purpose:
To prove based on legal and constitutional reasons whether the President and/or the Vice President are/is proven to have violated the law in the form of treason against the state, corruption, bribery, other serious criminal act, act of misconduct, and/or proven to be no longer fulfilling the requirements as President and/or Vice President.

3. Cause for request:
The petitioner shall be obligated to clearly describe in its petition any allegation of: (1) violation of the law committed by the President and/or the Vice President in the form of treason against the state, corruption, bribery, other serious criminal act, or act of misconduct; and/or (2) the President and/or the Vice President no longer fulfilling the requirements for President and/or Vice President by virtue of the 1945 Constitution of the State of the Republic of Indonesia.

4. Procedures:
- The impeachment of the President and/or the Vice President is to be proposed by the House of Representatives (DPR) by first submitting a petition to the Constitutional Court.
- The Constitutional Court shall convey to the President the petitions which have been recorded in the Registry of Constitutional Cases within 7 (seven) working days as from the time at which the appeal is recorded in the Registry of Constitutional Cases.
- In the event that during the process of examination by the Constitutional Court, the President and/or the Vice President resigns from office, the examination process shall be discontinued and the petition concerned shall be declared null and void by the Constitutional Court.

5. Decisions and effects:
- In the event that the Constitutional Court is of the opinion that the petition does not meet the requirements as intended in point number 3 above, the injunction of the decision shall declare that the petition cannot be accepted.
- In the event that the Constitutional Court decides that the President and/or the Vice President are/is proven to have violated the law as intended in point number 3 above, the injunction of the decision shall affirm the opinion of the DPR.
- In the event that the Constitutional Court decides that the President and/or the Vice President are/is not proven found to have violated the law as intended in point number 3 above, the injunction of the decision shall declare that the appeal is rejected.

Annex

Annex 1. Case Statistics

1-1. Since establishment (Aug. 2003-Dec. 2017)

Type		Total	Judicial Review of Law	Competence Dispute	Dispute of General Election Result	Dispute of Regional Election Result
Filed		2,481	1,134	25	412	910
Settled		2,432	1,085	25	412	910
Decision	Unconstitutional[1]	376	244	1	58	73
	Rejected	1,107	379	3	257	468
	Unacceptable[2]	762	325	16	79	342
	Void[3]	20	20			
	Withdrawn	147	110	5	5	27
	Unauthorized[4]	7	7			
	Interlocutory Decisions[5]	13			13	
Pending		49	49			

1) "Unconstitutional": Used in Constitutionality of Laws cases that Constitutional Court accepted the petition filed and declared a certain law (partially or as a whole) is unconstitutional. This includes the decision of Conditionally Constitutional and Conditionally Unconstitutional.
2) "Unacceptable": Used for petitions the Constitutional Court is of the opinion that the petitioner and/or the petition does not meet the requirements as stipulated in the Act of Constitutional Court.
3) "Void": The Constitutional Court declares a petition as "Void" after the petitioner does not attend any of the court sessions following the submission of the petition and being called properly to present before the court.
4) "Unauthorized": In cases of examining the constitutionality of a law, the Court considers that the petition does not fall under its authority. For example, it should be undergoing a legislative review instead of a judicial review.
5) "Interlocutory Decision": Used in the Dispute of General Election Result and/or Regional Election Result cases. Such decision is issued if the error(s) in the ballot count as announced by the General Election Commission is caused by more than just administrative mistakes. Normally, the Court orders the Commission to recalculate or even to conduct a re-election process; the result(s) of which will be submitted to the Court for final decision.

1-2. Last five years (2013-2017)

2013

Type		Total	Judicial Review of Law	Competence Dispute	Dispute of General Election Result	Dispute of Regional Election Result
Filed		384	181	3		200
• 2013 New Files		304	109	3		192
• 2012 Pending Files		80	72			8
Settled		308	110	2		196
Decision	Unconstitutional[1]	24	22			2

Type		Total	Judicial Review of Law	Competence Dispute	Dispute of General Election Result	Dispute of Regional Election Result
	Rejected	184	52			132
	Unacceptable[2]	66	22	2		42
	Void[3]	3	1			2
	Withdrawn	18	12			6
	Unauthorized[4]	1	1			
	Interlocutory Decisions[5]	18				18
Pending		76	71	1		4

2014

Type		Total	Judicial Review of Law	Competence Dispute	Dispute of General Election Result	Dispute of Regional Election Result
Filed		520	211	1	295	13
• 2014 New Files		444	140		295	9
• 2013 Pending Files		76	71	1		4
Settled		442	131	1	295	13
Decision	Unconstitutional[1]	38	29		9	
	Rejected	265	41		215	9
	Unacceptable[2]	96	37	1	54	4
	Void[3]	6	6			
	Withdrawn	21	17		4	
	Unauthorized[4]	1	1			
	Interlocutory Decisions[5]					
Pending		80	80			

2015

Type		Total	Judicial Review of Law	Competence Dispute	Dispute of General Election Result	Dispute of Regional Election Result
Filed		221	220	1		
• 2014 New Files		141	140	1		
• 2013 Pending Files		80	80			
Settled		158	157	1		
Decision	Unconstitutional[1]	25	25			

Type		Total	Judicial Review of Law	Competence Dispute	Dispute of General Election Result	Dispute of Regional Election Result
	Rejected	50	50			
	Unacceptable[2]	61	61			
	Void[3]	4	4			
	Withdrawn	16	15	1		
	Unauthorized[4]	2	2			
	Interlocutory Decisions[5]					
Pending		63	63			

2016

Type		Total	Judicial Review of Law	Competence Dispute	Dispute of General Election Result	Dispute of Regional Election Result
Filed		326	174			152
• 2014 New Files		263	111			152
• 2013 Pending Files		63	63			
Settled		248	96			152
Decision	Unconstitutional[1]	22	19			3
	Rejected	39	34			5
	Unacceptable[2]	168	30			138
	Void[3]	3	3			
	Withdrawn	15	9			6
	Unauthorized[4]	1	1			
	Interlocutory Decisions[5]					
Pending		78	78			

2017

(as per 22 December 2017)

Type	Total	Judicial Review of Law	Competence Dispute	Dispute of General Election Result	Dispute of Regional Election Result
Filed	240	180			60
• 2014 New Files	162	102			60
• 2013 Pending Files	78	78			
Settled	191	131			60

Type		Total	Judicial Review of Law	Competence Dispute	Dispute of General Election Result	Dispute of Regional Election Result
Decision	Unconstitutional[1]	24	22			2
	Rejected	55	48			7
	Unacceptable[2]	95	44			51
	Void[3]	4	4			
	Withdrawn	12	12			
	Unauthorized[4]	1	1			
	Interlocutory Decisions[5]					
Pending		49	49			

Annex 2. Cases

▸ **Identification**

a) Country, b) Name of the Court, c) Date of decision given, d) Number of the decision, e) Jurisdiction, f) Title of the decision

▸ **Summary**

Case 1.

▸ **Identification**

a) Indonesia, Republic b) Constitutional Court, c) 24-02-2004, d) 11-17 / PUU-I / 2003, e) Judicial Review, f) The Political Rights of Former Members of Banned Organizations in the Election

▸ **Headnotes**

The Petitioners consisted of public figures in the struggles of law enforcement, human rights and democracy, although not directly impaired their constitutional rights, former political prisoners accused of directly or indirect involvement in the G30S / PKI incident, as well as individuals who joined to fight for the rehabilitation of citizens who were categorized as G30S / PKI participants.

The Petitioners argued that the article being tested creates discrimination based on political beliefs because the revocation and restriction of constitutional rights can only be made on the basis of a decision of a court which has permanent legal force. The Petitioners examined Article 60 Sub-Article g of Law 12/2003 regarding the requirements of being legislative member candidates could not be former members of illegal organizations and requested that the article a quo be declared to have no binding legal force as opposed to Article 27, Article 28A to Article 28J of the 1945 Constitution.

▸ **Summary**

In Decision Number 11-17 / PUU-I / 2003 dated February 24, 2004, the Constitutional Court decided on the constitutionality of one of the requirements as a legislative candidate, i.e. not a former member of a banned organization. The Court was of the opinion that the requirement is political. According to the Court, in the matter of restriction of voting right in elections (both active and passive), it was usually based only on considerations of inadequacy, such as age and mental illness and impossibility, for example by being revoked by a court's decision which are generally individual and non-collective.

The Court considered that per individual ex-members of the Indonesian Communist Party (PKI) and the mass organizations under its control had to be treated equally with other citizens without discrimination, including to become legislative candidates. Therefore, the Court declared that the provisions concerning the political requirements were contradictory to the 1945 Constitution and had no binding legal force.

Dissenting Opinion

According to Justice, H. Achmad Roestandi, S.H., the Petitioners' petition must be rejected on the following grounds.

1. Article 60 Sub-Article g of Law 12/2003 seems not to be consistent with the spirit contained in some articles of the 1945 Constitution; however, in reading and seeking the meaning of the articles of the 1945 Constitution should not be partial, but must be systematically linked with other articles, in particular Article 22E Paragraph (6), Article 28I Paragraph (1), and Article 28J Paragraph (2) of the 1945 Constitution.
2. Article 22E Paragraph (6) stipulates: "Further provisions on General Election shall be governed by Law". This article mandates the Lawmakers (House of Representatives and the President) to make more detailed provisions on elections. As such, such mandates may include requirements, confirmation, repetition, and restrictions as long as they do not conflict with the Constitution.
   Such restrictions have a constitutional basis, namely Article 28J paragraph (2) and 28I Paragraph (1) of the 1945 Constitution. Article 28J Paragraph (2) authorizes the legislator to make restrictions on every person in exercising his/her rights with certain considerations. One of the considerations that can be used as a basis for the limitation is the consideration of security and public order.
3. Although the last reference is the 1945 Constitution, the limitation was in conformity with Article 29 Paragraph (2) of the Universal Declaration of Human Rights. In comparison, the limitation of individual rights due to political conduit, such as former members of a particular Political Party, could also occur in other countries, including democratic countries. At the very least during the occupation of the Allies (1945-1949) and early in the era of the Federation of Germany (1949-1953) there had been restrictions on former Nazi party members to occupy certain positions (e.g. ministerial posts).
   Meanwhile, although human rights could not be violated by reason of raison d'etat, but in reality using national interest reasons sometimes violations of those provisions are committed by "democratic" countries. The United States government had arrested Afghans suspected of involvement in al-Qaeda and then detained them at a camp in Guatanamo (Cuba). Although such action might not be justified by US Judges, but for the sake of raison d'etat and national interest the American Government did it.
4. In Indonesia, under the 1945 Constitution such limitations may be made by lawmakers of all human rights, except for the rights set forth in Article 28I. Meanwhile, the limitations set forth in Article 60 Sub-Article g of Law 12/2003

are not included in any of the rights mentioned in Article 28I Paragraph (1). Therefore, the limitation in Article 60 letter g is not contradictory to the 1945 Constitution.
The restrictions imposed by the lawmakers as set forth in Article 60 (g) are not permanent restrictions but situational restrictions, in relation to the intensity of the prospects for the dissemination of the ideology of Communism/Marxism-Leninism and the consolidation of the Indonesian Communist Party (PKI). This is marked by the increasingly lax treatment of former PKI members and others from the previous Electoral Law to the next. In previous Election Laws, former members of the PKI and others were not only limited in the passive vote (the right to be elected), but also their active voting right (the right to vote). Whereas in Law 12/2003 they were restricted to passive suffrage only.

Case 2.

- **Identification**

a) Indonesia, Republic b) Constitutional Court, c) 06-07-2009, d) 102/PUU-VII/2009, e) Judicial Review, f) Unregistered Voters May Be Able To Exercise Their Suffrage

- **Headnotes**

The Petitioners argue that the Petitioners could not vote in the 9 April 2009 elections because they are not listed in the Permanent Voter List (DPT). This was due to the provision of Article 20 of Law Number 10 Year 2008 regarding General Election of Members of DPR, DPD and DPRD which reads, "In order to exercise the right to vote, Indonesian citizens must be registered as voters." Similar provisions were also contained in Article 28 and Article 111 Paragraph (1). Article 28 reads, "In order to exercise the right to vote, an Indonesian citizen as referred to in Article 27 shall be registered as a Voter." Article 111 Paragraph (1) reads, "Voters entitled to vote at the TPS include: a. Voters registered on the Permanent Voters List at the respective TPS; and b. Voters registered in the Additional Voters List."

The applicant required that:

1. Article 28 of Law Number 42 Year 2008 regarding General Election of President and Vice President was contradictory to the 1945 Constitution and had no binding legal force.
2. Article 111 of Law Number 42 Year 2008 regarding the General Election of the President and Vice President was contradictory to the 1945 Constitution and had no binding legal force, or at least stated that Article 111 Paragraph (1) should be read that those not listed in the DPT could still vote as long as the person was 17 years old and/or married.

- **Summary**

The constitutionality of the provisions in the Election Law which states to be able to exercise the right to vote, Indonesian citizens must be registered as voters, was questioned. The reason was that if the Permanent Voters List (DPT) became a requirement that a person may exercise his/her right to vote in the election, then the right to vote may be neglected if his/her name was not registered in the DPT. Through the Decision Number 102/PUU-VII/2009, the Constitutional Court grants the application partially and states that an unnamed voter in the DPT may still exercise his/her right to vote by using an ID Card (KTP) or passport in accordance with the address stated in his/her identity by registering Local Voting Organizer Group (KPPS) one hour prior to the completion of voting at the Voting Place (TPS) concerned.

Case 3.

▸ Identification

a) Indonesia, Republic b) Constitutional Court, c) 17-02-2012, d) 46/PUU-VIII/2010, e) Judicial Review, f) Legal Protection for Children Outside Marriage

▸ Headnotes

The Petitioner argued that Article 43 Paragraph (1) of Law 1/1974 which states, "A child born outside of marriage has only a civil relationship with his mother and his mother's family" was unconstitutional so long as the paragraph was interpreted to eliminate a civil relationship with a man that could be proven on the basis of science and technology and/or other evidence according to the law having a blood relation as the father.

▸ Summary

The provisions of the Marriage Act stating that a child born outside a marriage has only a civil relationship with his mother and his mother's family is questioned of its constitutionality. The provision is considered to eliminate civil relationships with the man who has a blood relationship as the father. In Decision Number 46/PUU-VIII/2010 dated February 17, 2012, the Constitutional Court declared the provision as conditionally unconstitutional. According to the Constitutional Court, the child's relationship with a man as a father is not solely due to a marriage bond, but can also be based on the proof of a blood relationship between the child and the man as a father, regardless of the procedure/administration of his marriage, children born should have legal protection.

Concurring Opinion

Administrative record that has no effect on the validity or illegality of a marriage, then it is not contradictory to the 1945 Constitution because there is no addition to the terms of marriage. Accordingly, the word "marriage" in Article 43 Paragraph (1) of the Law a quo shall also be interpreted as an Islamic marriage or marriage according to the five pillars of marriage.

Nevertheless, based on the sociological review of marriage institutions in the community, the validity of marriage according to certain religions and beliefs cannot directly guarantee the fulfilment of civil rights of wives, husbands, and/or children born of such marriages because of the implementation of religious and customary norms in society is left entirely to individual consciousness and public consciousness without being protected by an official authority (state) that has coercive power.

The essence of recording, in addition to orderly administration, is to protect women and children. The requirements for recording such marriages may be placed in at least two main contexts, namely (i) preventing and (ii) protecting, women and children from irresponsible marriages.

In addition, the protection of children's rights as regulated by Article 28B Paragraph (2) and Article 28D Paragraph (1) of the 1945 Constitution, will be maximized if all marriages are listed so that it will easily be known to the children's genealogy and who has the obligation to the child. Marriage recording is a social dimension intended to provide a guarantee of the legal status and effect of a legal event as well as the recording of birth and death.

A marriage not based on Law 1/1974 also has the potential to harm a child born of the marriage. The potential loss for children is the unrecognized relationship of the child

with his biological father, which certainly cannot be demanded of his father's father to finance the needs of the child's life and other civil rights.

It is not in place if the child has to share the harm caused by the action (marriage) of both parents. If regarded as a sanction, state law and religious law (in this case Islam) do not recognize the concept of the child must share the sanctions due to the actions taken by his parents, or the so-called "derived sin". In other words, the potential loss due to marriages that are carried out not in accordance with Law 1/1974 is a risk to married men and women, but not the risks that should be borne by the child born in the marriage. Thus, the fulfilment of the rights of a child born of a marriage, regardless of whether or not the marriage is legal under the law of the country, remains the responsibility of either biological parents or both biological parents.

Case 4.

- **Identification**

a) Indonesia, Republic b) Constitutional Court, c) 17-02-2012, d) 013-022/PUU-IV/2006, e) Judicial Review, f) Insult To the President or Vice President

- **Headnotes**

The Petitioners were Indonesian individual citizens who appeal to the Constitutional Court to declare Article 134 and Article 136 bis of the Criminal Code along with their explanations were in contrary to Article 28F of the 1945 Constitution. According to the Petitioners, the articles a quo strongly contradicted the principle of legal certainty because they did not impose limits which was unequivocal about the category of defamatory acts in question, thus causing bias and/or creating a vast interpretation of the law and contrary to the 1945 Constitution. In addition, the articles a quo were considered by the Petitioners no longer compatible with the development of society in the democratic world, even more so in the reform era.

- **Summary**

Based on Decision Number 013-022/PUU-IV/2006 dated December 6, 2006, the Constitutional Court granted the Petitioners' petition completely and annulled the articles relating to defamation offenses against the President or Vice President contained in Article 134, Article 136 bis, and Article 137 of the Criminal Code. According to the Court, these articles may create legal uncertainty (rechtsonzekerheid) because it is very vulnerable to the interpretation of whether a protest, statement of opinion or thought is a criticism or contempt against the President and/or Vice President. In addition, the Court also believes that the a quo articles also have the opportunity to obstruct the right to freedom of expression of thoughts with oral, written and expression of attitude when the three articles of criminal law are always used by the law apparatus against the momentum of the demonstrations in the field.

Dissenting Opinions of Constitutional Justice I Dewa Gede Palguna dan Soedarsono

It is a universal provision, in any legal tradition, that defamation is a crime, although its substance varies according to space and time, so that what is in a place and at any given time is considered as an insult, not necessarily elsewhere and different times are also an insult. Thus, humiliation - against whomever is addressed and in any criminal law of any country - is a criminal act.

It is true that, according to its history, the provisions of Article 134 of the Criminal

Code are intended to protect the dignity of the King and are therefore not formulated as complaints but as ordinary offenses. Considering the reason that, according to its history, the current Criminal Code is derived from Wetboek van Strafrecht which is a relic of the Dutch colonial government in which the provision of defamation of the institution of the President (and Vice President), according to the history of its composition, it is derived from the intent to protect the dignity of the King. We are of the opinion that it remains relevant.

The potential or likelihood of violation of constitutional rights, particularly as regulated in Article 28 and Article 28E Paragraphs (2) and (3) of the 1945 Constitution, namely in the event that there is a situation in which a person who submits criticism of the President, by the investigator or the public prosecutor judged as an insult to the President, it is not a matter of constitutionality of the norm but the issue of the application of norms. A constitutional norm when applied in practice by law enforcement officers is indeed likely to violate one's constitutional rights, partly because it is wrong in interpreting it. However, errors in the interpretation and application of norms are completely different from the unconstitutionality of the norm. To overcome this problem, the Constitutional Court in another country, in addition to being authorized to adjudicate a judicial review or constitutional review case, is also authorized to adjudicate cases of constitutional question and constitutional complaint. The two authorities, constitutional question and constitutional complaint, are not owned by this Court - at least until now.

Dissenting Opinions of Constitutional Justice H.A.S. Natabaya dan H. Achmad Roestandi

The Presidential Institution according to the 1945 Constitution is the result of the distillation of the people of Indonesia so that the President is the personal embodiment and representative of people dignity and majesty. Thus all honors and privileges granted by a foreign country are due to his position as Head of State derived from the fact that the dignity of a Head of State is recognized by the international community and international law.

All legal actions of a President is not accountable to the person (prive), but in his position as the personality of the office (ambtsdrager). It is logical according to the law if the Criminal Code contains articles that regulate the protection of the personality of the office. Such case can also be found in almost every Criminal Code of some countries. For example, among others, the German state that in Deutsches Strafgesetzbuch, the crime of contempt against the President is qualified as a crime that endangers a democratic legal state (demokratischer Rechtsstaat). This is set forth in Section 90 which actually serves to protect the Democratic Rule of Law in Germany.

Within the framework of the transitional legal norms, it is the duty of the People's Legislative Assembly and the Government to legislatively review the laws and regulations prevailing before the amendment of the 1945 Constitution. Obviously, in the amendment of the Criminal Code need to be put as a consideration for the legislators whether or not the defamation offense against the President who is a self-defeating offense (zelfstandigedelict) will become a complaint offense (klacht delict). Similarly, the threat of punishment directed against the offense of defaming the President whether to be lightened or not. Thus, the way is open to review the current Criminal Code for changes and adjustments by taking into account the spirit of time. All of that will be repeated to the legal policy of the legislators in this case the Parliament and the Government.

Apart from the above problems it is also necessary to discuss equality before the law which was argued by the Petitioners. Equality before the law as stipulated in Article 27 Paragraph (1) of the 1945 Constitution, does not mean that every law should apply to all people who by its nature, achievement or circumstances are indeed different from each other. And if it is necessary, as long as there is a reasonable and arbitrary reason, the

distinction of treatment of a particular person does not constitute something contrary to the Constitution. It should also be noted that the Court's Decision in the case No. 070 / PUU-II / 2004, which states among other things "justice is to treat equally to the same things and treat differently to things that are different".

Case 5.

- **Identification**

a) Indonesia, Republic b) Constitutional Court, c) 23-07-2007, d) 5/PUU-V/2007,
e) Judicial Review, f) Individual Candidates In the Election Of Regional Head

- **Headnotes**

The Petitioner wishes to run in the election of Governor and Deputy Governor of West Nusa Tenggara but Law 32/2004 does not provide opportunities for candidate pairs outside candidate pair proposed by political party. Therefore, the Petitioners prefer that Article 56 Paragraph (2), Article 59 Paragraph (1), Paragraph (2), Paragraph (3), Paragraph (4), Paragraph (5) a and c, and Paragraph (6)) and Article 60 Paragraph (2), Paragraph (3), Paragraph (4), Paragraph (5) of Law Number 32 Year 2004 regarding Regional Government are considered contradictory to Article 18 Paragraph (4), Article 27 Paragraph (1) Article 28D Paragraph (1) and Paragraph (3), and Article 28I Paragraph (2) of the 1945 Constitution, so that the Petitioner may submit himself to become an individual candidate not proposed by a political party or a coalition of political parties in the regional head election.

- **Summary**

Decision of the Constitutional Court Number 5/PUU-V/ 2007 dated July 23, 2007 stipulates that the nomination of regional head and deputy regional head individually outside the Province of Nanggroe Aceh Darusalam must be opened so that there is no dualism in the implementation of Article 18 Paragraph (4) of the 1945 Constitution According to the Court, the existence of such dualism may result in violation of the rights of citizens guaranteed by Article 28D Paragraph (1) and Paragraph (3) of the 1945 Constitution. Since the Decision a quo, the individual candidate as a candidate pair not proposed by a political party or a coalition of parties can follow the election of heads and deputy heads of regions throughout Indonesia.

Dissenting Opinion of Constitutional Justice H. Achmad Roestandi

The 1945 Constitution has regulated the procedures for filling the position (membership) of state institutions. The detailed procedure for completing the position of the President and Vice President, members of the DPR, members of the DPRD and the DPD members, is democratic and should be accepted as consistent with the spirit contained in the fourth paragraph of Preamble and Article 1 Paragraph (2) of the 1945 Constitution.

Article 18 Paragraph (7) of the 1945 Constitution instructs the legislators (DPR and President) to regulate the composition and procedure of local government administration. Under the provisions of Article 18 Paragraph (7) of the 1945 Constitution, the legislator may determine the procedures for the election of regional heads that meet the criteria of "democratically elected". The determination of that choice is the legal policy which is the authority of the legislator.

The articles petitioned for judicial review do not necessarily cover the possibility of the

emergence of independent candidates who are not members of the party, only that they are subject to restrictions, they must be submitted by political parties or coalitions of political parties. Such restrictions are not unconstitutional, since they are made possible by the provisions of Article 28J of the 1945 Constitution.

The specificity of the Nanggroe Aceh region in the nomination of regional heads, due to the current conditions that have not been possible for the Aceh region to be compared with other regions. In addition, the specificity is related to the material content of M.O.U. the agreement between the Republic of Indonesia and GAM. The legislator is well aware of this. Procedures for the election of such regional heads are only valid once (eenmalig), thus, the differences will not occur again in the election of regional heads in the future. That is, the tendency of a kind of discrimination is no longer possible.

Based on the reasons described above the articles in the Regional Government Law have been in accordance with the 1945 Constitution, there is nothing unconstitutional. Therefore, the Petitioners' petition must be declared rejected entirely.

Dissenting Opinion of Constitutional Justice I Dewa Gede Palguna

Equality of positions and opportunities in government without discrimination is different from the mechanism of recruitment in democratic government positions. It is true that the right of everyone to equal opportunity in government is protected by the Constitution as long as the person meets the conditions prescribed in the law concerning it. The Terms shall apply equally to all persons, irrespective of persons, whether by reason of religion, ethnicity, race, ethnicity, group, class, social status, economic status, gender, language and political beliefs. Proposing candidates through such political parties cannot be viewed contrary to the 1945 Constitution, such a system is a legal policy that cannot be tested unless it is done arbitrarily (willekeur) and exceeds the legislator's authority (detournement de pouvoir)

It is true that such articles do not allow individuals to nominate themselves as regional heads / deputy heads of regions, but such is not discrimination either in the sense of the 1945 Constitution, Article 1 Paragraph (3) of Law Number 39 Year 1999 concerning Human Rights, as well as under Article 2 of the International Covenant on Civil and Political Rights (ICCPR).

The provisions in the Regional Government Law, insofar as it concerns the way of election of regional head / deputy head of region, is inter-related between the provisions of one and the other, where it is not limited to the provisions petitioned for review. Therefore, if the provisions of the Regional Government Law petitioned for judicial review in the petition a quo regulating the candidate pair of regional head / vice regional head through political parties are contradictory to the 1945 Constitution, whereas not (quod non), the Regional Government Law is impossible to be implemented, at least insofar as it concerns the election of regional head / deputy regional head.

Based on all the above considerations, the Petitioners' argument stating that Article 56 Paragraph (2), Article 59 Paragraph (1), Paragraph (2), Paragraph (3), Paragraph (4), Paragraph (5) a,) Paragraph (3), Paragraph (4), Paragraph (5) of the Regional Government Law is contradictory to Article 27 Paragraph (1), Article 28D Paragraph (3), and Article 28I Paragraph (2) of the 1945 Constitution is unwarranted. Therefore, the Court should declare to reject the petition a quo.

Dissenting Opinion of Constitutional Justice H.A.S. Natabaya

The mechanism for determining the pair of candidates for Regional Head and Deputy Regional Head submitted by a political party or a coalition of political parties as regulated in Article 56 juncto Article 59 Paragraph (3) of the Regional Government Law

is in conformity with the provisions of Article 6A Paragraph (1) and Paragraph (2) of the 1945 Constitution. It is very ironic if a law is declared contradictory to the 1945 Constitution, while the law itself (Act on Regional Government) has taken over the mechanism used by the 1945 Constitution which is the basic law (Staatsgrundgesetz) of the State of Indonesia. If this happens, then the mechanism is not in accordance with the hierarchy theory of legislation that we embrace as stated in Article 7 Paragraph (1) Laws for the Establishment of Laws and Regulations.

The Petitioners have been mistaken for the existence of individual candidates as stipulated in Article 67 Paragraph (1) sub-paragraph d, the Aceh Government Law is only for overgang before the formation of local parties and the provision only applies eenmalig (one way only) because afterwards there may not be individual candidates.

Referring to the Decision of the Constitutional Court on Case Number 006 / PUU-III / 2005 concerning the Judicial Review of Law Number 32 Year 2004 regarding Regional Government, the limitation of such political rights is justified by Article 28J Paragraph (2) of the 1945 Constitution, provided that such restrictions are "solely to secure the recognition and respect for the rights and freedoms of others and to fulfil fair demands in accordance with moral judgment, values of the religion, security, and public order in a democratic society "

Whereas the granting of a constitutional right to nominate candidate pairs of regional heads/deputy heads of regions to political parties does not mean that it removes the constitutional rights of citizens, in casu Petitioners to become regional heads, as long as the Petitioner meets the requirements of Article 58 and is conducted according to the referred to in Article 59 Paragraphs (1) and Paragraph (3) of the Regional Government Law, which requirements constitute a mechanism or procedure binding on each person who will be a candidate for regional head / deputy head of region.

Referring to the Decision of the Constitutional Court on Case Number 010 / PUU-III / 2005 concerning the Judicial Review of Law Number 32 Year 2004 regarding Regional Government, the regulation of Article 59 Paragraph (2) is a policy option so that Article 59 Paragraph (2) of the Regional Government Law is not contradictory to Article 27 Paragraph (1), Article 28C Paragraph (2), Article 28D Paragraph (1) of the 1945 Constitution.

If the above verdict is analogous to the case a quo, then there is the same legal issue, so the regulation of the articles petitioned in the case a quo is also a legal policy choice of the legislator.

Subject to the provisions of Article 60 of the Constitutional Court Law, the Petitioners' petition in the petition a quo should be declared rejected or at least not acceptable (niet ontvankelijk verklaard).

4. Kazakhstan

Constitutional Council

Summary

The Constitution of 1995 established a new quasi-judicial body for constitutional review, the Constitutional Council. The Constitutional Council of Kazakhstan is a collegiate body which consists of 7 members. The term of office is 6 years and is non-renewable. The competence of the Constitutional Council includes the following: Official interpretation of the norms of the Constitution; ex ante constitutional review of legislation, constitutional review of international treaties; resolution of competence disputes related to the conduct of a set of enumerated elections and referenda; constitutional review of parliamentary resolutions; and opinions on the compliance with established constitutional procedures for early release or dismissal of the Head of State. In addition, the Constitutional Council considers appeals of courts regarding laws and other normative legal acts that infringe the rights and freedoms of a person and citizen enshrined in the Constitution. An enumerated list of state organs are able to apply for this appeal, including courts. Citizens therefore have the opportunity to exercise in the Council the protection of their constitutional rights and freedoms indirectly through courts of general jurisdiction. The modernization of the institution of constitutional control was carried out in 2017. The mechanism of constitutional control by the Constitutional Council of Kazakhstan is being gradually modernized in line with global trends.

Content

A. Introduction

A1. History

The beginning of the establishment of the institution of constitutional control in Kazakhstan is associated with the introduction in 1989 of an amendment to the Constitution of the Kazakh SSR that covers the establishment of the Constitutional Oversight Committee, which, however, was not created. Later, the Constitutional Law of the Republic of Kazakhstan, dated December 16, 1991 "On State Independence of the Republic of Kazakhstan" established that the Constitutional Court of the Republic of Kazakhstan is the supreme body of judicial protection of the Constitution. This body was elected by the Supreme Council of the Republic on July 2, 1992 and exercised constitutional control until October 1995.

The Constitution of the Republic of Kazakhstan, adopted on August 30, 1995 at the republican referendum, completed an important period of reforming state bodies of independent Kazakhstan, which proclaims itself as a democratic, secular, legal and social state.

Section VI of the Constitution contains the fundamental rules establishing constitutional control in the Republic, the implementation of which is entrusted to the Constitutional Council of the Republic of Kazakhstan (hereinafter – the Constitutional Council). It is not included in the judicial system; it is a state body that ensures the supremacy of the Constitution of the Republic as the Basic Law of the state in the entire territory of Kazakhstan.

On the basis of the Constitution of 1995, the Constitutional Council was formed in February 1996.

The Constitution and the Constitutional Law of the Republic of Kazakhstan, dated December 29, 1995, No. 2737 "On the Constitutional Council of the Republic of Kazakhstan" are the legal basis for the organization and activities of the Council.

According to its constitutional status, the Council shall be independent and separate from state bodies, organizations, official persons and citizens, subordinated only to the Constitution of the Republic and may not use political or any other motives when exercising its powers.

The constitutional reform carried out in the country played an important role in the development of the institution of constitutional control.

In 2007, the decisions of the Parliament and its Chambers were included in the subject of the review of the Constitutional Council.

In accordance with the legislative initiative of the President of the Republic of Kazakhstan, amendments were made to the Constitutional Law on the Constitutional Council in 2008, according to which recommendations and proposals on improvement of the legislation contained in the decisions of the Constitutional Council shall be subject to obligatory consideration by the authorized state bodies and officials with the obligatory notice of the Constitutional Council on the accepted decision. Thus, a certain imperative nature is given to the recommendations of the Constitutional Council.

Following this trend, the constitutional reform carried out in 2017 expanded the powers of the Constitutional Council.

The President of the Republic renounced his right to object to the decision of the Constitutional Council.

The subsequent constitutional control was strengthened by giving the President the right to send appeals to the Constitutional Council on considering the law or other legal act that came into force to comply with the Constitution of the Republic. This right is associated with the interests of protecting the rights and freedoms of an individual and a citizen, ensuring national security, sovereignty and integrity of the state.

Amendments to the Constitution of the country undergo mandatory preliminary constitutional review. They can be submitted to a republican referendum or to the Parliament of the Republic only if the Constitutional Council gives a positive opinion.

The institute of constitutional control in Kazakhstan is developing step-by-step in response to global changes. The example of Kazakhstan confirms that the performance of the function of constitutional control contributes to ensuring unity and coordinated interaction.

A2. Basic Texts

- Constitution of the Republic of Kazakhstan (adopted on August 30, 1995)
- Constitutional Law of the Republic of Kazakhstan "On the Constitutional Council of the Republic of Kazakhstan" (adopted on December 29, 1995)
- Regulations of the Constitutional Council (adopted on April 19, 2002)
- Provisions on the Staff of the Constitutional Council (adopted on September 29, 2017)

B. Organization

B1. Chairperson and members

The Constitutional Council consists of seven members, including the Chairperson.

The Chairperson of the Constitutional Council shall be appointed by the Decree of the President of the Republic of Kazakhstan, and in case the votes are equally divided, his vote shall be decisive.

Two members of the Council are appointed by the President of the Republic, two members are appointed by the Senate (upper house) and two by the Majilis (lower house) of the Parliament for a period of six years. Half of members of the Council are renewed every three years. Moreover, ex-Presidents of the Republic shall be life-long members of the Constitutional Council.

According to point 5 of Article 71 of the Constitution the Chairperson and members of the Constitutional Council during the term of the powers cannot be arrested, subjected to detention, measures of administrative punishment imposed judicially, brought to trial without consent of the Parliament of the Republic of Kazakhstan, except detention cases on the crime scene or committing serious crimes.

The Chairperson and members of the Constitutional Council for the activities concerning

the constitutional proceedings are not accountable. It means that nobody has the right to demand from them any report. Before adoption of the final resolution the Chairperson and members of the Constitutional Council have no right, except as at a meeting of the Constitutional Council, to express opinion or to advice on the questions which are a subject of the constitutional proceedings.

For ensuring impartiality the Constitutional Law establishes a prohibition to members of the Council to perform protection and representation in court or other law-enforcement bodies (except legal), rendering protection of any persons in providing the rights and release from obligations.

During the term of implementation of the powers, members of the Constitutional Council are irremovable. Their powers cannot be stopped or suspended, except for the cases provided by law.

B2. The Staff of the Constitutional Council

The Staff of the Constitutional Council (hereinafter – the Staff) is a state body that performs information-reference, scientific-advisory and other auxiliary duties.

The Staff is a legal entity in the organizational and legal form of a state institution.

The activity of the Staff is regulated by the legislation of the Republic of Kazakhstan, the Regulations of the Constitutional Council and the Provisions on the Staff of the Constitutional Council.

The aim of the Staff is to create conditions for ensuring the activities of the Constitutional Council and the exercise of its powers.

The Staff is headed by the Secretary General, who is personally responsible for the performance of tasks assigned to the Staff and the exercise of his functions.

B3. Scientific Advisory Board under the Constitutional Council

The Scientific Advisory Board under the Constitutional Council is a consultative and advisory body established to provide scientific assistance to the Constitutional Council in the exercise of the powers conferred on it.

The Scientific Advisory Board is composed of scholars of jurisprudence in the field of constitutional law and other branches of jurisprudence. The composition of the Scientific Advisory Board is approved by the Constitutional Council on the proposal of the Chairperson of the Constitutional Council. Members of the Constitutional Council have the right to submit proposals on candidatures.

C. Jurisdictions (constitutional proceedings)

C1. Competence of the Constitutional Council

The Competence of the Constitutional Council includes:

- Official interpretation of norms of the Constitution;
- Consideration of laws adopted by the Parliament with respect to their compliance with the Constitution of the Republic before they are signed by the President;
- Consideration of international treaties of the Republic with respect to their compliance with the Constitution, before they are ratified;
- The decision in case of a dispute the questions of correctness of carrying out:
  a) presidential elections,
  b) deputies of the Parliament,
  c) republican referendum;
- Consideration of decisions adopted by the Parliament and its Chambers to their compliance with the Constitution of the Republic.

Constitutional Council also draws conclusions about observance of the established constitutional processes in case of early release or dismissal from a position of the Head of the state.

Separate constitutional competence of the Constitutional Council is constituted by consideration of appeals of the courts which find out infringement of the rights and freedoms of the person and citizen affirmed by the Constitution in the laws and other normative legal acts.

- **The competence on the official interpretation of norms of the Constitution**

One of the main activities of the Constitutional Council is the official interpretation of the norms of the Constitution, which is its exclusive competence.

Under the Constitution, only the Constitutional Council is empowered to give an official interpretation of the Constitution.

The official interpretation of norms of the Constitution given by the Constitutional Council is mandatory for all legal entities and carries the relevant legal consequences. This authority of the Constitutional Council is the most important, and about half of the applications considered by the Constitutional Council are devoted to the interpretation of norms of the Constitution. By their nature, such legal solutions are an organic extension of the Constitution and play the basic role in the system of acting law.

On the essence of the interpretation of the constitutional norms, the role of such a competence of the Constitutional Council to ensure higher legal force and direct effect of provisions of the Constitution is specified in the Normative decisions of the Constitutional Council of December 13, 2001 No. 19/2. It has found that the official interpretation of norms of the Constitution is to establish and clarify the content of the Constitutional Council and the meaning of the constitutional norms. It is caused by a characteristic for some of them special terminology, as well as the ambiguity of perception by subjects of appeals of certain provisions of the Constitution and the contradictions in the practice of their application.

While giving the official interpretation of norms of the Constitution, the Constitutional Council shall be independent and subject only to Constitution. The right to give an official interpretation of the Constitution gives rise to the legal validity of the decisions

of the Constitutional Council, which is equal to the legal force of those norms, which have become the subject of interpretation.

The official interpretation of norms of the Constitution - is the normative interpretation, which is given by the Constitutional Council in accordance with the meaning of verbal expression of norms of the Constitution by means of different ways to clarify their meaning.

The volume of interpretation cannot be set in advance; the Constitutional Council is restricted in the choice of legal research methods of official interpretation of norms of the Constitution, only by the Constitution itself. Logical interaction of norms of the Constitution with its common positions and principles are taken into consideration. Normative decisions of the Constitutional Council, creating precedents of interpretation of the Constitution solely on the issues of subjects of appeal make up the semantic understanding of these norms for direct constitutional regulation. This legal position of the Constitutional Council, arising from the provisions of the Constitution, complies with the Constitution itself. The Constitutional Council does not make conclusions that do not directly follow from the meaning of the Constitution, written norms, general provisions and principles.

By giving the official interpretation the Constitutional Council shall decide important questions of law-making and law enforcement, revealing the essence of the constitutional provisions, resolve disputes that arise in practice.

- **The competence to review the constitutionality of laws passed by the Parliament before they are signed by the President, as well as international treaties prior to their ratification**

The Constitutional Council according to Article 72 of the Constitution exercises preliminary constitutional control by consideration on compliance with the Constitution of the laws adopted by the Parliament before their signing by the President, and also international treaties of the republic before their ratification.

Consideration on compliance with the Constitution of the laws adopted by the Parliament before signing by the President has its features. Firstly, such control determines constitutionality of the laws which didn't come into force and are not put into effect yet. This protects constitutional rights and freedoms of the person and citizen from possible illegal consequences in advance. Secondly, preliminary control of laws of the Parliament is the obvious key factor of resolving of the disputable situations between executive and legislative branches of the state power which arise in legislative process. In practice of the Constitutional Council there are cases when contradictions between the Government and the Parliament were resolved after consideration by Council of the appeals about compliance with the Constitution of the laws adopted by the Parliament. Thirdly, preliminary control positively influences the legislation of the country, providing its constitutionality.

In the course of preliminary constitutional control not only the President, the Prime Minister of the Republic, but also Chairperson of Chambers of the Parliament, and its deputies participate as the subject of the appeals.

The Constitution of Kazakhstan provides at least 1/5 part from total number of deputies of Parliament, that is to parliamentary minority, the right of dispute of the law adopted by the Parliament of the Republic.

The Constitutional Council while considering the laws adopted by the Parliament to their compliance with the Constitution pays attention not only to normative content, but also to formalities of legislative process.

As it was already said, the Constitutional Council in case of the appeals of appropriate subjects is entitled to consider the international agreements of the Republic which are to be ratified to their compliance with the Constitution. The international agreements of the Republic of Kazakhstan, according to the Constitution are ratified by the Parliament, and also the President, in case of delegation of legislative powers to him.

According to Article 11 of the Law "On international treaties of the Republic of Kazakhstan" adopted on May 30, 2005 the international agreements to be ratified are:

1) subject of which are the rights and freedoms of the person and the citizen;
2) accomplishment of which requires changes of acting or adoptions of new laws, and also the establishing other rules, than it is provided by laws of the Republic of Kazakhstan;
3) on territorial differentiation of the Republic of Kazakhstan with other states, including the international agreements on passing of the state border of the Republic of Kazakhstan, and also on differentiation of an exclusive economic zone and the continental shelf of the Republic of Kazakhstan;
4) concerning bases of the interstate relations, concerning disarmament or the international arms control, providing international peace and safety, and also peace international treaties and the international agreements on collective security;
5) about participation of the Republic of Kazakhstan in interstate associations and the international organizations if such international agreements provide transfer of implementation of a part of the sovereign rights of the Republic of Kazakhstan or establish legal obligation of decisions of their bodies for the Republic of Kazakhstan;
6) on state loans;
7) on rendering economic and other help by the Republic of Kazakhstan, except humanitarian;
8) when the parties signing the agreement participating in negotiations agreed on subsequent ratification of it;
9) if the international agreements provide that such consent is expressed by ratification.

In case of the appeal to the Constitutional Council the course of terms of ratification of international treaties stops. The international agreements recognized not corresponding to the Constitution cannot be ratified.

Consideration on compliance with the Constitution of international treaties of the Republic before their ratification has a number of benefits. One of them is prevention of those undesirable consequences which can contradict interests of society, citizens, and, above all the constitutional norms and principles. International agreements, ratified by the Republic, have a priority before the domestic legislation (Article 4 of the Constitution).

- **Competence on consideration on compliance with the Constitution of resolutions of the Parliament and its Chambers**

The changes and additions brought by the Law of May 21, 2007 to the Constitution expanded the competence of the Constitutional Council, having granted it the right of consideration to compliance with the Fundamental Law of the resolutions of the Parliament and its Chambers. According to the normative resolution of the Constitutional Council of March 6, 1997, the resolutions of the Parliament and its Chambers refer to other normative legal acts specified in Article 4 of the Constitution.

According to the Normative resolutions of the Constitutional Council of June 10, 2003, No. 8 the resolution of Parliament and its Chambers in point 1 of Article 62 of the

Constitution are named "legal acts" in the meaning of a form of acts of implementation by the Parliament, Senate and Mazhilis of their law-enforcement powers, which are performed by them along with legislation, provided by the Constitution. The supreme representative body and its chambers pass resolutions on specific areas of jurisdiction in pursuance of these norms of the Constitution and by their legal force cannot enter into legal competition with laws, acts of other institutes of the government: President, executive bodies, courts and local authorities of public administration. Resolutions of the Parliament, Senate and Mazhilis, being acts of parliamentary law enforcement, as a rule, of organization-legal value, have a binding character.

Resolutions of the Parliament and its Chambers regulate a wide range of questions, including calling of election of the President of the Republic, consent on appointment by the President of the Prime-minister, approval of the report of the Government on execution of the republican budget for fiscal year, and other questions. Resolutions of the Parliament and its Chambers appoint a number of leadership and officials of state bodies of the Republic. The Constitution and the constitutional legislation does not specify what resolutions of Parliament and its Chambers can be considered by the Constitutional Council to their compliance with the Constitution, and does not establish any exceptions or features of the constitutional proceedings on verification of such acts of Parliament and its Chambers.

- Competence on consideration of appeals of courts

The essential place in the activities of the Constitutional Council is taken by its interaction with courts of the Republic concerning protection of constitutional rights and freedoms of the person and the citizen against unconstitutional norms and provisions of the acting legislation.

According to Article 78 of the Constitution, courts have no right to apply the laws and other normative legal acts violating the rights and freedoms of the person and the citizen consolidated in the Constitution. If the court sees that the law or other normative legal act which is subject to application violate the rights and freedoms of the person and the citizen consolidated in the Constitution, it is obliged to suspend proceedings and to appeal to the Constitutional Council for recognition of this act as unconstitutional.

The appeal to the Constitutional Council of courts of the Republic concerning laws or other normative legal acts which are subject to application is an effective way of ensuring compliance of the existing legal base with the Constitution of the Republic.

The appeal of courts to the Constitutional Council for verifying of constitutionality of the acting laws violating constitutional rights and freedoms of the person and citizen is determined by the Constitution not as their right, but as their obligation. The specified obligation of courts follows from the constitutional power assigned to them to perform judicial authority and to protect the rights, freedoms and legitimate interests of citizens, to provide the implementation of the Constitution and laws, other normative legal acts, international treaties of the Republic.

The Constitution, assigning the function of verifying the acting laws constitutionality to the Constitutional Council, obliges courts of the Republic to participate in the corresponding constitutional proceedings as subjects at the initiative of which the specified constitutional power of the Council is directly implemented.

In this quite difficult process the Constitutional Council and courts of the Republic shall interact. Such power of the Constitutional Council on the one hand confers the mutual responsibility on the Council and courts for the constitutional purity of the national legislation, on the other hand, - responsibility for protection of constitutional rights of citizens.

Object of the subsequent constitutional control exercised by the Constitutional Council is all acting normative legislative framework of the Republic, concerning constitutional rights of citizens.

- **The decision on the correctness of conducting the elections of the President of the Republic, deputies of Parliament, and conducting of all-nation referendum in case of dispute**

One of the important mechanisms of ensuring the constitutionality of the realization of citizens' declaration of will is the decision by the Constitutional Council on the correctness of conducting the elections of the President of the Republic, deputies of Parliament, and conduct of nationwide referendum in case of dispute.

Special procedures of the constitutional control of elections or referendum to some extent are provided today in most of the Post-Soviet states. Kazakhstan is also not an exception. Unlike many countries, in our Republic such control is exercised only in case of a dispute, before assessing the results of elections and a referendum, that is this function of the Constitutional Council has facultative and preliminary character.

By consideration of such disputes the Central Elections Commission transfers the materials connected with elections preparation and conducting to the Constitutional Council. In this case summing up the results of republican referendum suspends for consideration of the appeals.

According to the Constitutional Law "On the Constitutional Council of the Republic of Kazakhstan" the Constitutional Council in case of violation of the Constitution has the right to recognize elections of the President of the Republic, deputies of Parliament and a referendum not corresponding to the Constitution of the Republic. In this case the Central Election Commission (the central commission of referendum) passes the decision on recognition of elections of the President of the Republic, deputies of Parliament and a referendum invalid on those polling stations (administrative and territorial units) where they were acknowledged not corresponding to the Constitution, and conducting repeated elections on these stations (administrative and territorial units). The results of the held elections (referendum) recognized not corresponding to the Constitution by decision of Central Elections Commission (the central commission of referendum) at the respective polling stations (administrative territorial units) are recognized invalid (Articles 68, 84 and 100 of the Constitutional Law "On elections in the Republic of Kazakhstan", Article 32 of the Constitutional Law "On the republican referendum"). Recognition of the held election of the President of the Republic, deputies of the Parliament and a referendum corresponding to the Constitution involves the summing up of their results.

- **Issuing a judgment on observance of the established constitutional processes in case of early release or dismissal from a position of the President of the Republic**

Norms of Article 47 of the Constitution regulate a procedural order of early prematurely release from office of the President in the case of continued incapacity to perform his duties due to illness and discharge from office by the Parliament in the case of high treason.

In case of early release from the President's position because of his continued incapacity to perform duties due to illness on joint sitting of Chambers of the Parliament, the Constitutional Council issues its judgment on observing of the established constitutional processes.

The judgment of the Constitutional Council should contain: formation (availability) of the commission consisting of the equal number of deputies of each Chamber of the

Parliament and experts of the respective areas of medicine; holding joint sitting of Chambers of Parliament where the relevant decision is made; participation on joint sitting of Chambers of Parliament at least of three quarters of total number of deputies from each Chamber; availability of the conclusion of commissions.

When issuing a judgment about observance of the established constitutional processes in the course of discharge of the Head of State from position in case of high treason while performing his duties the Constitutional Council shall proceed from the following constitutional requirements.

The decision on promotion of accusation and its investigation shall be accepted by the majority from total number of deputies of the Mazhilis at the initiative of at least one third of its deputies. Investigation of the accusation shall be organized by the Senate, and its results by a majority of votes from total number of deputies of the Senate should be submitted at the joint sitting of the Chambers of Parliament. The final decision on the matter is passed at the joint sitting of Chambers of the Parliament by the majority of at least three quarters of the total number of voices of deputies from each Chamber.

Except the Constitutional Council, the Supreme Court of the Republic also participates in this process by providing the judgment on the validity of accusation.

- **Consideration of the appeal for passing of the additional resolution and initiation of review of earlier passed resolution of the Constitutional Council**

Competence of the Constitutional Council for ensuring rule of the Constitution is specified by the Constitutional Law "On the Constitutional Council of the Republic of Kazakhstan" by means of powers derivative of the main functions specified in Article 72 of the Constitution of the Republic. Such powers, according to Articles 35 and 36 of the Constitutional Law are the passing of the additional resolution on its own initiative, on the petition of participants of the constitutional proceedings or the petition of the state bodies and officials obliged to accomplish the final decisions of Council, and also review at the initiative of the Head of State or at the Council's own initiative.

The Constitutional Law "On the Constitutional Council of the Republic of Kazakhstan" establishes the bases of adoption of the additional decision. They are: issues of interpretation of the final decision; necessity of correction of the inaccuracies and mistakes of editorial nature made in final decisions.

According to Article 35 of the Constitutional Law the additional decision shall not contradict the valid content, meaning and purpose of the decision of the Constitutional Council.

In practice of the Constitutional Council a number of additional resolutions on interpretation of earlier passed normative resolutions was accepted.

Review of earlier passed final decisions is initiated by the Head of State or Constitutional Council. According to Article 36 of the Constitutional Law "On the Constitutional Council of the Republic of Kazakhstan" the decision of the Constitutional Council can be reviewed at the initiative of the President of the Republic of Kazakhstan or at Council's own initiative in the following cases:

1) the norm of the Constitution, on the base of which the decision was passed, changed;
2) new essential circumstances were opened.

The resolution on review of the decision of the Constitutional Council completely or in part cancels the earlier made decision.

In its practice the Constitutional Council several times initiated the constitutional proceeding on review of the earlier accepted resolutions, in particular, connected with adoption of the law of the Republic of Kazakhstan of May 21, 2007 No. 254-III "On making changes and additions to the Constitution of the Republic of Kazakhstan".

- **Passing by the Constitutional Council of the address on constitutional legality in the Republic to the Parliament**

According to Article 53 of the Constitution the Parliament on joint sitting of Chambers listens to the annual address of the Constitutional Council on the constitutional legality in the Republic. The address of the Constitutional Council on the constitutional legality in the country is being prepared on results of generalization of practice of the constitutional proceedings and is announced by the Chairperson of the Constitutional Council.

In addresses of the Constitutional Council in addition to the generalization of practice of the constitutional proceeding and the analysis of final decisions of the Constitutional Council, the general tendency of the development of the constitutional legality in the country is characterized, questions of respect for the constitutional legality in certain spheres of society life, in activities of state bodies, questions of observance and protection of constitutional rights and freedoms of citizens are considered. Also in addresses of the Constitutional Council the conditions of implementation of the constitutional regulations of the current legislation of the Republic and implementation of resolutions of the Constitutional Council is specified.

The Constitutional Council in its addresses makes propositions to public authorities directed to observance of the constitutional legality, enhancement of the current legislation to bring it to compliance with the Constitution of the Republic and normative resolutions of the Council, and also to heighten the efficiency of ensuring of the rights and freedoms of citizens. The propositions of the Constitutional Council, find understanding and support of the Head of State, the Parliament and the Government. Annually the issue of implementation of decisions of the Constitutional Council is considered at a meeting of an advisory body - Council for Legal Policy under the President of the Republic, with determination of responsible state bodies and making specific orders.

The text of the address is submitted also to the President of the Republic. In addition, the Constitutional Law "On the Constitutional Council of the Republic of Kazakhstan" establishes that the Chairperson of the Constitutional Council upon the demand of the President of the Republic provides him with the information on the constitutional legality in the country. Upon requirements of the Head of State such information was provided twice.

C2. Subjects of appeals

Constitutional proceedings can be instituted only at the request of the President of the Republic of Kazakhstan, the Chairperson of the Senate of the Parliament, the Chairperson of the Mazhilis of the Parliament, deputies of the Parliament not less than one-fifth of their total number, the Prime Minister.

Citizens of the Republic are not included in the list of subjects of appeal to the Constitutional Council. Their constitutional rights and freedoms can be protected in the courts of general jurisdiction, and in the Constitutional Council in cases and in the procedure established by Article 78 of the Constitution, according to which if a court finds that a law or other regulatory legal act to be applied infringes on the rights and

freedoms of an individual and a citizen it shall suspend legal proceedings and address the Constitutional Council with a proposal to declare that law unconstitutional.

C3. Rights and obligations of participants of constitutional proceedings

Participants of constitutional proceedings within the bounds of their authority shall enjoy equal procedural rights.

Participants of constitutional proceedings shall have the following rights:

1) To peruse materials of proceedings, to make extracts from them and to take photocopies;
2) To submit evidence, participate in their investigation and to prove those circumstances to which they refer as the basis for their appeals and objections;
3) To submit their arguments and thoughts on all the issues which emerge in the course of the constitutional proceedings to the Constitutional Council;
4) To file petitions and express their opinion on petitions filed;
5) To provide oral and written explanations to the Constitutional Council.

A participant of constitutional proceedings shall:

1) On whose appeal the constitutional proceedings are instituted, have the right prior to the beginning of the session of the Constitutional Council at which a final decision is to be adopted, to change the basis of the petition, increase or reduce its volume or repudiate the petition;
2) Have the right to recognize claims filed in the petition fully or partially or to object against them, with regard to acts on which constitutional proceedings are instituted.

Participants of constitutional proceedings shall be obliged as follows:

1) Conscientiously exercise their rights. Reporting to the Constitutional Council deliberately false information or failure to file documents, materials and other information required by the Constitutional Council, shall be considered as a disregard to the Constitutional Council and it shall entail liability in accordance with the law;
2) Respect the Constitution of the Republic, the Constitutional Council, its requirements, and procedures adopted by the Constitutional Council;
3) Obey ordinances of the Chairperson with regard to compliance with the order at sessions.

Annex

Annex 1. Case Statistics

During the activity of the Constitutional Council more than 140 of regulatory decrees have been adopted, 6 of them on supplementary interpretations of its decrees. In relation to the introduction of constitutional innovations in the Fundamental Law (1998, 2007 and 2017), the Constitutional Council made decisions to reconsider some of the acts (2004, 2007, 2008, 2011 and 2017).

Since January 1996 and up to date more than 190 appeals have been proposed: 24 appeals from the Head of the State, 77 appeals from Chairpersons of the Chamber of the Parliament and its deputies, 27 appeals from the Prime Minister and 68 appeals from courts.

In whole or partially, about 30 laws and international treaties were regarded as unconstitutional. On results of practice generalization of the constitutional control, the 22nd annual message on the constitutional legitimacy in the country was sent to the Parliament. The issues on the protection of human rights, the development of legislation, the enforcement of legislation in compliance with the Constitution, court organization and the justice system conducted by administrative reform and in the other fields of the constitutional regulations, were raised in them.

Annex 2. Cases

Case 1.

Regulatory decision of the Constitutional Council of the Republic of Kazakhstan, dated December 14, 2016, No. 1 on the constitutionality of subparagraph 3) of paragraph 7 of the Rules of paperwork to travel outside the Republic of Kazakhstan for permanent residence, approved by the Government of the Republic of Kazakhstan, dated March 28, 2012, No. 361, on the proposal of the City Court of Temirtau in Karaganda region.

The Constitutional Council on November 16, 2016 received a representation of Temirtau City Court of Karaganda region for recognition of the unconstitutionality of subparagraph 3) of paragraph 7 of the Rules of paperwork to travel outside the Republic of Kazakhstan for permanent residence, as approved by Decree of the Republic of Kazakhstan, dated March 28, 2012 No. 361.

The representation shows that in the production of Temirtau City Court is a civil case No. 2-3560 for the lawsuit of Barinova E. against Moiseenko V. to permit the plaintiff to depart the Republic of Kazakhstan and take up permanent residence in the Russian Federation.

The reason for the lawsuit was the refusal of Moiseenko V. - father of Barinova E. – to give her a written permission to leave. In this connection, Barinova E. asks the court to allow her to leave for permanent residence outside the Republic of Kazakhstan to the Russian Federation.

Having examined the materials of the civil case and having heard the explanations of the plaintiff, the court of first instance has seen “the infringement established by the Constitution of the Republic of Kazakhstan human and civil rights in connection with

the controversy of subparagraph 3) of paragraph 7 of the Rules of paperwork to travel outside the Republic of Kazakhstan for permanent residence, approved by the Government of the Republic of Kazakhstan, dated March 28, 2012, No. 361, paragraph 2 of Article 21 and paragraph 1 of Article 39 of the Constitution of the Republic of Kazakhstan."

In this connection, the Court in accordance with Article 78 of the Constitution suspended production in a civil case and addressed to the Constitutional Council with a proposal to declare unconstitutional the subparagraph 3) of paragraph 7 of the Rules of paperwork to travel outside the Republic of Kazakhstan for permanent residence approved by the Government of the Republic Kazakhstan, dated March 28, 2012, No. 361 (hereinafter - the Rules).

Having analyzed the provisions of the Constitution of the Republic of Kazakhstan in relation to the subject of appeals, the Constitutional Council decided:

1. Recognize subparagraph 3) of paragraph 7 of the Rules of paperwork to travel outside the Republic of Kazakhstan for permanent residence, approved by the Government of the Republic of Kazakhstan, dated March 28, 2012, No. 361, corresponding to the Constitution of the Republic of Kazakhstan.
2. To recommend to the Government of the Republic of Kazakhstan:
   Rules bring paperwork to travel outside the Republic of Kazakhstan for permanent residence, approved by Resolution of the Government of the Republic of Kazakhstan, dated March 28, 2012, No. 361, in accordance with the legal positions of the Constitutional Council, contained in this statutory ordinance;
   Consider initiating amendments to the legislative acts regulating public relations in the field of migration, in order to better safeguard the rights and freedoms of man and citizen.
3. According to paragraph 3 of Article 74 of the Constitution of the Republic of Kazakhstan Normative Resolution enters into force from the date of its adoption, cannot be appealed, it is binding on the whole territory of the Republic and final considering the case provided for in paragraph 4 of Article 73 of the Constitution of the Republic of Kazakhstan.
4. To publish the present regulatory decision in the Kazakh and Russian languages in official republican printings.

Case 2.

Regulatory decision of the Constitutional Council of the Republic of Kazakhstan, dated April 13, 2012, No. 2 on official interpretation of provisions of the Constitution of the Republic of Kazakhstan on the calculation of the constitutional terms

The Constitutional Council on March 1, 2012 received an appeal from the Prime Minister of the Republic of Kazakhstan (hereinafter - the Prime Minister), the official interpretation of the norms of some Articles of the Constitution of the Republic of Kazakhstan on the calculation of the constitutional terms.

In his appeal, the Prime Minister noted that "the Constitution of the Republic of Kazakhstan does not always set the start and end of calculation specified in the terms and it does not specify from which date or event determined by the calculation of the start and end dates. The existing law of the Republic is also not fixed timing calculation rules set out in the Constitution. This may cause difficulties in the application of the Constitution, the activities of state bodies and officials."

In this regard, the Prime Minister raised the issue of the official interpretation of

paragraph 2 of Article 16, subparagraph 2) of paragraph 1 of Article 44 (in part, according to which the President of the Republic shall sign submitted by the Senate of the Parliament of the law within one month, promulgate the law or return the law or its separate Articles for a second discussion and voting), paragraph 3 of Article 51, subparagraph 2) of paragraph 2 of Article 54, paragraph 3 of Article 73 and other provisions of the Constitution, which set the deadlines for performing constitutionally significant actions. During giving an official interpretation of the norms of the Constitution of the treated subjects were asked to identify the procedure for calculating the start and end dates, provided for in the Constitution of the Republic of Kazakhstan.

On March 29, 2012 the Constitutional Council received a second appeal of the Prime Minister, in which he asked for clarification of Article 16, paragraph 2 of Article 51, subparagraph 3) of Article 53, subparagraph 2) of Article 54, paragraph 2, paragraph 3 of Article 59, paragraph rules 2, paragraph 7 of Article 61, paragraph 2 of Article 63, paragraph 3 of Article 71, paragraphs 1, 2 and 4 of Article 91, paragraph 1 of Article 94, Article 94-1 of the Constitution, and to answer the following questions:

1. What is the concept of "detention" used in paragraph 2 of Article 16 of the Constitution, and what is the procedure for calculating the start and end contained in this constitutional norm of life?
2. Given that Parliament is the supreme representative body, works in sessions, if the specified month is to consider the objections of the Head of State be interrupted if it coincides with the parliamentary recess?
3. How should I determine the beginning and end of the period stated in the Constitution in years?

Due to the fact that the received applications are linked, and the first treatment a final decision has not been made in accordance with paragraph 2 of Article 26 of the Constitutional Law of the Republic of Kazakhstan, dated December 29, 1995 No. 2737 "On the Constitutional Council of the Republic of Kazakhstan" the decision of the Constitutional Council on March 29, 2012 3/1 specified appeal combined into one constitutional proceedings.

During the meeting of the Constitutional Council by the representative of the subject of appeal to the order of subparagraph 1) of paragraph 3 of Article 21 of the Constitutional Law "On the Constitutional Council of the Republic of Kazakhstan" announced, and the Constitutional Council is satisfied with the application, "to clarify the rules for calculating the monthly period of consideration by the Constitutional Council received applications when they are combined into one production, bearing in mind that the time of their arrival may be different".

After having analyzed the provisions of the Constitution of the Republic of Kazakhstan in relation to the subject of appeals, the Constitutional Council decided:

1. The term "detention", in relation to paragraph 2 of Article 16 of the Constitution, it should be understood as measure of coercion, which is expressed in a short time, no more than seventy-two hours, restriction of personal freedom in order to prevent offenses or to ensure in criminal, civil and administrative cases, and as the application of other coercive measures and carried out by the authorized state bodies, officials and others on the grounds and in the manner prescribed by law.
   The beginning of the period of detention is one hour to the nearest minute, when the restriction of the freedom of the detained person, including freedom of movement - forcible confinement in a certain place, forced conveying the bodies of inquiry and investigation (capture, closing the room, forced to go elsewhere or stay in place and so on. d.), as well as any other actions significantly limiting personal freedom, became real, regardless of the detainee giving any procedural

status, or perform any other formalities. The end of this period is the expiry of the seventy-two hours, reckoned continuously from the time of actual detention.

2. The Constitutional term calculated in months, starting from the day of the event referred to in the Constitution, and will expire on the corresponding day (number) of the last month of the period. If the end of the period falls on a month in which there is no corresponding date, the term shall expire on the last day of that month.
3. The period of one month to consider the objection by the Parliament Head of State to the law or the Articles of the law was suspended, if time does not coincide with the period of work of the session of the Parliament set forth in paragraph 3 of Article 59 of the Constitution, except as provided for in paragraph 4 of Article 59 and paragraph 2 of Article 61 Constitution.
4. The Constitutional period specified in years, calculated from the date of the event referred to in the Constitution, and expires on the corresponding day and month of the last year of the term. If the end of the period falls on a month in which there is no corresponding date, the term shall expire on the last day of that month.
   Under the time period "year" with respect to paragraph 7 of Article 61 of the Constitution should be understood the current year (from 1 January to 31 December).
5. The Constitutional term calculated in days shall start from the date of the event referred to in the Constitution, and expires on the last day of the prescribed period.
6. In the case of combining the Constitutional Council into one interconnected appeals month period provided for by the Constitution of the judgment, should be calculated from the date of receipt of the last treatment.
7. Questions of calculating start and end dates set out in the Constitution, if necessary, could be regulated by law, taking into account the legal positions of the Constitutional Council.
8. According to paragraph 3 of Article 74 of the Constitution of the Republic of Kazakhstan Decree comes into force from the date of its adoption, cannot be appealed, it is binding on the whole territory of the Republic and final considering the case provided for in paragraph 4 of Article 73 of the Constitution of the Republic of Kazakhstan.
9. To publish this resolution in the Kazakh and Russian languages in official republican printings.

Case 3.

Regulatory decision of the Constitutional Council of the Republic of Kazakhstan, dated February 11, 2009, No. 1 about verification of the Law of the Republic of Kazakhstan "On amendments and additions to some legislative acts of Kazakhstan of the issues of freedom of religion and religious associations" on the accordance with the Constitution of the Republic of Kazakhstan.

The Constitutional Council has considered an appeal of the President in open court on the accordance of the Law of the Republic of Kazakhstan "On amendments and additions to some legislative acts of Kazakhstan on issues of religious freedom and religious associations" with the Constitution of the Republic of Kazakhstan.

After having studied the materials of the constitutional proceedings, the Constitutional Council decided:

1. To recognize the Law of the Republic of Kazakhstan "On amendments and additions to some legislative acts of Kazakhstan on issues of religious freedom

and religious organizations", adopted by the Parliament on November 26, 2008 and submitted to the President on December 2, 2008, to be unconstitutional.
2. In accordance with paragraph 1 of Article 74 of the Constitution of the Republic of Kazakhstan, the Law of the Republic of Kazakhstan "On amendments and additions to some legislative acts of Kazakhstan on the issues of freedom of religion and religious associations" cannot be signed and put into effect.
3. According to paragraph 3 of Article 74 of the Constitution of the Republic of Kazakhstan Decree comes into force from the date of its adoption, cannot be appealed, it is binding on the whole territory of the Republic and final considering the case provided for in paragraph 4 of Article 73 of the Constitution of the Republic of Kazakhstan.
4. To publish this resolution in the Kazakh and Russian languages in official republican printings.

Case 4.

Regulatory decision of the Constitutional Council of the Republic of Kazakhstan, dated February 27, 2008, No. 2 on the constitutionality of the first and fourth parts of Article 361 of the Criminal Code of the Republic of Kazakhstan an appeal of Kapshagai city's court of Almaty region.

The Constitutional Council on January 28, 2008 received representation of Kapshagai City's Court of Almaty region about recognition unconstitutional parts of first and fourth paragraph of Article 361 of the Criminal Code of the Republic of Kazakhstan, which providing for criminal responsibility for an act of self-mutilation by group of persons who are kept in special institutions to provide isolation from a society, to destabilize the normal functioning of institutions or obstructing the lawful activity of employees of institutions as well as for the same acts, committed by a group of persons by prior conspiracy or with application of violence dangerous to life and health.

The representation shows that under consideration of Kapshagai City's Court is a criminal case against a group of persons in committing a crime under part four of Article 361 of the Criminal Code of the Republic of Kazakhstan. During the trial, the defense had filed a petition to appeal to the Constitutional Council with a proposal to declare unconstitutional the provisions of the Criminal Code of the Republic of Kazakhstan, which establishes criminal liability for an act of self-mutilation group of persons kept in institutions to provide isolation from society, in order to destabilize the normal functioning of institutions or obstructing the lawful activities of agency staff. According to the authors of the petition, acts of self-harm is a way of protecting prisoners of their rights and freedoms from unlawful acts of the administration, and due to their right to recognition before the law and freedom of expression.

In this connection, the Court in accordance with Article 78 of the Constitution of the Republic of Kazakhstan has suspended the criminal proceedings and addressed the Constitutional Council with a proposal to "recognize inappropriate the first and fourth part of Article 361 of the Criminal Code of the Republic of Kazakhstan to Constitution of the Republic of Kazakhstan in relation to liability for an act of self-harm (in the wording of the Law of 26.03.07, No. 240).

During verification the constitutionality of parts of the first and the fourth paragraph of Article 361 of the Criminal Code of the Republic of Kazakhstan of 16 July 1997 No. 167-I (as amended by the Law of the Republic of Kazakhstan dated 26 March 2007 No. 240-III "On introducing amendments and addenda to some legislative acts of the Republic of Kazakhstan on the penal system"), the Constitutional Council decided:

1. To recognize the first part and the fourth part (with respect to the establishment of the qualifying features of the first part) of Article 361 of the Criminal Code of the Republic of Kazakhstan (as amended by the Law of the Republic of Kazakhstan 26 March 2007 No. 240-III "On introducing amendments and addenda to some legislative acts of the Republic of Kazakhstan on the penal system") as unconstitutional.
2. In accordance with paragraph 2 of Article 74 of the Constitution of the Republic of Kazakhstan laws and other regulatory legal acts, recognized, including infringements on the human rights and freedoms and the citizen, shall be canceled and shall not be applied, and in accordance with paragraph 2 of Article 39 of the Constitutional Law of the Republic of Kazakhstan "On the Constitutional Council of the Republic of Kazakhstan" decisions of the courts and other law enforcement officials, based on this law cannot be enforced.
3. On the basis of paragraph 3 of Article 74 of the Constitution of the Republic of Kazakhstan Decree comes into force from the date of its adoption, cannot be appealed, it is binding on the whole territory of the Republic and final considering the case provided for in paragraph 4 of Article 73 of the Constitution of the Republic of Kazakhstan.
4. To publish this resolution in the Kazakh and Russian languages in official republican printings.

Case 5.

Regulatory decision of the Constitutional Council of the Republic of Kazakhstan, dated August 23, 2005, No. 6 on verification of the laws of the Republic of Kazakhstan "On activities of international and foreign non-commercial organizations in the Republic of Kazakhstan" and "On amendments and additions to some legislative acts of Kazakhstan on the issues of non-profit organizations" on conformity with the Constitution of the Republic of Kazakhstan.

The Constitutional Council has considered in open court the appeal of the President of Kazakhstan on the verification of the laws of the Republic of Kazakhstan "On the activity of international and foreign non-commercial organizations in the Republic of Kazakhstan" and "On amendments and additions to some legislative acts of Kazakhstan on the issues of non-profit organizations" on the conformity with the Constitution of the Republic of Kazakhstan.

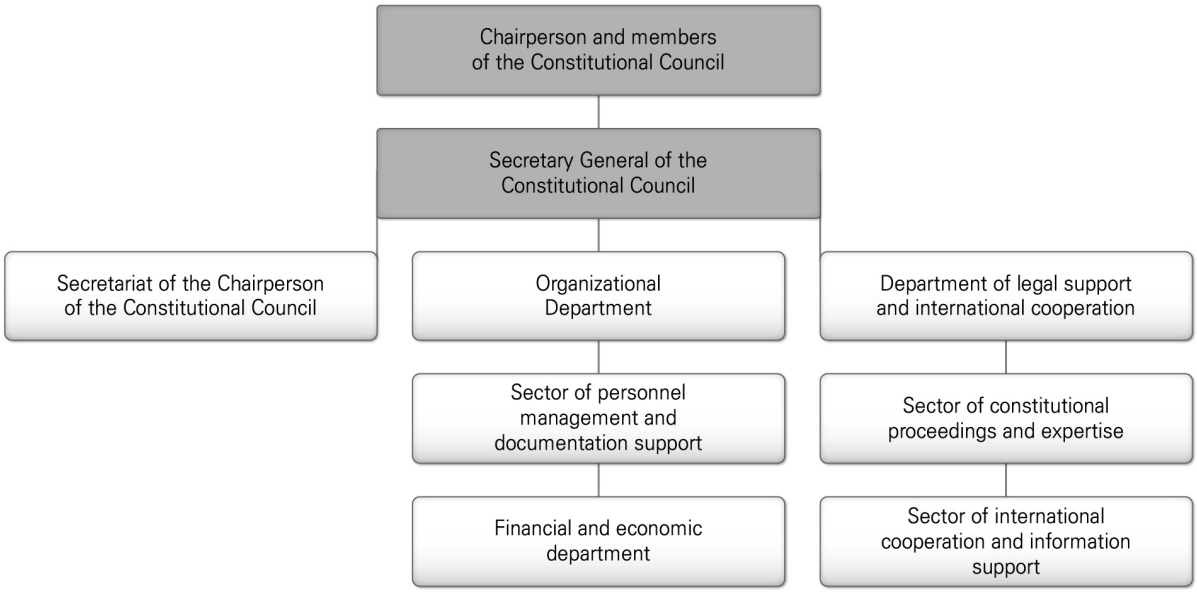
After having studied the materials of the constitutional production, the Constitutional Council decided:

1. To recognize the Laws of the Republic of Kazakhstan "On the activity of international and foreign non-commercial organizations in the Republic of Kazakhstan" and "On amendments and additions to some legislative acts of Kazakhstan on the issues of non-profit organizations", adopted by the Parliament of the Republic of Kazakhstan on June 29, 2005 and submitted to the President the Republic of Kazakhstan on July 4, 2005 are inconsistent with the Constitution of the Republic of Kazakhstan.
2. Pursuant to paragraph 1 of Article 74 of the Constitution of the Republic of Kazakhstan Laws of the Republic of Kazakhstan "On the activity of international and foreign non-commercial organizations in the Republic of Kazakhstan" and "On amendments and additions to some legislative acts of Kazakhstan on the issues of non-profit organizations" may not be signed and put into act.
3. In accordance with paragraph 3 of Article 74 of the Constitution of the Republic of Kazakhstan Decree comes into force from the date of its adoption, cannot be appealed, it is binding on the whole territory of the Republic and final

considering the case provided for in paragraph 4 of Article 73 of the Constitution of the Republic of Kazakhstan.

4. To publish this resolution in the Kazakh and Russian languages in official republican printings.

Annex 3. The structure of the Constitutional Council



5. Republic of Korea

Constitutional Court

Summary

The Constitutional Court of Korea is led by a President, who is one of 9 Justices of the Court. He or she is appointed by the President of Korea from among the Justices with the consent of the National Assembly. Nominees for Justices must be legally qualified to practice law. Even though all Justices are appointed by the President of Korea, 3 are elected by the National Assembly and another 3 are nominated by the Supreme Court. Rapporteur Judges support the adjudication process. Research Officers and Academic Advisors provide additional research assistance. Administrative issues are handled by a separate Secretariat, which is led by the Secretary General. According to Art. 111(1) of the Constitution of Korea, the Constitutional Court has 5 jurisdictions. They are the constitutional review of legislation, impeachment, dissolution of a political party, competence disputes, and constitutional complaint. The Constitutional Court of Korea does not possess the power of abstract constitutional review. So far there have been only two cases of impeachment and one case on party dissolution. The number of cases received by the Constitutional Court has been growing steadily, including over the past five years.

Content

A. Introduction

A1. History

The Constitutional Court of Korea was established in 1988, based on an amendment of the Constitution in 1987 following a movement for democratization, and is an integral part of the constitutional order of the Republic of Korea. The Constitutional Court of Korea consists of nine Justices, who are supported by the Department of Constitutional Research and the Department of Court Administration of the Constitutional Court. The Court covers five constitutional jurisdictions including constitutionality of statutes and constitutional complaints.

Since the Founding Constitution of the Republic of Korea in 1948 previous constitutional systems have provided various institutions for constitutional adjudication. They include Constitutional Committees as well as equipping the Supreme Court with constitutional adjudication. However, due to political circumstances, predecessors of the current Constitutional Court were largely unsuccessful in serving their function as constitutional guardians. For the first 40 years of its existence, the constitutional adjudication system of Korea only pronounced four decisions of unconstitutionality.

The Constitutional amendment in 1987 introduced a system of centralized constitutional review. Since its establishment in 1988, the current Constitutional Court of Korea has handed down numerous landmark decisions which shaped and strengthened the democratic order of Korea. According to recent surveys, the Constitutional Court ranks among the most trusted government institutions of Korea. The current total number of staff at the Court is 342.

A2. Basic Texts

- Constitution of Korea (enacted 1948, last amended 1987): Articles 111-113
- Constitutional Court Act (enacted 1988, last amended 2018)

B. Organization

B1. President

Appointed by the President of the Republic of Korea from among the Justices of the Constitutional Court with the consent of the National Assembly, he or she represents the Constitutional Court, manages its affairs and directs and supervises public employees under his or her authority.

The President of the Constitutional Court chairs the Council of Justices and presides over the Full Bench of the Constitutional Court. He or she also has authority on personnel management. In case the position becomes vacant due to an unforeseeable event, another Justice of the Constitutional Court will be acting President according to the procedure set forth in the Constitutional Court Act.

B2. Justices

Number of Justices: 9 (including the President)

The Constitutional Court of Korea follows the representation model of appointing Constitutional Court Justices. Even though all nine are appointed by the President of the Republic of Korea, three are appointed from persons selected by the National Assembly, and another three are appointed from persons nominated by the Chief Justice of the Supreme Court. Nominees must be qualified to be ordinary court judges.

All nominees are subject to a confirmation hearing at the National Assembly. However, a majority vote in the legislature is only required for the appointee for Constitutional Court President and the National Assembly's candidates for Constitutional Court Justices.

The Justices exercise jurisdictions in judgments as a member of either the Full Bench or a Panel consisting of 3 Justices. As members of the Council of Justices, they exercise voting rights on important matters concerning the administration of the Constitutional Court.

The term of Justices is six years and may be renewed. The retirement age of a Justice is 70. No Justice can be removed from his or her office against his or her own will, unless impeached or criminally sanctioned with a sentence of imprisonment.

B3. Council of Justices

The final decision making body regarding the administration of the Constitutional Court is the Council of Justices. It is composed of nine Justices, including the President of the Constitutional Court as the Chairman. The Council requires attendance of at least seven Justices, and the majority vote to make decisions.

The matters decided by the Council of Justices include matters concerning the enactment and amendment of the Constitutional Court Rules and issues concerning the presentation of opinions on legislation related to the organization, personnel affairs, operation, adjudication procedure and other functions of the Constitutional Court. budget requests, expenditure of reserve funds and settlement of accounts, appointment and dismissal of the Secretary General, Deputy Secretary General, Rapporteur Judges, and public officials of Grade III and higher, and other important matters tabled by the President of the Constitutional Court Regulations.

B4. Department of Constitutional Research

The Constitutional Court of Korea employs around 64 Rapporteur Judges to assist the Justices in delivering judgments.

- **Rapporteur Judges (Research Judges)**

Rapporteur Judges are appointed by the President of the Constitutional Court through a resolution of the Council of Justices, from those falling under any of the following categories: 1) a person who is qualified as a judge, a public prosecutor, or an attorney-at-law; 2) a person who has been in a position equal to or higher than an assistant professor of law in an accredited college or university; 3) a person who has been engaged in legal affairs for five or more years as a public official of Grade IV or higher in the state agencies, such as the National Assembly, the Government, ordinary courts, or the Constitutional Court; 4) a person who has obtained a doctorate in law,

and engaged in legal affairs for five or more years in the state agencies, such as the National Assembly, the Government, ordinary courts, or the Constitutional Court; and 5) a person who has obtained a doctorate in law, and engaged in legal affairs for five or more years in an accredited research institute, such as a college or university as stipulated by the Constitutional Court Regulations. Depending on prior experience, some appointees are required to first serve as an Assistant Rapporteur Judge for three years, before being appointed to the position of a Rapporteur Judge.

The term of office of Rapporteur Judges is ten years. A consecutive appointment may be permitted, with the age limit set at 60 years.

Rapporteur Judges engage in research and investigation concerning the deliberation and adjudication of cases under the order of the Court President. Rapporteur Judges are divided into two groups. The first group is assigned to Justices and responsible for prior review of constitutional complaints and cases which have similar precedents (3 Rapporteur Judges per 1 Justice). The second group is not assigned to particular Justices but instead work in sub-groups of specialized areas: 1) civil liberties, 2) property rights, and 3) social rights. Around 7 to 12 Rapporteur Judges are assigned to each sub-group. This second group of Rapporteur Judges conducts research and discussions on cases transferred to the Full Bench. Generally one Rapporteur Judge is assigned to one case throughout the constitutional adjudication process. This system, however, may vary in exceptional circumstances such as where a case is of great social importance and draws great public attention or cases in a particularly specialised field.

- Seconded Rapporteur Judges

The President of the Constitutional Court may request other state agencies (mainly from the ordinary courts and the prosecutor's offices) to dispatch judges or prosecutors etc. to the Constitutional Court as seconded rapporteur judges. Currently, 18 seconded Rapporteur Judges work at the Constitutional Court.

- Constitutional Researchers and Academic Advisors

The Constitutional Court may hire Constitutional Researchers who hold doctoral degrees in law to engage in professional study and research concerning the deliberation and adjudication of cases. These researchers usually possess expertise in a particular specialism, such as the law of a foreign jurisdiction, thus providing the possibility for in-depth comparative legal research.

Starting in September 2007, the Constitutional Court has been appointing university professors as academic advisors.

B5. Department of Court Administration

The Court's administrative affairs are managed and supervised by the Department of Court Administration. The Secretary General, under the direction of the President, oversees the work of the Department of Court Administration, directs and supervises its employees and attends National Assembly sessions to make statements on the Court's administrative issues. The Deputy Secretary General assists the Secretary General and shall act on behalf of the Secretary General should he or she be unable to perform his or her duties due to unforeseeable circumstances.

As of 2018, 236 public officials work at the Department of Court Administration of the Constitutional Court. The Department of Court Administration is comprised of the following:

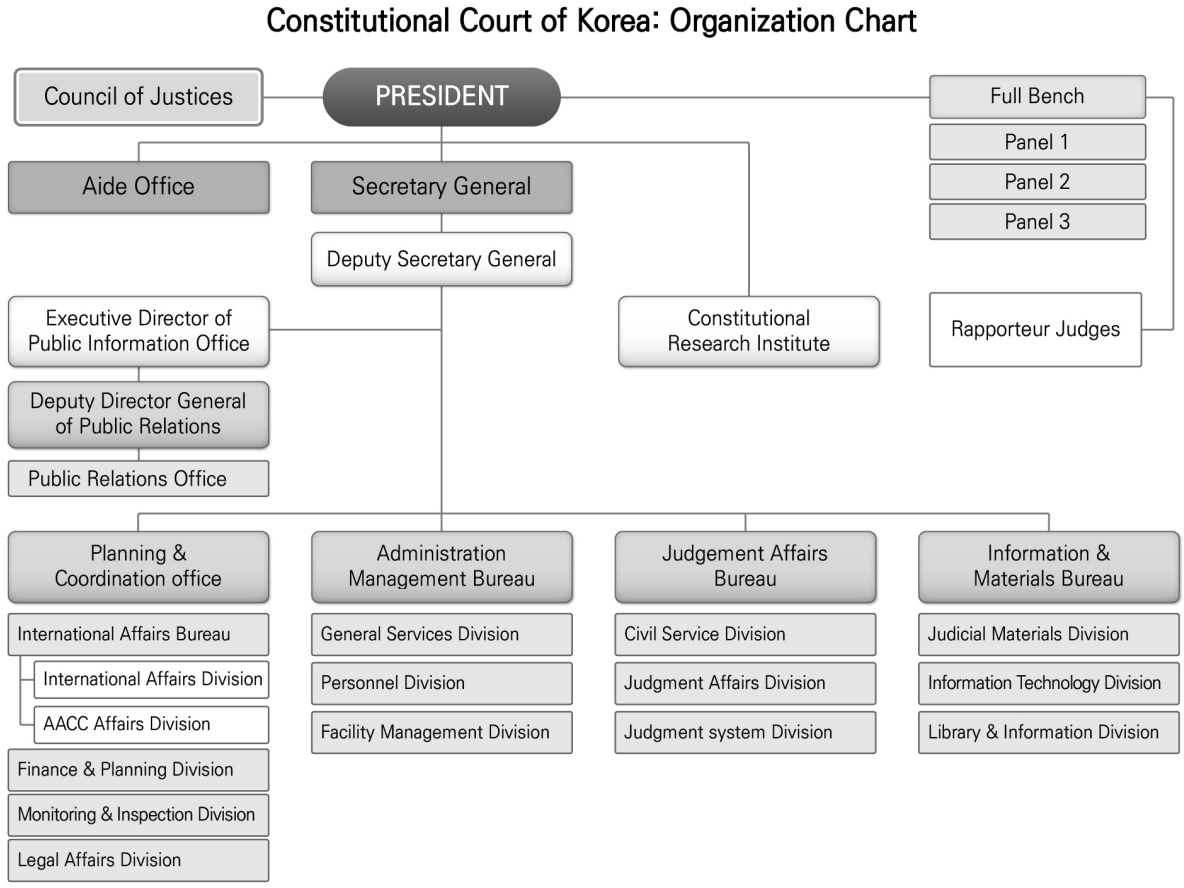
- **Planning and Coordination Office:** Responsible for formulating key project plans, budget planning, international cooperation, monitoring and inspection, the enactment and amendment of rules and regulations related to the Constitutional Court.
- **Administration Management Bureau:** In charge of the Court building security, sourcing, procurement, final accounts, protocol, events and personnel management.
- **Judgment Affairs Bureau:** Assists the work related to the handling of cases filed with the Constitutional Court, and formulates policy to improve the constitutional adjudication system.
- **Information & Materials Bureau:** Takes charge of the collection, publishing, management of materials on constitutional adjudication, support for research councils, library management, and IT work.
- **Public Relations Office:** Promotes the Court's important cases and events to the public through press releases and the official website, and produces promotional materials and conducts tours of the Constitutional Court.

B6. Constitutional Research Institute

The Constitutional Research Institute conducts systematic study and research of constitutional law and constitutional adjudication with a long term perspective and seeks ways to develop the Korean Constitution and constitutional adjudication system into one that suits Korea's particular circumstances. The Institute also provides educational programs on constitutional law for public officials, law school and university students, teachers, and others.

The Institute is divided into the following research teams: Institution Research Team, Fundamental Rights Research Team, and Comparative Constitutional Law Research Team. Serving purposes beyond research, the Institute also operates an Instruction Team responsible for educational work. The Planning and Administration Division is in charge of administrative affairs of the Constitutional Research Institute.

As of 2018, 39 Constitutional Researchers work at the Constitutional Research Institute.



C. Jurisdictions

According to Article 111(1) of the Korean Constitution, the Constitutional Court shall have jurisdiction over the following:

1. The constitutionality of a law upon the request of the 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; and
5. Constitutional complaint as prescribed by Act.

C1. Constitutional review of legislation

- **Key legal provisions:** Constitution (Articles 107, **111**, 113), Constitutional Court Act (Articles 2, 26, 27, 30, **41-47**, 68, 69).
- **Purpose:** Adjudication on the constitutionality of a law serves the purpose of securing the system of checks and balances in constitutional government. By nullifying a law on the basis of its unconstitutionality, the powers of the legislature can be checked for the purpose of protecting the Constitution.
- **Causes for requests:** A request for the review of a law can be made by an ordinary court, either ex officio or by decision upon a motion by the party. The

subject of adjudication includes statutes legislated by the National Assembly, and other norms with the equivalent status of such statutes. Such norms include emergency presidential orders, treaties, and universally accepted international law. The constitutionality of a law must be the precondition of adjudication of a particular case.

- Procedures
  - **Request procedure:** Request for review made by individual ordinary courts must go through the Supreme Court. No appeal is possible against the decision of the ordinary court on the request for review.
  - **Suspension of proceedings, etc.:** When an ordinary court requests the Constitutional Court to adjudicate on the constitutionality of a law, the proceedings of the ordinary court shall be suspended until the Constitutional Court makes a decision. However, if the ordinary court deems it urgent, the proceedings, other than the final decision, may proceed. Adjudication on the constitutionality of a law shall be conducted through paper hearing.
  - **Opinions of parties, etc. to the litigious case:** The parties to the original case and the Minister of Justice may submit to the Constitutional Court a written opinion on the issue of whether or not a law is constitutional.

- **Decisions and effect:** The Constitutional Court may decide that the law is unconstitutional or constitutional, or make a decision of constitutional nonconformity, conditional unconstitutionality, and conditional constitutionality. The concurrence of six or more Justices is required to make a decision of unconstitutionality (including a decision of constitutional nonconformity, conditional unconstitutionality or conditional constitutionality). Any decision that statutes are unconstitutional shall bind the ordinary courts, other state agencies and local governments. Any statute or provision thereof decided as unconstitutional shall lose its effect from the day on which the decision is made. Notwithstanding the previous sentence, statues or provisions relating to criminal punishment shall lose effect retrospectively: In a situation where the Constitutional Court had previously held a criminal statute or provision as constitutional, the decision of unconstitutionality shall have retroactive effect only up to the date of the former decision of constitutionality. In the case of retroactive effect relating to criminal penalties, a retrial may be allowed with respect to convictions that were based on statutes or provisions that have now been deemed as unconstitutional.

C2. Impeachment

- **Key legal provisions:** Constitution (Articles 65, 111-113), Constitutional Court Act (Articles 2, 5, 8, 19, 23, 26, 30, 40, 48-54).

- **Purpose:** An impeachment motion is made by the National Assembly, and the Korean Constitution endows the Constitutional Court with exclusive jurisdiction over the final decision of impeachment. The mechanism of impeachment plays an important role in providing accountability for unconstitutional actions by high ranking public officials, especially in a presidential system.

- **Causes for requests:** The National Assembly may pass a motion for impeachment if the President of the Republic of Korea, the Prime Minister, members of the State Council or Ministers of Government Ministries, Justices of the Constitutional Court, Judges, members of the National Election Commission, Chairman or commissioners of the Board of Audit and Inspection, or other public officials

designated by the law violate the Constitution or other laws in the performance of one's official duties.

- Procedures
  - **Procedure of impeachment motion:** The National Assembly may pass a motion for impeachment, and the impeachment prosecutor shall request adjudication by presenting to the Constitutional Court an authentic copy of the written resolution of initiating impeachment proceedings. No person against whom such a resolution is passed shall exercise his or her power until the Constitutional Court has passed judgment on the matter.
  - **Procedure of impeachment adjudication:** Oral hearings are conducted at the Constitutional Court. If the party is not present on the day of the hearings, the date must be reassigned. If the party fails to be present on the reassigned date, the hearing may proceed without the defaulting party.

- **Decisions and effect:** When a request for impeachment is upheld, the Constitutional Court shall pronounce a decision that the accused person be removed from public office. The concurrence of six or more Justices is required to make a decision of impeachment. The decision of impeachment does not excuse the official from civil or criminal responsibility. An impeached official cannot become a public official within 5 years from the decision is pronounced.

C3. Dissolution of a political party

- **Key legal provisions:** Constitution (Articles 8, 89, **111**, 113), Constitutional Court Act (Articles 2, 23, 30, **55-60**).

- **Purpose:** The twin aims of assigning this jurisdiction to the Constitutional Court are to protect the Constitution from the destruction of the basic democratic order by a political party, and to also protect political parties from the arbitrary decisions of the Government.

- **Causes for requests:** Upon a deliberation of the State Council, the Government may file for adjudication of a political party dissolution when it decides the purposes or activities of a political party are harmful to the basic order of a democratic society.

- **Procedures:** The written request for adjudication on dissolution of a political party shall include an indication of the political party requested to be dissolved, and the grounds of the request. When adjudication is requested, the President of the Constitutional Court shall notify the facts to the National Assembly and the National Election Commission and shall deliver the copy of the request to the respondent. Adjudication on dissolution of a political party shall be conducted through oral hearing.

- **Decisions and effect:** When a decision ordering dissolution of a political party is pronounced, the political party shall be dissolved. The concurrence of six or more Justices is required to make a decision of ordering dissolution. The Constitutional Court shall serve an authentic copy of the written decision, in addition to the respondent, to the Government, to the National Assembly and the National Election Commission. The dissolution of a political party decision is executed by the National Election Commission, according to the Political Party Law.

C4. Competence dispute

- **Key legal provisions:** Constitution (Article **111**), Constitutional Court Act (Articles 2, 30, 40, **61-67**).

- **Purpose:** When conflicts arise between state agencies, between state agencies and local governments, and between local governments, about the duties and authorities of each institution, it not only endangers the principle of checks and balances between public powers, but also risks paralyzing an important government function. This may pose a threat to the fundamental rights of citizens, which calls for a systematic coordinating mechanism.

- **Causes for requests:** The claimant (state agencies, local governments) may request adjudication on competence, if the respondent's action or inaction of which the competence or scope is in controversy, infringes or is clearly in danger of infringing the competence conferred to the claimant by the Constitution or the laws.
  - **Competence dispute between state agencies:** Disputes between the National Assembly, the Government, ordinary courts and the National Election Commission.
  - **Competence dispute between a state agency and a local government:** Disputes between the Government and the Special Metropolitan City, Metropolitan City or Province; disputes between the Government and the City or County.
  - **Competence dispute between local governments:** Disputes between the Special Metropolitan City, Metropolitan City or Province; disputes between the City and County or Self-governing District; disputes between the Special Metropolitan City, Metropolitan City or Province and the City, County or Self-governing District.

- **Procedures:** The written request to the Constitutional Court for adjudication on competence dispute shall include the following matters: indication of the respondent's action or inaction which is the subject matter of the adjudication; reasons for the request; and other necessary matters. The adjudication on competence dispute shall be requested within 60 days after the existence of the cause is known and within 180 days after the cause occurs. Adjudication on competence dispute shall be conducted through oral hearing.

- **Decisions and effect:** A vote of majority of Justices participating in the final trial is needed to make a decision. In the case of the existence or scope of competence of a state agency or local government, the Constitutional Court may nullify an action of the respondent, which was the cause of the competence dispute, or may confirm the invalidity of the action. When the Constitutional Court has rendered a decision upholding the request for adjudication against an inaction, the respondent shall act in pursuit of performing the required action. The decision of the Constitutional Court shall prospectively bind all state agencies and local governments. The decision to nullify an action of a state agency or a local government shall not alter the effect which has already been given to the person whom the action is directed against, in order to avoid confusion.

C5. Constitutional complaint

- **Key legal provisions:** Constitution (Articles **111** and 113), Constitutional Court Act (Articles 2, 23, 30, 37, 40, **68-75**).

- **Purpose:** If individuals file a constitutional complaint under Article 68(1) of the Constitutional Court Act, individuals may seek protection against state power by directly requesting relief from the violation of fundamental rights. Like the constitutional review of legislation under Article 41(1) the Constitutional Court Act, constitutional complaint under Article 68(2) is to secure the system of checks and balances, especially regarding the legislature.

- Causes for requests:
  - **Constitutional Court Act Article 68(1):** Any person who claims that his or her fundamental rights which are guaranteed by the Constitution has been violated by an exercise or non-exercise of state power, except the judgments of the ordinary courts, may file a constitutional complaint to the Constitutional Court. Since the legislative power of the National Assembly is a public power, the enactment of statutes or the non-enactment of statutes that have been mandated for enactment, resulting directly in the infringement of constitutional rights, are also subject to constitutional complaint.
  - **Constitutional Court Act Article 68(2):** If a motion made under Article 41(1) of the Constitutional Court Act for request of adjudication on the constitutionality of laws is rejected, the party may file a constitutional complaint to the Constitutional Court. The party may not repeatedly move to request for adjudication on the constitutionality of statutes for the same reason in the procedure of the case concerned.

- Procedures
  - Period of request for adjudication:
    - ✓ **Filed under Article 68(1):** The complaint shall be filed within 90 days after the existence of the cause is known, and within one year after the cause occurs. If a constitutional complaint is filed after exhausting remedial processes provided by other laws, it shall be filed within 30 days after the final decision in these processes has been made.
    - ✓ **Filed under Article 68(2):** The constitutional complaint shall be filed within 30 days after a denial of a motion to request for review on the constitutionality of the statute is notified.
  - Matters to be stated on the request for adjudication:
    - ✓ **Filed under Article 68(1):** Indication of the case, information of the complainant and his or her counsel, the fundamental right(s) which has been allegedly infringed, the causes for infringement including the exercise and non-exercise of state power, reasons for the request and other necessary matters.
    - ✓ **Filed under Article 68(2):** Indication of the requesting ordinary court, information of the case and the parties, the law or any provision of the law which is interpreted as unconstitutional, bases on which that law is interpreted as unconstitutional, and other necessary matters. A document attesting the appointment of a counsel or a written notification of appointment of the court-appointed counsel shall be appended to the written request for adjudication.
  - **Prior review:** The Panel of three Constitutional Court Justices can conduct a prior review. The Panel shall dismiss a constitutional complaint unanimously as a result of the non-satisfaction of formal requirements for constitutional complaint. Formal requirements between complaints filed under Article 68(1) and filed under Article 68(2) are different. When a Panel cannot reach a decision of dismissal with unanimity, it shall transfer to the Full Bench. When a dismissal is not decided within 30 days after requesting the adjudication on constitutional complaint, it shall be deemed that a decision to transfer it to the Full Bench is made.
  - **Presentation of opinions by interested agencies:** State agencies or public organizations which have interests in adjudication on a constitutional

complaint, and the Minister of Justice may present to the Constitutional Court a written opinion on the adjudication. When a constitutional complaint prescribed in Article 68(2) is transferred to the Full Bench, the provisions of Articles 27(2) and 44 shall apply *mutatis mutandis*.

▸ Decisions and effect

- Content of adjudication: There are three types of final judgment on the request for adjudication.
  - ✓ Rejection: The request is irrational and unfounded.
  - ✓ Dismissal: The request was made unlawfully.
  - ✓ Upholding: Six or more Justices deem the request to have reason(s) and is justified.
- Effect of decision:
  - ✓ Filed under Article 68(1): The concurrence of six or more Justices is required to make a decision of upholding. The upholding decision shall bind the ordinary courts, other state agencies and local governments. In the case of a constitutional complaint under Article 68(1) and the request was found to be rational, the Constitutional Court must specify the exercise or non-exercise of state power that infringed fundamental rights. In accepting a constitutional complaint the Constitutional Court may nullify the exercise of the public authority which infringes on fundamental rights, or confirm that the non-exercise is unconstitutional. When a decision has been made against the non-exercise of state power, the respondent must take new action in accordance with the decision. If the infringement was from the laws or statutes, the Court may hold the statute unconstitutional like the constitutional review of legislation under Article 41(1). If the unconstitutionality of a provision makes the whole statute unenforceable, the Court may announce the whole statute unconstitutional.
  - ✓ Filed under Article 68(2): The concurrence of six or more Justices is required to make a decision of upholding. The upholding decision shall bind the ordinary courts, other state agencies and local governments. In cases where a constitutional complaint is accepted, the Constitutional Court may decide that the law is unconstitutional or constitutional. If the unconstitutionality of a provision makes the whole statute unenforceable, the Court may announce the whole statute unconstitutional. Any statute or provision decided as unconstitutional shall lose its effect from the date of the decision. Notwithstanding the previous sentence, statue or provisions relating to criminal punishment shall lose effect retrospectively: In a situation where the Constitutional Court had previously held a criminal statute or provision as constitutional, the decision of unconstitutionality shall have retroactive effect only up to the date of the former decision of constitutionality. When a case of an ordinary court, which is related to the instant constitutional complaint, has been already decided by final judgment, the party may request a retrial of the case before the court, whether criminal, civil or administrative.

Annex

Annex 1. Case Statistics

1-1. Since establishment (Sep. 1988 - Dec. 2017)

Type		Total	Constitutionality of Statutes[1]	Impeachment	Dissolution of a Political Party	Competence Dispute	Constitutional Complaint		
							Sub total	§68 I	§68 II
Filed		33,217	940	2	2	102	32,171	25,721	6,450
Settled		32,295	880	2	2	88	31,322	25,211	6,111
Decided by Full Bench	Unconstitutional[2]	580	274				306	104	202
	Unconformable[3]	189	59				130	59	71
	Conditionally Unconstitutional[4]	70	18				52	20	32
	Conditionally Constitutional[5]	28	7				21		21
	Constitutional	2,431	330				2,101	4	2,097
	Upholding[6]	644		1	1	17	625	625	
	Rejected	7,291		1		20	7,270	7,270	
	Dismissed	20,150	69		1	36	16,476	3,568	20,044
	Other	10					10	8	2
	Withdrawn	902	123			16	763	645	118
Pending		922	60			13	849	510	339

http://english.ccourt.go.kr/cckhome/eng/decisions/caseLoadStatic/caseLoadStatic.do

1) This type of "Constitutionality of Statutes" case refers to the constitutionality of statutes cases brought by ordinary courts, i.e., any court other than the Constitutional Court.
2) "Unconstitutional": Used in Constitutionality of Laws cases.
3) "Unconformable": This conclusion means the Court acknowledges a law's unconstitutionality but merely requests the National Assembly to revise it by a certain period while having the law remain effective until that time.
4) "Conditionally Unconstitutional": In cases challenging the constitutionality of a law, the Court prohibits a particular way of interpretation of a law as unconstitutional, while having other interpretations remain constitutional.
5) "Conditionally Constitutional": This means that a law is constitutional if it is interpreted according to the designated way. This is the converse of "Unconstitutional, in certain context". Both are regarded as decisions of "partially unconstitutional".
6) "Upholding": This conclusion is used when the Court accepts a Constitutional Complaint which does not include a constitutionality of law issue.

1-2. Last five years (2013-2017)

2013

Type	Total	Constitutionality of Statutes[1]	Impeachment	Dissolution of a Political Party	Competence Dispute	Constitutional Complaint		
						Sub total	§68 I	§68 II
Filed (2012 pending + 2013 newly filed)	2,328	60		1	9	2,258	1,456	802

Type		Total	Constitutionality of Statutes[1]	Impeachment	Dissolution of a Political Party	Competence Dispute	Constitutional Complaint		
							Sub total	§68 I	§68 II
Settled		1,585	22		1	5	1,558	1,088	470
Decided by Full Bench	Unconstitutional[2]	25	7				18	5	13
	Unconformable[3]	3	1				2	2	
	Conditionally Unconstitutional[4]								
	Conditionally Constitutional[5]								
	Constitutional	43					43	43	
	Upholding[6]	147	14				133		133
	Rejected	225				1	224	224	
	Dismissed	1,101				2	1,099	782	317
	Other								
	Withdrawn	41				2	39	32	7
Pending		743	38		1	4	700	368	332

2014

Type		Total	Constitutionality of Statutes[1]	Impeachment	Dissolution of a Political Party	Competence Dispute	Constitutional Complaint		
							Sub total	§68 I	§68 II
Filed (2013 pending + 2014 newly filed)		2,712	64		1	5	2,642	1,808	834
Settled		1,888	14		1	2	1,871	1,368	503
Decided by Full Bench	Unconstitutional[2]	11	3				8	3	5
	Unconformable[3]	15	1				14	11	3
	Conditionally Unconstitutional[4]	3	3						
	Conditionally Constitutional[5]								
	Constitutional	31			1		30	30	
	Upholding[6]	104	6				98		98
	Rejected	151					151	151	
	Dismissed	1,550	1			1	1,548	1,155	393
	Other								
	Withdrawn	23				1	22	18	4
Pending		824	50			3	771	440	331

2015

Type		Total	Constitutionality of Statutes[1]	Impeachment	Dissolution of a Political Party	Competence Dispute	Constitutional Complaint		
							Sub total	§68 I	§68 II
Filed (2014 pending + 2015 newly filed)		2,683	87		1	11	2,584	1,765	819
Settled		1937	44		1	2	1,891	1,375	516
Decided by Full Bench	Unconstitutional[2]	47	21				26	6	20
	Unconformable[3]	15	1				14	10	4
	Conditionally Unconstitutional[4]								
	Conditionally Constitutional[5]								
	Constitutional	48				1	47	47	
	Upholding[6]	176	20				156		156
	Rejected	203					203	203	
	Dismissed	1,421	2			1	1,418	1,090	328
	Other	1					1	1	
	Withdrawn	26					26	18	8
Pending		746	43		1	9	693	390	303

2016

Type		Total	Constitutionality of Statutes[1]	Impeachment	Dissolution of a Political Party	Competence Dispute	Constitutional Complaint		
							Sub total	§68 I	§68 II
Filed (2015 pending + 2016 newly filed)		2,697	63	1	1	18	2,614	1,769	845
Settled		1,976	27		1	5	1,943	1,373	570
Decided by Full Bench	Unconstitutional[2]	33	12				21	17	4
	Unconformable[3]	9	2				7	2	5
	Conditionally Unconstitutional[4]	1					1	1	
	Conditionally Constitutional[5]								
	Constitutional	58					58	58	
	Upholding[6]	179	4				175		175
	Rejected	214					214	214	
	Dismissed	1,418	5		1	3	1,409	1,050	359
	Other	3					3	2	1

Type		Total	Constitutionality of Statutes[1]	Impeachment	Dissolution of a Political Party	Competence Dispute	Constitutional Complaint		
							Sub total	§68 I	§68 II
	Withdrawn	61	4			2	55	29	26
Pending		721	36	1		13	671	396	275

2017

Type		Total	Constitutionality of Statutes[1]	Impeachment	Dissolution of a Political Party	Competence Dispute	Constitutional Complaint		
							Sub total	§68 I	§68 II
Filed (2016 pending + 2017 newly filed)		3,347	71	1		15	3,260	2,383	877
Settled		2,425	11			2	2,411	1,873	538
Decided by Full Bench	Unconstitutional[2]	4	1				3	1	2
	Unconformable[3]	1					1	1	
	Conditionally Unconstitutional[4]								
	Conditionally Constitutional[5]								
	Constitutional	38		1			37	37	
	Upholding[6]	116	10				106		106
	Rejected	177					177	177	
	Dismissed	2,064				2	2,062	1,633	429
	Other								
	Withdrawn	25					25	24	1
Pending		922	60			13	849	510	339

Annex 2. Cases

▸ **Identification**

a) Country, b) Name of the Court, c) Date of decision given, d) Number of the decision, e) Jurisdiction, f) Title of the decision

▸ **Headnotes**

▸ **Summary**

Case 1.

▸ Identification

a) Korea, Republic of / b) Constitutional Court / c) 31-5-2018 / d) 2013Hun-Ba322 / e) Constitutional complaint / f) Prohibition of Assemblies Near the National Assembly

▸ Headnotes

In this case, the Constitutional Court decided that the portion of Article 11 Item 1 of the Assembly and Demonstration Act concerning the "National Assembly", which provides that no person may hold any outdoor assembly or stage any demonstration anywhere within a 100-meter radius from the boundary of the office building, is in violation of the Constitution.

▸ Summary

1. (1) The National Assembly is the representative body of the people which enacts or revises laws. As the institution with the power to oversee national affairs, exercising a strong control over the executive power in particular, the National Assembly plays a major role in national policy decisions. Such a function and role of the National Assembly calls for a special and sufficient protection in view of its particularity and importance.

The object of the provisions at issue is to ensure the members of the National Assembly, the people working in the National Assembly, and the general public free access to the National Assembly building and to ensure the National Assembly facilities remain safe and secure. In this regard, the provisions at issue are found to have a legislative purpose.

And prohibition of the outdoor assembly or demonstration from being held at a place within 100 meters from the border of the National Assembly (hereinafter referred to as the “National Assembly neighborhood”) is considered as an adequate means to serve the legitimate legislative purpose, because it can contribute to the protection of the functions of the National Assembly.

(2) Assembly or demonstration near the National Assembly neighborhood is compatible with the constitutional function of the National Assembly, as well as serve its constitutional function more faithfully. In view of the role of the National Assembly, which is to “represent the popular will of the people”, the necessity for the National Assembly to be protected from unjustifiable pressure from particular persons or some forces should in principle be limited to the case of physical pressure imposed on the members of National Assembly and a threatening situation where access to, or safety of, National Assembly facilities is at risk.

Considering the legislative purpose, it is possible to interpret “the National Assembly building” (Article 11-1) from the provisions at issue as “the entire place in the National Assembly site where the functional activities of the National Assembly are held, for example, National Assembly building, Member’s Office building, and National Assembly Library”. But if the scope of the National Assembly building is defined as such, even the sites which are irrelevant to the occupational functions of the National Assembly, such as the area separated by the road from the National Assembly site and, the nearby park or green space would also be included in the ban. Moreover, since the National Assembly site is surrounded by fences and a considerable amount of space is secured from the fences to the National Assembly facilities, such as the National Assembly building, the constitutional function of the National Assembly can be guaranteed.

On the other hand, if the general presumption that an assembly or demonstration near the National Assembly neighborhood is a direct threat to the legal interests protected by the provisions at issue can be denied in specific circumstances, exceptional clauses should be arranged by a legislator to allow outdoor assembly (e.g. "small-scale assemblies", "assemblies held on holidays or recess", "assemblies not for the activities of the National Assembly", etc.). In such circumstances, exceptional clauses shall be granted by a legislator so as to alleviate the excessive restrictions on the freedom of assembly resulting from the provisions at issue.

Of course, any violent and illegal mass assembly held near the National Assembly neighborhood, is likely to undermine the constitutional function of the National Assembly. However, the "Assembly and Demonstration Act" prescribes various regulatory measures to cope with such situation, and acts of violence or obstruction of business in the process of assembly are subject to criminal sanctions by criminal law.

As such, the provisions at issue violate the principle of minimum restriction.

(3) The provisions at issue does not only limit the assembly which may impair or impede the constitutional function of the National Assembly, but also prohibit all other peaceful and legitimate assemblies. It cannot be presupposed that the public interest that is to be achieved by the provisions at issue is greater than the restriction on the freedom of assembly.

Therefore, the provisions at issue does not fulfill the requirement of balances between the public and private interests.

(4) The provisions at issue does not fulfill the rule against excessive restriction, and thus infringe upon the freedom of assembly.

2. The elements of unconstitutionality and constitutionality cohabitate in the provisions at issue. Therefore, the Court delivers a decision of nonconformity to the Constitution regarding the provisions at issue, but orders its continued application until an amendment is made by December 31, 2019.

Case 2.

▸ **Identification**

a) Korea, Republic of / b) Constitutional Court / c) 28-07-2018 / d) 2011Hun-Ba379 / e) Constitutional complaint / f) Case on Conscientious Objectors

▸ **Headnotes**

In this case, the Constitutional Court held that Article 88 Section 1 Item 1 of the former Military Service Act, which imposes criminal punishment on those who are subject to the draft but evade their required military service, is not against the Constitution because that provision does not infringe on the conscientious objector's freedom of conscience.

But the Constitutional Court held that Article 5 Section 1 of the Military Service Act and the same Article of the former Military Service Act, from prior to amendment by Act No. 7897 on March 24, 2006, to the present Act (hereinafter collectively referred to as 'Categories of Military Service Provision'), are nonconforming to the Constitution for not stipulating alternative service options for conscientious objectors. While delivering a decision of nonconformity to the Constitution for the provision, the Court held it temporary applicable.

▸ **Summary**

1. Court Opinion

The Constitutional Court found Categories of Military Service Provision nonconforming to the Constitution on the ground that it stipulated the categories of military service only as five items not including Alternative service. The five items are: Active duty service, Reserve service, Supplementary service, Preliminary military service, and Wartime labor service. The Court's decision is summarized as follows.

Categories of Military Service Provision has a purpose to ensure national security by imposing military duty equally and retaining and allocating military service resources efficiently. Therefore the provision itself is an adequate means to fulfill the reasonable legislative purpose.

Since types of military service stipulated in Categories of Military Service Provision are all set upon the premise of receiving military trainings, it may cause conflict with the conscience of the conscientious objectors, if they are imposed of such military duty. As such, the possibility of Alternative service has long been examined

The number of conscientious objectors is not large enough to discuss the decrease of military service resources, and even when punishing the objectors, they will be imprisoned in the correctional facility not utilized as military resources. Thus, the permission of Alternative service program will not generate the loss of military resources. Also, when considering the fact that the importance of military service resources in the entire national defense system has been decreasing, it is hard to find that introducing Alternative service program will have significant influence to the national defense power of Korea.

Provided that an objective and fair preliminary examination and a strict post management procedure are regulated by the government and equity between Active military service and Alternative service regarding the level of difficulties and duration is acquired, thus removing the causes of evading military duty, the problem of increase in abuse by draft evaders feigning conscience and the difficulties in determining whether a refusal of military service is based on genuine conscience will be solved. Accordingly, it is possible to retain the equity of military duty even after the introduction of Alternative service.

As long as the introduction of Alternative service system does not have significant influence on the national defense of Korea nor it reduces effectiveness of the military service system, as stated earlier, holding or preventing the introduction of Alternative system on reasons of the unique security situation of the nation cannot be justified. Therefore, Categories of Military Service Provision runs against the rule of minimum restriction for categorizing military services that entail military training and not including the Alternative service program.

Although the public interests, such as 'national security' and 'equity or fairness in the allocation of military duties' are significantly important, it can also possibly be accomplished by adding Alternative service system to Categories of Military Service Provision. By contrast, without stipulating Alternative service program in the Provision, conscientious objectors have to be imprisoned for more than a year and a half, and are left to suffer immense disadvantages, such as dismissal and restriction from working as public officials, loss of patent, permission, approval, license from the government, disclosure of personal information, implicit and unconscious bias upon ex-convicts, and difficulties in finding jobs, and etc. Provided that conscientious objectors are assigned to public service work, it will have broader meaning of realizing national security and provide more efficient ways to accomplish public interests than just imprisoning the

objectors for the punishment. In addition to this, the societal and national level of integration and diversity will be increased as well. Thus, it is considered that Categories of Military Service Provision does not fulfill the requirement of balance between the public and private interests.

Accordingly, Categories of Military Service Provision, which did not stipulate Alternative service program for conscientious objectors, infringes on objectors' freedom of conscience by violating the principle against excessive restriction.

In 2004, the Court urged the legislature to review the alternatives that can ensure the public interest of national security as well as conscientious objectors' freedom of conscience. However, the legislature did not make legislative progress for the past 14 years. During that time, several governmental organizations, such as the National Human Rights Commission of Korea, the Ministry of National Defense, the National Assembly, and etc. have reviewed or recommended the introduction of Alternative service program. Also, an increasing number of ordinary lower courts' judgments announced that conscientious objectors are not guilty. By considering all these circumstances, the government shall not put aside such issue and is obliged to remove the situation of infringement of fundamental rights with the introduction of the Alternative service program.

In a democratic decision making system where the majority decides, the true way to realize the spirit of democracy that upholds tolerance and diversity is to give careful attention to the 'Minorities,' people who think different from the majority group.

2. Aftermath of the case

After the Court's decision, active and heated discussion over introducing an Alternative service system for conscientious objectors has increased. The media reported that setting an objective and fair preliminary examination and a strict post management procedure regulated by the government and determining an adequate duration and the level of difficulties that can ensure the equity between Active military service and Alternative service are the primary concerns of the public (Yonhap News, July 5, 2018).

The deadline for amendment to the Military Service Act, which ought to stipulate the introduction of an alternative service system for those who refuse to join the military based on their religious beliefs or conscience, is set as no later than December 31, 2019.

Case 3.

▸ Identification

a) Korea, Republic of / b) Constitutional Court / c) 3-02-2005 / d) 2001Hun-Ka9 /
e) Constitutional review of legislation / f) Case on "House Head System"

▸ Headnotes

Relevant provisions of the Civil Code constituting the "house head system", under which a household, in a collective concept, is formed around the house head at its core and is passed down only through direct male descendants serving as successive house heads, are non-conforming with the Constitution.

▸ **Summary**

I.

Petitioners are people who had married but divorced and established new families. Despite the fact that they held custody of and raised their children, to whom they gave birth with their respective ex-husbands, the children were registered under the households in which the ex-husbands were the family heads. These petitioners reported to the family registration office to register their children under their own households, but the family registration office refused.
The other petitioners were people married and registered under the same households as their husbands or wives, in which the husband was the family head. These petitioners filed for a change of family head, to register their families as households without family heads. However, the family registration office rejected the filing.

II.

The Constitutional Court issued a decision of nonconformity to the Constitution regarding the family headship provisions, for the following reasons.

The Constitution is the supreme norm of the state. Therefore, even though the family system is distinctively an outcome of history and society, it cannot deviate from the superior force of the Constitution. In other words, if a law regulating the family system impairs the realization of the constitutional ideal, and only strengthens the gap between a constitutional norm and reality, such law should be amended. Our Constitution expressed its constitutional resolution to no longer tolerate the patriarchal and feudal order of marriage handed down from the past, by declaring the equality of men and women in marriage as the basis of the constitutional marital order. In the current Constitution, gender equality and individual dignity are firmly seated as the supreme values in marriage and the family system.

We understand that a certain limit - that the tradition and cultural heritage of the family system should at least not be contrary to the constitutional ideals of individual dignity and sexual equality - exists. Therefore, if a certain family system from the past is contrary to the individual dignity and gender equality required by Article 36 Section 1 of the Constitution, it cannot be justified on the basis of Article 9.

The family headship system, which forms the basis of Article 778 ("A person who has succeeded to the family lineage or has set up a branch family, or who has established a new family or has restored a family for any other reason, shall become the head of a family."), the latter part of the main text of Article 781 Section 1 ("entered into his or her father's family register"), and the main text of Article 826 Section 3 ("The wife shall have her name entered in her husband's family register.") of the Civil Act, is a system whereby "a household, a concept of a collective, is formed around the family head at its core and passes down only through direct male descendants serving as successive family heads." In other words, the family head system is a statutory device that forms families with male lineage at the center and perpetuates this to successive generations. It is not a system that simply identifies the representative of a family as a family head ("*hoju*") and compiles the family register accordingly.

The family headship system is discrimination based on stereotypes concerning sexual roles. This system, without justifiable grounds, discriminates men and women in determining the succession order to the family head, forming marital relations, and forming relations with children. Due to this system, many families are suffering inconvenience and pain, being unable to form a legal family relationship aligned with reality and the family's welfare. Traditional ideology or public morals such as ancestor worship, respect for the aged and obedience to parents, and harmony in family can be

passed down and developed through cultural and ethical aspects, but cannot justify the blatant sexual discrimination of the family headship system.

Today, relationships inside a family are no longer authoritarian, with the family divided into a family head and those who obey the head. Rather, families consist of democratic relationships where all family members are equally respected as individuals with dignity, regardless of sex. Families now take on diverse forms, including families with single mothers, and remarried couples living with children from previous marriages, among others. Also, due to the growing economic power of women as well as the number of divorces, more and more women are serving as the breadwinner of the family. The foundation of the existence of the family headship system has collapsed along with social development, as seen above, and thus can no longer be maintained as a family system. If the provisions of the Civil Act that form the framework of the family headship system are found to be unconstitutional, the system cannot be retained. As a result, a vacuum will occur in public records used for notifying and verifying relations among people. Therefore, we pronounce a decision of nonconformity to the Constitution in order to temporarily enforce the aforementioned provisions until the Family Register Act is amended with a new family register system.

Two Justices dissented, stating that family law, regulating marriage and family relations, can have strong traditional, conservative, and ethical features. Therefore, in interpreting the constitutional provision on marriage and family relations, the nature of the family law as a tradition should be considered. In particular, in the realm of family law, we should not carelessly judge our traditional culture with a mechanistic rule of equality, consequently rejecting and dismantling the traditional family culture. The family headship system currently in force is designed to actualize the constitution of family and succession of the family system based on the principle of paternal lineage. The system is based on the long-established tradition and reality of the Korean society, and cannot be seen as substantial discrimination against women. Even if the family headship system in some aspect forms status relations one-sidedly, this was inevitable in the process of enacting the family system. Moreover, there are measures that alleviate such aspects, such as the voluntary branching of a family or the waiver of the right to succeed the family head. Therefore, it is also difficult to say that the family headship system does not respect individual dignity.

Another Justice partially dissented, as follows. The Civil Act prescribes a household system in order to contribute to the forming and maintaining the family system, as prescribed in Article 36 Section 1 of the Constitution. The reason for having a family head is based on our traditional culture. Therefore, Article 778 of the Civil Act cannot be said to violate the Constitution, including Article 36 Section 1, for acknowledging the concept of a household and introducing the idea of a family head into such a concept. The element of gender discrimination of the family headship system can be ameliorated by voiding individual articles such as Article 984 or through legislative amendment. Therefore, such an unconstitutional element cannot be said to be a problem essentially innate in Article 778, which is the basic provision constituting the household system. Therefore, Article 778 of the Civil Act does not violate the Constitution.

Case 4.

- **Identification**

a) Korea, Republic of / b) Constitutional Court / c) 10-03-2017 / d) 2016Hun-Na1 /
e) Impeachment / f) Case on the Impeachment of the President (Park Geun-hye)

▸ **Headnotes**

In this case, the Constitutional Court decided to uphold the impeachment removing President Park Geun-hye from office, on the grounds that she had violated the Constitution and law in the performance of duties, and that such violations were grave. Article 65 of the Constitution provides for the possibility of impeachment of high-ranking public officials of the executive branch and of the judiciary for violation of the Constitution or statutes.

▸ **Summary**

1. Whether the grounds for impeachment have been specified

It is sufficient for the grounds for impeachment to be stated in specific circumstances to the extent that they can be clearly distinguished from other facts. It is true that to a certain degree, the grounds for impeachment are not distinctly classified by category with respect to violations of the Constitution. However, the facts listed as the aforementioned grounds for impeachment, when considered together with violations of law, are detailed enough to be clearly distinguishable from the other grounds for impeachment.

2. Whether the voting procedure of the National Assembly was illegal

(a) The self-regulating authority of the deliberative process of the National Assembly should be respected under the doctrine of separation of powers, as long as it is not marked by any clear violation of the Constitution or law. Furthermore, Article 130 Section 1 of the National Assembly Act prescribes that whether to investigate the grounds of a proposed impeachment bill is at the discretion of the National Assembly. Therefore, the fact that the National Assembly did not perform a separate investigation into the grounds for impeachment, or that it voted on the motion for impeachment without waiting for the results of its investigation of state administration or the investigation results of the special prosecutor, does not mean that the vote was in violation of the Constitution or law.

(b) The National Assembly Act does not explicitly prescribe that a debate is absolutely required before a motion for impeachment is put to vote. Moreover, no National Assembly member wished to debate the vote for impeachment in this case, which was why the vote proceeded after an explanation of the proposal for the motion for impeachment, without any debate. The Speaker did not intentionally prevent or hinder any National Assembly member from engaging in a debate against his or her wishes.

(c) Whether each ground for impeachment in the motion should be separately proposed or whether the grounds should be proposed as a single motion is at the discretion of the National Assembly members proposing the motion for impeachment. If there have been a number of violations of the Constitution and law, the combination of which are deemed enough to substantiate removal from office, then the numerous grounds for impeachment can be integrated and proposed under a single motion for impeachment.

(d) The impeachment procedure concerns the relationship between two constitutional institutions, the National Assembly and the President, and the impeachment resolution of the National Assembly does not infringe upon the basic rights of the President as a private individual. Therefore, the due process principle, formed as a legal principle that should be observed in the exercise of governmental power by a state institution on its citizens, cannot be directly applicable to an impeachment procedure that is designed to protect the Constitution against a state institution.

3. Whether adjudication on impeachment can be undertaken by eight Justices

As a rule, a constitutional trial is assigned to the Full Bench consisting of nine Justices. In reality, however, certain circumstances may arise which inevitably prevent Justices from participating in trials. Thereupon, the Constitution and Constitutional Court Act clearly provide that a case can be reviewed and determined with the attendance of seven or more Justices notwithstanding a vacancy or vacancies, to prevent the role of the Constitutional Court to protect the Constitution from being interrupted. Thus, that the vacancy of one Justice has led the Bench to consist of eight Justices presents no problem under the Constitution or law in reviewing and deciding on an impeachment trial.

4. Requirements for impeachment

Article 65 of the Constitution provides that the ground for impeachment shall be a "violation of the Constitution or other laws in the performance of official duties." The "official duties" as provided for here means the duties inherent in particular governmental offices as provided for by law and other duties related thereto as commonly understood, and thus, is a concept that includes not only acts based on laws, but also all of those performed by the President in his or her office with respect to the implementation of State affairs. The "Constitution" includes the unwritten constitution formed and established by the precedents of the Constitutional Court as well as the express provisions of the Constitution. "Other laws" include not only statutes in their formal context, but also, among others, international treaties that have the same force as statutes and international law that has been generally accepted.
Article 53 Section 1 of the Constitutional Court Act provides that the Constitutional Court shall pronounce a decision that the respondent be removed from public office "when there is a valid ground for the petition for impeachment adjudication." For the impeachment of a President to take place, the benefits of upholding the Constitution by removing the President from office on account of the severity of the negative impact on or harm to constitutional order caused by the President's violation of law, should overwhelmingly outweigh the national loss incurred by the removal of the President from office. Therefore, "the existence of a valid ground for the petition for impeachment adjudication" means the existence of a grave violation of the Constitution or law sufficient to justify the removal of the President from office.

5. Whether the obligation to serve the public interest has been violated

Article 7 Section 1 of the Constitution, based on the principles of people's sovereignty and representative democracy, clarifies the obligation of public officials to serve the public interest by providing that public officials shall be "servants of the entire people," while Article 69 of the Constitution reiterates the duty of the President to serve the public interest. The President, being a servant of "the entire people," is obliged to be independent from the special interests of a specific political party, of the stratum, religion, region or social organization he or she belongs to, and of factions that he or she is acquainted with, and to perform duties for all people in a fair and balanced manner. The President's obligation to serve the public interest is further specified in Article 59 of the State Public Officials Act, Article 2-2 Section 3 of the Public Service Ethics Act, and Item 4 (a) of Article 2 and Article 7 of the 'Act on the Prevention of Corruption and the Establishment and Management of the Anti-Corruption and Civil Rights Commission' (hereinafter referred to as the "Act on Preventing Corruption and the Civil Rights Commission").

The respondent appointed a number of people recommended by Choi ™-Won as public officials, and some of the public officials appointed in this manner helped Choi ™-Won seek personal interests. The respondent ordered the establishment of Mir and K-Sports and the solicitation of funds for those foundations from private companies. She also used her position and authority as President to request that companies make

contributions. The respondent then appointed persons recommended by Choi ™-Won to executive management positions at Mir and K-Sports, to enable Choi ™-Won to take de facto control of the two foundations. Consequently, Choi ™-Won was able to use the above foundations as tools for generating personal benefits through Playground Communications Inc. and The Blue K Inc. (hereinafter referred to as "The Blue K"), which were both actually under her management. The respondent demanded that companies hire certain persons and requested that they enter into contracts with certain companies, using her position and authority as President to intervene in the management of private companies. In addition, the respondent ordered the formulation of policies related to the interests of Choi ™-Won, such as the reorganization of sports clubs, and compelled Lotte Group to contribute substantial funds to K-Sports in connection with the construction of sports facilities in five key areas for sports talent fostering programs.

Through such conduct, the respondent abused her position and authority as President for the benefits of Choi ™-Won et al., which cannot be considered a fair performance of duties. The respondent has violated Article 7 Section 1 of the Constitution, Article 59 of the State Public Officials Act, Article 2-2 Section 3 of the Public Service Ethics Act, and Item 4 (a) of Article 2 and Article 7 of the Act on Preventing Corruption and the Civil Rights Commission.

6. Whether the freedom and property rights of companies have been infringed upon

In person or through the Senior Secretary to the President for Economic Affairs, the respondent requested that conglomerate executives make contributions to Mir and K-Sports. Taking into account the President's extensive authority and influence in the financial and economic sectors, and the unusual manner through which the foundations were established and circumstances under which they were managed, the respondent's demands were in reality imperative, rather than being mere suggestions or recommendations expecting voluntary cooperation. The respondent, by compelling companies to give contributions to foundations using her authority as President, without determining by law the criteria and requirements that can justify the intervention of governmental power, has infringed upon the property rights and autonomy of management of those companies.

The respondent demanded that Lotte Group provide support to the project for constructing sports facilities in Hanam City, which was related to projects in which the interests of Choi ™-Won were vested in, and ordered Ahn ™-Beom to check on the progress whenever necessary. The respondent demanded that Hyundai Motor Company sign a supply contract with a company run by Choi ™-Won's acquaintance, and that KT Inc. hire and internally reassign persons related to Choi ™-Won. Aside from this, the respondent also demanded that companies establish sports teams and enter into contracts with The Blue K, and in the process, exercised influence through high-ranking public officials, Ahn ™-Beom and Kim ™. Such conduct of the respondent is judged to be imperative, rather than being mere suggestions or recommendations expecting voluntary cooperation from companies. The respondent, by interfering with the private autonomous domain of companies using the President's authority without any legal grounds whatsoever, has infringed upon the property rights and autonomy of management of those companies.

7. Whether the duty of confidentiality has been violated

Numerous documents were divulged to Choi ™-Won under the orders and tacit approval of the respondent, and these contained information pertaining to the President's schedule, diplomacy, personnel affairs, and policies. Such information, being related to the duties of the President, may undermine administrative objectives should it be disclosed to the public and must be kept classified, and therefore qualifies as classified information related to duties. The respondent, by ordering or neglecting the disclosure of

the aforementioned documents to Choi ™-Won, has violated the duty of confidentiality provided for in Article 60 of the State Public Officials Act.

8. Whether the power to appoint and dismiss public officials has been abused

There is a lack of evidence to prove that the respondent ordered disciplinary personnel measures regarding Roh ™-Kang and Jin ™-Soo, who were both public officials belonging to the Ministry of Culture, Sports and Tourism, for their interference in Choi ™-Won's pursuit of personal gains. The evidence submitted in this case is also insufficient to clarify the reason why the respondent dismissed Yoo ™-Ryong, or ordered that the Chief of Staff to the President collect resignation letters from six Grade 1 public officials. Therefore, this cannot be accepted as a ground for impeachment.

9. Whether the freedom of press has been infringed upon

In light of the respondent's statements that condemned the leaking of Cheong Wa Dae documents, the respondent can be considered to have expressed criticism against the Segye Ilbo report on the Jeong ™-Hoe document. However, this alone cannot be deemed an infringement of the freedom of press of Segye Ilbo, and there is a lack of evidence to prove that the respondent was involved in the dismissal of the president of Segye Ilbo, Cho ™-Kyu.

10. Whether the duty to protect the right to life has been violated

As the head of the administration, the respondent bears the obligation to exercise authority and perform duties to enable the state to faithfully fulfill its duty to protect the lives and physical safety of the people. However, it is difficult to say that the respondent is immediately responsible for the specific and particular duty to act, for example, by participating in the rescue operation in person, when a disaster threatens the lives of the people. The inadequate and inappropriate way the respondent dealt with the Sewol ferry tragedy cannot be deemed to directly constitute a violation by the respondent of the duty to protect the right to life.

11. Whether the unfaithful execution of duties is justiciable in the impeachment adjudication procedure

Although the "obligation to faithfully execute the duties" of the President is a constitutional obligation, unlike the "obligation to safeguard the Constitution," by nature, its performance cannot be normatively enforced. Therefore, as a matter of principle, this obligation is non-justiciable. Whether the respondent faithfully performed her official duties on the day the Sewol ferry tragedy occurred cannot, in and by itself, constitute a ground for impeachment, and therefore is non-justiciable in impeachment proceedings.

12. Whether to remove the respondent from office

The respondent delivered to Choi ™-Won documents on state affairs containing classified information related to official duties, and secretly reflected the opinions of Choi ™-Won, who is not a public official, in the management of state affairs. Such unlawful conduct by the respondent continued for over three years since the respondent took office as President. The respondent abused the authority delegated by the people for personal purposes, readily and repeatedly assisting the pursuit of personal benefits by Choi ™-Won. In the process, the respondent used her position as President, or mobilized state agencies and organizations, both an extremely grave violation of law. The President is obliged to disclose the performance of duties transparently, to enable appraisal by the public. However, the respondent allowed Choi ™-Won to intervene in state affairs while keeping this a complete secret, and denied all relevant suspicions that were raised, simply condemning the suspicions instead. Thus, it was practically impossible for

constitutional institutions such as the National Assembly to provide checks and balances under the doctrine of separation of powers, or for the private sector, including the press, to perform its monitoring role. Such conduct of the respondent undermines the principle of representative democracy and the spirit of the rule of law, and constitutes a grave violation of the President's obligation to serve the public interest.

Instead of making efforts to regain the trust of the people with regard to her violations of the Constitution and law, the respondent made insincere apologies to the public and failed to keep her word that she would cooperate to the utmost extent with the investigation. Judging by such words and actions, we cannot find any definite intent on the part of the respondent to protect the Constitution.

In conclusion, the respondent's acts of violating the Constitution and law are a betrayal of the people's confidence, and should be deemed grave violations of the law unpardonable from the perspective of protecting the Constitution. Since the negative impact and influence on the constitutional order brought about by the respondent's violations of the law are serious, we believe that the benefits of protecting the Constitution by removing the respondent from office overwhelmingly outweigh the national loss that would be incurred by the removal of the President.

Case 5.

▸ Identification

a) Korea, Republic of / b) Constitutional Court / c) 19-12-2014 / d) 2013Hun-Da1 /
e) Dissolution of political party / f) Dissolution of the Unified Progressive Party case

▸ Headnotes

This case involving the dissolution of political parties is the first of its kind in the Korean constitutional history, in which the Court decided to disband the Unified Progressive Party and strip its lawmakers of parliamentary seats, on grounds that the Party's objectives and activities violate the basic democratic order. This power of the Constitutional Court was exercised in accordance with Article 8 Section 4 of the Constitution.

▸ Summary

1. Requirements to dissolve a political party

Article 8 Section 4 of the Constitution provides that, "if the objectives or activities of a political party are against the basic democratic order, the government may bring an action against it in the Constitutional Court." The issue here is precisely how to interpret this provision in connection with the requirements for initiating adjudication on the dissolution of political parties.

A. Meaning of "objectives and activities of a political party"

"Objectives of a political party" generally refers to the political direction or purpose, or political plans to be practically implemented by a political party. Such objectives are mostly manifested in the official party platform or constitution. But other means, such as official statements by a party's main figures including the chairperson or party executives, publications such as party journals or propaganda materials, and activities of party members who are influential in the party's decision-making process or those who are influenced by the party's ideology, can also be helpful in understanding the party's

objectives. If the real objectives are hidden, they can be unveiled through means other than the party platform.

Meanwhile, "activities of a political party" refer to acts or behaviors by an organ or key officials, members, etc. of a party, which in general are attributable to the party at large.

Considering the structure of the said provision, it is interpreted that the requirement to dissolve a party is met if either the objectives or the activities of a party are in violation of the basic democratic order.

B. Meaning of "basic democratic order"

The idea of the "basic democratic order" stipulated in Article 8 Section 4 of the Constitution, which is founded upon the pluralistic view that believes in the autonomy of reason and presumes that all political opinions have relative truth and rationality, indicates a political order composed of and operated by the democratic decision-making process and freedom and equality that defy all sorts of violent, arbitrary control and respect the majority while caring for the minority. Specifically, the key elements of the basic democratic order specified in the current Constitution are: popular sovereignty, respect for basic human rights, separation of powers, and plural party system.

C. Meaning of "are against"

The conditions for disbanding a political party set forth in Article 8 Section 4 of the Constitution is: "if the objectives or activities of a political party are against the basic democratic order." The "are against" herein does not indicate a simple violation or infringement of the basic democratic order; it refers to a situation where the party's objectives or activities have the concrete danger to cause a substantial threat to our basic democratic order such that restricting the party's existence itself is necessary, notwithstanding that it is one of the indispensable elements of a democratic society.

D. Compliance with proportionality principle

Since a forced dissolution of a political party amounts to fundamental restriction on the freedom of political party activities, which is a core political fundamental right guaranteed by the Constitution, the Constitutional Court, before handing down a decision, has to consider: Article 37 Section 2 of the Constitution, the limitations of a legal state in the intrusive exercise of state powers, and the fact that the dissolution of political parties should be a measure of last resort or subsidiary means. For this reason, even if there is an express provision on the dissolution requirement as provided by Article 8 Section 4 of the Constitution, the Constitutional Court's decision to dissolve a political party can be constitutionally justified only when there are no alternatives other than dissolution to effectively remove the unconstitutionality inherent in the party at issue and where the social interests of the disbanding decision far outweigh its disadvantage, namely the regulation of the freedom of political party activities and a major restriction on the democratic society.

2. Whether the Respondent's objectives and activities contravene the basic democratic order

The values or ideological ideal held by the Respondent is "progressive democracy." However, the idea of progressive democracy has been interpreted differently depending on the circumstances of the times, and, in fact, the goals of a political party eventually correspond with the ideological disposition and the direction of the party's leading members. Therefore, in order to identify the true meaning of progressive democracy advocated by the Respondent, it is necessary that we look beyond the literal sense of the

party platform and examine the detailed process of its adoption, as well as the perception about the platform and the direction taken by the members who currently lead the Respondent.

We hereby find that the leading members of the Respondent aim to accomplish progressive democracy through violence and to ultimately achieve socialism through unification. They are followers of North Korea, and their idea of progressive democracy is overall the same or very similar to the North's revolutionary strategy against South Korea in almost all respects. At the same time, they defend the position of Pyongyang and deny the legitimacy of South Korea, while calling for revolution in line with the theory of People's Democracy Revolution, a tendency that is clearly shown in the insurrection case. Given the aforementioned circumstances and the fact that the leading members of the Respondent are taking control of the Respondent, we can attribute their objectives and activities to those of the Respondent. Considering all this, it can be concluded that the Respondent's true objectives and activities are aimed at initially implementing progressive democracy through use of force and eventually achieving North Korean-style socialism.

Taking into account the details and forms of activities and the disposition of the leading members of the Respondent, as well as the very supportive and protective attitude of the Respondent toward its members' activities, a number of activities of the Respondent reviewed earlier including the gatherings where treason was plotted, are grounded on the actual objectives of the Respondent and are highly likely to be repeated in similar circumstances. Furthermore, the fact that the Respondent admits the possibility of taking over power through violence tells us that many of the Respondent's activities reveal the concrete risk of inflicting substantial harm to the basic democratic order. In particular, the insurrection case, in which the leading members of the Respondent sympathized with North Korea and discussed specific ways to endanger the existence of South Korea, is a clear demonstration of the Respondent's true objectives, and it exceeds the limits of the freedom of expression and doubles the concrete risk of damage to the basic democratic order.

Consequently, the Respondent's real objectives and the activities based thereon are considered to have generated a concrete risk of causing substantial harm to the basic democratic order of our society, and are thus in violation of the basic democratic order.

3. Whether disbanding the Respondent is compatible with the proportionality principle

The objectives and activities of the Respondent aimed at implementing the North Korean-style socialism contain seriously unconstitutional elements; South Korea is in a unique situation where it faces confrontation with North Korea, a country that strives to overthrow the government of its southern neighbor; there is no alternative other than dissolution in removing the risk of the Respondent, since criminal punishment of the party's individual members will not be sufficient to eliminate the danger inherent in the entire party; the importance of social interest of safeguarding the basic democratic order and democratic pluralism far outweighs the disadvantage caused by party dissolution, namely the fundamental restraint on the Respondent's freedom to engage in party activities or partial restriction on pluralistic democracy. All these considered, the decision to dissolve the Respondent is an inevitable solution to effectively remove the risk posed to the basic democratic order, and is therefore not in violation of the principle of proportionality.

4. Whether members of a political party shall be removed from seats when the party is dissolved by the Constitutional Court

It is not specified in law whether members of the National Assembly shall lose their seats when their party is dissolved by the Constitutional Court. Yet, the essence of

entrusting the Constitutional Court with the power to disband parties lies in protecting the citizens by excluding the parties opposing the basic democratic order from forming political opinions, and it becomes impossible to obtain substantial effectiveness of the decision to dissolve a party unless its members are stripped of their parliamentary membership. For reasons such as the said purpose, once the Constitutional Court decides to dissolve a political party, its affiliated lawmakers should be removed from their National Assembly seats regardless of how they were elected.

Dissenting Opinion of One Justice

1. Whether objectives or activities of the Respondent violate the basic democratic order

The "people's sovereignty" asserted by the Respondent does not deny the principle of popular sovereignty itself. It seeks to abolish the status quo in which the sovereignty is exclusively concentrated in certain privileged groups and provide substantial guarantee of sovereign rights to the politically and economically marginalized groups and classes. Additionally, the "independent and self-sufficient economy centered on people's livelihood" supported by the Respondent proclaims the strengthening of national regulation and coordination designed to exercise democratic control over the market and deliver social welfare and justice; it does not require the denial of private property rights or economic liberties that serve as the economic foundation of the protection of fundamental rights. Furthermore, the "Korean federalism" proposed by the Respondent seems to be based on the idea of a unified state in transition before achieving de jure unification, but the Respondent's ultimate idea of the unified state is not envisaged in the federalism-based plan for Korea's unification. Other arguments of the Respondent such as the abolition of the National Security Act, etc. are no more than just supporting a certain position about many current issues that have already been fully discussed in society. In other words, the details of "progressive democracy" in the Respondent's platform hardly imply the denial of a certain group's sovereignty and fundamental rights or concur with the North's strategy of unification under communism. Therefore, the activities of the Respondent are not in violation of the basic democratic order.

2. Whether the Constitutional Court's decision to disband the Respondent is consistent with the proportionality principle

The interest to be achieved from the decision to disband the Respondent is relatively insignificant compared to the severe damage it may cause to the democracy of our society. Although such a decision should be made very limitedly, confined to cases of urgency as a last resort and subsidiary means, it is in violation of the proportionality principle given the following: a) if there are forces within the Respondent who attempt to overthrow the South Korean basic democratic order, they can be excluded from making policy decisions through means such as criminal punishment, b) although, in principle, it is most fit to leave the decision of dissolving a party to the political public forum, there already is substantial criticism and refutation about the Respondent in the political public sphere such as local elections, c) disbanding the Respondent may result in a social stigma for the vast majority of its ordinary members, and d) today's reality involving South and North Korea has changed, including the significant gap in national power.

6. Kyrgyz Republic

Constitutional Chamber of the Supreme Court

Summary

In 1993 the Constitutional Court of the Kyrgyz Republic was established. In 2010, it became the Constitutional Chamber of the Supreme Court of the Kyrgyz Republic. It consists of the Chairman, Deputy Chairman, and 9 Justices. The Secretary General heads up the administration of the Chamber. The Expert and Analytical Department provides scientific and legal expertise, prepares scientific and analytical notes, and assists in the preparation of draft acts of the Constitutional Chamber. The jurisdictions of the Chamber consist of the following: Declaration of unconstitutionality in the event of contradiction of laws and other normative regulatory acts with the Constitution; pronouncing on the constitutionality of international agreements which have not yet entered into force for the Kyrgyz Republic; pronouncing on draft laws concerned with changes to the Constitution. In terms of the constitutional oversight of laws and other normative regulatory acts, private persons or legal entities can file a motion of petition, an enumerated number of state organs can present a petition, and judges can request a petition. Decisions of constitutionality, part-constitutionality and unconstitutionality can be made. Regarding the constitutional oversight over international agreements, subjects who can address the Chamber are the following: Parliament, faction(s) of Parliament, the President, the Government, and the Prime Minister. Key considerations when assessing a law on constitutional amendment are the following: Fundamental rights and freedoms and the admissibility of their restrictions; principles of a democratic and secular state based on the rule of law; the procedures of changing the Constitution as stipulated in Art. 114 of the Constitution.

Content

A. Introduction

A1. History

The first steps to create a mechanism to protect the Constitution were made before the collapse of the USSR and the independence of the Kyrgyz Republic.

In 1989 the Committee of the constitutional oversight of the Kyrgyz SSR was created. The main objectives of the Committee of the constitutional oversight were: to ensure compliance of acts of state bodies and public organizations with the Constitution of the Kyrgyz SSR, protection of constitutional rights of peoples residing on the territory of the Kyrgyz SSR and democratic foundations of Soviet society.

In order to strengthen the guarantees of constitutional legality, in 1990 the Committee of the constitutional oversight was abolished and Kyrgyzstan became one of the first former USSR republics to create the highest judicial body for the constitutional oversight – the Constitutional Court of the Kyrgyz SSR.

With the proclamation of the sovereignty of Kyrgyzstan in August 1991 and the adoption of a new Constitution of May 5, 1993, the Constitutional Court of the Kyrgyz Republic was determined as the supreme body of the judiciary to protect the Constitution.

Changes in the socio-political and legal spheres of the country entailed the reorganization of the system of public authorities, including the termination of the activities of the Constitutional Court on April 7, 2010, until a special decision of the state.

According to the Constitutional Law on the Constitutional Chamber of the Supreme Court of the Kyrgyz Republic the Constitutional Chamber is the highest judicial body which independently performs constitutional oversight by means of constitutional legal proceedings.

The Constitutional Chamber began its activity from June 1, 2013 after the formation of its eligible total number of judges.

A2. Basic Texts

- Constitution of the Kyrgyz Republic (enacted 2010, last amended 2016): Article 97
- Constitutional Law on the Constitutional Chamber of the Supreme Court of the Kyrgyz Republic (enacted 2011, last amended 2017)

B. Organization

B1. Chairman

A meeting of judges of the Constitutional Chamber shall elect the Chairman from amongst its members for the period of three years. One and the same judge may not be elected the Chairman for two consecutive terms.

The Chairman of the Constitutional Chamber, alongside with the performance of duties of a judge of the Constitutional Chamber, shall:

1) manage the preparation of cases and other matters for consideration at the sittings of the Constitutional Chamber;
2) convene the sittings of the Constitutional Chamber, submit for discussion matters subject to consideration and chair the sittings;
3) represent the Constitutional Chamber and speak on its behalf;
4) distribute petitions received among the judges of the Constitutional Chamber;
5) ensure overall guidance of the Administration of the Constitutional Chamber, appoint and dismiss from office the head of Administration.

B2. Judges

Number of Judges: 11

A Judge of the Constitutional Chamber can be any citizen of the Kyrgyz Republic who is not younger than 40 years of age and not older than 70 years of age, has higher legal education and not less than 15 years of experience in the legal profession.

The Judges of the Constitutional Chamber are elected by the Parliament on the representation of the President based on the offer of Council on selection of Judges. The term of office is 7 years, but with a mandatory retirement limit at 70 years of age.

Selection of candidates for the vacant position of a Judge of the Constitutional Chamber is carried out by the Council on selection of Judges on a competitive basis. In turn, the Council on selection of Judges consists of Judges elected by the Council of Judges of the Kyrgyz Republic, representatives of civil society elected by a parliamentary majority and parliamentary opposition.

B3. Expert and Analytical Department

The Expert and Analytical Department is located within the structure of the Secretariat, and consists of 8 employees.

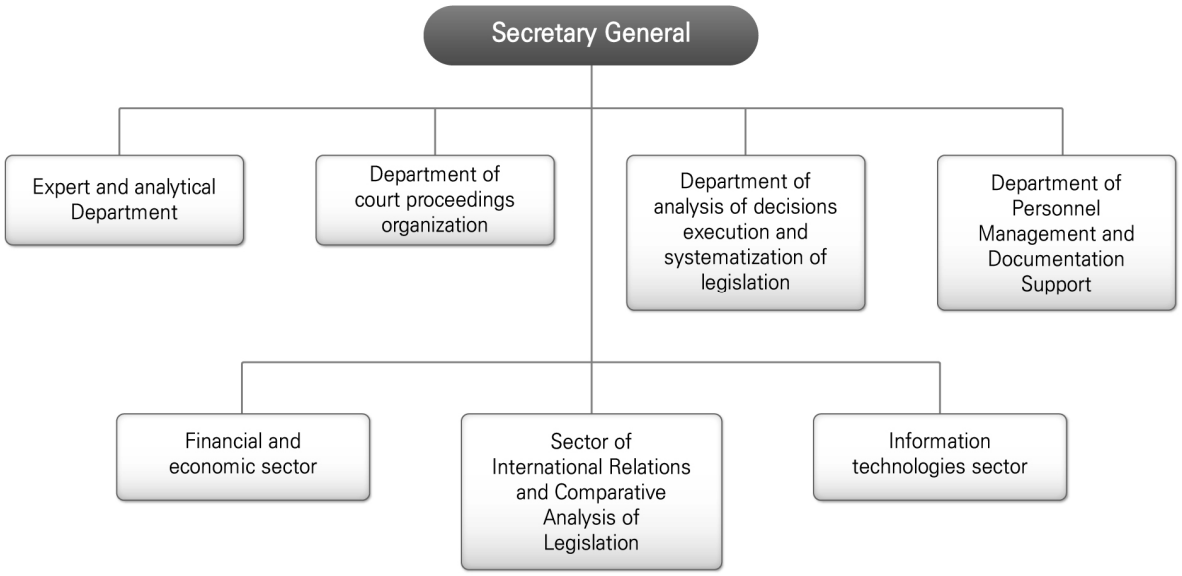
- Conducts legal and scientific expertise of the normative legal acts of the Kyrgyz Republic, the international agreements to which the Kyrgyz Republic is a party and which have not entered into force for the Kyrgyz Republic, the draft law on amendments to the Constitution of the Kyrgyz Republic, which are the subject of constitutional legal proceedings.
- Prepares scientific and analytical notes, including the analysis of decisions of the bodies of constitutional control of foreign countries, international courts, judicial practice, indicating the available scientific doctrines.
- Assists in the preparation of draft acts of the Constitutional Chamber.

The staff of this department, as well as the staff members of the Administration (Secretariat), pass through an open competition and are appointed by the Secretary General.

B4. Administration of the Constitutional Chamber

The activity of the Administration of the Constitutional Chamber shall be directly managed by the Head of Administration (Secretary General), who is appointed and dismissed by the Chairman of the Constitutional Chamber.

The employees of the Administration of the Constitutional Chamber shall be civil servants; they are appointed and dismissed from their positions by the Head of administration. 29 public officials work at the Administration of the Constitutional Chamber.



- EXPERT AND ANALYTICAL DEPARTMENT: The department has the duty of providing scientific and analytical support to the activities of the Constitutional Chamber
- DEPARTMENT OF COURT PROCEEDINGS ORGANIZATION: The department has the duty of providing organizational support to the activities of the Constitutional Chamber.
- DEPARTMENT OF ANALYSIS OF EXECUTION OF DECISIONS AND SYSTEMATIZATION OF LEGISLATION: The department has the duty of providing information support to the activities of the Constitutional Chamber, and also to analyze the implementation of decisions.
- DEPARTMENT OF PERSONNEL MANAGEMENT AND DOCUMENTATION SUPPORT: The department has the duty of providing personnel and documentation support to the Constitutional Chamber.
- FINANCIAL AND ECONOMIC SECTOR: The sector has the duty of providing financial and economic support to the activities of the Constitutional Chamber.
- SECTOR OF INTERNATIONAL RELATIONS AND COMPARATIVE ANALYSIS OF LEGISLATION: The sector has the duty of providing organizational support to the international relations of the Constitutional Chamber.
- INFORMATION TECHNOLOGY SECTOR: The sector has the duty of providing software and technical support to the activities of the Constitutional Chamber.

C. Jurisdictions

According to Article 97 of the Kyrgyz Constitution, the Constitutional Chamber shall have jurisdiction over the following:

1) in the event of contradiction of laws and other normative regulatory acts with the Constitution declare them unconstitutional;
2) make its pronouncement on constitutionality of international agreements which have not entered into force for the Kyrgyz Republic;
3) make its pronouncement on the draft laws on changes to the Constitution.

C1. Constitutional oversight of the laws and other normative regulatory acts

- **Key legal provisions:** Constitution (Article 97), Constitutional Law on the Constitutional Chamber (Articles 4, 18, 19, 20, 21, 24, 25, 32, 46, 51).

- **Purpose:** Adjudication on the constitutionality of laws and other normative acts serves the purpose of securing the system of checks and balances. By nullifying laws and other normative acts on the basis of their unconstitutionality, the powers of the legislature can be checked for the purpose of protecting the Constitution.

- **Causes for requests:** The right to submit a petition on declaring laws and other normative regulatory acts unconstitutional shall be assigned to next subjects:

  1) a private person (persons) or a legal entity (entities) in case they believe that the laws or other normative regulatory acts violate their rights and freedoms recognized in the Constitution;
  2) the Parliament;
  3) a faction (factions) of the Parliament;
  4) the President;
  5) the Government;
  6) the Prime Minister;
  7) a judge (judges) of the Kyrgyz Republic;
  8) bodies of local self-governance;
  9) the Prosecutor General;
  10) the Ombudsman.

  The object of adjudication includes laws legislated by the Parliament, and other normative regulatory acts. Such norms include decree of the President, resolution of parliament, government resolution, acts of National Bank, Central Commission on elections and holding referenda, normative regulatory acts of representative bodies of local self-governance.

- **Procedures**
  - **Petition procedure:** All subjects can address to the Constitutional Chamber directly. There is no need to pass any instances. In the event of appeal to the Constitutional Chamber on the issues of competence, state agencies and officials except judges may submit presentments only to the extent of their competence.

- Agencies and officials except judges shall submit to the Constitutional Chamber petitions in the form of presentments, other persons shall submit motions and a judge (judges) shall submit requests.
- In the event that during examination of a case in any judicial instance, there arises a question concerning the constitutionality of the law or other legal and regulatory act on which ruling of the case shall be based, the court shall send a request to the Constitutional Chamber. In such situation examination of a case in court stops for the term of consideration of request in Constitutional Chamber.
  The Constitutional Chamber, by verifying the constitutionality of a contested normative legal act, shall determine its correspondence to the Constitution in the following aspects:
  1) the content of provisions;
  2) the format of the normative legal act;
  3) the procedure of adoption, signing, publication and entering into force.
- Suspension of proceedings, etc.: In the event that the consideration of a case is not possible within the time limits envisaged in the constitutional law (5 months), the Constitutional Chamber shall be entitled to suspend the proceedings of the case for the period needed for removal of obstacles emerging, such period should not last for more than three months, in these circumstances the period of consideration shall be also suspended.
  The proceedings on the case shall be resumed after the circumstances which caused its suspension cease to exist.
- Opinions of parties, etc. to the litigious case: The defendant party (agencies or officials who published or signed a normative legal act) submits to the Constitutional Chamber a written opinion on the issue of whether or not laws and other normative regulatory acts are constitutional. Private persons and legal entities, state agencies, public associations and international organizations have the right to present their written explanations, arguments and considerations on certain issues of law, reviewed by the Constitutional Chamber in a concrete case. The Constitutional Chamber, however, shall not be bound by their arguments and considerations. The reporting judge shall have the right to apply to these subjects at his/her own initiative.

‣ Decisions and effect: The Constitutional Chamber may make a decision on the constitutionality, unconstitutionality and partly unconstitutionality of the law and other normative regulatory acts.
The legal force of a judgment on unconstitutionality of a normative legal act or part thereof shall not be superseded by a repeated adoption of the same normative legal act or part thereof with the same contents.
In the event that the Constitutional Chamber decides that laws or other normative regulatory acts or provisions thereof are unconstitutional, then such decision shall oblige relevant state agencies and officials thereof to align to the Constitution and the acts of the Constitutional Chamber normative regulatory acts which were adopted by them and which were based on the above documents except for judicial acts. Before the alignment or cancellation thereof the Constitution and the decisions of the Constitutional Chamber shall be directly applied.
Judicial acts which are based on provisions of laws or other normative regulatory acts which were declared unconstitutional shall be revised by the court which adopted such acts in each concrete case based on the appeals of citizens whose rights and freedoms were affected.

C2. Constitutional oversight of the international agreements which have not entered into force for the Kyrgyz Republic

- **Key legal provisions:** Constitution (Article 97), Constitutional Law on the Constitutional Chamber (Articles 4, 18, 19, 20, 22, 24, 25, 32, 46, 51).

- **Purpose:** Adjudication on the constitutionality of international agreements which have not entered into force for the Kyrgyz Republic serves the purpose to estimate compliance of drafts of international agreements to the Constitution of the Kyrgyz Republic.

- **Causes for requests:** The right to submit a petition on giving the pronouncement on the constitutionality of international agreements which have not entered into force for the Kyrgyz Republic shall be assigned to next subjects:
  1) the Parliament;
  2) a faction (factions) of the Parliament;
  3) the President;
  4) the Government;
  5) the Prime Minister.

- **Procedures**
  - **Petition procedure:** The above-stated agencies and officials can address to the Constitutional Chamber only if they have discovered an uncertainty in respect of concordance with the Constitution of an international agreement which has not entered into force for the Kyrgyz Republic.
  - **Suspension of proceedings, etc.:** In the event that the consideration of a case is not possible within the time limits envisaged in the constitutional law (5 months), the Constitutional Chamber shall be entitled to suspend the proceedings of the case for the period needed for removal of obstacles emerging, such period should not last for more than three months, in these circumstances the period of consideration shall be also suspended. The proceedings on the case shall be resumed after the circumstances which caused its suspension cease to exist.
  - **Opinions of parties, etc. to the litigious case:** The defendant party (agencies or officials who initiated ratification, adoption or otherwise enforcement for the Kyrgyz Republic of an international agreement) submits to the Constitutional Chamber a written opinion on the issue of whether or not an international agreement is constitutional. Private persons and legal entities, state agencies, public associations and international organizations have the right to present their written explanations, arguments and considerations on certain issues of law, reviewed by the Constitutional Chamber in a concrete case. The Constitutional Chamber, however, shall not be bound by their arguments and considerations. The reporting judge shall have the right to apply to these subjects at his/her own initiative.

- **Decisions and effect:** Having considered petitions in respect of the jurisdictions of constitutional review of international agreements which have not entered into force for the Kyrgyz Republic the Constitutional Chamber adopts a pronouncement.
  In case the Constitutional Chamber declares unconstitutional international agreements which have not come into force, such agreements shall not be subject to entry into force and application.

C3. Constitutional oversight of the draft law on changes to the Constitution

- **Key legal provisions:** Constitution (Article 97), Constitutional Law on the Constitutional Chamber (Articles 4, 18, 19, 20, 23, 24, 25, 32, 46, 51).

- **Purpose:** Adjudication on the constitutionality of draft law on changes to the Constitution serves the purpose to estimate compliance of such drafts of law to the Constitution of the Kyrgyz Republic.

- **Causes for requests:** The right to submit a petition on giving the pronouncement on the draft law on changes to the Constitution shall be assigned to next subjects:
  1) the Parliament;
  2) a faction (factions) of the Parliament;
  3) the President;
  4) the Government;
  5) the Ombudsman.

- Procedures
  - **Petition procedure:** Giving the pronouncement on the draft law on changes to the Constitution by the Constitutional Chamber is obligatory, without such pronouncement changes can't be made to the Constitution.
    The Constitutional Chamber, in making its pronouncement to the draft law on changes to the Constitution, shall determine whether it corresponds to the following:
    1) fundamental rights and freedoms of a man and citizen and admissibility of their restriction;
    2) principles of a democratic and secular state based on the rule of law;
    3) the procedures of changing the Constitution envisaged in Article 114 thereof.
  - **Opinions of parties, etc. to the litigious case:** The defendant party (agencies or officials who initiated a draft law on introduction of changes in the Constitution) submits to the Constitutional Court a written opinion on the issue of whether or not the draft law on changes to the Constitution corresponds to the above-stated criteria.

  Decisions and effect: Having considered petitions in respect of the jurisdictions of constitutional review of the draft laws on changes to the Constitution the Constitutional Chamber adopts a pronouncement.
  The Constitutional Chamber draws the conclusion that the draft laws corresponds all to the established criteria, or doesn't correspond to all or some criteria which have to be eliminated.

Annex

Annex 1. Case Statistics

1-1. Since establishment (July 2013- July 2018)

Type	Total	Constitutionality of laws and other normative regulatory acts (Judgments)	Constitutionality of international agreements (Pronouncements)	Constitutionality of draft law on changes to the Constitution (Pronouncements)
Filed	451	450	-	1
Accepted	101	100	-	1
Judgments, pronouncements	79	78	-	1
Constitutional	60	59	-	1
Unconstitutional or partly unconstitutional	19	19	-	-
Stopped	10	10	-	-
Pending	12	12	-	-
Rejected	350	350	-	-

Annex 2. Cases

▸ **Identification**

a) Country, b) Name of the Court, c) Date of decision given, d) Number of the decision, e) Jurisdiction, f) Title of the decision

▸ **Headnotes**

▸ **Summary**

Case 1.

▸ **Identification**

a) Kyrgyzstan / b) Constitutional Chamber / c) 06-11-2013 / d) 8-p / e) Constitutional oversight of the laws and other normative regulatory acts / f) Criminal liability for insult of honor and dignity of the person

▸ **Headnotes**

Legislative provisions which attach criminal liability to insulting someone's honor and dignity are not in line with the Constitution.

▸ **Summary**

I. Under Article 128 of the Criminal Code, insulting somebody's honor and dignity carries criminal liability. The Criminal Code defines insult as «the deliberate abasement of honor and dignity of another person expressed in an unseemly manner». Under Part 2 of Article 128, an insult in a public statement, in publicly exhibited work or in the media is deemed to be a qualified indicator of the same crime.

The applicants argued that this provision ran counter to constitutional norms, such as the ban on prosecution for dissemination of information defaming the honor and dignity of the individual which is not subject to any restriction, and the principle that nobody should be subject to criminal prosecution for the dissemination of information which discredits or humiliates a person's honor and dignity.

Human rights and freedoms are proclaimed within the Constitution. They are of direct application and determine the meaning and content of norms issued by legislative, executive and local authorities. The honor and human dignity of the person is also proclaimed as an integral part of human rights and freedoms within the Constitution and international treaties (International Covenant on Civil and Political Rights), which are an integral part of the legal system of Kyrgyz Republic; there is a universal right to privacy and the protection of honor and dignity. Everyone, including the judiciary, is entitled to protection from improper collection, storage, disclosure of confidential information and information about the privacy of individuals, and is guaranteed the right to compensation for material and moral damage caused by unlawful activity. However, the Constitution, under Article 33.5, rules out prosecution for the dissemination of information defaming honor and dignity; such actions cannot be considered as a crime. There is no reason to consider as a crime actions against the honor and dignity of the person representing less danger to the public, set out in paragraph 1 of the same Article. Since the norms of Article 128 of the Criminal Code only cover features of one crime, it is necessary to consider them in a close relationship. The Constitutional Chamber found that Article 128 of the Criminal Code was out of line with Articles 20.4.6 and 33.5 of the Constitution.

It observed, however, that the legislator should consider an effective mechanism for the protection of honor and dignity by making appropriate changes and additions to the civil and administrative law, including protective measures in actions aimed at insult.

Case 2.

▸ **Identification**

a) Kyrgyzstan / b) Constitutional Chamber/ c) 19-11-2013 / d) 10-p / e) Constitutional oversight of the laws and other normative regulatory acts / f) Payment for passing of alternative military service because of religious beliefs

▸ **Headnotes**

Legislative provisions requiring citizens, undergoing alternative service rather than standard military service because of their religious convictions, to make a payment into an account controlled by the Ministry of Defence are in breach of the Constitution.

▸ **Summary**

I. «Alternative service» is a type of service provided for citizens of the Kyrgyz Republic in place of compulsory military service, in accordance with their age, religious beliefs,

marital status, criminal record and state of health.

Under the legislative provisions in question, male citizens aged between eighteen and twenty-five, who are not entitled to delay their call up and who have not already undertaken military duty, may be called up for alternative service if they are members of a registered religious organization the religious doctrine of which does not permit the use of weapons and service in the military forces.

Alternative service requires a payment by civilian employees into a special account of the authorized state organ in charge of defence issues. Money raised in this way goes towards the conducting of assemblies, the improvement of training facilities, enhanced financial security for military personnel, incentives for servicemen and entertainment. Citizens who have completed alternative service and paid the whole sum required will then be included in the list of citizens liable for «call-up of the second category» and will be listed in the reserves.

The applicants had been convicted under Article 351.2 of the Criminal Code for avoidance of alternative service in the military forces. They contended that they were members of the religious organization «Jehovah's Witnesses». Their payment for alternative service would have gone to the account of the Ministry of Defence. This was, in their view, contradictory. They indicated on several occasions their willingness to make the required payment for alternative service to the General Fund of Kyrgyz Republic and other state organs not linked to the Ministry of Defence.

II. Article 56 of the Constitution places citizens under a sacred duty to defend their native country. Military service or its replacement by alternative training is established, in accordance with the Constitution, by the Law on the general military duty of citizens of Kyrgyz Republic and on military and alternative service. Since defence of the native country is a sacred duty and obligation for citizens, the state should create appropriate conditions for its realization. Liability for avoidance of military service is set out in the Criminal Code.

The problem with the legislation on general military duty and military and alternative service was that it required payment to be made by those undergoing alternative service to the special account of the authorized state organ in charge of defence issues. The rationale behind alternative service is that it is in line with the views of citizens who profess religious doctrines based on peacefulness and the development of peace.

The universal freedoms of conscience and religion are enshrined in Article 32 of the Constitution. Each person is entitled to profess their own religion (or none at all), whether individually or alone. Article 20.3 of the Constitution also stipulates that restrictions on rights and freedoms in pursuit of other aims cannot be established by law to a greater extent than is stipulated by the Constitution.

The State should not expose to suppression or punish in any way those who, from a moral perspective, are excluded from military service or «alternative service» supported by the state and held under its control and leadership.

The Constitutional Chamber found the first paragraph of Articles 32.4, 32.7 and 35.1 of the Law to be in breach of the Constitution. It indicated to the legislature that appropriate changes should be made to the Law without delay.

Case 3.

▸ Identification

a) Kyrgyzstan / b) Constitutional Chamber/ c) 21-02-2014/ d) 15-p / e) Constitutional oversight of the laws and other normative regulatory acts / f) Trial in absentia

▸ Headnotes

Legislation may allow criminal cases to be tried in the defendant's absence.

▸ Summary

I. Legislation was introduced which permitted criminal cases to be tried in the defendant's absence where the defendant is outside the Kyrgyz Republic and has refused to appear in court, and where he or she, following a recall, has not appeared at the hearing or informed the court of their absence. Under the rules of the Criminal Procedure Code, the defendant is entitled to participate in the proceedings of the case, can enjoy all the rights of a party, has the «last word» and may appeal against the court's decision. However, in the same provision, a defendant must also appear in court when summoned, to a «hearing in the trial court held with the participation of the defendant, whose presence is required.» Participation in the trial is both the right and duty of the defendant.

To ensure the defendant's participation, the court may oblige the prosecutor to ensure his or her appearance. The court may subject a defendant who has not appeared to preventive or more rigorous measures, in cases of real necessity, when it has been established that the defendant is refusing to appear in court. In this way, the criminal procedural law is prescribing all the measures that need to be taken to ensure the proper conduct of the defendant and the conditions necessary for a full trial, and upholding the duty of the state to protect and defend the rights and interests of persons and victims of crimes and to ensure access to justice and compensation for criminal damage. Trial *in absentia* is a way of implementing the principle of inevitability of criminal liability for somebody who is hiding from the court or deliberately avoiding the obligation to participate in a criminal trial.

II. The Constitutional Chamber decided unanimously that the contested provisions were not contrary to the Constitution. The decision was taken unanimously.

III. A dissenting opinion was attached, by Oskonbaev EJ, who observed that criminal proceedings are about protection against illegal and unjustified accusation and condemnation, as well as the protection of the rights and lawful interests of individuals and organizations and victims of crimes. In allowing trial *in absentia*, the public interest must be weighed up against the legitimate interests of the persons involved in criminal process (especially the defendants and victims). The absence of the defendant in litigation creates significant obstacles to the realization of fundamental principles of criminal justice. The principle of immediacy is difficult to achieve, as the court cannot hear evidence and arguments from the defendant. It is also not possible to secure full «equality of arms» or the right of defendants to choose their own methods of protection. A systematic approach to this issue is needed, along with changes to the Code of Criminal Procedure, to ensure proper regulation in criminal cases, both at trial and pre-trial stage, when the defendant is absent.

Case 4.

- **Identification**

a) Kyrgyzstan / b) Constitutional Chamber / c) 16-12-2015 / d) 15-p / e) Constitutional oversight of the laws and other normative regulatory acts / f) Establishing age limit for the position of Dean of the Faculty of the University

- **Headnotes**

The mere fact of having reached an age limit is not a reasonable basis to dismiss a dean or to stop him or her taking part in elections for this post. Provisions seeking to impose an upper age limit are in contravention of the principle of equality, given that the post of dean of faculty is not an administrative function, but instead aligned with educational and scientific research.

- **Summary**

I. The Constitutional Chamber considered a case on the constitutionality of Article 378.4 of the Labour Code. Under this provision, the posts within public and municipal higher education institutions of rectors, vice-rectors, deans and heads of institutions may be held by persons who are under sixty-five years of age, regardless of the duration of their contracts of employment.

II. The Constitutional Chamber found that the provision did not contradict the Constitution provided it did not apply to the positions of deans of faculties in state and municipal institutions of higher education. It drew a distinction in its decision between the post of dean and that of rector, vice-rector and head of institution; the latter are primarily concerned with the implementation of managerial and administrative functions. The legislator, in order to ensure the interests of the state and municipalities, is entitled to set high requirements for heads of state and municipal universities. This in itself is not contrary to the Constitution.

The position of dean of the faculty is scientific/educational in nature rather than administrative. A dean performs work which differs significantly from that of an administrative employee. The provision under dispute imposed age limits on the post of dean of faculty. No such restrictions were placed on other scientific and teaching posts. Being over sixty-five years of age does not interfere with the successful implementation of scientific and pedagogical activity. To the extent, therefore, that the disputed norm envisages an age limit for those holding the posts of faculty dean in state and municipal universities, it violates the constitutional principle of equality of rights, leading to discrimination in the implementation of the right, set out in Article 16.2.2 of the Constitution.

Case 5.

- **Identification**

a) Kyrgyzstan / b) Constitutional Chamber / c) 23-09-2015/ d) 15-p / e) Constitutional oversight of the laws and other normative regulatory acts / f) Mandatory biometric registration as the requirement for participation in elections

- **Headnotes**

Norms which only allow citizens to be included in the list of voters and to exercise their

right to vote if they have undergone biometric registration should not be perceived as being in breach of the principle of universal and equal suffrage and the right of citizens to elect and be elected to bodies of state power and local self-government.

- **Summary**

I. Several citizens filed a petition with the Constitutional Chamber asking it to recognize the regulatory provision of Article 14.2 of the Constitutional Law on Elections of the President of the Kyrgyz Republic and deputies of the Parliament, expressed by the words «and those who passed a biometric registration in the manner established by legislation» unconstitutional. In their view, the inclusion in the voters' list of only those citizens who have submitted biometric data is an unreasonable restriction on citizens' voting rights.

II. The Constitutional Chamber observed that on 15 October 2013, in a review of the electoral legislation and practices of the States parties to the Organization for Security and Cooperation in Europe (OSCE), prepared by the Office for Democratic Institutions and Human Rights with respect to Kyrgyzstan, the absence was noted «of clear and formal rules for the system of voter registration management in Kyrgyzstan, which creates the potential risks of manipulation of voter lists».

In this context, the legislator introduced a new procedure for drawing up electoral lists in the Constitutional Law on Elections of the President of the Kyrgyz Republic and deputies of the Parliament, combining both declarative and imperative approaches, aimed at removing the possibility of double or multiple entries in the voters' lists of the same people. The legislator also provided a mechanism for tracking the voters due to changes in their place of residence on the basis of the Unified State Register of population.

The Constitutional Chamber in its decision dated 14 September 2015 did not find separate provisions of the Law on the Biometric Registration of Citizens of the Kyrgyz Republic and the requirement of mandatory biometric registration of citizens of the Kyrgyz Republic with a view to the preparation of an updated voters' list to be in contravention of the Constitution.

The state is entitled to develop and use a variety of tools to ensure transparency, integrity and fairness of elections. One such tool is the use of new technologies in the preparation of an updated voters' list.

7. Malaysia

Federal Court

Summary

The Federal Court of Malaysia stands at the apex of the Malaysian judiciary. It is the final appellate court in both civil and criminal matters. The jurisdictions of the Court are the following: Exclusive original jurisdiction on the validity of laws and the resolution of disputes; appellate jurisdiction to determine appeals from the Court of Appeal and the High Court; referral jurisdiction to determine any question that arises before any court as to the effect of any provision of the Constitution; and advisory jurisdiction as to the effect of any provision of the Constitution which has arisen or appears likely to arise. Led by the Chief Justice of Malaysia, members of the Federal Court consist of Federal Court judges. Judges of the Federal Court are appointed by the King, acting on the advice of the Prime Minister, after consulting the Conference of Rulers. There are a total of 14 Federal Court Judges. The Chief Registrar's Office not only serves the Federal Court, but also functions as the administrative arm of the Malaysian judiciary, of both the superior and the subordinate courts. Apart from personnel and financial responsibilities, it oversees the day to day administration of the 480 courts which operate throughout Malaysia.

Content

A. Introduction

A1. History

The Federal Court is the highest court within the hierarchy of legal jurisdictions in Malaysia. It was established under Article 121(2) of the Federal Constitution. Prior to 1985, the Privy Council was the final court of appeal for Malaysia. It was abolished and replaced with the Supreme Court under Act A566 which came into force on January 1, 1985. The Supreme Court remained as the highest court of appeal until the establishment of the Court of Appeal in 1994.

In 1994, Parliament amended the Federal Constitution and approved a reorganisation of the court system in Malaysia. Sixteen (16) amendments were added to the Constitution and entered into force from June 24, 1994. Significantly, the Court of Appeal was established and the Supreme Court was renamed the Federal Court. The Federal Court is headed by the Chief Justice, a post formerly known as the Lord President prior to the amendment.

The Federal Court being the apex court in Malaysia is the final appellate court in both civil and criminal matters. Besides exercising its appellate jurisdiction, it has three other functions as provided for under the Federal Constitution: firstly, the exclusive original jurisdiction under Article 128(1) – (a) to determine 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 to which the particular legislature has no power to make laws (b) disputes or any other question between states or between the Federation and any state; secondly, the referral jurisdiction under Article 128(2) where in any proceeding before another court a question arises as to the effect of any provision of the Constitution, the Federal Court has jurisdiction to determine the question and remit the case to the other court to be disposed of in accordance with the determination; and thirdly, advisory jurisdiction under Article 130 which provides His Majesty the Yang di-Pertuan Agong with power to refer to the Federal Court any provision of the Constitution which has arisen or appears to him likely to arise.

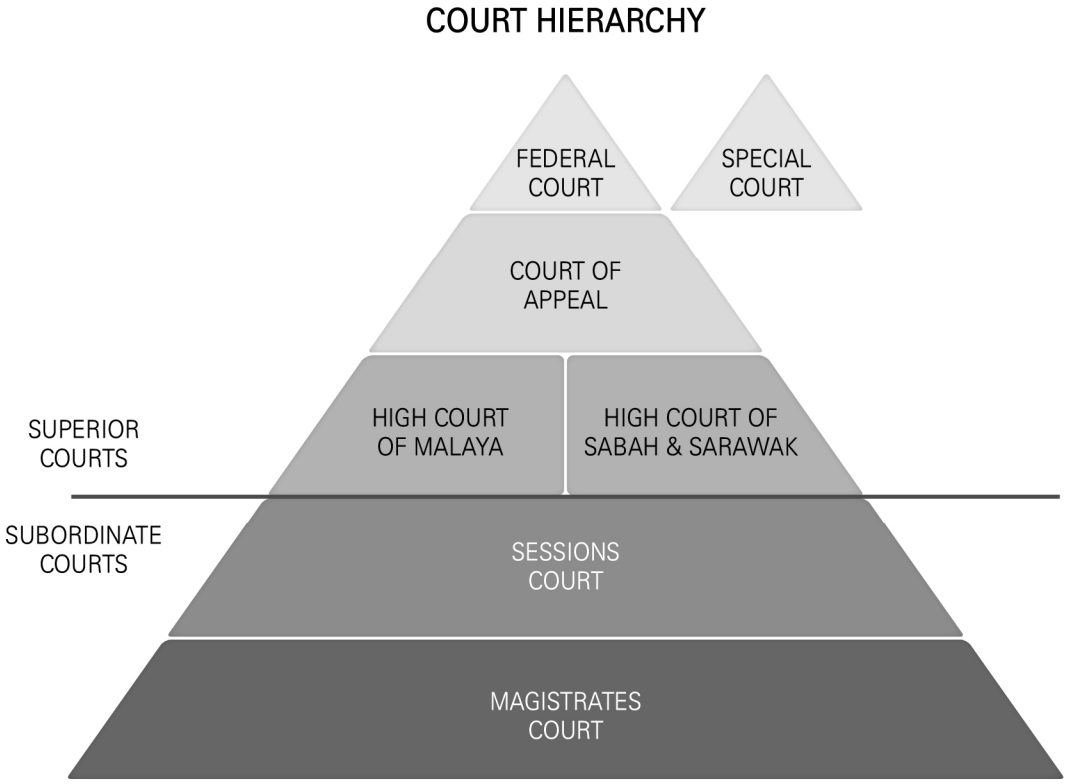
The Federal Court as the apex court serves a wide public purpose in ensuring confidence in the administration of justice. The Federal Court will continue to uphold the highest standards of commitment to the Rule of Law.

A2. Basic texts

- Articles 121, 128 and 130 of the Federal Constitution of Malaysia
- Court of Judicature Act, 1964
- Federal Court Rules, 1995

B. Organization

The High Courts of Malaya, Sabah and Sarawak, the Court of Appeal and the Federal Court are the superior courts in Malaysia. In contrast, the Sessions Court and Magistrates' Court are the Subordinate Courts. Article 121 of the Federal Constitution establishes the current hierarchy of courts as follows:



Hierarchy of Malaysian Courts

In Malaysia, we do not have a specific Constitutional Court. Nevertheless, the equivalent institution having the same jurisdiction in dealing with constitutional issues is the Federal Court of Malaysia. The Federal Court is the apex court in the judicial hierarchy in this country. It is established pursuant to Article 121(2) of the Federal Constitution.

In view of the appointment of the new Chief Justice of Malaysia in July 2018, cases involving constitutional interest at the Federal Court will be heard by a panel of nine which will comprise of the Chief Justice, the President of the Court of Appeal, the Chief Judge of Malaya, the Chief Judge of Sabah and Sarawak and five other Federal Court judges.

B1. Chief Justice

The Malaysian Judiciary is headed by the Chief Justice. Article 122 of the Federal Constitution provides that—

"(1) The Federal Court shall consist of a president of the Court (to be styled "the Chief Justice of the Federal Court"), of the President of the Court of Appeal, of the Chief Judges of the High Courts and, until the Yang di-Pertuan Agong by order otherwise provides, of eleven other judges and such additional judges as may be appointed pursuant to Clause (1A)."

Under Article 122B of the Malaysian Constitution, the appointment of the Chief Justice and the judges of the Federal Court are made by His Majesty the Yang di-Pertuan Agong on the advice of the Prime Minister after consulting the Conference of Rulers.

B2. Justices

No. of Judges in the Federal Court (currently): 14[19]

The composition of the Federal Court is as being stated in Article 122 of the Federal Constitution. The Federal Court shall consist of the—

(a) Chief Justice of the Federal Court;
(b) President of the Court of Appeal;
(c) Chief Judge of High Court of Malaya;
(d) Chief Judge of High Court of Sabah and Sarawak;
(e) eleven other judges; and
(f) such additional judges as may be appointed pursuant to Clause (1A).

Terms of office and retirement age:

Pertaining to the term of office and retirement age, it is as provided under Article 125 of the Federal Constitution. This Article states that a judge of the Federal Court shall hold office until he attains the age of sixty-six years or such later time, not being later than six months after he attains that age, as the Yang di-Pertuan Agong may approve.

B3. Research Officers

In Malaysia, we do not have the Department of Constitutional Research. However, the Judges of the Federal Court are assisted by their Research Officers in providing a comprehensive, sound and professional research findings on constitutional issues before delivering a judgment. The Research Officers are judicial officers who are drawn from the Judicial and Legal Service. Currently, there are 21 Research Officers attached to Federal Court Judges.

B4. Court Administration

The Administrative Role of the Office of the Chief Registrar of the Federal Court of Malaysia:

The Office of the Chief Registrar of the Federal Court ("the CR's Office") is regarded as the administrative arm of the Malaysian Judiciary. The number of personnel comprising the Judiciary includes judicial officers, administrative officers as well as the staff of the superior and subordinate courts. The Chief Registrar as the chief administrator of the Judiciary assumes responsibility for the administration of these personnel comprising the Judiciary. The Chief Registrar also carries the responsibility of procuring the finances required for the administration of the Judiciary.

The CR's Office is led by a Chief Registrar and assisted by 2 Deputy Chief Registrars, each of which maintains the Policy as well as Operational Office. At present, the Chief Registrar is YBhg. Dato' Sri Latifah binti Haji Mohd. Tahar.

The wide ranging nature of duties and functions that fall within the purview of this office require that they be categorised into distinct divisions to facilitate and enhance administration. As such, the CR's Office encompasses several divisions and units, among others:

[19] Information correct as of 30 November 2018.

(a) The Registry of the Federal Court
(b) The Registry of the Court of Appeal
(c) The office of the Registrar of the High Court of Malaya
(d) The office of the Registrar of the High Court of Sabah and Sarawak
(e) The office of the Registrar of the Lower Court of Malaya
(f) The office of the Registrar of the Lower Court of Sabah and Sarawak
(g) Policy and Legal Division
(h) International Affair Division
(i) Judicial Training Division
(j) Management Division
(k) Integrity Unit
(l) Information Technology Division

C. Jurisdictions

The powers and jurisdiction of the Federal Court are derived from the Federal Constitution and the Courts of Judicature Act 1964. Article 121(2) of the Federal Constitution stipulates that the Federal Court shall have the following jurisdiction (inter alia):

(a) to determine appeals from decisions of the Court of Appeal, of the High Court or a judge thereof;
(b) such original jurisdiction or consultative jurisdiction as specified in Articles 128 and 130; and
(c) such other jurisdiction as may be conferred by or under federal law.

Basically, the jurisdiction of the Federal Court is classified into four distinct jurisdictions:

(a) Original
(b) Appellate
(c) Referral
(d) Advisory

C1. Original jurisdiction

The Federal Court shall have the same original jurisdiction as the High Court (*Section 81 of the Courts of Judicature Act 1964*).

In addition, according to Article 128(1)(a) & (b) of the Federal Constitution, the Federal Court is also embedded with an exclusive jurisdiction to:

(a) determine the validity of the law made by the Parliament or by the Legislature of a state; and
(b) decide disputes on any other question between the States of the Federation or between the Federation and a State. In such a dispute, the Federal Court may only pronounce a declaratory judgment.

In exercising the above exclusive jurisdiction, the Federal Court has power to declare any Federal or State law invalid on any of the three grounds stated below:

(a) In the case where the federal or state written law relates to a matter in which the Parliament or the State Legislature has no power to create such law;
(b) In the case of both Federal and State written law, because it is inconsistent with the Constitution, pursuant to Article 4(1); or

(c) In the case of State written law, because it is inconsistent with Federal law, as stated in Article 75.

It is to be noted however, that the proceedings for a declaration that a law created by Parliament or the Legislature is invalid on the grounds that it has no powers to create such law shall not be commenced without leave of a Judge of the Federal Court (Article 4(3) & (4) Federal Constitution).

C2. Appellate jurisdiction

The Federal Court also has jurisdiction to hear and determine civil and criminal appeals.

C2(A). Civil appeals

Section 96 of the Courts of Judicature Act 1964 provides that an appeal shall lie from the Court of Appeal to the Federal Court with the leave of the Federal Court. Basic prerequisites for civil appeal under Section 96 of the Courts of Judicature Act 1964 are as follows:

"(i) An appeal can be made on any judgment or order of the Court of Appeal, in respect of any civil cause or matter decided by the High Court in the exercise of its original jurisdiction involving a question of general principle decided for the first time or a question of importance upon which further argument and a decision of the Federal Court would be to public advantage; or

(ii) From any decision as to the effect of any provision of the Constitution including the validity of any written law relating to any such provision."

C2(B). Criminal appeals

The Federal Court has jurisdiction to hear and determine any appeal against any decision of the Court of Appeal in its appellate jurisdiction concerning any criminal matter decided by the High Court in its original jurisdiction (Section 87 Courts of Judicature Act 1964).

For habeas corpus case, any person aggrieved by any decision or direction of the High Court may appeal to the Federal Court directly (Section 374 Criminal Procedure Code).

During the hearing of an appeal, the Federal Court shall hear the submissions on both sides and may exercise its powers to (Section 90 Courts of Judicature Act):

(a) Confirm, reverse or vary the decision of the Court of Appeal;
(b) Order a retrial;
(c) Remit the matter to the High Court, or
(d) Make any order as to it may seem just and may by that order exercise the powers which the Court of Appeal or the High Court might have exercised.

C3. Referral jurisdiction

The referral jurisdiction of the Federal Court is provided under Article 128(2) of the Federal Constitution. The Federal Court in exercising its referral jurisdiction may determine in any pending proceedings before another court a question arising as to the effect of any provision in the Constitution and shall thereupon remit the case to that other court to be disposed of in accordance with the determination.

Where in any proceedings in the High Court a question arises as to the effect of any provision of the Constitution, the Judge hearing the case may stay the proceedings to await the decision of the question by the Federal Court.

Where an order for stay of proceedings has been made, the judge shall state the question which in his opinion has arisen as to the effect of the Constitution in a form of a special case and the question shall be transmitted to the Federal Court for determination (Section 84 Courts of Judicature Act 1964).

C4. Advisory jurisdiction

The Federal Court may give its opinion on any question which has arisen or likely to arise, and which had been referred to it by the Yang di-Pertuan Agong, concerning the effect of any provision of the Constitution.

The Federal Court shall pronounce in the open court its opinion on the question which was referred to it (Article 130 Federal Constitution).

Annex

Annex 1: Case Statistics (Jan. 1994 – Dec. 2017)

ORIGINAL JURISDICTION						
YEAR	REGISTRATION	DISPOSAL				
		CONSTITUTIONAL	UNCONSTITUTIONAL	DISMISS	WITHDRAWN	PENDING
PRE 2013	24	13	-	3	8	
2013	2	2	-	-	-	
2014	1	1	-	-	-	
2015	2	-	-	2	-	
2016	-	-	-	-	-	
2017	**1**	**-**	**-**	**1**	**-**	**0**
REFERRAL JURISDICTION (CIVIL & CRIMINAL)						
YEAR	REGISTRATION	DISPOSAL				
		CONSTITUTIONAL	UNCONSTITUTIONAL	DISMISS	WITHDRAWN	PENDING
PRE 2013	14	13	-	-	1	
2013	3	1	1	-	1	
2014	5	5	-	-	-	
2015	4	3	-	-	1	
2016	5	5	-	-	-	
2017	**9**	**6**	**-**	**-**	**-**	**3**
HABEAS CORPUS						
YEAR	REGISTRATION	DISPOSAL				
		CONSTITUTIONAL	UNCONSTITUTIONAL	DISMISS	WITHDRAWN	PENDING
PRE 2013	609	186	46	-	377	
2013	25	14	-	-	11	
2014	38	14	3	-	21	
2015	30	9	1	-	20	
2016	83	30	6	-	47	
2017	**102**	**31**	**12**	**-**	**58**	**1**

Annex 2: Cases of interest

- **Identification**

a) Country, b) Name of the Court, c) Date of decision given, d) Number of the decision, e) Jurisdiction, f) Title of the decision

- **Headnotes**

- **Summary**

Case 1: Semenyih Jaya v. Land Administrator of Hulu Langat

- **Identification**

(a) Malaysia / (b) Federal Court / (c) 20 April 2017 / (d) 01(f)-47-11/2013(B) & 06-3-05/2013(B) / (e) Civil Appeal & Referral jurisdiction / (f) Whether non-judicial personages could exercise judicial power

- **Headnotes**

1) Under Article 121(1) of the Constitution, the judicial power of the court resides in the Judiciary and no other. There is always a strong presumption in favour of the constitutionality of provisions in a statute based on the principle that Parliament cannot be presumed to intend an unconstitutional action. The burden is upon him who challenges the provision to show that they are unconstitutional. Hence, by virtue of Article 121(1) of the Constitution, the power to award compensation in land reference proceedings is a judicial power that is vested in the High Court Judge sitting in the Land Reference Court.

2) Further, the act of determining the amount of compensation payable arising out of land acquisition cases involves judicial assessments. Hence, the power to award compensation in land reference proceedings is a judicial power that should rightly be exercised by a judge and no other. Therefore, a non-judicial personage (i.e. a non-member of the judicature) has no right to exercise judicial power. The discharge of judicial power by non-qualified persons or non-judicial personages renders the said exercise ultra vires Article 121 of the Constitution.

- **Summary**

Semenyih Jaya Sdn Bhd ("the Developer"), who was the registered proprietor of a piece of land located in the District of Ulu Langat ("the land"), was notified of the intended compulsory acquisition of the land under the Land Acquisition Act 1960 ("the LAA"). The Land Administrator then conducted an enquiry to determine the amount of compensation payable to the Developer arising from the compulsory acquisition of the land and awarded compensation amounting to RM20,862,281.75 to the Developer. Dissatisfied with the award made by the Land Administrator, the Developer objected to the adequacy of the award. The objection was referred to the High Court for determination.

The objection was heard and determined by the High Court Judge who sat with two assessors. The High Court affirmed that part of the Land Administrator's award relating

to the valuation of the land, allowed the Developer's claim for severance and injurious affection but dismissed the other claims of compensation sought by the Developer.

On appeal, the Court of Appeal dismissed the Developer's appeal against the decision of the High Court.

Dissatisfied with the Court of Appeal's decision, the Developer applied for and obtained leave to appeal to the Federal Court. One of the issues for consideration by the Federal Court was whether Section 40D of the LAA, which empowers the assessors to decide on the amount of compensation in compulsory acquisition cases, was constitutional.

The main issue here was whether Section 40D of the LAA was ultra vires Article 121 of the Federal Constitution.

In allowing the appeal and ordering the case to be remitted to the High Court for compensation, the Federal Court held that Section 40D of the LAA was ultra vires Article 121 of the Federal Constitution as it ignores the role of Judges as defenders of the Constitution and renders the constitutional guarantee of adequate compensation illusory since judges 'abdicate' their constitutional role, as the guarantee of adequate compensation was in the hands of two lay assessors. Hence, the power to award compensation in land reference proceedings is a judicial power that should rightly be exercised only by a judge.

Case 2: Indira Gandhi Mutho v. Perak Islamic Religious Affairs Department & Ors

- **Identification**

(a) Malaysia / (b) Federal Court / (c) 29 January 2018 / (d) NO: 01(f)-17-06-2016 (A), 01(f)18-06-2016 (A) & 01(f)-19-06-2016 (A) / (e) Civil Appeal / (f) Interpretation of art.121(1A) of Federal Constitution

- **Headnotes**

Both Clauses (1) and (1A) of Article 121 of the Federal Constitution illustrates the respective regimes in which each court operates. Thus, issues of jurisdiction and conferment of powers in the civil courts and the Syariah courts are clearly drawn. Both the civil and Syariah courts co-exist in their respective spheres, even if they are dissimilar in the extent of their powers and jurisdiction, in that, the civil courts are possessed of powers, fundamental and intrinsic, as outlined in the Federal Constitution. If the relief sought is in the nature of the 'inherent powers' of the civil court (for example, judicial review) or if it involves constitutional issues or interpretation of the law, then the civil courts would be seized with jurisdiction to determine the issue, regardless of its subject matter and especially if it comes within the scope and ambit of judicial powers.

- **Summary**

The appellant wife, Indira Ghandi Mutho ("the appellant") and Patmanathan ('the sixth respondent') were married under the Law Reform (Marriage and Divorce) Act 1976 ('the LRA'). There were three children of the marriage. On 11 March 2009, the sixth respondent converted to Islam and subsequently, the appellant received documents from the sixth respondent showing that her three children had been converted to Islam and that the Pengarah Jabatan Agama Islam Perak had issued three certificates of conversion to Islam on the said three children. The documents also showed that the Registrar of

Muallafs had registered the children as Muslims. Aggrieved, the appellant filed an application for judicial review at the High Court for an order of certiorari to quash the certificates of conversion to Islam of the children. The appellant contended that the issuance of the certificates of conversion to Islam by the Registrar of Muallafs were ultra vires and illegal. It contravened the provisions of ss. 96 and 106(b) of the Administration of the Religion of Islam ('Perak') Enactment 2004 ('the Perak Enactment 2004'), ss. 5 and 11 of the Guardianship of Infants Act 1961 ('GIA') and Article 12(4) read together with Article 8(2) of the Federal Constitution. At the High Court, it was held that Article 121(1A) of the Federal Constitution does not confer jurisdiction for constitutional interpretation on the Syariah courts to the exclusion of the civil courts. The Judicial Commissioner ('JC') declared that the requirements of ss. 96 and 106 of the Perak Enactment must be complied with by the Registrar of Muallafs in issuing the certificates of conversion. Section 101(2) which states that the certificates shall be conclusive proof of the fact stated therein, was held not to oust the jurisdiction of the court where there is patent non-compliance with the statutory requirements. Accordingly, the JC found that the High Court had exclusive jurisdiction to hear the application.

The High Court decision was reversed by the Court of Appeal, which had rejected the JC's approach in determining the constitutionality of the conversion process. The Court of Appeal held that the High Court had no power to question the decision of the Registrar of Muallafs or to consider the Registrar's compliance with the statutory requirements of ss. 96 and 106 of the Perak Enactment. The Court of Appeal took the position that the fact that a person had been registered in the Registrar of Muallafs as stated in the certificates of conversion was proof that the conversion process had been done to the satisfaction of the Registrar. Thus, the appellant in these appeals appealed against the said decision of the Court of Appeal.

The Federal Court decided that the High Court has jurisdiction to hear judicial review applications and constitutional/statutory interpretations. At the outset, the Federal Court clarified that the appellant was not challenging the conversion of her children, but the legality of the administrative power exercised by the Registrar of Muallaf under the Perak Enactment.

Significantly, the Federal Court held that the inherent supervisory power of judicial review is essential to the role of civil courts as a check and balance mechanism. Under Article 121(1) of the Federal Constitution, judicial power is vested exclusively in the civil High Courts, and these courts will continually engage in the interpretation of all laws. The Federal Court affirmed that judicial power is fundamental to the underlying principles of the Constitution and is inherent in the basic structure of the Constitution. Hence, this power cannot be revoked or altered by Parliament by way of constitutional amendment.

As to the jurisdiction of the Syariah Courts, the Federal Court held that Article 121(1A) does not oust the jurisdiction of the civil courts, and both civil and Syariah courts co-exist in their respective spheres. For the Syariah Courts to have jurisdiction over a particular matter, it must be expressly provided for by the state legislature and this does not extend to judicial review. Where there are questions of constitutionality or statutory interpretation, civil courts must determine such matters, regardless of whether the subject-matter relates to Islamic law.

Case 3: Public prosecutor v. Gan Boon

- **Identification**

(a) Malaysia / (b) Federal Court / (c) 15 March 2017 / (d) NO: 06-2-05/2016 /
(e) Criminal Referral / (f) Validity of Section 122(1) of the Securities Industry Act 1983 (SIA)

▸ Headnotes

There was a presumption and reverse onus Clause in Section 122(1) of the SIA and thus, there was a balance between the general interest of the community and the protection of Fundamental Rights. In the circumstances, there was no basis to hold that Section 122(1) was unconstitutional. Hence, the court in answering the first, second and third 'Constitutional issues' held that Section 122(1) of the SIA: (i) does not violate the doctrine of presumption of innocence; (ii) maintained the burden of proof, in that the prosecution must prove a charge against an accused beyond all reasonable doubt; and (iii) upheld the doctrine of separation of powers.

▸ Summary

Gan Boon Aun, the respondent and one Khiudin bin Mohd, both directors of Transmile Group Berhad ("Transmile"), were charged at the Sessions Court under the Securities Industry Act 1983 ('SIA") for making a misleading statement in Transmile's report, which was likely to induce the purchase of shares in Transmile; and alternatively, for furnishing a misleading statement to Bursa Malaysia Securities Berhad in Transmile's report. The trial judge acquitted the respondent and Khiudin on the principal charge but ordered their defence to be entered on the alternative charge. An objection was raised, contending that Section 122 of the SIA was unconstitutional. The respondent and Khiudin applied to have it referred to the High Court. The High Court ruled that Section 122 of the SIA was constitutional, but the ruling was reversed by the Court of Appeal. In the Federal Court, it was held that only the Federal Court has the jurisdiction to determine questions that affect the provisions of the Federal Constitution. Thus the matter was remitted to the High Court, which then referred the constitutional issues to the Federal Court.

The main issue was whether Section 122(1) of the SIA violates Articles 5(1) and 8(1) of the Federal Constitution, on the basis that it abrogated the fundamental right of an accused person to be presumed innocent until proven guilty, and that a criminal charge must be proved by the prosecution against the accused beyond reasonable doubt.
It was held by the Federal Court that Section 122(1) of the SIA was not unconstitutional and therefore did not violate the doctrine of presumption of innocence, as such presumption required the prosecution to prove the guilt of the company beyond all reasonable doubt. Thus, the deeming provision was held to be fair and necessary as it must be first proved beyond reasonable doubt that the offence was committed by the company before it is deemed committed by its directors or its officers.

Case 4: Gin Poh Holdings Sdn Bhd v. The Government of the State of Penang & 5 Ors

▸ Identification

(a) Malaysia / (b) Federal Court / (c) 12 March 2018 / (d) BKA-1-12/2014(P) /
(e) Original jurisdiction / (f) State Legislature's power to make laws

▸ Headnotes

1) The long title of the Incorporation (State Legislatures Competency) Act 1962 ('Act') states that it is 'an Act relating to the powers of State Legislatures to make laws with respect to the incorporation of certain persons and bodies within a State'. Meanwhile, Item 5 in the First Schedule provides for the 'Incorporation of the Menteri Besar or Chief Minister'. The Act relates, in pith and substance, to the incorporation of persons and bodies within a State. The incorporation of corporations, excluding municipal

corporations, including all ancillary matters, are encompassed under item 8(c) of the Federal List. Additionally, Parliament is expressly authorised by Article 76A of the Federal Constitution ('the FC') to delegate its legislative powers in respect of matters in the Federal List to the State Legislatures. In the present case, Parliament did so by enacting the Act, which authorises State Legislatures to make laws with respect to the incorporation of, among others, the Chief Minister.

2) Exercising the delegated legislative power pursuant to the Act and in accordance with Section 3 and its First Schedule, the Penang State Legislature passed the Chief Minister of Penang (Incorporation) Enactment 2009 ("Enactment"). Section 3 of the Enactment provides for the incorporation of the Chief Minister of Penang. Sections 4 and 5 of the Enactment state the various powers of the Chief Minister of Penang incorporated, which could fairly and reasonably be comprehended as matters ancillary or incidental to its incorporation.

3) The Act relates to a matter enumerated in the Federal List, this within the legislative competence of Parliament under Article 74 of the FC. The Enactment relates to a matter enumerated in the Federal List, on which the power to make laws has been validly delegated by Parliament to the State Legislature under Article 76A of the FC. In doing so, Parliament or State Legislature had not covertly or indirectly encroached upon forbidden territory. Accordingly, the Act makes provision with respect to a matter which Parliament has power to make laws while the Enactment makes provision with respect to a matter which the Penang State Legislature has powers to make laws. The Act and the Enactment are not invalid.

- **Summary**

The petitioner was the registered owner of lands acquired by the Penang State Government ('the first respondent') through the Director of Lands and Mines, Penang ('the third respondent') and the Land Administrator of the South West District of Penang ('the fourth respondent'). The lands were acquired for a public purpose pursuant to Section 8 of the Land Acquisition Act 1960. The fourth respondent conducted an enquiry and offered compensation in the sum of RM40,161,639.50 to the petitioner and the latter accepted the same under protest. The petitioner later applied to the fourth respondent to refer its objection as to the amount of compensation to the High Court. The High Court ordered the compensation amount to be increased to RM44,964,837. The fourth respondent then alienated the lands to the fifth respondent, a body corporate established under the Chief Minister of Penang (Incorporation) Enactment 2009 ('the Enactment'). The lands were alienated with the express condition that they were to be used for educational purposes only. The petitioner commenced a civil suit at the High Court against the first, third, fourth and fifth respondents, challenging the validity of the acquisition of the lands and sought the return of the lands as it was alleged that the acquisition was done mala fide and not for a public purpose ('the civil suit'). The civil suit is still ongoing. According to the petitioner, the constitutionality of the Incorporation (State Legislatures Competency) Act 1962 ('the Act') and the Enactment could not be dealt with by the High Court. Therefore, in the present petition, the petitioner sought declarations that:

(i) the Enactment or alternatively Sections 3, 4 and 5 of the Enactment is/are invalid and void as being a law which the State Legislature of the State of Penang has no power to make; and
(ii) the Act or alternatively Section 3 and Item 5 of its First Schedule, insofar as it allows the incorporation of the office of the Chief Minister of Penang with perpetual succession and permits the corporation to engage in commercial activities is/are invalid and void as being a law which Parliament has no power to make.

The Federal Court held that the Act makes provision with respect to a matter which Parliament has power to make laws, whereas Enactment 9 makes provision with respect

to a matter which the Penang State Legislature has power to make laws.

In view of the foregoing, the Federal Court did not find the Act and Enactment 9 to be invalid on the ground that the laws relate to matters beyond the legislative competence of Parliament and the State Legislature respectively. Therefore, the petition was dismissed.

Case 5: Public Prosecutor v. Azmi Sharom

- **Identification**

(a) Malaysia / (b) Federal Court / (c) 6 October 2015 / (d) 06-5-12/2014(W) /
(e) Criminal Referral jurisdiction / (f) Validity of pre-Merdeka law, i.e. Sedition Act 1948 and freedom of speech

- **Headnotes**

(a) The intention of the framers of the Constitution was to provide for the continuance of all existing laws including the Act, subject to any modifications as may be made so as to bring it into accord with the Constitution. The existing law is only rendered void or invalid if it could not be brought into accord with the Constitution. This was to be contrasted with the treatment of post Merdeka Day legislation which by virtue of Article 4(1) was rendered null and void to the extent of its inconsistency with the Constitution.

(b) It was the intention of the framers of the Constitution to ensure that the existing law will continue to be valid and enforceable upon the coming into operation of the Constitution on Merdeka Day. It followed therefore that the Act being the 'existing law' at the material date should continue to be valid and enforceable post Merdeka Day.

(c) Article 10(1)(a) provides for freedom of speech, assembly and association. It is, however, commonly acknowledged that the rights conferred by the said Article are not absolute. By Article 10(2), Parliament is given the right to impose such restrictions as it deemed necessary or expedient in the interest of the security of the Federation and other grounds enumerated in Clause (2)(a). However, Parliament or the Legislature is not free to impose any restrictions as they fancy; the restrictions must fall within the parameters set out by Clause (2)(a) of Article 10.

(d) The restriction that may be imposed by the Legislature under Article 10(2) is not without limit. The law promulgated under Article 10(2) must pass the proportionality test in order to be valid. That was in line with the test laid down in Pung Chen Choon. Section 4(1) of the Act is directed to any act, word or publication having a 'seditious tendency' as defined in Section 3(1) Paragraphs (a) to (f) of the Act. This is consistent with Article 10(2)(a) and Article 10(4) of the Constitution, as it cannot be said that the restrictions imposed by Section 4(1) is too remote or not sufficiently connected to the subjects/objects enumerated in Article 10(2)(a). Furthermore, this is not a total prohibition as it is subject to a number of exceptions as provided in Section 3(2) of the Act. As legislated, it is not seditious to show that any Ruler had been misled or mistaken in any of his measures, or to point out errors or defects in any Government or constitution as by law established. Thus, the restrictions imposed in Section 4(1) fell squarely within the ambit or parameter of Article 10(2)(a) of the Constitution. Section 4(1) of the Act does not run counter to Article 10(2)(a) of the Constitution.

- **Summary**

Azmi Sharom, the defendant was charged in the Kuala Lumpur Criminal Sessions Court

for an offence under Section 4(1)(b) and alternatively under Section 4(1)(c) of the Sedition Act 1948 ('the Act'). The charges relate to two seditious statements made by the defendant as reported by the Malay Mail online on 14 August 2014 which read 'You don't want a repeat of that, where a secret meeting took place...' and 'I think what happened in Perak was legally wrong. The best thing to do is do it as legally and transparently as possible.' The defendant claimed trial to the charges. Prior to the commencement of the trial, the defendant applied to the Sessions Court to refer the question of the constitutionality of the Act to the High Court. On 5 November 2014, pursuant to Section 84 of the Courts of Judicature Act 1964, the High Court, by way of a special case, referred the following questions to this court:

(i) whether Section 4(1) of the Act contravened Article 10(2) of the Federal Constitution ('the Constitution') and was therefore void under Article 4(1) of the Constitution ('first question'); and
(ii) whether the Act is valid and enforceable under the Federal Constitution ('second question').

First Question

The Federal Court held that:

(a) The rights conferred by the said Article are not absolute. This is clear from Art. 10(2) itself which states that the rights conferred by Article 10(1) (a), (b) and (c) are subject to Clauses (2), (3) and (4).
(b) By Article 10(2), Parliament is given the right to impose such restrictions as it deems necessary or expedient in the interest of the security of the Federation and other grounds enumerated in Clause (2)(a). What this means is that Parliament or the legislature is not free to impose any restrictions as they fancy; the restrictions must fall within the parameters set out by Clause (2)(a) of Article 10.
(c) Upon close analysis, the panel agrees with the plaintiff's submission that the restrictions imposed in Section 4(1) fall squarely within the ambit or parameter of Article 10(2)(a) of the Constitution and hold that Section 4(1) of the Act does not run counter to Article 10(2)(a) of the Constitution. Accordingly, the first question is answered in negative.

Second Question

On the second question, the Federal Court held that:

(a) The Act is a pre-Merdeka law. The issue therefore was whether it was saved by Article 162 of the Constitution.

(b) Article 162 of the Constitution is a transitional provision intended to ensure the continuance of all existing laws after Merdeka Day with such modifications as may be made under the said article and subject to any amendment as may be made by Federal or State law. Under Article 162(6), the court or tribunal are given further powers to make any necessary modification to any such law to bring it into accord with the Constitution. The term 'Parliament may by law' as appearing in Article 10(2) should not be read restrictively but must be read harmoniously with the other provisions of the Constitution such as Article 162.

(c) To say that the Act does not come within the ambit of Article 10(2) of the Constitution as it was not made by Parliament would give it a highly restrictive and rigid interpretation to the phrase 'Parliament may by law' as appearing in the said article. The framers of the Constitution in drafting Article 162 would have in their contemplation the provision of Article 10(2) and had they indeed

intended that the phrase 'the existing laws' in art. 162 was not to include the Act, they could have done so in no uncertain terms. On the contrary, the intention of the framers of the Constitution was to provide for the continuance of all existing laws including the Act, subject to any modifications as may be made so as to bring it into accord with the Constitution. The existing law is only rendered void or invalid if it could not be brought into accord with the Constitution. This was to be contrasted with the treatment of post Merdeka Day legislation which by virtue of Article 4(1) was rendered null and void to the extent of its inconsistency with the Constitution.

(d) It was the intention of the framers of the Constitution to ensure that the existing law will continue to be valid and enforceable upon the coming into operation of the Constitution on Merdeka Day. It followed therefore that the Act being the 'existing law' at the material date should continue to be valid and enforceable post Merdeka Day. Thus, the second question was answered in the positive.

8. Mongolia

Constitutional Court

Summary

The Constitutional Court of Mongolia was established in 1992 following a broader process of constitutional reform. The Constitutional Court is made up of 9 Justices. 3 are nominated by the State Great Hural (the legislature), 3 by the President of Mongolia, and 3 by the Supreme Court. The term of office is 6 years. The Chair of the Constitutional Court is a serving Justice of the Court and fulfils his/her function as Chair for 3 years. The Secretary General leads the administration of the Court, which also includes a Research Center. Art. 66 of the Mongolian Constitution sets out the jurisdictions of the Court. The Constitutional Court shall make conclusions and submit them to the legislature, called the State Great Hural, on the following issues under a dispute: The constitutional conformity of laws, decrees or other decisions; election disputes; whether high ranking officials have committed a breach of the Constitution; and the impeachment of the President, Speaker or Members of the State Great Hural, and the Prime Minister. Significantly, the adjudication of the Constitutional Court will be reviewed by the State Great Hural. If the State Great Hural disagrees with the Court's first decision, then the decision comes back to the Court, which will then sit *en banc* and make a second and final judicial decision.

Content

A. Introduction

A1. History

In 1990, the Mongolian people abolished the totalitarian regime, rejected the planned economy, and began a comprehensive transition toward a new political system. This new choice was to develop a country respecting human rights, democratic values, the market economy, and the rule of law. This led to the complete reform of the legislative system and structure, this reform did not taken place all at one time but was rather an on-going and gradual process.

Mongolia established a new democratic Constitution. The 1992 Constitution, as it was pointed out, "mobilized the intellectual capacity of the country".

This Constitution installed many important elements that abolished the totalitarian regime to transition to a democracy. One of the important aspects of this Constitution is to establish a new constitutional institution which secures the Constitution.

The Constitutional Court called the Constitutional Tsets was established in 1992 for the first time in Mongolia, based on the paragraph 1 of the Article 64 of the Constitution of Mongolia. The article says that "The Constitutional Tsets is the body which has full powers to exercise supreme supervision over implementing of the Constitution, to make decisions on the breaches of its provisions, to settle disputes". It would be the guarantee for strict enforcement of the Constitution.

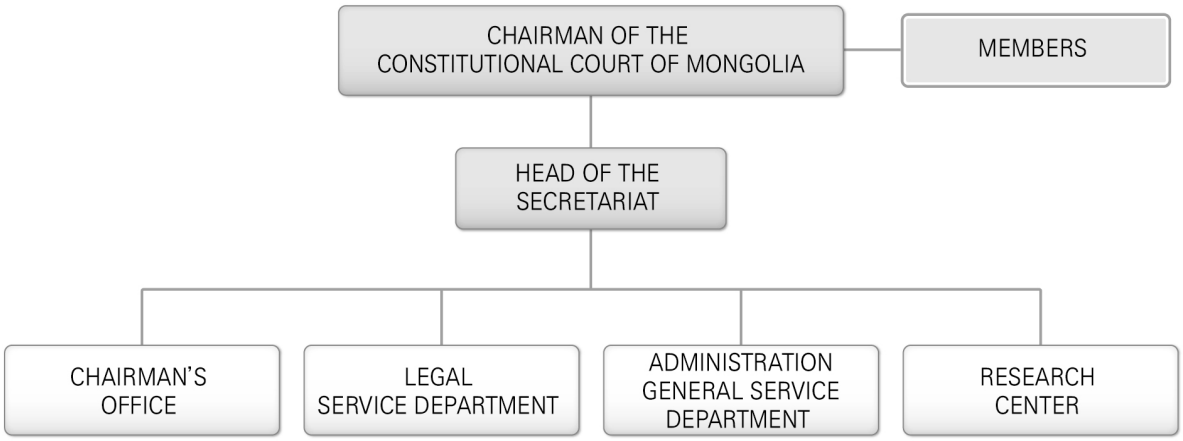
Establishing a Constitutional Tsets is one of the biggest steps forward to guarantee the concept of the supremacy of the Constitution in Mongolia.

The Constitutional Tsets shall be guided by such basic principles, that the Tsets shall be independent, be subject to the Constitution of Mongolia, its members shall be equal, matters shall be decided without any bias, and its activities shall be transparent.

A2. Basic Texts

- Constitution of Mongolia (1992): Articles 64-67
- The Law on the Constitutional Court of Mongolia (1992)
- The Law on the Constitutional Procedure (1997)

B. Organizational Structure



B1. Chairperson

Members of the Constitutional Tsets shall nominate from themselves a person/persons for the post of a chairperson, discuss candidates at a plenary session, and shall by secret vote elect a Chairperson with a majority of the total number of votes.

If three or more candidates for the Chairperson of the Constitutional Tsets are introduced and after the first vote, none of the candidates has received a majority of votes, the second ballot will be conducted on two candidates who received the majority of votes during the first round, and the person who then receives a majority of the total number of votes shall be elected as a Chairperson.

The term of office of the Chairperson of the Constitutional Tsets shall be 3 years and may be re-elected only once.

The Chairperson of the Constitutional Tsets shall ensure working conditions for the activities of the Constitutional Tsets, ensure equal representation for each member of the Constitutional Tsets, when determining the composition of the proceeding, allocate the functions of the members of the Constitutional Tsets, supervise their implementation, manage the budget, represent the Constitutional Tsets in relations with other organizations and officials on administrative matters.

B2. Justices

Number of Justices: 9 including the Chairperson of the Tsets

The Constitutional Tsets shall be comprised of nine Justices.

The Members of the Constitutional Tsets shall be appointed by the State Great Hural (Mongolia's Parliament) for a term of six years, upon the nomination proposals of three of them by the State Great Hural, other three by the President, and another three by the Supreme Court.

A citizen of Mongolia who has recognized high qualifications in the sphere of the law and politics, without a criminal record, and has turned 40 years of age, may be a member of the Constitutional Tsets.

The authorities of a member of the Constitutional Tsets shall commence on the day of appointment and shall continue until the appointment of a new member to the post by the State Great Hural.

B3. Secretariat

The Mission of the Secretariat is to deliver adequate financial and technical service and assistance in full conformity with its needs and requirements in order to support the Constitutional Tsets in exercising its supreme supervision over the ruling of the Constitution, making decisions on breaches of its provisions, and settling disputes.

The Secretariat of the Constitutional Tsets is responsible for the delivery of information, related research findings, technical, administrative support, and provision of the proper working conditions to the Constitutional Tsets and its members.

1. LEGAL SERVICE DEPARTMENT

The Legal Service Department has the duty to assist in resolving and examining disputes by the Constitutional Tsets. The staff in this department should have a professional knowledge and experience to support the dispute resolution process of the Constitutional Tsets. Number of staff: 12.

2. RESEARCH CENTER

The Research Center has the duty to conduct research related to the domestic and international constitutional proceedings including constitutional law and constitutional adjudication. One of the main duties is to provide or organize training programs for officials. Number of staff: 5.

3. DEPARTMENT OF ADMINISTRATION GENERAL AND SERVICE

The function of the administrative office of the Constitutional Tsets shall support the daily activities.

This department has the duty to carry out human resources policy, manage budget, administer household, state property, archives, and library and public relations. Number of staff: 20 staff.

4. SECRETARY GENERAL

The Secretary General under the supervision of the Chairman regulates and coordinates activities of the departments of the Secretariat.

The Court's administrative affairs are managed and supervised by the Secretary General.

5. CHAIRMAN'S OFFICE

The Chairman's Office has the duty to conduct internal and international relations and protocol administration. Since its establishment, the Constitutional Tsets has put emphasis on establishing relationships with similar organizations of foreign countries to broaden the scope of its external relations and exchange experiences and information.

C. Jurisdictions

The Constitutional Tsets shall consider the following disputes concerning the breach of the Constitution, make revision thereon and submit them to the State Great Hural.

If a revision is rejected by the State Great Hural, the Constitutional Tsets shall reconsider the grounds for the rejection and shall make a final decision:

1. The constitutionality of laws and other decisions of the State Great Hural;
2. The consitutionality of decrees and other decisions of the President;
3. The constitutionality of resolutions and the other decisions of the Government;
4. The consitituionality of international treaties concluded by Mongolia;
5. The constitutionality of decisions by central electoral body concerning referendum;
6. The constitutionality of decisions by central electoral body on elecctions of the State Great Hural, it's members and President.

If the Constitutional Tsets decides that the laws, decrees and other decisions of the State Great Hural and the President, the decisions of the Government, the international treaties concluded by Mongolia, the decisions by the central electoral body are inconsistent with the Constitution, the laws, decrees, decisions, and ratifications in question or the unconcstitutional parts thereof become null and void.

The Constitutional Tsets shall consider the following disputes concerning the breach of the Constitution, make conclusions and submit them to the State Great Hural:

- whether the President has comitted a breach of the Constitutions;
- whether the Chairperson and members of the State Great Hural have committed a breach of the Constitution;
- whether the Prime Minister and members of the Government have committed a breach of the Constitution;
- whether the Chief judge of the Supreme Court and the Prosecutor General have committed a breach of the Constitution;
- whether the legal grounds exist for the impeachment of the President or the Prime Minister and for recalling members of the State Great Hural.

The jurisdiction of the Constitutional Tsets consists following two parts: (1) decisions, and (2) actions of public officials.

1. The Constitutional Tsets shall consider and deliver a judgment, and, if necessary, reconsider the matter and make a final decision on the disputes regarding the constitutionality.
2. The Constitutional Tsets shall consider and deliver a judgement on acts of non-compliance with the Constitutions.
3. The Constitutional Tsets shall consider and deliver a judgement on existence of grounds for the resignation or withdrawal.
4. The Constitutional Tsets shall make a judgement on the claim within its jurisdiction and refrain from resolving claims or parts of claims outside its jurisdiction.

C1. Review of laws and other norms against the Constitution

- **Key legal provisions:** Constitution (Article 66.2.1), The Law of Mongolia on the Constitutional Court (Article 8.2), The Law on Constitutional Court Procedure

(Article 13.1).

The Constitutional Tsets shall consider and deliver a judgment, and if necessary, reconsider the matter and make a final decision on the following disputes regarding the constitutionality of
1) Law and other decisions of the State Great Hural;
2) Decrees and other decisions of the President;
3) Decisions of the Government;
4) International treaties to which Mongolia is signatory party;
5) Decisions of the General Election Committee on referendums, and elections of State Great Hural and the President.

- **Purpose:** Adjudication on the constitutionality of a law and norms serves the purpose of securing the system of checks and balances in constitutional government.

- **Causes for requests:** A citizen can submit petitions or information. The State Great Hural, the President, the Prime Minister, the Supreme Court and the Prosecutor General shall make request concerning breach of the Constitution.

- **Procedures**
  - **Request procedure:** A citizen shall submit petition or information in writing which must indicate their names and addresses and a statement clearly describing what provision of the Constitution have been breached, by whom and in which way. The Tsets shall not accept any petition or information which does not indicate a name and an address of a petitioner.
  - **Suspension of proceedings, etc.:** A member of the Tsets shall study a petition or information within 14 days, and if the matter in question is not a constitutional dispute or does not fall within the jurisdiction the Tsets, then a notification stating the grounds for refusal to accept said petition or application shall be given to the petitioner.
  - **Opinions of parties, etc. to the litigious case:** A member of the Tsets, if considered appropriate, shall transfer a petition or application to the respective organizations for consideration and shall notify the petitioner about his/her decision.

- **Decisions and effect:** The Constitutional Court may decide that the law or norms is unconstitutional or constitutional, or make a decision of constitutional nonconformity. If claims filed to the Constitutional Tsets contain claims within jurisdictions of other courts and authorities, the Constitutional Tsets shall make a judgment on the claim within its jurisdiction and refrain from resolving claims or parts of claims outside its jurisdiction. This shall not constitute an obstacle to action on claims or parts of claims by relevant courts and authorities.

C2. The Constitutional Tsets shall consider and deliver a judgement on acts of non-compliance with the Constitution

- **Key legal provisions:** Constitution (Article 66.2.3), The Law of Mongolia on the Constitutional Court (Article 8.2), The Law on Constitutional Court Procedure (Article 13.2).

The Tsets shall consider and deliver a judgment on acts of non-compliance with the Constitution of the following officials: 1/ the President of Mongolia; 2/ the Chairperson of the State Great Hural; 3/ a member of the State Great Hural; 4/ the Prime Minister; 5/ a member of the Government; 6/ the Chief Justice of the

Supreme Court; 7/ the Prosecutor General.

- **Purpose:** To avoid overlapping authorities between State Bodies and to uphold the principle of checks against high-ranking officials.

- **Causes for requests:** A citizen can submit petitions or information. The State Great Hural, the President, the Prime Minister, the Supreme Court and the Prosecutor General shall be entitled to submit requests regarding existence of substance of breach of the Constitution.

- **Procedures**
  - **Request procedure:** Apart from citizens of Mongolia, foreign citizens and stateless persons residing lawfully in the territory of Mongolia shall enjoy the right to submit petitions and notifications to the Tsets.
  - **Suspension of proceedings, etc.:** A member of the Tsets shall study a petition or information within 14 days, and if the matter in question is not a constitutional dispute or does not fall within the jurisdiction of the Tsets, then a notification stating the grounds for refusal to accept said petition or application shall be given to the petitioner.
  - **Opinions of parties, etc. to the litigious case** Citizens, authorized officials, organizations originators of petitions, information, and requests, which served as a ground for initiation of dispute proceedings of the Constitutional Tsets, including organizations and public officials responsible for laws and other decisions or carried out activities that allegedly have breached the Constitution. Authorized representatives and advocates eligible due to their official position or appointed in accordance with the appropriate rules.

- **Decisions and effect:** The conclusions on constitutional violations by these officials or on grounds for their removals are final, and the State Great Hural must not discuss the merits of these conclusions. The court does not deliver the abstract official interpretation (or advisory opinion) on the Constitution at the request of any authority.

The Decision shall be based on the Tsets and evidence proved in the process of a session. A decision of a session of the Tsets shall be adopted by a majority of vote of the members participating in the session (5 members); the resolution delivering a decision of a reconsidered dispute shall be adopted by the 2/3 vote of the members participating (7-9 members).

C3. Constitutionality of the resignation or removal of officials

- **Key legal provisions:** Constitution (Article 66.2.3), The Law of Mongolia on the Constitutional Court (Article 8.2), The Law on Constitutional court procedure (Articles 13.3).

  The Tsets shall consider and deliver a judgment on existence of grounds for the resignation or withdrawal of the following officials:

  1/ the President of Mongolia; 2/ the Chairperson of the State Great Hural; 3/ the Prime Minister; 4/ a Member of the State Great Hural.

- **Purpose:** Control systems and accountability mechanisms for unconstitutional action by high-ranking officials.

- **Causes for requests:** A citizen can submit petitions or information. The State

Great Hural, the President, the Prime Minister, the Supreme Court and the Prosecutor General shall make request concerning breach of the Constitution.

- **Procedures:** The Constitutional Tsets has exclusive jurisdiction over impeachment proceedings brought against certain high-ranking public officials. Article 13.2 and 13.3 of the *Tsets* Procedure Law enacted the procedure of resignation or withdrawal of high officials in Mongolia. However, in the Constitution was stated two types of impeachments. Difference between this proceedings is *first part,* review on action of high official's breach of Constitution, and *second part,* review on removal, resignation or withdrawal of their actions. The difference of these two reviews is the legal consequence.

- **Decisions and effect:** The Constitutional Tsets decides constitutional disputes through two stages of the procedure according to Article 66 of the Constitution. In the first stage, a Middle Panel of five Justices delivers the conclusion on constitutionality of the law and other decisions listed in Article 66.2 of the Constitution. If this panel finds a law or decision unconstitutional, then that law or decision will be suspended until the final judgment of the Constitutional Tsets. The conclusion is submitted to the State Great Hural that must decide whether to recognize it within 15 days.

  In the parliamentary session discussing the conclusion of the Constitutional Tsets, one of the Justices only reads the conclusion, and the Members of Parliament have no right to ask the Justice questions.

  The conclusion becomes the final judgment and immediately enters into force if the State Great Hural accepts it. However, if the State Great Hural rejects the conclusion, the second stage starts. A Grand Panel of seven to nine Justices reconsiders the grounds for the rejection by the State Great Hural and delivers the final judgment (called the resolution) by a two-thirds majority. Moreover, if the State Great Hural does not respond to the conclusion of the Constitutional Tsets within due time (15 days) fixed by the law or if the State Great Hural reenacts the legislation that the *Tsets* previously quashed as unconstitutional, the Grand Panel of the Constitutional Tsets directly completes a resolution without any decision of the State Great Hural. The resolution of the Constitutional Tsets can overrule the conclusion of the Constitutional Tsets in deciding the same case if there are enough reasons to do so.

Annex

Annex 1. Case Statistics

1-1. Since establishment (July 1992-2017)

Type		Total
Petitions or applications by citizen		2470
Requests from Authorized Organizations (Para. 3, Art 21 of the Law on Constitutional Procedure)	Prosecutor Office	1
	Supreme Court	7
	President of Mongolia	2
TOTAL		2480

1-2. The total number of 182 conclusions made by the Constitutional Court (Tsets) (1992-2017)

YEAR	Conclusions			Acceptance of PARLIAMENT
	Total	Unconstitutional	Constitutional	
1992	1		1	-
1993	4	2	2	-
1994	9	2	7	2
1995	7	5	2	-
1996	10	4	6	1
1997	6	3	3	2
1998	9	5	4	2
1999	1	1	-	-
2000	4	2	2	-
2001	2	1	1	1
2002	4	-	4	-
2003	3	1	2	1
2004	3	2	1	1
2005	9	2	7	4
2006	13	5	8	4
2007	13	9	4	-
2008	10	4	6	3
2009	7	4	3	1
2010	8	3	5	2
2011	5	3	2	-
2012	5	4	1	-
2013	6	3	3	1
2014	8	2	3	3

YEAR	Conclusions			Acceptance of PARLIAMENT
	Total	Unconstitutional	Constitutional	
2015	16	2	14	3
2016	12	5	7	5
2017	7	5	2	2
Total	**182**	**80**	**102**	**38**

1-3. Number of filed applications, petitions and requests, and delivered decisions (1992-2017)

YEAR	Petitions or applications or requests	Decisions		
		Conclusion	Resolution	Certification
1992	24	1	-	-
1993	60	4	3	4
1994	78	9	2	6
1995	39	7	2	6
1996	80	10	4	8
1997	71	6	3	10
1998	78	9	2	12
1999	42	1	-	6
2000	30	4	2	3
2001	23	2	-	1
2002	54	4	3	7
2003	38	3	2	5
2004	42	3	-	10
2005	81	9	2	5
2006	106	13	4	15
2007	146	13	3	19
2008	154	10	3	21
2009	128	7	3	16
2010	101	8	2	27
2011	103	5	2	14
2012	154	5	3	26
2013	130	6	1	25
2014	134	8	2	16
2015	171	16	11	30
2016	250	12	5	33
2017	163	7	2	29
TOTAL	**2480**	**182**	**66**	**354**

Annex 2. Cases

- **Identification**

a) Country, b) Name of the Court, c) Date of decision given, d) Number of the decision, e) Jurisdiction (if applicable), f) Title of the decision

- **Headnotes**

- **Summary**

Case 1.

- **Identification**

a) Mongolia / b) Constitutional Tsets of Mongolia c) 2007.06.22 / d) Number 02, Ulaanbaatar / e) - / f) Final adjudication on the constitutionality of allocating 250 million tugrug for each State Great Hural election District, while approving the State budget law for 2007

- **Headnotes**

Upon review of the above evidence, the Constitutional Court of Mongolia has reached the following decision:

In the process of approving the 2007 Budget Law, the Parliament of Mongolia (State Great Hural) allocated 250 million tugrug to each electoral district, in total 19 billion tugrug by incorporating these resources into budget ministers' portfolios. This allocation was based on individual MP's investment proposals and defied the principles and procedures set out by the Law on Public Sector Management and Finance. Thus the Constitutional Court found that this allocation violated respective clauses of the Constitution and declared this section of the Budget Law void.

The articles of the Constitution in concern are quoted in the footnote.[20]

- **Summary**

The Members of the Parliament (MP) allocated 250 million tugrug to each electoral

[20] Section 2 of Article 1 of the Constitution of Mongolia "The fundamental principles of the activities of the State shall be ensuring democracy, justice, freedom, equality, national unity and rule of law"; Section 1 of Article 23 "A member of the State Great Hural shall be an envoy of the people and shall represent and uphold the interests of all the citizens and the State"; Section 2.2 of Article 38 "(The Government shall) work out…guidelines for economic and social development, the State budget, credit and fiscal plans and to submit these to the State Great Hural and to execute decisions taken thereon"; Section 1 of Article 58 "Aimag, the capital city, Soum and district are administrative, territorial and socio-economic complexes with their functions and administrations provided for by law"; Section 1 of Article 62 "Local self-governing bodies besides making independent decisions on matters of socio-economic life of the respective Aimag, the capital city, Soum, district, Bagh and Horoo shall organize the participation of the population in solving problems of national scale and that of larger territorial divisions"; Section 2 of Article 62 Authorities of higher instance shall not take decision on matters coming under the jurisdiction of local self-governing bodies. If law and decisions of respective superior state organs do not specifically deal with definite local matters, local self-governing bodies can decide upon them independently in conformity with the Constitution"; Section 1 of Article 70 "Laws, decrees and other decisions of state bodies, and activities of all other organizations and citizens should be in full conformity with the Constitution."

district and legalised the member's right to decide its utilisation.

This issue, which was found to be in breach of the Constitution, was raised in 2006 when each of the 76 MPs was preparing to stand for re-elections in their respective constituencies.

When approving the State Budget Law for the year 2007, some MPs initiated a draft budget which allocated 250 million tugrug to each electoral district with spending decision left at the discretion of each MP. This decision violated the exclusive power of the Government to draft, submit for approval and allocate spending of the state budget. The petition also stated that this decision violated respective articles of the Constitution of Mongolia.

It was found that:

1. Some MPs initiated a draft law to allocate 250 million tugrug to each electoral district, in total 19 billion tugrug from the budget, which has not been previously included in the draft budget submitted by the Government.

2. Each MP has proposed a list of expenditures to be financed with the 250 million tugrug allocation to each electoral district which was subsequently approved as part of the Budget Law.

3. There has been no examination or review of the list of expenditures proposed by individual MPs in terms of their appropriateness or necessity. Therefore, it was revealed that, some MPs have proposed to finance private investments from budget resources, such as repairing the roof of the voters' private residences and financing the construction of a private clinic which belonged to an acquaintance.

4. Investment proposals were based solely on the MP's individual estimation, and therefore there have been numerous discrepancies in the costing of similar expenditures, which led to a violation of the principles of fairness and equality. Thus for example, in the portfolio of the Chief of the Cabinet Secretariat alone, the construction of the *bagh* governor's office building in the 4th*bagh* of Dornod *aimag* Kherlen *soum* was budgeted for 20 million, in Selenge *aimag* Shaamar *soum* for 50 million tugrug, and in Tuv aimag Buren *soum* a similar construction was allocated 70 million tugrug. Similarly, construction of the soum governor's office building in Uvurkhangai Uyanga soum was budgeted for 250 million tugrug, whereas in Sukhbaatar aimag Uulbayan soum the same work was allocated 25 million tugrug.

5. The President of Mongolia had, at the time, placed a veto on this article of the Budget Law. In this veto the President stated that allocation of 250 million tugrug to each electoral district by MPs creates a situation which may obstruct the fairness and equality of Parliamentary elections. This allocation violated the Article 23 of Section 1 of the Constitution which states that "a member of the State Great Hural shall be an envoy of the people and shall represent and uphold the interests of all the citizens and the state" and pursued narrow interests of electoral territories by allocating equal amounts of additional investment without due consideration to the specific circumstances of local governments and territories.

The State Great Hural has discussed but failed to accept the President's veto.

6. Several MPs have opposed the equal distribution of 250 million tugrug to each MP's district, but they were not successful. For example, MP E.Bat-Uul has stated during the plenary session of the Parliament that "this is a very serious matter, and as noted by MP T.Ochirkhuu, this investment in the current 76 members' constituencies is, in fact, an investment in the 2008 elections. This is a political investment. We are all aware that the principles of free democratic elections are being obliterated as a result of this issue.

It is only a matter of time that this 250 million would become 500 million, 1 billion tugrug, and then who will run in the elections against me?" Some MPs have also noted that this is one form of a bribe to the MPs.

Case 2.

- **Identification**

a) Mongolia / b) Constitutional Tsets of Mongolia / c) 2009.06.10 / d) Number 03, Ulaanbaatar / e) - / f) "… the conclusion made unanimously…" is inconsistent with the relevant provisions of the Constitution of Mongolia

- **Headnotes**

The Constitutional Court has examined the dispute and came to the following conclusion:

1. The phrase "reach a unanimous conclusion" in Section 24.7 of Article 24 of the Law on the State Great Hural of 26 January 2006 which states that "the sub-committee on the Immunity of Members of Parliament shall comprise four members who have been elected to the Parliament the most number of times, and these members shall review the proposals submitted by relevant bodies and authorities mentioned in this law to suspend or terminate the mandate of a Member of Parliament. They will reach a unanimous conclusion on the issue and present their conclusion to relevant Standing Committees and the plenary session" breaches Section 1 of Article 14 of the Constitution that declares that "all persons lawfully residing within Mongolia are equal before the law and the courts," and Section 3 of Article 29 of the Constitution which states that "if a question arises that a member of the State Great Hural is involved in a crime, it shall be considered by the session of the State Great Hural to decide on the suspension of his/her mandate." The Constitutional Court has therefore declared invalid the part "reach a unanimous conclusion" in Section 24.7 of Article 24 of the Law on the State Great Hural.

It should be noted here that the Constitutional Court of Mongolia has reached the above two decisions under considerable pressure from the Members of the Parliament.

- **Summary**

Although the Constitution of Mongolia includes an important clause that "all persons lawfully residing within Mongolia are equal before the law and the courts," this clause does not seem to apply when a necessity arises to question MPs.

Section 24.7 of Article 24 of the Law on the State Great Hural of 26 January 2006 states that "the sub-committee on the Immunity of Members of Parliament shall comprise four members who have been elected to the Parliament the most number of times, and these members shall review the proposals submitted by relevant bodies and authorities mentioned in this law to suspend or terminate the mandate of a Member of Parliament. They will reach a unanimous conclusion on the issue and present their conclusion to relevant Standing Committees and the plenary session of the State Great Hural." The petition argues that the section concerning the "unanimous conclusion" violates relevant clauses of the Constitution. In this case, Section 3 of Article 29 of the Constitution which declares that "if a question arises that a member of the State Great Hural is involved in a crime, it shall be considered by the session of the State Great Hural to decide on the suspension of his/her mandate" can no longer be executed because of the necessity of a unanimous conclusion by these four members, who must present the issue

to Standing Committees and the plenary session of the Parliament.

Upon receipt of this petition, the Constitutional Court of Mongolia began the dispute review process and found that the obstacle mentioned in the petition was already established in the operations of the State Great Hural. On two occasions the sub-committee on the Immunity of Members of Parliament has declined to submit to the Standing Committee and the plenary session a proposal submitted by the State General Prosecutor to suspend the mandate of a MP involved in a criminal activity on the basis that one member of the sub-committee failed to agree with the General Prosecutor's proposal.

This created a situation where legal organs cannot investigate and decide a case of a MP who has committed a criminal offense. In other words, a lawful opportunity has been created for a MP under question to avoid investigation if he/she could lobby one of the four members of the sub-committee based on party affiliation, friendship ties or other connections.

Case 3.

- **Identification**

a) Mongolia / b) Constitutional Tsets of Mongolia / c) 2012.02.08 / d) Number 01, Ulaanbaatar / e) - / f) Dispute on whether some provisions of the law on the implementation of the Social insurance Law and some other tax laws violate the relevant provisions in the Constitutions

- **Headnotes**

1.Social insurance law and some other tax law as well as leaving unregulated the protection of insured's rights and interests respectively violates the paragraph 5 and paragraph 6 in the Article 16, the Constitution of Mongolia.

1. To repeal the Resolution No.03 dated 05 January 2012 of the State Great Hural of Mongolia "on the Conclusion No.04 dated 2011 of the Constitutional Court".
2. No mention that this resolution is effective upon its issuance.

- **Summary**

The main ground for the enjoyment of the right, of any Mongolian citizen, enshrined in the Constitution of Mongolia, which is a 'right to material and financial assistance in old age, disability, childbirth and child care and in other circumstances as provided by law' arises upon the citizen's or employee's registration of certain funds of the social insurance or accumulation of monetary asset. Such monetary assets accumulated in the social insurance fund are formulated as "social insurance premium". This way, the insured citizen, for the purpose of exercising his right under the Constitution, pays the social insurance premium of 10% and the employer 10% of the wage, in the event he is employed. Then, according to the Law on the Implementation of the 2007 Social Insurance Law and some other Tax Law, releasing the employer from his obligation to transfer to the social insurance fund on behalf of the citizen or employee by the state (State Great Hural), violates the right to material and financial assistance in old age, disability, childbirth and child care and in other circumstances as provided by law under the Constitution, of all citizens or employees with pension accounts under their name, and all the citizens or employees who created an accumulation in other cases. Because of the release of employers from the obligation to pay social insurance premiums on behalf of the citizens, or employees through adoption of the law by the state (State

Great Hural) there arises a blank space which is equal to the amount of released assets in the pension account of the citizen or employee, as well as the social insurance fund, and the state is not held liable to compensate such assets.

This dispute has been discussed in the Middle Bench Session of the Constitutional Court, dated 7 December 2011 and 4th conclusion has been issued.

9. Myanmar

Constitutional Tribunal of the Union

Summary

The Constitutional Tribunal of the Union was established in 2011 and consists of 9 members. Its functions and duties include the following: To interpret the provisions of the Constitution, to review the constitutional conformity of laws and executive measures, to resolve competence disputes, to review matters intimated by the President relating to Union territory, and to perform functions and duties conferred by laws enacted by the legislature. The Office of the Tribunal includes organizational units such as the Administrative Division, the Procedural and Research Division and the Judicial Division. The Procedural and Research Division conducts research on whether promulgated laws are in conformity with the Constitution, and sends the decisions of the Tribunal to the respective institutions for publication in the state official gazette. Furthermore, it publishes research papers of the Tribunal's researchers. It also enacts orders, directives and procedures, and conducts research on constitutions, judgements, existing laws and international laws. Subjects of research include the constitutional adjudicatory bodies, political systems, elections, administration, legislation and judicial branches of other countries.

Content

A. Introduction

A1. History

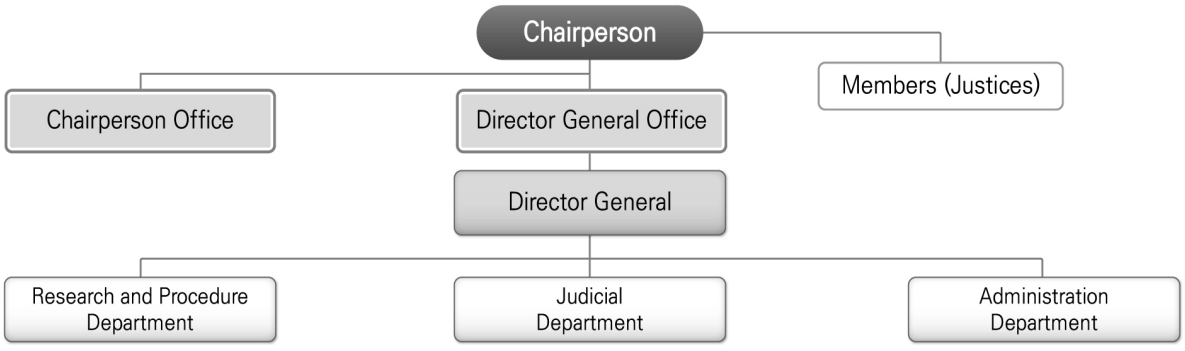
The Constitution of the Union of Myanmar was ratified by referendum on 10th May 2008 and promulgated on 29th May 2008. It entered into forced on 31st January 2011, which was the first day of the first meeting of Pyidaungsu Hluttaw (Union Parliament). According to this Constitution, the Constitutional Tribunal of the Union of Myanmar arises on 30th March 2011 that came into being for the first time in the history of Myanmar.

The main objective of the Constitutional Tribunal of the Union of Myanmar is to protect and upholds the Constitution. The key goal of the Constitutional Tribunal is to implement the activities of the State Institutions, or individual or organizations in the State to be in alignment with the Constitution. There are nine members including the Chairperson in the Constitutional Tribunal.

A2. Basic Texts

- Constitution of the Republic of the Union of Myanmar (enacted 2008, amended 2015): Schedule 2 and 5
- The Law of the Constitutional Tribunal (enacted 28th October 2010, amended on 21st March 2013 and 5th November 2014)
- The Rules of the Constitutional Tribunal (enacted on 6th August 2015)

B. Organization



B1. Chairperson

The Chairperson of the Constitutional Tribunal shall be appointed by the President with the approval of the Pyidaungsu Hluttaw (Union Parliament) among its members. He or she represents the Constitutional Tribunal, takes charges of its affairs and directs and supervises all of the staff under his or her authority.

The Chairperson of the Constitutional Tribunal presides over the Full Bench of the Constitutional Tribunal.

B2. Members of the Constitutional Tribunal

In respect of the appointment of the chairperson and members of the Tribunal, the qualification, appointment of new members, selection of members, causes for impeachment, term of the Tribunal are provided in Section 327 to Section 335 of this Constitution.

The Constitutional Tribunal of the Union shall consist of nine members appointed by the President with the approval of the Pyidaungsu Hluttaw (Union Parliament). Of these, three shall be chosen by the Speaker of the Pyithu Hluttaw (Lower House), three shall be chosen by the Speaker of the Amyotha Hluttaw (Upper House) and three shall be chosen by the President. The term of the Constitutional Tribunal of the Union is the same as that of the Pyidaungsu Hluttaw (Union Parliament) being five years.

As the Tribunal is formed with 9 members, if the Chairperson or one of the members is not available, we may say that composition of the Tribunal becomes incomplete. It means the adjudication proceedings which need oversight by all members shall not be performed.

B3. Structure of the Office

The Constitutional Tribunal is composed of 64 officers which include the Director General and 134 staff members working in related departments. Among them, 33 personnel are assigned to the Chairperson's Office and 165 personnel are assigned to the Director General Office.

B3-1. Chairperson Office

The duties and functions of the Chairperson's Office are to perform all administrative matters of the Justices including arrangement of deliberation meeting, meeting with domestic and foreign dignitaries, local and foreign trips and to support the judicial administration of Justices.

B3-2. Director General Office

The Director General manages and instructs all administrative matters. He supports judicial administrative matters for judicial proceedings. There are 3 Departments in the Director General Office which are respectively led by each Director. They are as follows;

- **Judicial Department:** Judicial Department is assigned to prepare necessary judicial work for court hearing procedures, receiving submissions and assist logistic and technical matters to Justices.
- **Procedural and Research Department:** Procedure and Research Department has the tasks of research, publishing the research papers and final decisions of the Tribunal, library management, conducting the information and technology matters and arranging the international and local training courses for the staff.
- **Administrative Department:** Administrative Department performs the general administration of all staff, supervising all financial and budget matters and administering the internal security measures for the Constitutional Tribunal.

C. Jurisdictions

The functions and the duties of the Tribunal are to interpret the provisions under the Constitution; to vet 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; to vet 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; to decide 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 a Self-Administered Area and among the Self-Administered Areas; to decide 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; to vet and deciding matters intimated by the President relating to the Union Territory; to perform the functions and duties conferred by laws enacted by the Pyidaungsu Hluttaw (Union Parliament).

C1. Submission to obtain the interpretation, resolution and opinion of the Constitutional Tribunal of the Union

The persons entitled to present the submission to the Tribunal are the President, Speaker of the Pyidaungsu Hluttaw (Union Parliament), Speaker of the Pyithu Hluttaw (Lower House), Speaker of the Amyotha Hluttaw (Upper House), the Chief Justice of the Union Supreme Court, the Chairperson of the Union Election Commission, Chief Minister of the Region or State and Speaker of the Region Parliament or State Parliament, the Chairperson of the Self-Administered Division Leading Body or the Self- Administered Zone Leading Body, representatives numbering at least ten percent of all the representatives of the Pyithu Hluttaw (Lower House) or the Amyotha Hluttaw (Upper House), in a prescribed means.

According to the above mentioned provision, the Tribunal shall admit a submission and make a decision only as and when the submission is presented by those who are entitled to make submission through proper channels.

C2. The Decision of the Tribunal

All members of the Tribunal including the Chairperson have the right as well as the obligation to be present and attend hearings. However, if a member is unable to attend and the cause of absence is acceptable, it shall be permitted that the remaining 5 members and the Chairperson, a total of 6 persons shall be present at the hearing. However, the case cannot be heard if the said quorum is not obtained.

The Tribunal shall pass the final verdict only with the consent of 6 members including the Chairperson. The decision of the Tribunal shall not be affected if the quorum is not fulfilled. The members may express their dissenting opinion during deliberations but it may not be reflected in the decision. It shall be kept in record.

According to Section 324 of the Constitution and Section 24 of the Tribunal Law, the decision of the Tribunal shall be final and conclusive. The decision upon the submission presented by a Court under Section 12, Sub-Section (g) of the Tribunal Law shall be effected in all similar cases as stipulated in Section 23 of the Tribunal Law. It signifies that the right to appeal or the right to revision by the parties is not allowed. In

adjudicating the submission, the Tribunal has to apply the procedures set out in Section 22 of the Tribunal Law and other existing Procedural Laws. Section 35 of the Tribunal Law provides that the judgment passed by the Tribunal shall be declared in the State Gazette. Judgments shall be bound and published for reference and kept as precedent cases.

The Tribunal is bound only to the cases such as the interpretation of the Constitution, decision on the constitutional dispute, constitutionality of the dispute and conflict of rights and duties of the Union. In other words, the decisions of the Tribunal are effected only to the points, namely, which parties are right or wrong or what rights and liabilities are imposed on which of the disputing parties. The Tribunal has no power to enforce its decision on the disputing parties, persons concerned or relevant organizations. Since the decision of the Tribunal is based on the Constitution, the concerned parties, persons, organizations are committed to apply and obligated to comply with the Constitution as dutiful citizens. Those parties, organizations who are not in compliance with the Constitution, shall face lawful action under Institutional Law of the organizations concerned.

The role of the Tribunal becomes very important as it protects and safeguards the Constitution. One may realize the importance of the decision of the Tribunal as it is based solely on the Constitution.

Annex

Annex 1. Case Statistics since establishment (2011-2017)

Year	Total	Interpretation	Resolution	Opinion	Review case	Withdraw case
2011	3	1	1	1		1
2012	3	2	-	-	1	-
2013	-	-	-	-	-	-
2014	5	3	1	1	-	2
2015	1	1	-	-	-	-
2016	1	1	-	-	-	-
2017	1	-	-	1	-	-

Annex 2. Cases

▸ **Identification**

a) Country, b) Name of the Court, c) Date of decision given, d) Number of the decision, e) Jurisdiction, f) Title of the decision

▸ **Headnotes**

▸ **Summary**

Case 1.

▸ **Identification**

a) Myanmar / b) Constitutional Tribunal / c) 14-7-2011 / d) Submission No.1/2011 / e) Resolution / f) Chief Justice of the Union Supreme Court Vs the Ministry of Home Affairs

▸ **Headnotes**

The Chief Justice of the Union Supreme Court submitted the submission to the Constitutional Tribunal questioning the legality of conferring the first class judicial power to the sub-township administrative Officers as requested by the Ministry of Home Affairs.

▸ **Summary**

Criminal jurisdictional power in the Union of Myanmar is varied from time to time. Before independence, judicial functions were jointly carried out by the administrative officers. After the independence in 1948, the High Court and the Supreme Court were established under the Constitution of the Union of Myanmar, 1947. The then judicial system allowed to confer the power of the Criminal jurisdiction to both the Judges and the Staff of General Administration Department as Magistrates. When the Revolutionary

Council took the power in 1962, the new Judiciary System so call People's Court System was established. The powers of the criminal jurisdiction were granted to the People's Courts. During the tenure of the State Law and Restoration Council and the State Peace and Development Council, Supreme Court, State or Divisional Court and Township Court were formed. Sub-township administrative officers were conferred the power of criminal jurisdiction in areas that were needed. Due to these reasons, the Ministry of Home Affairs submitted the Supreme Court to empower the First Class Magistrate power to 27 sub-townships administrative officers as judicial officers.

The Tribunal held that the provisions of the 2008 Constitution clearly stipulate that the legislative power, the executive power and the judicial power of the Union shall be separately exercised. The Judicial power empowered to the Courts and Judges are clearly prescribed in the Constitution. Therefore, the exercise of the judicial power is permitted only to those Judges who are empowered by the Constitution. The conferring of the judicial power to administrative officers of the General Administration Department of the Ministry of Home Affairs is not in conformity with the Constitution.

Case 2.

- **Identification**

a) Myanmar / b) Constitutional Tribunal / c) 14-12-2011 / d) Submission No.2/2011 / e) Interpretation / f) Dr. Aye Maung and 22 representatives Vs The Republic of the Union of Myanmar

- **Headnotes**

22 representatives of the National Parliament including Dr. Aye Maung presented the submission questioning whether the status of Ministers of the National Races Affairs is equal to that of the Ministers of the Region or State concerned and whether they are entitled to the emoluments, allowances and insignia of office as the Ministers of the Region or State.

- **Summary**

Dr. Aye Maung and 22 representatives of the National Parliament presented the submission questioning whether the term "Minister of the National Races Affairs" used in Section 5 of the Law of Emoluments, Allowances and Insignia for Representatives of the Region or State is excluded from the term of the "Ministers of the Region or State". If they are excluded, their claim to the entitlement of emoluments, allowances and insignia as the Ministers of the Region or State are eligible or not. It is also questioning whether Section 2(f), 3(a), 4(c) and 48 of the Region or State Government Law are in conformity with the Constitution or not.

The Tribunal affirms that the current submission falls outside the scope of its competence and decided that the Tribunal is not in the position to intervene upon the submission, questioning the constitutionality of the appointment of Lisu and Rawn national races Ministers in Kachin State and similarly the appointment of Lisu national races Minister in the Shan State.

Case 3.

- **Identification**

a) Myanmar / b) Constitutional Tribunal / c) 18-9-2014 / d) Submission No.1/2014 / e) Interpretation / f) Daw Dwe Bu and other 49 members of the Pyithu Hluttaw Vs The Republic of The Union of Myanmar

- **Headnotes**

The constitutionality of the preliminary objection to the submission made by Attorney-General's Office, Legal Consuls of Rawan, Lisu national races Ministers, Legal Consuls of Chief-Ministers of Kachin and Shan States Government ; Whether to accept or not the objection of the Union Attorney-General that the Tribunal has no competence to pronounce itself on this question.

- **Summary**

Daw Dwe Bu and other 49 members of the Pyithu Hluttaw has presented the submission to the Constitutional Tribunal through Speaker of the Union Parliament. The submission is related to question whether the appointment of National Races Affairs Ministers for Lisu and Rawan races in Kachin State is in conformity with the Constitution or not.

The Tribunal affirms that the current submission falls outside the scope of its competence and decided that the Tribunal is not in the position to intervene upon the submission, questioning the constitutionality of the appointment of Lisu and Rawn national races Ministers in Kachin State and similarly the appointment of Lisu national races Minister in the Shan State.

Case 4.

- **Identification**

a) Myanmar / b) Constitutional Tribunal / c) 27-2-2015 / d) Submission No.5/2014 / e) Interpretation / f) U Aung Kyi Nyunt and other 25 members of the Amyotha (National Parliament) Hluttaw

- **Headnotes**

The question of the constitutionality of the law, which is aimed to be enacted for exercising PR System in the election of Amyotha (National) Hluttaw proposed by Amyotha Hluttaw.

- **Summary**

U Aung Kyi Nyunt and other 25 members of Amyotha (National Parliament) Hluttaw has presented the submission on the question of the constitutionality of Proportional Representation System for the election of Amyotha (National) Hluttaw.

The Tribunal determines that the submission is not ripe to seek a decision from the Tribunal. It has, as yet, not covered the scope needed for the jurisdiction of the Tribunal. As a result, the Tribunal has dismissed the submission.

Case 5.

- **Identification**

a) Myanmar / b) Constitutional Tribunal / c) 11-5-2015 / d) Submission No.1/2015 / e) Interpretation / f) Dr. Aye Maung and other 23 members of the Amyotha (National) Hluttaw

- **Headnotes**

The constitutionality of Section 11(a) of the Bill of the Referendum Law for amending the Constitution, which allows the right to vote to the holders of Temporary Identity Cards.

- **Summary**

Dr. Aye Maung and 23 MPs from Amyotha (National) Parliament brought the submission to the Tribunal, requesting to check the constitutionality of the Bill of the Referendum Law for amending the Constitution. They questioned one of the provisions of the Referendum Law most specifically Section 11(a) that provide the holders of Temporary Identity Cards shall have the right to vote in the Referendum.

Under the Presidential Notification, validity of the cast votes under Referendum Law, it is not in accord with the Constitution, particularly with regard to Section 38(a), Section 391(a) and Section 391(b). Therefore, the Tribunal ordered that Section 11(a) of the Bill of the Referendum Law for amending the Constitution (2008) which permits holders of the Temporary Identity Cards are not in accordance with the Constitution.

Case 6.

- **Identification**

a) Myanmar / b) Constitutional Tribunal / c) 19-1-2017 / d) Submission No.01/2016 / e) Interpretation, f) U Sai Than Naing and other 23 members of the Amyotha (National) Hluttaw Vs The Pyidaungsu Hluttaw

- **Headnotes**

To interpret Article 333(d)(4) "person who is, in the opinion of the President, an eminent jurist."

- **Summary**

U Sai Than Naing and other 22 members of the Amyotha (National) Hluttaw has presented the submission to the Tribunal, requesting to interpret Article 333(d)(4) of the Constitution (2008) "person who is, in the opinion of the President, an eminent jurist."

An issue in the submission is not to interpret a provision included in the Constitution (2008). This submission is not concerned with the provision of Section 322(a) of the Constitution (2008), as it is a matter of the contradiction between the Constitution and the existing Law.

The Tribunal determines that this submission is not in accordance with Section 322(a) of the Constitution (2008). As a result, the Tribunal has dismissed the submission.

Case 7.

- **Identification**

a) Myanmar / b) Constitutional Tribunal / c) 21-9-2017 / d) Submission No.1/2017 / e) Opinion / f) Brigadier General Maung Maung and other 49 of the Pyithu Hluttaw (Lower House) Representatives who are the Defence Services personnel Vs The Pyidaungsu Hluttaw (Union Parliament)

- **Headnotes**

The constitutionality of the opinion which includes the provision and composition of the commissions by Pyidaungsu Hluttaw in the Law Amending the Law Relating to the Pyidaungsu Hluttaw (2014) and other related sections.

- **Summary**

Brigadier General Maung Maung and other 49 of the Pyithu Hluttaw Representatives who are the Defence Services personnel have presented the submission on the question of the constitutionality of the opinion which is included in the provision and composition of the commissions by Pyidaungsu Hluttaw in the Law Amending the Law Relating to the Pyidaungsu Hluttaw (2014) and in other related sections.

The Tribunal determines that the Law Amending the Law Relating to the Pyidaungsu Hluttaw (2014) is not contrary to the Constitution (2008). As a result, the Tribunal has dismissed the submission.

10. Pakistan

Supreme Court

Summary

Established in 1956, the Supreme Court of Pakistan is the highest appellate court of the country. The Judicial Commission of Pakistan plays an important role in the appointment of Judges of the superior courts, including Judges of the Supreme Court. The President of Pakistan appoints the senior Judge of the Supreme Court as Chief Justice. At any time when the office of a Judge of the Supreme Court is vacant or a Judge of the Supreme Court is absent or is unable to perform the function of the office, the President may appoint an Acting Judge. In other cases, such as when it is necessary to increase the number of Judges of the Supreme Court, the Chief Justice in consultation with the Judicial Commission may, with the approval of the President, request any retired Judge of the Supreme Court to attend sittings/proceedings of the Supreme Court as an ad hoc Judge for a period as may be necessary. The administration of the Court is headed by the Registrar, functioning under the overall supervision of the Chief Justice. To provide a specific remedy in matters relating to infringements of fundamental rights, the Supreme Court of Pakistan operates the Human Rights Cell. It is mandated to expeditiously process complaints and grievances received from the general public. The main jurisdictions of the Supreme Court of Pakistan can be broadly summarized under the following headings: Original jurisdiction, appellate jurisdiction, and advisory jurisdiction. The Supreme Court also has the power to transfer cases, and issue legally enforceable directions, orders or decrees for the purpose of doing justice in any case or matter pending before the Court.

Content

A. Introduction

A1. History

The Supreme Court of Pakistan is the highest appellate court of the country and court of last resort. It is the final arbiter of the law and the Constitution. Its orders/decisions are binding on all other courts in the country. All executive and judicial authorities are bound to act in aid of the Supreme Court. The Constitution contains elaborate provisions on the composition, jurisdiction, powers and functions of the Court. The qualifications for and mode of appointment of judges, the age of retirement, the grounds and procedure for removal and the terms and conditions of service of judges are elaborately prescribed. The Constitution provides for the independence of the judiciary and its separation from the executive. The Constitution assigns the Supreme Court a unique responsibility of maintaining harmony and balance between the three pillars of the State, namely, the Legislature, the Executive and the Judiciary. As guardian of the Constitution, the Court is required to preserve, protect and defend this basic document.

The Supreme Court was created under the Constitution of 1956. It succeeded the Federal Court, set up in 1948, which was successor to the Federal Court of India, established in 1937. Since its creation in 1956, the Supreme Court has retained its name and jurisdiction through the successive legal instruments including the Constitution of 1973.

The Constitution of 1956 provided that the Supreme Court shall sit in Karachi and at such other place as the Chief Justice of Pakistan, with the approval of the President, may decide. The Court was housed initially at Karachi but later on shifted to Lahore and housed in the High Court building. The 1973 Constitution provided for the permanent seat of the Court at Islamabad. The non-availability of funds, however, prevented the construction of the building. The Court shifted in 1974 from Lahore to Rawalpindi and was housed in an improvised building called East Pakistan House. The construction for a new building at Islamabad started in 1990. The work was completed and on 31st December 1993, the Court shifted to its new premises in Islamabad. The Court also has branch registries at each of the four provincial headquarters. Cases are filed at principal seat and/or branch registries. Benches of the Court rotate between the principal seat and branch registries to dispose of cases. With wide/broad jurisdiction of the Court, it is a great relief to the litigant parties to have easy and convenient access to justice, closer to their home town.

A2. Basic Texts

- Constitution of the Islamic Republic of Pakistan, 1973
  - Came into force on 14th August 1973
  - last amended on 24th December 2017
  - Total Articles 280
- The Supreme Court (*Number of Judges*) Act, 1997
- Supreme Court of Pakistan Rules, 1980

B. Organization

B1. Chief Justice

Under Article 175(A)(3) of the Constitution of Pakistan, 1973, the President of Pakistan shall appoint the senior Judge of the Supreme Court as the Chief Justice of Pakistan.

The Judicial Commission of Pakistan has been constituted under Article 175A of the Constitution of Pakistan for the appointment of Judges of the superior courts. The Chief Justice of Pakistan acts as a Chairman of the Judicial Commission. For each anticipated or actual vacancy of a Judge in the Supreme Court or the Chief Justice of the Federal Shariat Court or the Chief Justice of a High Court, the Chief Justice of Pakistan shall initiate nominations in the Commission for appointment against such vacancy. Similarly, the Chief Justice of the Federal Shariat Court and High Courts shall initiate and send nomination for appointment against anticipated or actual vacancy of a Judge to the Chairman of the Commission. The Commission by majority of its total membership shall nominate to the Parliamentary Committee one person, for each vacancy of a Judge in the Supreme Court, Federal Shariat Court and High Courts as the case may be. The Parliamentary Committee shall send the name of the nominee confirmed by it or deemed to have been confirmed to the Prime Minister who shall forward the same to the President for appointment.

Federal Review Board consisting of a Chairman and two members, each of whom is or has been a judge of the Supreme Court or a High Court, for reviewing orders made under a law providing for preventive detention;

An arbitrator to determine any question arising as to whether any conditions imposed on any provincial government are lawfully imposed, or whether any refusal by the federal government to entrust functions is unreasonable with respect to broadcasting and telecasting.

Administers Oath to the:
- President of Pakistan
- Chief Election Commissioner
- Auditor General of Pakistan
- Judges of the Supreme Court

The Chief Justice nominates a Judge of the Supreme Court to act as Chief Election Commissioner, during the absence of the Chief Election Commissioner; and Judges of the Supreme Court to various bodies of the Bar, e.g., Disciplinary Committees, Syndicates, Governing Bodies of universities, etc.

Ex-officio Chairman of:
- Supreme Judicial Council
- Judicial Commission of Pakistan
- Law and Justice Commission of Pakistan
- National Judicial (Policy Making) Committee
- Governing Body, Access to Justice Development Fund
- Federal Judicial Academy
- Al-Mizan Foundation

  - **Administrative Powers:** The Chief Justice under administrative powers appoints/removes, officers/staff of the Court and upgrades/downgrades posts; and has financial powers to sanction expenditure and re-appropriate funds within the

budgetary allocation of the Court.

- **Court Roster:** Prepares Court Roster and constitutes benches of the Court to hear cases.
- **Heads Benches:** The Chief Justice heads benches for hearing cases.
- **Presides Meetings:** The Chief Justice presides over the Full Court meetings and leads in taking important policy decisions.
- **Court Supervision:** The Chief Justice supervises the Court administration, deals with cases of leave of the Judges and acts as intermediary between the Court and the judicial system.
- **Formulation of Policies:** The Chief Justice initiates internal Court operational policies for early disposal of cases, delay reduction and case flow management.
- **Assigns Judges with Specialized Work:** The Chief Justice assigns the Judges with responsibilities to assist him in formulation of policies and court management.
- **Court Business:** The Chief Justice prescribes the working hours, Court business and holidays.
- **Conducts Judicial Conferences and Seminars:** The Chief Justice conducts conferences and seminars for the improvement of administration of justice in the country.

The Constitution of the Islamic Republic of Pakistan under Article 176 envisages that the number of Judges of the Supreme Court of Pakistan shall be determined by an Act of Parliament. In the light of this provision "The Supreme Court (Number of Judges) Act, 1997" has determined that the number of the Judges of the Supreme Court of Pakistan other than the Chief Justice shall be sixteen.

A person with five years' experience as a Judge of the High Court or 15 years' experience as advocate of the High Court is eligible to be appointed as a Judge of the Supreme Court.

The Chief Justice of Pakistan and each of the other judges of the Supreme Court shall be appointed by the President in accordance with Article 175A, inserted through the 18th and 19th Constitutional amendments.

These Constitutional amendments provide for the constitution of the Judicial Commission of Pakistan and Parliamentary Committee. The Judicial Commission of Pakistan consists of the Chief Justice of Pakistan as Chairman, four senior most judges of the Supreme Court, one former Chief Justice or judge of the Supreme Court nominated by the Chairman in consultation with four member judges for a period of two years, the Attorney General for Pakistan, the Federal Law Minister and a senior advocate of the Supreme Court of Pakistan nominated by the Pakistan Bar Council. Similarly, the Parliamentary Committee consists of eight members with equal membership from the Treasury and Opposition Benches as well as of the two Houses i.e. the National Assembly and the Senate. The nomination of the members from the Treasury Benches shall be made by the Leader of the House and from Opposition Benches by the Leader of the Opposition, provided that when the National Assembly is dissolved, the total membership of the Parliamentary Committee shall consist of the members from the Senate only.

The Judicial Commission of Pakistan shall nominate a name for the appointment as

judge of the Supreme Court in majority after evaluating professional competency and antecedents. The recommendations of the Judicial Commission are sent to the Parliamentary Committee. The Committee after receipt of nomination from the Commission may confirm the nominee by majority of its total membership within fourteen days, failing which the nomination shall be deemed to have been confirmed. However, the Committee may not confirm the nomination for reasons to be recorded, by three-fourth majority within said period and forward it to the Commission through the Prime Minister and in such case the Commission shall send another nomination. The Committee shall send the name of the nominee confirmed by it or deemed to have been confirmed to the Prime Minister who shall forward the same to the President for appointment.

The Constitution of the Islamic Republic of Pakistan, 1973, provides for the Council, consisting of the Chief Justice, two most senior Judges of the Supreme Court and the two most senior Chief Justices of the High Courts. The Council is entrusted with twofold functions, the first is to hold enquiry into a charge of misconduct against a superior Court Judge or into the mental or physical incapacity of any such Judge on a reference by the President or on information received to the Council; the second is to issue a code of conduct for the observance by the judges of the Superior Courts

B2. Acting Judges

At any time when the office of a Judge of the Supreme Court is vacant or a Judge of the Supreme Court is absent or is unable to perform the function of his office due to any other cause, the President may appoint a Judge of a High Court as Acting Judge of the Supreme Court if he is qualified as Judge of the Supreme Court. The retired Judge of a High Court can also be appointed as acting Judge of the Supreme Court if he fulfils the qualifications provided under Article 177 of the Constitution.

B3. Ad hoc Judges

An ad hoc Judge can be appointed under Article 182 of the Constitution, the reason for the appointment of ad hoc Judges is that if at any time it is not possible to hold or continue a sitting of the Supreme Court due to shortage, ad hoc Judges/Judge may be appointed. Apart from the above reason, it is also provided that for any other reason if it is necessary to increase temporarily the number of Judges of the Supreme Court, the Chief Justice of Pakistan in consultation with the Judicial Commission may, with approval of the President request any retired Judge of the Supreme Court to attend sittings/proceedings of the Supreme Court as an ad hoc Judge for such period as may be necessary. The ad hoc Judge shall have the same power and jurisdiction as a Judge of the Supreme Court. A retired Judge is qualified for appointment who has ceased to hold office of Judge of the Supreme Court, but a period of 3 years has not elapsed. A Judge of a High Court can also be requested to attend sittings of the Supreme Court as ad hoc Judge. The appointment of a High Court Judge as an ad hoc Judge requires consent of the Chief Justice of the High Court concerned along with the approval of the President.

B4. Court Administration

The administration of the Court, headed by the Registrar, functions under the overall supervision of the Chief Justice of Pakistan. In the performance of his functions under the judicial rules, the Registrar is aided and assisted by the Additional Registrar, Deputy Registrars, Assistant Registrars and the respective branches on the judicial side. The Secretary to the Chief Justice, Research & Reference Officers, Librarian, Private Secretaries

to the Judges, Court Associates and Assistant Librarian provide services in their respective spheres. The administration and general branches headed by the Deputy Registrars provide to the Registrar spade work in their respective spheres. The Court, with the approval of the President, is empowered to make rules providing for appointment of its staff and determining the terms and conditions of their service. Such rules empower the Chief Justice to exercise, in respect of officers and servants of the Court, the same powers as the President exercises in respect of the Federal Government employees.

The Registry provides administrative services to the Court for carrying out its judicial functions. It prepares the cases for fixing before a bench and assists the Court in case flow management. The Registry provides information and assistance to advocates and the general public on legal procedures and formalities for filing cases and completing the record. It prepares cause lists and intimates fixation of cases to parties, advocates-on-record, advocates and litigants appearing in person. It conveys the judgments and orders of the Court to the concerned quarters for implementation and compliance and maintains the Court records.

B5. Human Rights Cell

To provide an expeditious and inexpensive remedy in matters relating to infringements of Fundamental Rights enshrined in Chapter II of the Constitution, a Human Rights Cell has been established in the Court. The Cell functions under the direct supervision of the Hon'ble Chief Justice of Pakistan. It is mandated to expeditiously process the complaints and grievances received from the general public by post addressed to the Hon'ble Chief Justice of Pakistan. Reports and comments are called from the concerned quarters under the orders of the Hon'ble Chief Justice of Pakistan and the matters disposed of. The cases requiring hearing are fixed in Court and are decided there. Relief is provided to the poor persons without going through the traditional protracted litigation process.

The public interest litigation in this form paved the way for bringing various statutory reforms in matters of general public importance, e.g. the enactment of the Human Organ Transplantation Ordinance 2007, the Prohibition of Smoking at Public Places Ordinance, etc.

Quick provision of relief to the common man without any expense has generated a high degree of trust and confidence of the general public in the judiciary as a whole and the apex Court in particular. The Human Rights exercise has also played a pivotal role in eliminating social evils like Vani, Karo-Kari, dangerous kite-flying etc., which were rampant in the society to the detriment of the common man.

C. Jurisdictions

C1. Jurisdictions

The Constitution of the Islamic Republic of Pakistan, 1973 provides the following jurisdictions and powers to the Supreme Court of Pakistan:

▸ **Original Jurisdiction**

Article 184.

(1) The Supreme Court shall, to the exclusion of every other court, have original jurisdiction in any dispute between any two or more Governments.

Explanation.—In this clause, "Governments" means the Federal Government and the Provincial Governments.

(2) In the exercise of this jurisdiction conferred on it by clause (1), the Supreme Court shall pronounce declaratory judgments only.

(3) Without prejudice to the provisions of Article 199, the Supreme Court shall, if it considers that a question of public importance with reference to the enforcement of any of the Fundamental Rights conferred by Chapter 1 of Part II, is involved, have the power to make an order of the nature mentioned in said Article.

▸ **Appellate Jurisdiction**

Article 185.

(1) Subject to this Article, the Supreme Court shall have jurisdiction to hear and determine appeals from judgments, decrees, final orders or sentences of a High Court.

(2) An appeal shall lie to the Supreme Court from any judgment, decree, final order or sentence of a High Court-

(a) if the High Court has on appeal reversed an order of acquittal of an accused person and sentenced him to death or to transportation for life or imprisonment for life; or, on revision, has enhanced a sentence to a sentenced as aforesaid; or

(b) if the High Court has withdrawn for trial before itself any case from any court subordinate to it and has in such trial convicted the accused person and sentenced him as aforesaid; or

(c) if the High Court has imposed any punishment on any person for contempt of the High Court; or

(d) if the amount or value of the subject-matter of the dispute in the court of first instance was, and also in dispute in appeal is, not less than fifty thousand rupees or such other sum as may be specified in that behalf by Act of [Majlis-e-Shoora (Parliament)] and the judgment, decree or final order appealed from has varied or set aside the judgment, decree or final order of the court immediately below; or

(e) if the judgment, decree or final order involves directly or indirectly some claim or question respecting property of the like amount or value and the judgment, decree or final order appealed from has varied or set aside the judgment, decree or final order of the court immediately below; or

(f) if the High Court certifies that the case involves a substantial question of law as to the interpretation of the Constitution.

(3) An appeal to the Supreme Court from a judgment, decree, order or sentence of a High Court in a case to which clause (2) does not apply shall lie only if the Supreme

Court grants leave to appeal.

- **Advisory jurisdiction**

Article 186.

(1) If, at any time, the President considers that it is desirable to obtain the opinion of the Supreme Court on any question of law which he considers of public importance, he may refer the question to the Supreme Court for consideration.

(2) The Supreme Court shall consider a question so referred and report its opinion on the question to the President.

- **Power to Transfer Cases**

Article 186A. The Supreme Court may, if it considers it expedient to do so in the interest of justice, transfer any case, appeal or other proceedings pending before any High Court to any other High Court.

- **Issue and execution of processes of the Supreme Court**

Article 187.

(1) Subject to clause (2) of Article 175, the Supreme Court shall have power to issue such directions, orders or decrees as may be necessary for doing complete justice in any case or matter pending before it, including an order for purpose of securing the attendance of any person or the discovery or production of any document.

(2) Any such direction, order or decree shall be enforceable throughout Pakistan and shall, where it is to be executed in a Province, or a territory or an area not forming part of a Province but within the jurisdiction of the High Court of the Province, be executed as if it had been issued by the High Court of that Province.

(3) If a question arises as to which High Court shall give effect to a direction, order or decree of the Supreme Court, the decision of the Supreme Court on the question shall be final.

C2. Review of Judgments of Orders

The Supreme Court has the power to subject to review any judgment pronounced or any order made by it subject to two conditions (i) Provisions of any Act of Parliament; and (ii) any rule made by the Supreme Court. Under Supreme Court Rules Part (iv), Order XXVI, section (1), the Court reviews its judgements or orders in Civil Proceedings on the grounds similar to those mentioned in Order KLVII, Rule (1) of the Code and in a Criminal Proceedings on the grounds of an error apparent on the face of the record. An error may be ground for review, it is necessary that it must be one which is apparent on the face of the record, that is, it must be so manifest, so clear that no court could permit such error to remain on the record. A review proceeding is neither in the nature of rehearing of the whole case, nor is it an appeal against the judgement under review. (Article 188)

C3. Decision of the Supreme Court binding on other courts

All decision of the Supreme Court shall be binding on all other Courts in Pakistan to the extent of law on which the decision is based. It is quite clear that only a decision of the Supreme Court shall be binding which fulfils any of the following conditions: (i) it decides a question of law; or (ii) if it is based upon a principle of law; or (iii) if it enunciates a principle of law. (Article 189.)

C4. Action in aid

All executive and judicial authorities throughout Pakistan shall act in aid of the Supreme Court. Since the law declared by the Supreme Court is binding on all courts in Pakistan, therefore all executives and judicial authorities throughout Pakistan are bound to act in aid of the Supreme Court. The non-implementation of the judgement of the Supreme Court means a disregard of provision of Article 190. Therefore, a person identified as responsible for non-implementation of the judgment of the Supreme Court can be punished by the court for contempt and disobedience of the Supreme Court judgment. (Article 190)

Annex

Annex 1. Case Statistics

1-1. Since establishment (1950 - 2017)

A. Institution, Disposal and Pendency of Appeals in the Supreme Court of Pakistan from 1950 to December, 2017

Year	Last Balance	Fresh Institution	Total	Disposal	Pending
1950	0	25	25	11	14
1951	14	31	45	19	26
1952	26	53	79	31	48
1953	48	65	113	95	18
1954	18	50	68	48	20
1955	20	140	160	92	68
1956	68	63	131	42	89
1957	89	44	133	59	74
1958	74	1	75	16	59
1959	59	210	269	91	178
1960	178	288	466	285	181
1961	181	287	468	285	183
1962	183	382	565	273	292
1963	292	454	746	326	420
1964	420	367	787	316	471
1965	471	392	863	379	484
1966	484	371	855	384	471
1967	471	328	799	335	464
1968	464	426	890	341	549
1969	549	829	1378	359	1019
1970	1019	541	1560	343	1217
1971	1217	118	1335	350	985
1972	985	138	1123	387	736
1973	736	166	902	249	653
1974	653	174	827	259	568
1975	568	207	775	225	550
1976	550	1208	1758	170	1588
1977	1588	603	2191	182	2009
1978	2009	1284	3293	579	2714
1979	2714	765	3479	613	2866
1980	2866	1334	4200	410	3790
1981	3790	772	4562	536	4026
1982	4026	1127	5153	661	4492
1983	4492	1459	5951	1242	4709
1984	4709	541	5250	878	4372
1985	4372	978	5350	866	4484
1986	4484	1186	5670	1060	4610

Year	Last Balance	Fresh Institution	Total	Disposal	Pending
1987	4610	1130	5740	972	4768
1988	4768	1415	6183	1012	5171
1989	5171	2279	7450	1472	5978
1990	5978	1301	7279	5601	1678
1991	1678	1208	2886	1095	1791
1992	1791	4808	6599	4245	2354
1993	2354	1525	3879	1559	2320
1994	2320	1200	3520	692	2828
1995	2828	1872	4700	876	3824
1996	3824	4919	8743	3227	5516
1997	5516	1949	7465	2487	4978
1998	4978	3282	8260	3817	4443
1999	4443	1883	6326	2237	4089
2000	4089	3055	7144	1806	5338
2001	5338	3100	8438	3738	4700
2002	4700	2375	7075	1669	5406
2003	5406	1920	7326	1936	5390
2004	5390	2865	8255	1530	6725
2005	6725	3141	9866	2919	6947
2006	6947	3051	9998	3054	6944
2007	6944	3104	10048	3258	6790
2008	6790	2831	9621	1884	7737
2009	7737	4456	12193	3523	8670
2010	8670	4054	12724	3110	9614
2011	9614	3700	13314	3695	9619
2012	9619	3754	13373	3140	10233
2013	10233	4811	15044	3460	11584
2014	11584	4753	16337	5328	11009
2015	11009	3231	14240	3408	10832
2016	10832	4154	14986	3880	11106
2017	11106	3709	14815	3300	11515

B. Institution, Disposal and Pendency of Petitions in the Supreme Court of Pakistan from 1950 to December, 2017

Year	Last Balance	Fresh Institution	Total	Disposal	Pending
1950	0	9	9	1	8
1951	8	154	162	93	69
1952	69	141	210	186	24
1953	24	213	237	217	20
1954	20	205	225	210	15
1955	15	228	243	199	44
1956	44	278	322	268	54
1957	54	305	359	314	45
1958	45	408	453	408	45
1959	45	218	263	385	-122
1960	-122	199	77	251	-174
1961	-174	886	712	861	-149
1962	-149	1277	1128	1337	-209
1963	-209	1218	1009	1069	-60
1964	-60	1318	1258	1341	-83
1965	-83	2038	1955	1999	-44
1966	-44	1845	1801	1912	-111
1967	-111	2316	2205	1923	282
1968	282	1857	2139	2018	121
1969	121	1728	1849	1740	109
1970	109	1478	1587	1489	98
1971	98	640	738	230	508
1972	508	974	1482	489	993
1973	993	1092	2085	678	1407
1974	1407	633	2040	373	1667
1975	1667	5755	7422	4266	3156
1976	3156	2370	5526	1746	3780
1977	3780	2651	6431	2676	3755
1978	3755	2651	6406	1153	5253
1979	5253	2455	7708	2734	4974
1980	4974	2519	7493	3804	3689
1981	3689	3689	7378	2249	5129
1982	5129	3365	8494	2399	6095
1983	6095	2888	8983	3270	5713
1984	5713	3934	9647	2302	7345
1985	7345	3663	11008	3616	7392

Year	Last Balance	Fresh Institution	Total	Disposal	Pending
1986	7392	2935	10327	3486	6841
1987	6841	3803	10644	4379	6265
1988	6265	4429	10694	5942	4752
1989	4752	3534	8286	7528	758
1990	758	3999	4757	3621	1136
1991	1136	3560	4696	1604	3092
1992	3092	1818	4910	3033	1877
1993	1877	4983	6860	3671	3189
1994	3189	4879	8068	4263	3805
1995	3805	4735	8540	4663	3877
1996	3877	6749	10626	4978	5648
1997	5648	8400	14048	7742	6306
1998	6306	7089	13395	6934	6461
1999	6461	6530	12991	6371	6620
2000	6620	8647	15267	7732	7535
2001	7535	12143	19678	9433	10245
2002	10245	11472	21717	7878	13839
2003	13839	11070	24909	8393	16516
2004	16516	14656	31172	8408	22764
2005	22764	5052	27816	8336	19480
2006	19480	5602	25082	11457	13625
2007	13625	6398	20023	7260	12763
2008	12763	6976	19739	7082	12657
2009	12657	10091	22748	12548	10200
2010	10200	10857	21057	10306	10751
2011	10751	8783	19534	8611	10923
2012	10923	9066	19989	10465	9524
2013	9524	10877	22414	12017	8384
2014	8384	11164	19548	9440	10108
2015	10108	13433	23541	9163	14378
2016	14378	15328	29706	10579	19127
2017	19127	15747	34874	10649	24225

1-2. Last five years (2013-2017)

2013

A. Institution, Disposal and Pendency of Appeals

Year	Last Balance	Fresh Institution	Total	Disposal	Pending
2013	10233	4811	15044	3460	11584

B. Institution, Disposal and Pendency of Petitions

Year	Last Balance	Fresh Institution	Total	Disposal	Pending
2013	9524	10877	22414	12017	8384

2014

A. Institution, Disposal and Pendency of Appeals

Year	Last Balance	Fresh Institution	Total	Disposal	Pending
2014	11584	4753	16337	5328	11009

B. Institution, Disposal and Pendency of Petitions

Year	Last Balance	Fresh Institution	Total	Disposal	Pending
2014	8384	11164	19548	9440	10108

2015

A. Institution, Disposal and Pendency of Appeals

Year	Last Balance	Fresh Institution	Total	Disposal	Pending
2015	11009	3231	14240	3408	10832

B. Institution, Disposal and Pendency of Petitions

Year	Last Balance	Fresh Institution	Total	Disposal	Pending
2015	10108	13433	23541	9163	14378

2016

A. Institution, Disposal and Pendency of Appeals

Year	Last Balance	Fresh Institution	Total	Disposal	Pending
2016	10832	4154	14986	3880	11106

B. Institution, Disposal and Pendency of Petitions

Year	Last Balance	Fresh Institution	Total	Disposal	Pending
2016	14378	15328	29706	10579	19127

2017

A. Institution, Disposal and Pendency of Appeals

Year	Last Balance	Fresh Institution	Total	Disposal	Pending
2017	11106	3709	14815	3300	11515

B. Institution, Disposal and Pendency of Petitions

Year	Last Balance	Fresh Institution	Total	Disposal	Pending
2017	19127	15747	34874	10649	24225

Annex 2. Cases

Case 1.

▸ Identification

- Title: Waris Ali and others Vs. The State
- Court: Supreme Court of Pakistan
- Citation: (2017 SCMR 1572)

▸ Headnotes

Ss. 7(a) & 7(c)---Penal Code (XLV of 1860), Ss. 302(b), 449 & 458---Act of terrorism, qatl-i-amd, house-trespass in order to commit offence punishable with death. Conviction under S. 7 of Anti-Terrorism Act, 1997 converted to one under S. 302(b), P.P.C.---Report of the crime was lodged at the crime spot after more than two hours---Complainant lodged the crime report, instead of the injured witnesses, who could speak coherently at that time---Injured victims with bleeding wounds were kept at the spot for hours, till the police arrived, thus, question arose as to why they were not moved quickly to the hospital for medical aid and treatment---Admittedly, the motive for the crime related to the complainant and he should have been the prime target, however, he was not caused any harm during the occurrence and his life was spared---In the present case, the acts committed and executed were the consequence of personal motive and despite being gruesome in nature, no element of "terrorism" defined by the legislature was found---Parties had a blood feud since long and the object to be achieved was to take revenge---Conviction of the accused persons under S. 7(a) of the Anti-Terrorism Act, 1997 was set aside and the same was converted to one under S.302(b), P.P.C., and the death sentences awarded to all the accused persons were reduced to life imprisonment---Appeal was disposed of accordingly.

▸ Summary

Facts leading to instant case as depicted in the contents of FIR (First Information Report) lodged at the instance of Miskeen Ali with respect to an incident of cold blooded murder of 04 persons including a minor child who lost their lives while 08 others including two minors, who sustained fire arm injuries, for which the appellants in this appeal along with 06 other co-accused were booked initially under Sections 302,324, 452, 436 r/w 148, 149 PPC registered at Police Station Gujranwala. However, subsequently Sections 6 & 7(a) of the Anti-Terrorism Act, 1997 (ATA) were added thereto. The accused put to trial after framing of charge and examination of witnesses, the learned judge Anti-Terrorism Court convicted the appellants by awarding death sentence, imprisonment of certain periods and fine on various counts. The Convicts/Appellants preferred appeal before the learned Lahore High Court, Lahore but remained unsuccessful. Feeling aggrieved, the appellants preferred petition for leave to appeal in the Supreme Court, which was converted in to appeal.

The Supreme Court after hearing the learned counsel for the appellants as well as the learned Additional Prosecutor General and perusal of the record and evidence thereof dilated upon important aspects of the case, which has more bearing on the merits of whole case, such as the crime has been reported by Miskeen on the spot with delay of two hour strange enough leaving the bleeding injured at the place of incidence till the arrival of the local police; surprisingly without taking any medical assistance in respect of the injured victims', thereof. Besides above, the existence of direct motive against the complainant but again the unresolved mystery that he being the prime target of the assailants was spared unhurt. The above pointed infirmities and mysteries compel the Supreme Court to examine the prosecution story from the angle as to whether

these facts narrated by the complainant side take out the case of accused from the ambit of terrorism.

The Supreme Court analyzed the complainant version in light of relevant provision of the Anti-Terrorism Act, 1997 and observed that for an offence to fall within the ambit of afore said legislation, the essential element of *"mens rea"* must be with an object in mind to accomplish the act of terrorism creating sense of insecurity among the State or its other institutions or causing damage to public or private properties while affecting the public at large. But in this case the act does not qualify those incidences which were the outcomes of private revenge or traditional enmity as could be seen in our routine affairs of life.

While discussing the issue in depth, the Supreme Court held that in applying the special law enacted to cater for the menace of terrorism, the Courts must have to apply its judicious mind to the entire scheme of a special law (ATA 1997) for particular class of criminals and specified crimes, as detailed in schedule thereof and should not be departed from the principles of literal construction of a statute. It must also keep in mind the events of the past which has necessitated the legislature to enact a new law. This exercise would help the Court of law to reach at a proper and fair conclusion, which left little room for our conventional crimes to enter therein, which according to the rules literal construction of a statute, falls outside of the ambit of the special law thereof.

The Court went on to state that another differentiating aspect of the case is the application of Qisas and Diyat Laws to such incidences, wherein in our customary crimes, the legal heirs or an injured do receive their due share of the specified compensation in accordance with Injunction of Islam, while in offences relating to terrorism the imposition of a fine as a penalty directly goes to the national exchequer which ultimately deprives the legal heirs of decease or the injured victim, to claim any share in compensation thereof.

By keeping in view the peculiar circumstances of the present case and applying the judicious mind thereof, the Supreme Court finally held the incident was a result of personal vendetta which did not qualify the litmus test of the special enactment. Moreover, as the complainant threw a wider net to involve a number of persons in the commission of offence, therefore, as a precautionary measure the sentence of death awarded to the convicts was altered with that of the sentence of imprisonment for life with extension of the benefit of Section 382-B Cr.P.C, accordingly.

Case 2.

- **Identification**

- Title: Sindh Revenue Board through Chairman Government of Sindh and another. Vs. The Civil Aviation Authority of Pakistan through Airport Manager
- Case NO: Civil Appeal No. 767 of 2014 and C.M.A. No. 565-K of 2013, decided on 29th May, 2017
- Citation: (2017 SCMR 1344)

- **Headnotes**

Sindh Sales Tax on Services Act, 2011 and the Sindh Sales Tax on Services Rules, 2011 to the extent that they taxed the Civil Aviation Authority violated Art. 142(a) of the Constitution since only the Federal Legislature could make laws with respect to matters pertaining to the Authority.

Civil Aviation Authority ("Authority") was a regulatory authority which performed functions that were within the exclusive domain of the Federal Legislature. Functions performed by the Authority were those which were listed in the Federal Legislative List. Legislative duties and functions performed by the Authority were not services. The Authority had no option but to undertake its statutory duties and responsibilities. Merely because the Authority imposed a fee or charge for providing them, which Parliament had authorized it to impose, would not in itself bring the provision of these duties and functions and the facilities and paraphernalia provided pursuant thereto within the realm of services upon which sales tax could be levied. The Federation exercised executive authority in respect of subjects which could be legislated by the Federal Legislature (Article 97(1) of the Constitution) and the Federal Government's executive authority could be conferred on "authorities subordinate to the Federal Government" (Article 98(1) of the Constitution). The Federal Legislature enacted the Pakistan Civil Aviation Authority Ordinance, 1982. The Authority was controlled by a Board which was appointed by the Federal Government and the Authority was bound by the directives of the Federal Government. Moreover, the Authority operated under the oversight of the peoples' representatives and as such was accountable to them. It was financially monitored by a constitutional office holder. In taxing the Authority the Provincial Government was trying to tax the operations of the Federal Government and a regulatory authority created by the Federal Legislature.

By imposing sales tax on services, the Provincial Government had legislated in respect of subjects or matters related thereto which were within the domain of the Federal Legislature. Whilst the provincial legislatures were independent, they must operate within the sphere allotted to them and within their prescribed limit. Neither the Federation nor the Provinces should invade upon the rights of the other nor encroach on the other's legislative domain. Supreme Court held that the Sindh Sales Tax on Services Act, 2011 and the Sindh Sales Tax on Services Rules, 2011 to the extent that they imposed on Civil Aviation Authority sales tax on services were contrary to the provisions of the Constitution, and were void ab initio and of no legal effect. The Sindh Sales Tax on Services Act, 2011 and the Sindh Sales Tax on Services Rules, 2011 to the extent that they taxed the Civil Aviation Authority violated Article 142(a) of the Constitution since only the Federal Legislature could make laws with respect to matters pertaining to the Authority.

- **Summary**

The case involved the constitutionality of sales tax on services imposed by the Provincial Government on the Civil Aviation Authority under the Sindh Sales Tax on Services Act, 2011 and the Sindh Sales Tax Services Rules, 2011.

The Court in a detailed landmark judgment while addressing every aspect of the controversy observed that the Civil Aviation Authority ("Authority") was a regulatory authority which performed functions that were within the exclusive domain of the Federal Legislature. Functions performed by the Authority were those which were listed in the Federal Legislative List. Legislative duties and functions performed by the Authority were not services. Authority had no option but to undertake its statutory duties and responsibilities. Merely because the Authority imposed a fee or charge for providing them, which Parliament had authorized it to impose, would not in itself bring the provision of these duties and functions and the facilities and paraphernalia provided pursuant thereto within the realm of services upon which sales tax could be levied.

The Court further observed that the Federation exercised executive authority in respect of subjects which could be legislated by the Federal Legislature (Article 97(1) of the Constitution) and the Federal Government's executive authority could be conferred on "authorities subordinate to the Federal Government" (Article 98(1) of the Constitution).

The Federal Legislature enacted the Pakistan Civil Aviation Authority Ordinance, 1982. The Authority was controlled by a Board which was appointed by the Federal Government and the Authority was bound by the directives of the Federal Government. Moreover, the Authority operated under the oversight of the peoples' representatives and as such was accountable to them. It was financially monitored by a constitutional office holder. In taxing the Authority the Provincial Government was trying to tax the operations of the Federal Government and a regulatory authority created by the Federal Legislature. By imposing sales tax on services, the Provincial Government had legislated in respect of subjects or matters related thereto which were within the domain of the Federal Legislature. Whilst the provincial legislatures were independent, they must operate within the sphere allotted to them and within their prescribed limit. Neither the Federation nor the Provinces should invade upon the rights of the other nor encroach on the other's legislative domain.

The Supreme Court observed that airplanes carried passengers and transported goods and they took off and landed in airports throughout the country, including the territories of the provinces; that since sales tax was ultimately to be borne by the users/people, therefore, if every province imposed sales tax it would make flying complex and unnecessarily expensive; that connectivity of the country would be undermined and airports situated in remote areas, that were subsidized, may become too expensive to use and resultantly the people would suffer; that if sales tax was imposed, the Authority may avoid spending money on the proper maintenance of existing airports and may also be dissuaded to invest in new airports which were not commercially viable, which would adversely affect travel, national cohesion, the interest of the Federation and of the Provinces.

The Supreme Court held that the Sindh Sales Tax on Services Act, 2011 and the Sindh Sales Tax on Services Rules, 2011 to the extent that they imposed on Civil Aviation Authority sales tax on services were contrary to the provisions of the Constitution, and were void *ab initio* and of no legal effect. The Sindh Sales Tax on Services Act, 2011 and the Sindh Sales Tax on Services Rules, 2011 to the extent that they taxed the Civil Aviation Authority violated Article 142(a) of the Constitution since only the Federal Legislature could make laws with respect to matters pertaining to the Authority.

11. Philippines

Supreme Court

Summary

The Supreme Court of the Philippines stands at the top of the country's judicial hierarchy. By constitutional design, the 1987 Philippine Constitution provides the Supreme Court with distinct features of a constitutional court. This is evident in two of the Supreme Court's greatest powers. The first is the power of judicial review (Art. VIII, sec. 1), and the second is the power to make rules and regulations to protect and enforce constitutional human rights (Art. VIII, sec. 5(5)). The judicial review power grants authority to the courts to determine the existence of grave abuse of discretion on the part of any branch, agency or instrumentality of the government. The power to make rules directly implicates the duty of the courts to protect and enforce constitutional rights, referring to the Bill of Rights (Article III) and social justice rights (Art. XIII). Three recent cases demonstrate the power of judicial review by the Supreme Court, focusing on the presidential power to declare martial law. More specifically, these cases deal with the constitutionally-designed interaction among the three branches of government. In the exercise of the second major power of the Court, the Court has created two human rights writs, as well as writs concerned with the protection of the environment (e.g. the Writ of *Kalaksan*). The human rights writs are the Writ of *Amparo*, which addresses extra-legal killings and enforced disappearances and threats to life, liberty and security, and the Writ of *Habeas Data*, which addresses threats to the right to privacy and security.

Content

A. Introduction

A1. History

The Supreme Court of the Philippines is the progeny of the tribunal established by Act No. 136 of the Philippine Commission on June 11, 1901. While there is no umbilical cord joining the Supreme Court to the Real Audiencia de Manila set up by the Spaniards or the Audiencia Territorial de Manila constituted by Major General Elwell Otis, these audiencias serve as backdrops and proper perspectives in retelling the history of the present Supreme Court.

The Judicial System of the Pre-Spanish Filipinos

When the Spanish colonizers first arrived in the Philippine archipelago, they found the indigenous Filipinos without any written laws. Mainly, the laws enforced were derived from customs, usages and tradition. These laws were believed to be God-given and were orally transmitted from generation to generation.

A remarkable feature of these customs and traditions was that they were found to be very similar to one another notwithstanding that they were observed in widely dispersed islands of the archipelago. There were no judges and lawyers who were trained formally in the law, although there were elders who devoted time to the study of the customs, usages and traditions of their tribes to qualify them as consultants or advisers on these matters.

The unit of government of the indigenous Filipinos was the barangay, which was a family-based community of 30 to 100 families, occupying a pook ("locality" or "area") headed by a chieftain called a datu who exercised all functions of government: executive, legislative, and judicial. A barangay was not only a political but also a social and economic organization. In the exercise of his judicial authority, the datu acted as a judge (hukom) in settling disputes and deciding cases in his barangay.

The Judicial System Under the Spanish Regime

During the early Spanish occupation, King Philip II established the Real Audiencia de Manila which was given not only judicial but legislative, executive, advisory, and administrative functions as well. Composed of the incumbent governor general as the presidente (presiding officer), four oidores (equivalent to associate justices), an asesor (legal adviser), an alguacil mayor (chief constable), among other officials, the Real Audiencia de Manila was both a trial and appellate court. It had exclusive original, concurrent original and exclusive appellate jurisdictions.

Initially, the Audiencia was given a non-judicial role in the colonial administration, to deal with unforeseen problems within the territory that arose from time to time, it was given the power to supervise certain phases of ecclesiastical affairs as well as regulatory functions, such as fixing of prices at which merchants could sell their commodities. Likewise, the Audiencia had executive functions, like the allotment of lands to the settlers of newly established pueblos. However, by 1861, the Audiencia had ceased to perform these executive and administrative functions and had been restricted to the administration of justice.

When the Audiencia Territorial de Cebu was established in 1886, the name of the Real Audiencia de Manila was changed to Audiencia Territorial de Manila.

The Judicial System During the American Occupation

As expected, the subsequent occupation by the Americans of the Philippine Islands in the late 1890s after Spain's defeat in the Spanish-American War paved the way for considerable changes in the control, disposition, and governance of the Islands.

The judicial system established during the regime of the military government functioned as an instrument of the executive, not of the judiciary as an independent and separate branch of government.

Secretary of State John Hay, on May 12, 1899, proposed a plan for a colonial government of the Philippine Islands which would give Filipinos the largest measure of self-government. The plan contemplated an independent judiciary manned by judges chosen from qualified locals and Americans.

On May 29, 1899, General Elwell Stephen Otis, Military Governor for the Philippines, issued General Order No. 20, reestablishing the Audiencia Teritorial de Manila which was to apply Spanish laws and jurisprudence recognized by the American military governor as continuing in force.

The Audiencia was composed of a presiding officer and eight members organized into two divisions: the sala de lo civil or the civil branch, and the sala de lo criminal or the criminal branch.

It was General Otis himself who personally selected the first appointees to the Audiencia. Cayetano L. Arellano was appointed President (equivalent to Chief Justice) of the Court, with Manuel Araullo as president of the sala de lo civil and Raymundo Melliza as president of the salo de lo criminal. Gregorio Araneta and Lt. Col. E.H. Crowder were appointed associate justices of the civil branch while Ambrosio Rianzares, Julio Llorente, Major R.W. Young and Captain W.E. Brikhimer were designated associate justices of the criminal branch. Thus, the reestablished Audiencia became the first agency of the new insular government where Filipinos were appointed side by side with Americans.

The Establishment of the Supreme Court of the Philippines

On June 11, 1901, the Second Philippine Commission passed Act No. 136 entitled "An Act Providing for the Organization of Courts in the Philippine Islands" formally establishing the Supreme Court of the Philippine Islands and creating Courts of First Instance and Justices of the Peace Courts throughout the land. The judicial organization established by the Act was conceived by the American lawyers in the Philippine Commission and was patterned in its basic structures after similar organizations in the United States.

The Supreme Court created under the Act was composed of a Chief Justice and six Judges. Five members of the Court could form a quorum, and the concurrence of at least four members was necessary to pronounce a judgment.

Act No. 136 abolished the Audiencia established under General Order No. 20 and declared that the Supreme Court created by the Act be substituted in its place. This effectively severed any nexus between the present Supreme Court and the Audiencia.

The Anglo-American legal system under which the Supreme Court of the Philippine Islands was expected to operate was entirely different from the old Spanish system that Filipinos were familiar with. Adjustments had to be made; hence, the decisions of the Supreme Court during its early years reflected a blend of both the Anglo-American and Spanish systems. The jurisprudence was a gentle transition from the old order to the new.

The Supreme Court During the Commonwealth

Following the ratification of the 1935 Philippine Constitution in a plebiscite, the principle of separation of powers was adopted not by express and specific provision to that effect, but by actual division of powers of the government: "executive, legislative, and judicial" in different articles thereof.

As in the United States, the judicial power was vested by the 1935 Constitution "in one Supreme Court and in such inferior courts as may be established by law." It devolved on the Judiciary to determine whether the acts of the other two departments were in harmony with the fundamental law.

The Court during the Commonwealth was composed of "a Chief Justice and ten Associate Justices, and may sit en banc or in two divisions, unless otherwise provided by law."

The Supreme Court of the Second Republic

After the Japanese occupation during the Second World War and the subsequent independence from the United States, Republic Act No. 296 or the Judiciary Act of 1948 was enacted. This law grouped together the cases over which the Supreme Court could exercise exclusive jurisdiction to review on appeal, certiorari or writ of error.

The Supreme Court Under the 1973 Constitution

The declaration of Martial Law through Proclamation No. 1081 by former President Ferdinand E, Marcos in 1972 brought about the transition from the 1935 Constitution to the 1973 Constitution. This transition had implications on the Court's composition and functions.

This period brought in many legal issues of transcendental importance and consequence. Among these were the legality of the ratification of a new Constitution, the assumption of the totality of government authority by President Marcos, the power to review the factual basis for a declaration of Martial Law by the Chief Executive. Writ large also during this period was the relationship between the Court and the Chief Executive who, under Amendment No. 6 to the 1973 Constitution, had assumed legislative powers even while an elected legislative body continued to function.

The 1973 Constitution increased the number of the members of the Supreme Court from 11 to 15, with a Chief Justice and 14 Associate Justices. The Justices of the Court were appointed solely by the President, without the consent, approval, or recommendation of any other body or officials.

The Supreme Court Under the Revolutionary Government

Shortly after assuming office as the seventh President of the Republic of the Philippines after the successful People Power Revolution, then President Corazon C. Aquino declared the existence of a revolutionary government under Proclamation No. 1 dated February 25, 1986. Among the more significant portions of this Proclamation was an instruction for "all appointive officials to submit their courtesy resignations beginning with the members of the Supreme Court." The call was unprecedented, considering the separation of powers that the previous Constitutions had always ordained, but understandable considering the revolutionary nature of the post-People Power government. Heeding the call, the members of the Judiciary "from the Supreme Court to the Municipal Circuit Courts" placed their offices at the disposal of the President and submitted their resignations. President Corazon C. Aquino proceeded to reorganize the entire Court, appointing all 15 members.

On March 25, 1986, President Corazon Aquino, through Proclamation No. 3, also abolished the 1973 Constitution and put in place a Provisional "Freedom" Constitution. Under Article I, section 2 of the Freedom Constitution, the provisions of the 1973 Constitution on the judiciary were adopted insofar as they were not inconsistent with Proclamation No. 3.

Article V of Proclamation No. 3 provided for the convening of a Constitutional Commission composed of fifty appointive members to draft a new constitution. This would be implemented by Proclamation No. 9. The output of the Constitutional Commission of 1986 was submitted to the people for ratification, the Filipino people then ratified the Constitution submitted to them by the Constitutional Commission on February 2, 1987.

The Supreme Court Under the 1987 Constitution

As in the 1935 and 1973 Constitutions, the 1987 Constitution provides that "[t]he judicial power shall be vested in one Supreme Court and in such lower courts as may be established by law." (Art. VII, Sec. 1). The exercise of judicial power is shared by the Supreme Court with all the courts below it, but it is only the Supreme Court's decisions that are vested with precedential value or doctrinal authority, as its interpretations of the Constitution and the laws are final and beyond review by any other branch of government.

Unlike the 1935 and 1973 Constitutions, however, the 1987 Constitution defines the concept of judicial power. Under paragraph 2 of Section 1, Article VIII, "judicial power" includes not only the "duty of the courts of justice to settle actual controversies involving rights which are legally demandable and enforceable" but also "to determine whether or not there has been a grave abuse of discretion amounting to lack or excess of jurisdiction on the part of any branch or instrumentality of the government." This latter provision dilutes the effectivity of the "political question" doctrine which places specific questions best submitted to the political wisdom of the people beyond the review of the courts.

Building on previous experiences under former Constitutions, the 1987 Constitution provides for specific safeguards to ensure the independence of the Judiciary. These are found in the following provisions:

1. The grant to the Judiciary of fiscal autonomy. "Appropriations for the Judiciary may not be reduced by the legislature below the amount appropriated for the previous year, and, after approval, shall be automatically and regularly released." (Art. VIII, Sec. 3)
2. The grant to the Chief Justice of authority to augment any item in the general appropriation law for the Judiciary from savings in other items of said appropriation as authorized by law. (Art. VI, Sec. 25[5])
3. The removal from Congress of the power to deprive the Supreme Court of its jurisdiction over cases enumerated in Section 5 of Article VIII.
4. The grant to the Court of the power to appoint all officials and employees of the Judiciary in accordance with the Civil Service Law. (Art. VIII, Sec. 5 [6])
5. The removal from the Commission of Appointments of the power to confirm appointments of justices and judges." (Art. VIII, Sec. 8)
6. The removal from Congress of the power to reduce the compensation or salaries of the Justices and judges during their continuance in office. (Art. VIII, Sec. 10)
7. The prohibition against the removal of judges through legislative reorganization by providing that "(n)o law shall be passed reorganizing the Judiciary when it undermines the security of tenure of its members. (Art. VIII, Sec. 2)
8. The grant of sole authority to the Supreme Court to order the temporary detail

of judges. (Art. VIII, Sec. 5[3])
9. The grant of sole authority to the Supreme Court to promulgate rules of procedure for the courts. (Art. VIII, Sec. 5[5])
10. The prohibition against designating members of the Judiciary to any agency performing quasi-judicial or administrative function. (Art. VIII, Sec. 12)
11. The grant of administrative supervision over the lower courts and its personnel in the Supreme Court. (Art. VIII, Sec. 6)

The Supreme Court under the present Constitution is composed of a Chief Justice and 14 Associate Justices.

The members of the Court are appointed by the President from a list prepared by the Judicial and Bar Council of at least three nominees for every vacancy. This new process is intended to "de-politicize" the courts of justice, ensure the choice of competent judges, and fill existing vacancies without undue delay.

A2. Basic Texts

The basic text governing the Supreme Court in the Philippines would be the 1987 Constitution, specifically Article VIII (The Judiciary). Relevant to this main section would be the provisions under Article XI (Accountability of Public Officers), sections 2 and 3 and Article VII, section 4, paragraph 7 (Presidential Electoral Tribunal).

Pertinent sections of Article VIII referring to the Supreme Court are reproduced below:

> SECTION 1. The judicial power shall be vested in one Supreme Court and in such lower courts as may be established by law.
>
> Judicial power includes the duty of the courts of justice to settle actual controversies involving rights which are legally demandable and enforceable, and to determine whether or not there has been a grave abuse of discretion amounting to lack or excess of jurisdiction on the part of any branch or instrumentality of the Government.
>
> SECTION 2. The Congress shall have the power to define, prescribe, and apportion the jurisdiction of various courts but may not deprive the Supreme Court of its jurisdiction over cases enumerated in Section 5 hereof.
> No law shall be passed reorganizing the Judiciary when it undermines the security of tenure of its Members.
>
> SECTION 3. The Judiciary shall enjoy fiscal autonomy. Appropriations for the Judiciary may not be reduced by the legislature below the amount appropriated for the previous year and, after approval, shall be automatically and regularly released.
>
> SECTION 4. (1) The Supreme Court shall be composed of a Chief Justice and fourteen Associate Justices. It may sit *en banc* or in its discretion, in divisions of three, five, or seven Members. Any vacancy shall be filled within ninety days from the occurrence thereof.
>
> (2) All cases involving the constitutionality of a treaty, international or executive agreement, or law, which shall be heard by the Supreme Court *en banc*, and all other cases which under the Rules of Court are required to be heard *en banc*, including those involving the constitutionality, application, or operation of presidential decrees, proclamations, orders, instructions, ordinances, and other regulations, shall be decided with the concurrence of a majority of the

Members who actually took part in the deliberations on the issues in the case and voted thereon.

(3) Cases or matters heard by a division shall be decided or resolved with the concurrence of a majority of the Members who actually took part in the deliberations on the issues in the case and voted thereon, and in no case, without the concurrence of at least three of such Members. When the required number is not obtained, the case shall be decided *en banc*: *Provided,* that no doctrine or principle of law laid down by the court in a decision rendered *en banc* or in division may be modified or reversed except by the court sitting *en banc*.

SECTION 5. The Supreme Court shall have the following powers:

(1) Exercise original jurisdiction over cases affecting ambassadors, other public ministers and consuls, and over petitions for *certiorari*, prohibition, *mandamus*, *quo warranto*, and *habeas corpus*.

(2) Review, revise, reverse, modify, or affirm on appeal or *certiorari*, as the law or the Rules of Court may provide, final judgments and orders of lower courts in:

(a) All cases in which the constitutionality or validity of any treaty, international or executive agreement, law, presidential decree, proclamation, order, instruction, ordinance, or regulation is in question.
(b) All cases involving the legality of any tax, impost, assessment, or toll, or any penalty imposed in relation thereto.
(c) All cases in which the jurisdiction of any lower court is in issue.
(d) All criminal cases in which the penalty imposed is *reclusion perpetua* or higher.
(e) All cases in which only an error or question of law is involved.

(3) Assign temporarily judges of lower courts to other stations as public interest may require. Such temporary assignment shall not exceed six months without the consent of the judge concerned.

(4) Order a change of venue or place of trial to avoid a miscarriage of justice.

(5) Promulgate rules concerning the protection and enforcement of constitutional rights, pleading, practice, and procedure in all courts, the admission to the practice of law, the Integrated Bar, and legal assistance to the underprivileged. Such rules shall provide a simplified and inexpensive procedure for the speedy disposition of cases, shall be uniform for all courts of the same grade, and shall not diminish, increase, or modify substantive rights. Rules of procedure of special courts and quasi-judicial bodies shall remain effective unless disapproved by the Supreme Court.

(6) Appoint all officials and employees of the Judiciary in accordance with the Civil Service Law.

SECTION 6. The Supreme Court shall have administrative supervision over all courts and the personnel thereof.

SECTION 7. (1) No person shall be appointed Member of the Supreme Court or any lower collegiate court unless he is a natural-born citizen of the

Philippines. A Member of the Supreme Court must be at least forty years of age, and must have been for fifteen years or more a judge of a lower court or engaged in the practice of law in the Philippines.

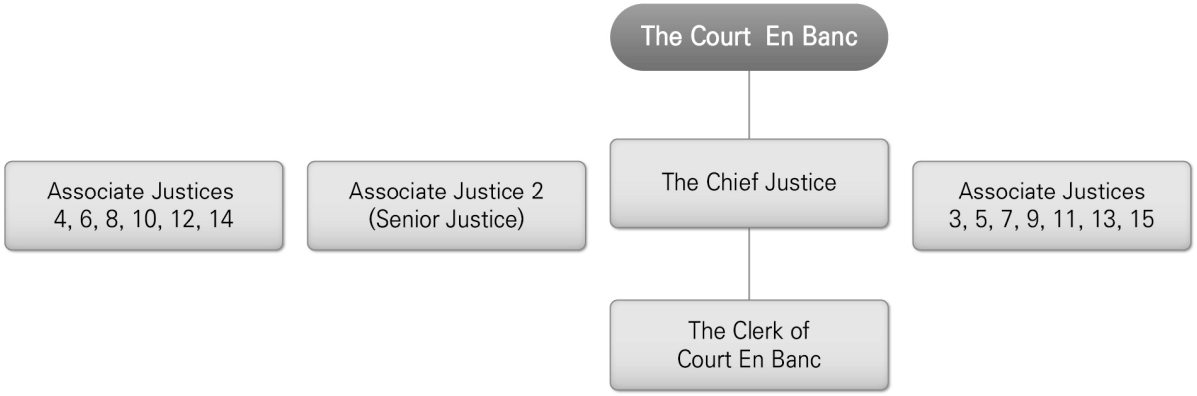
The pertinent paragraph of Article VII, section 4 on the Supreme Court being the Presidential Electoral Tribunal reads:

SECTION 4.

The Supreme Court, sitting *en banc*, shall be the sole judge of all contests relating to the election, returns, and qualifications of the President or Vice-President, and may promulgate its rules for the purpose.

B. Organization

THE SUPREME COURT OF THE PHILIPPINES
ORGANIZATION STRUCTURE



NOTES:

1. The Supreme Court operates on the basis of seniority with the Chief Justice considered as the most senior member and presiding officer; in his/her absence, the next most senior (Associate Justice 2 or the Senior Associate Justice) presides. Seniority is not observed in voting during deliberations as all Justices are entitled to the same number of votes and each vote is considered of the same weight.
2. The Supreme Court also decides cases in divisions of five, with the three most senior Justices serving as Chairpersons of the three divisions.
3. The decisions of the Supreme Court, regardless of whether rendered en banc or in division, form part of the law of the land. However, only the Court, acting en banc, may overrule or modify a previous decision, whether en banc or in division.
4. The Clerk of Court En Banc assists the Court in its deliberations as the rapporteur of the Court's resolutions and decisions.

B1. President

Under Article VIII, section 4, the Supreme Court shall be composed of a Chief Justice and fourteen Associate Justices. It may sit en banc (all 15) or in its discretion, in divisions of three, five, or seven Members. Any vacancy shall be filled within ninety days from the occurrence thereof. Section 7 provides that no person shall be appointed Member of the Supreme Court or any lower collegiate court unless he is a natural-born citizen of the Philippines. A Member of the Supreme Court must be at least forty years

of age, and must have been for fifteen years or more a judge of a lower court or engaged in the practice of law in the Philippines. A Member of the Judiciary must be a person of proven competence, integrity, probity, and independence.

The manner for nominating and selecting members of the Supreme Court (and all members of the judiciary) is provided in section 8, which creates the Judicial and Bar Council. It is led by the Chief Justice as ex officio Chairperson, the Secretary of Justice, and a representative of the Congress as ex officio Members, a representative of the Integrated Bar, a professor of law, a retired Member of the Supreme Court, and a representative of the private sector. The regular Members of the Council shall be appointed by the President for a term of four years with the consent of the Commission on Appointments. Of the Members first appointed, the representative of the Integrated Bar shall serve for four years, the professor of law for three years, the retired Justice for two years, and the representative of the private sector for one year. The Clerk of the Supreme Court shall be the Secretary ex officio of the Council and shall keep a record of its proceedings. The regular Members of the Council shall receive such emoluments as may be determined by the Supreme Court. The Supreme Court shall provide in its annual budget the appropriations for the Council. The Council shall have the principal function of recommending appointees to the Judiciary. It may exercise such other functions and duties as the Supreme Court may assign to it. Under section 9, the Members of the Supreme Court and judges of lower courts shall be appointed by the President from a list of at least three nominees prepared by the Judicial and Bar Council for every vacancy. Such appointments need no confirmation. For the lower courts, the President shall issue the appointments within ninety days from the submission of the list.

The manner for removal of members of the Court is through impeachment under Article XI, section 2.[21] However, on May 11, 2018, the Supreme Court ruled that a member of

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21 SECTION 2. The President, the Vice-President, the Members of the Supreme Court, the Members of the Constitutional Commissions, and the Ombudsman may be removed from office, on impeachment for, and conviction of, culpable violation of the Constitution, treason, bribery, graft and corruption, other high crimes, or betrayal of public trust. All other public officers and employees may be removed from office as provided by law, but not by impeachment.

SECTION 3. (1) The House of Representatives shall have the exclusive power to initiate all cases of impeachment.

(2) A verified complaint for impeachment may be filed by any Member of the House of Representatives or by any citizen upon a resolution of endorsement by any Member thereof, which shall be included in the Order of Business within ten session days, and referred to the proper Committee within three session days thereafter. The Committee, after hearing, and by a majority vote of all its Members, shall submit its report to the House within sixty session days from such referral, together with the corresponding resolution. The resolution shall be calendared for consideration by the House within ten session days from receipt thereof.

(3) A vote of at least one-third of all the Members of the House shall be necessary either to affirm a favorable resolution with the Articles of Impeachment of the Committee, or override its contrary resolution. The vote of each Member shall be recorded.

(4) In case the verified complaint or resolution of impeachment is filed by at least one-third of all the Members of the House, the same shall constitute the Articles of Impeachment, and trial by the Senate shall forthwith proceed.

(5) No impeachment proceedings shall be initiated against the same official more than once within a period of one year.

(6) The Senate shall have the sole power to try and decide all cases of impeachment. When sitting for that purpose, the Senators shall be on oath or affirmation. When the President of the Philippines is on trial, the Chief Justice of the Supreme Court shall preside, but shall not vote. No person shall be convicted without the concurrence of two-thirds of all the Members of the Senate.

(7) Judgment in cases of impeachment shall not extend further than removal from office and disqualification to hold any office under the Republic of the Philippines, but the party convicted shall nevertheless be liable and subject to prosecution, trial, and punishment according to law.

(8) The Congress shall promulgate its rules on impeachment to effectively carry out the purpose of

the Court, in that particular case the Chief Justice, can be removed by a petition for *quo warranto* filed directly with the Supreme Court. The Decision, while immediately executory, is still not final as a Motion for Reconsideration can still be filed.

B2. Justices

Under Article VIII, section 4, the Supreme Court shall be composed of a Chief Justice and fourteen Associate Justices. It may sit *en banc* or in its discretion, in divisions of three, five, or seven Members. Any vacancy shall be filled within ninety days from the occurrence thereof. Under section 7, no person shall be appointed Member of the Supreme Court or any lower collegiate court unless he is a natural-born citizen of the Philippines. A Member of the Supreme Court must be at least forty years of age, and must have been for fifteen years or more a judge of a lower court or engaged in the practice of law in the Philippines. A Member of the Judiciary must be a person of proven competence, integrity, probity, and independence.

B3. Constitutional Research

There is no specific department of constitutional research in the Philippine judiciary. In their work, the Justices are assisted by lawyers who are confidential employees and whose tenure is coterminous with that of the appointing authority or is at the latter's pleasure.

In every petition, a member of the Court is assigned to take charge of initial actions and to make a recommendation to the Court. Should the Court agree with the recommended action, it then promulgates the action either as a Decision or a Resolution.

At times, the Court may ask assistance from any of the following offices:

Office of the Chief Attorney
The Supreme Court also has the Office of the Chief Attorney (OCAt), the Supreme Court's legal research arm which renders adjudicative and administrative support functions on cases, issues and matters assigned by the Court, the Chief Justice, the Members of the Court, the Clerk of Court, and other offices of the Court. The OCAt has three (3) divisions namely, Legislative Research, Legal Research, and Special Studies, with a complement of eighteen (18) lawyers.

Office of the Court Administrator
Assisting the Supreme Court in resolving administrative cases is the Office of the Court Administrator (OCA), which has a Legal Office (LEGO) that receives, processes, and evaluates administrative complaints filed against Justices of the Court of Appeals and the Sandiganbayan, judge of the first and second level courts, and lower court personnel. This office submits its findings to the Supreme Court by way of Agenda Reports. It also takes charge of the reports and recommendations for administrative complaints referred by the OCA for evaluation, report and recommendation. Whenever warranted, the LEGO likewise initiates and prosecutes administrative complaints against judicial officers and employees. LEGO has three (3) divisions namely, Docket, Administrative and Agenda, with a complement of forty-five (45) lawyers and twenty-one (21) court legal researchers.

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this section.

Philippine Judicial Academy
For studying reform measures and producing reference materials for the justices, judges, lawyers and lower court personnel, the Supreme Court taps the Philippine Judicial Academy (PHILJA), the educational and training arm of the Supreme Court. PHILJA's involvement in judicial reform began in 1997 when the Supreme Court through then Chief Justice Andres Narvasa directed PHILJA Chancellor to "conduct an in-depth examination of our present legal and judicial system for the purpose of upgrading, improving and reforming it to meet the changes in and challenges of the new millennium."

B4. Court Administration

The Supreme Court has an internal organization structure composed of 18 offices. The Chief Justice manages this bureaucracy, assisted by the Clerk of Court En Banc and the various heads of offices.

Among these offices would be the Office of Administrative Services, the Fiscal Management and Budget Office, the Judicial Records Office, the Program Management Office, the Public Information Office, the Office of the Court Reporter, and the Office of the Chief Attorney.

The Supreme Court also oversees the entire judiciary, which is composed of one national appellate court, the Court of Appeals, one anti-graft court, the Sandiganbayan, and one national tax appeals court, the Court of Tax Appeals, and trial courts of the first and second level of varying jurisdictions nationwide. These three courts are collegial courts, led by a Presiding Justice.

The function of court administration over the trial courts would be carried out by the Office of the Court Administrator, which is an office created by law, specifically, Presidential Decree No. 828, as amended, *Creating the Office of the Court Administrator in the Supreme Court*.

B5. Other

The Supreme Court has a total of 49 main offices, including the 15 Chambers for the Chief Justice and the Associate Justices. There is one Clerk of Court En Banc and Three Division Clerks of Court. The administration of the Supreme Court is run through 18 main offices, including a central administrative office, a central finance office, and a central records office; included also in these offices are the Bar Confidant and the Public Information Office. There is one Court Administrator with three Deputy Court Administrators and two Assistant Court Administrators; the Office of the Court Administrator has five main sub offices.

The total staff complement, as of April 2018, for the Supreme Court and the Presidential Electoral Tribunal is 2,393.

C. Jurisdictions

Under Article VIII, section 5, the Supreme Court shall have the following powers:

(1) Exercise original jurisdiction over cases affecting ambassadors, other public ministers and consuls, and over petitions for certiorari, prohibition, mandamus, quo warranto, and

habeas corpus.

(2) Review, revise, reverse, modify, or affirm on appeal or certiorari, as the law or the Rules of Court may provide, final judgments and orders of lower courts in:

(a) All cases in which the constitutionality or validity of any treaty, international or executive agreement, law, presidential decree, proclamation, order, instruction, ordinance, or regulation is in question.
(b) All cases involving the legality of any tax, impost, assessment, or toll, or any penalty imposed in relation thereto.
(c) All cases in which the jurisdiction of any lower court is in issue.
(d) All criminal cases in which the penalty imposed is reclusion perpetua or higher.
(e) All cases in which only an error or question of law is involved.

Annex

Annex 1. Case Statistics

1-1. Since establishment

Case Inflow	Case Outflow	Pending Case Load
252,060	242,382	9,678

1-2. Last five years (2013-2017)

	Case Inflow							Case Flow					
	Beginning		New		Reinstated		Total	Disposed		Total	Pending		Total
Year	App.	Orig	App.	Orig	App.	Orig.		App.	Orig.		App.	Orig.	
2013	6934	130	5120	114	29	1	12328	4576	64	4640	7507	181	7688
2014	7507	181	4896	90	19	1	12694	4898	94	4992	7524	178	7702
2015	7524	178	5391	87	15	1	13196	5001	62	5063	7929	204	8133
2016	7929	204	6431	72	10	-	14646	5934	91	6025	8436	185	8621
2017	8436	185	6622	61	1	-	15305	5568	59	5627	8491	187	9678

Annex 2. Cases

Case 1.

IDENTIFICATION	Country	Philippines
	Name of Court	Supreme Court
	Decision Date	July 5, 2017
	Case Number and Title	G.R. No. 231658 (Representatives Edcel C. Lagman, Tomasito S. Villarin, Gary C. Alejano, Emmanuel A. Billones, and Teddy Brawner Baguilat, Jr. vs. Hon. Salvador C. Medialdea, Executive Secretary, Hon. Delfin N. Lorenzana, Secretary of National Defense and Martial Law Administrator; and General Eduardo Año, Chief of Staff of the Armed Forces of the Philippines and Martial Law Implementor), G.R. No. 231771 (Eufemia Campos Cullamat, et al. v. President Rodrigo Roa Duterte, et al.), and G.R. No. 231774 (Norkaya S. Mohamad, et al. v. Executive Secretary Salvador C. Medialdea, et al.)

SUMMARY	In a proclamation dated May 23, 2017, the President of the Philippines declared martial law and suspended the privilege of the writ of habeas corpus over a specific portion of the country, i.e., the entire island of Mindanao. This implicated the President's Commander-in-Chief powers under Article VII, section 18 of the 1987 Constitution which required the President to submit a report to Congress within 48 hours from proclamation and for Congress to convene to deliberate on the proclamation. The same provision provides the Supreme Court jurisdiction to entertain "in any appropriate proceeding" the sufficiency of the factual basis of the proclamation or suspension. These cases involve such challenges to the sufficiency of the factual basis for the proclamation and suspension.
HEADNOTES	The Supreme Court dismissed the three petitions, finding that there was sufficient factual basis for the President's proclamation of martial law over Mindanao and the suspension of the privilege of the writ of habeas corpus over the same area. This was based on the intelligence reports submitted by the government to the Court during the hearings conducted for this purpose. The Court also ruled that in discharging its review power, the Court's power is limited to determining whether the President in declaring martial law or suspending the privilege of the writ of *habeas corpus* had sufficient factual basis. The question to be answered would be if the President had acted within the bounds of the Constitution, i.e., whether the facts in his possession prior to and at the time of the declaration or suspension are suffidient for him to declare martial law or suspend the privilege of the writ of *habeas corpus*.

	The Court stated that in its determination of the sufficiency of the factual basis for the declaration and/or suspension, it should look into the full complement or totality of the factual basis, and not piecemeal or invididual justifications. The Court should also not expect absolute correctness of the facts stated in the proclamation and in the President's Written Report as the President cannot be expected to verify the accuracy and veracity of all facts reported to him due to the urgency of the situation. To require precision in the President's appreciation of facts would unduly burden him and therefore impede the process of decision making. The Court noted that the sufficiency of the factual basis should not be affected if subsequent events show that the situation had not been accurately reported to the President since the Court's review is limited to sufficiency, not accuracy, of the factual basis.

Case 2.

IDENTIFICATION	**Country**	Philippines
	Name of Court	Supreme Court
	Decision Date	July 25, 2017
	Case Number and Title	G.R. No. 231671 (Alexander A. Padilla, et al. v. Congress of the Philippines represented by the Senate President and the Speaker of the House of Representatives) and G.R. No. 231694 (Former Senator Wigberto E. Tañada, et al. v. Congress of the Philippines, represented by the Senate President and the Speaker of the House)

SUMMARY	Related to the President's declaration of martial law and suspension of the privilege of the writ of habeas corpus over Mindanao on May 23, 2017, petitioners sued to compel Congress to convene in order to review the President's action. This was brought about by the declaration of both the Senate President and the Speaker of the House of Representatives that Congress did not intend to convene as they had no intention of revoking the President's proclamation of martial law or suspension of the privilege of the writ of habeas corpus. The issue presented is whether Congress acted with grave abuse of discretion in not convening to review the President's action even if the declared intent is not to revoke such proclamation.
HEADNOTES	The Court ruled that Congress did not gravely abuse its discretion in not convening jointly upon the President's issuance of Proclamation No. 216 (S. of 2017) as Article VII, sec. 18 imposes no such duty on Congress to convene, such duty (to convene and vote) being limited to instances where Congress intends to revoke or extend any proclamation of martial law or suspension of the privilege of the writ of *habeas corpus*. Two Justices concurred in the result only, i.e., dismissal of the *Petitions*, reasoning that the controversy presented was already moot and academic.

Case 3.

IDENTIFICATION	**Country**	Philippines
	Name of Court	Supreme Court
	Decision Date	February 6, 2018
	Case Number and Title	G.R. Nos 235935 (Representatives Edcel C. Lagman, et al. v. Senate President Aquilino Pimentel III, et al.); G.R. No. 236061 (Eufemia Campos Cullamat, et al. v. President Rodrigo Roa Duterte, et al.) and G.R. No. 236155 (Christian S. Monsod, et al. v. Senate President Aquilino Pimentel III, et al.)

SUMMARY	By virtue of Proclamation No. 216 dated May 23, 2017, the President had placed the entire island of Mindanao under a state of martial law and suspended the privilege of the writ of habeas corpus; this was extended by Congress up to December 31, 2017. Through a letter to Congress, the President sought to extend further the proclamation of martial law. Congress convened in order to consider the request and granted the request, extending the suspension of the privilege of the writ of habeas corpus and the proclamation of martial law until the end of 2018. Petitioners brought suit to challenge the extension granted and the extent and nature of congressional review conducted.
HEADNOTES	On the question whether Congress may extend a proclamation of martial law by the President beyond the period sought by the President, the Court ruled that Congress has the power to extend and determine the period of martial law and the suspension of the privilege of the writ of *habeas corpus* under Article VII, Section 18 of the 1987 Constitution. It ruled that the Constitution is silent on how many times Congress may extend a proclamation of martial law or the suspension of the privilege of the writ of *habeas corpus*. It also does not fix a period for the duration of any extension of a proclamation or suspension but expressly leaves the matter to Congress—"for a period to be determined by Congress." The 60-day period of the initial proclamation and/or suspension by the President cannot be considered to apply to any extension as determined by Congress.

Case 4.

IDENTIFICATION	Country	Philippines
	Name of Court	Supreme Court
	Decision Date	
	Case Number and Title	G.R. No. 229781 (Senator Leila De Lima v. Hon. Juanita Guerrero, in her capacity as the Presiding Judge, Regional Trial Court of Muntinlupa, Branch 204, et al.)

SUMMARY	Petitioner, an incumbent Senator of the Republic, was arrested on the basis allegedly for being involved in the illegal drug trade at the National Penitentiary while she was then the Secretary of Justice, the responsible officer over the penitentiary. She questioned the warrant of arrest against her before the Supreme Court, claiming that, owing to the charges stated, the trial court had no jurisdiction over her but, because the violations were allegedly committed while she was then in office as Secretary of Justice, the Anti-Graft Court (Sandiganbayan) had the jurisdiction.
HEADNOTES	The Supreme Court ruled that the trial court had jurisdiction over her person as the charges were drug-related and were not related to her being a public officer. It also ruled that the trial judge did not gravely abuse her discretion in finding probable cause to issue the warrant of arrest against her considering that the allegations in the charge were sufficient to engender a well-founded belief on the part of the judge that petitioner was involved in the drug charges.

Case 5.

IDENTIFICATION	Country	Philippines
	Name of Court	Supreme Court
	Decision Date	December 20, 2016
	Case Number and Title	G.R. No. 207246 (Jose M. Roy III v. SEC Chairperson Teresita Herbosa, the Securities and Exchange Commission, and Philippine Long Distance Telephone Company; Wilson Gamboa, Jr. et al., petitioners-in-intervention; Philippine Stock Exchange Inc., Respondent-in-Intervention; Shareholders' Association of the Philippines Inc., Respondent-in-Intervention)

SUMMARY	The petition questions the constitutionality of MC No. 8 which was issued by the SEC to implement the final disposition of the Court in the earlier case of *Gamboa v. Teves (2011 and 2012)* promulgated on June 28, 2011 ("*Gamboa Decision*") and its *Resolution* on the motions for reconsideration issued on October 9, 2012 ("*Gamboa Resolution*"). *Gamboa* defined "capital" for purposes of the constitutional provision in Article XII, section 11. The Court's definition of "capital", as contained in the *Gamboa* Decision, eventually became final. In the *Gamboa* ruling, the Court ruled that compliance with the constitutional provision meant that full beneficial ownership over sixty percent (60%) of the total outstanding capital stock, coupled with sixty percent (60%) control over shares with the right to vote in the election of directors must be held by Filipinos. Addressing motions for reconsideration filed against this judgment, the Court, in 2012, ruled that the 60-40 ownership requirement in favor of Filipino citizens applied not only to voting control, but also to beneficial ownership of the corporation. The Court stated that the same limits must apply uniformly and separately to each class of shares, regardless of their restrictions or privileges. The issue presented to the Court in this case is whether: (a) the SEC gravely abused its discretion in issuing MC No. 8 wherein it omitted the uniform and separate application of the 60:40 rule in favor of Filipinos to each and every class of shares of a corporation; and (b) the constitutional prohibition has been complied with specifically as far as PLDT is concerned.
HEADNOTES	The Court found that the SEC did not gravely abuse its discretion as it was simply implementing the *Gamboa Decision* and the *Gamboa Resolution*. The Court reviewed the *Gamboa Decision* and *Resolution* and reiterated that both defined "capital" broadly but only to apply to shares of stock that can vote in the election of directors and that MC No. 8 simply implemented and is, thus, fully in accordance with *Gamboa*. The Court also declared that there was no conflict between the definition of "capital" in the *Gamboa Decision* of 2011 and the *Gamboa Resolution* of 2012. The challenged regulation stated that "(a)ll covered corporations shall, at all times, observe the constitutional or statutory ownership requirement. For purposes of determining compliance therewith, the required percentage of Filipino ownership shall be applied to BOTH (a) the total number of outstanding shares of stock entitled to vote in the election of directors; AND (b) the total number of outstanding shares of stock, whether or not entitled to vote in the election of directors." The Court noted that the *Gamboa Resolution* states that "capital" was still required to be owned by Filipinos as to sixty percent of the capital stock outstanding and entitled to vote.

12. Russia

Constitutional Court

Summary

The Constitutional Court of the Russian Federation was founded in 1991. Alterations were made in 1993 regarding the composition, competence, organization and procedures of the Court. The competencies of the Court consist of the following: Upon the request of an enumerated number of state institutions, the Court considers the issue of an abstract constitutional formality of an enumerated list of different types of norms and acts; resolves competence disputes; upon complaints on violation of constitutional rights and freedoms reviews the constitutionality of a law applied by a court in a particular case where a judicial decision entered into force; upon requests of courts reviews the constitutionality of a law subject to be applied by the respective court in a particular case; provides official interpretation of the Constitution; adopts an opinion on the observance of a prescribed procedure for charging the President of the Russian Federation with high treason or with commission of another grave crime; resolves the question of the possibility to execute a decision of an interstate body for the protection of human rights and freedoms; and examines the conformity with the Constitution of an issue that is submitted to a referendum of the Russian Federation. The Constitutional Court resolves cases in sessions and its decisions are final and binding throughout the entire territory of the Russian Federation. Each judge of the Constitutional Court is appointed to the office by the Council of the Federation through a secret ballot upon nomination put forward by the President of the Russian Federation.

Content

A. Introduction

A1. History

The Constitutional Court of the Russian Federation – the first body of judicial constitutional review in the history of Russia – was founded on 30 October 1991. The establishment thereof was provided for by the adopted amendments and additions to the 1978 Constitution of the RSFSR [Russian Soviet Federal Socialist Republic] and the Law of the RSFSR of 12 July 1991 "On the Constitutional Court of the RSFSR" adopted pursuant thereto. The Constitutional Court commenced its activity in December 1991.

The 1993 Constitution of the Russian Federation, as well as the Federal Constitutional Law of 21 July 1994 "On the Constitutional Court of the Russian Federation" have expanded the numerical composition and slightly altered the competence, organisation and procedures of the Constitutional Court. Subsequently, a series of amendments to the Federal Constitutional Law "On the Constitutional Court of the Russian Federation" were introduced, relating, in particular, to the place of permanent seat of the Court (until May 2008 – Moscow, since May 2008 – St. Petersburg), the procedures for the appointment of the President and Vice-Presidents of the Constitutional Court (in 2009), organisational forms of constitutional judicial procedure (in 2010), the procedure for execution of the Constitutional Court's decisions (in 2013 and 2016), the competencies of the Constitutional Court (in 2014, 2015 and 2016), as well as broadcasting of hearings of the Constitutional Court on the Internet and establishment of the possibility for the applicants to use an electronic form of application to the Constitutional Court (in 2015).

A2. Basic Texts

- Constitution of the Russian Federation of 12 December 1993: Article 125
- Federal Constitutional Law of 21 July 1994 "On the Constitutional Court of the Russian Federation"

B. Organization

B1. The status of the constitutional judge

The Constitutional Court consists of 19 judges. The Constitutional Court shall perform its functions provided that no less than three quarters of the total number of judges are in office.

The status of judges of the Constitutional Court is stipulated in the Federal Constitutional Law "On the Constitutional Court of the Russian Federation". Each judge of the Constitutional Court of the Russian Federation is appointed to the office by the Council of the Federation through a secret ballot upon nomination put forward by the President of the Russian Federation and is then sworn into office. The Law provides for guarantees of independence of a judge of the Constitutional Court, the most essential being irremovability, immunity, and equality of rights of judges. A judge of the Constitutional Court has a decisive vote with regard to all issues considered in the sessions of the Constitutional Court.

B2. President and Vice-Presidents

The President and two Vice-Presidents are appointed by the Council of the Federation for a term of six years from amongst the judges of the Constitutional Court upon nomination put forward by the President of the Russian Federation.

B3. Apparatus of the Constitutional Court

The Apparatus of the Constitutional Court consists of the following independent structural constituent units:

- Secretariat;
- Department of Civil Service and Human Resources;
- Department of General Administration;
- Financial Department; and
- Representative Office of the Constitutional Court in Moscow.

It is worth mentioning, that besides the Apparatus of the Constitutional Court, the staff members of the Court may also belong to the Secretariats of the President and 2 Vice-Presidents and Offices of 16 Judges as well; however, de jure these structural units are not attributed to the Court's Apparatus as far as they are subordinate directly to the President, Vice-Presidents and the Judges respectively and are established in order to maintain the due activity of a respective Judge only, not the Court in general.

The Secretariat of the Constitutional Court of the Russian Federation is an independent structural unit of the Constitutional Court's Apparatus established for maintaining the Court's due activity.

It is necessary to stress, that the issues of human resources, finances (including the judges' remunerations and staff members' salaries), social and medical maintenance of the judges and staff members are resolved by the Department of Civil Service and Human Resources, the Financial Department and Department of General Administration of the Constitutional Court respectively. These structural units compose the Apparatus of the Constitutional Court along with the Secretariat; however, only the Secretariat is mentioned in the respective legislation. At the same time, there is no such a position as the Head of Apparatus of the Constitutional Court of Russia. Coordination of activities of the constituent units of the latter in case of necessity is provided by one of the Vice-Presidents of the Constitutional Court.

The Secretariat comprises 4 so-called "law branch" departments dealing with the matters of the respective branch of law, and several other departments and sub-departments:

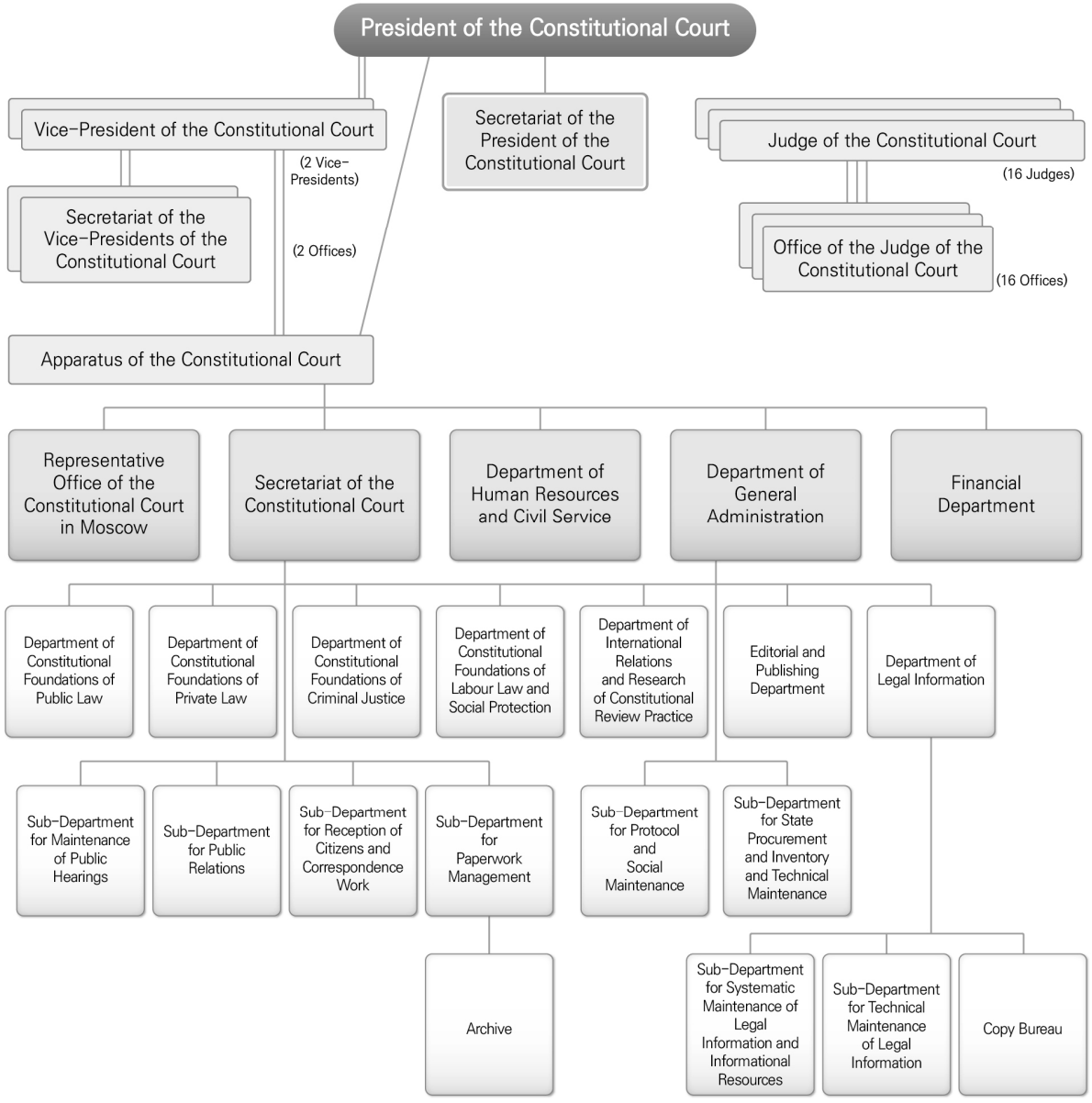
- Department of Constitutional Foundations of Public Law;
- Department of Constitutional Foundations of Private Law;
- Department of Constitutional Foundations of Criminal Justice;
- Department of Constitutional Foundations of Labour Law and Social Protection;
- Department of International Relations and Research of Constitutional Review Practice;
- Editorial and Publishing Department;
- Department of Legal Information;
- Sub-Department for Maintenance of Public Hearings;
- Sub-Department for Public Relations;
- Sub-Department for Reception of Citizens and Correspondence Work; and
- Sub-Department for Paperwork Management.

The main function of the Secretariat is the preliminary consideration of the submitted applications. Besides that, the Secretariat carries out a significant amount of

organisational and other daily activities related to due functioning of the Constitutional Court. Within this framework the Secretariat:

- compiles analytical and reference materials upon assignments of the President and the Judges of the Constitutional Court;
- provides organisational and paperwork maintenance of the Constitutional Court and the Judges' meetings;
- examines and summarises activity of the state authorities implementing the decisions of the Constitutional Court;
- maintains international relations of the Constitutional Court;
- researches and summarises foreign and national constitutional review jurisprudence, case law of international judicial bodies;
- provides the publishing activity of the Constitutional Court;
- provides interaction with media in order to give coverage to the activity of the Constitutional Court;
- maintains and develops the informational systems and data banks of the Constitutional Court.

Constitutional Court of the Russian Federation



C. Jurisdictions

C1. General description

The Constitutional Court is the highest court of the country alongside with the Supreme Court of the Russian Federation. The competence thereof is stipulated in Article 125 of the Constitution of the Russian Federation and Article 3 of the Federal Constitutional Law "On the Constitutional Court of the Russian Federation". Unlike other federal courts, the Constitutional Court, as a general rule, does not examine the factual circumstances when considering cases.

In order to protect the foundations of the constitutional order and fundamental human and civil rights and freedoms, to ensure the supremacy and direct effect of the Constitution of the Russian Federation throughout the entire territory of the Russian Federation, the Constitutional Court of the Russian Federation:

- upon requests of the President of the Russian Federation, the Council of the Federation, the State Duma, one fifth of members of the Council of the Federation or of deputies of the State Duma, the Government of the Russian Federation, the Supreme Court of the Russian Federation, and bodies of legislative and executive power of constituent entities of the Russian Federation considers cases on conformity with the Constitution of the Russian Federation of: federal laws, normative acts of the President of the Russian Federation, the Council of the Federation, the State Duma, the Government of the Russian Federation; constitutions of the republics, charters as well as laws and other normative acts of constituent entities of the Russian Federation adopted on the matters of competence of bodies of state authority of the Russian Federation and on the matters of joint competence of bodies of state authority of the Russian Federation and bodies of state authority of the constituent entities of the Russian Federation; treaties between bodies of state authority of the Russian Federation and bodies of state authority of constituent entities of the Russian Federation, treaties between bodies of state authority of constituent entities of the Russian Federation; international treaties of the Russian Federation not yet in force (in particular, on a mandatory basis – of international treaties on accession of a new constituent entity to the Russian Federation);

- resolves disputes on the competence designated by the Constitution of the Russian Federation, which arise between federal bodies of state authority; between bodies of state authority of the Russian Federation and bodies of state authority of constituent entities of the Russian Federation; between the highest bodies of state authority of constituent entities of the Russian Federation;

- upon complaints on violation of constitutional rights and freedoms reviews the constitutionality of a law applied by a court in a particular case where a judicial decision entered into force. This is the most widespread category of cases considered by the Constitutional Court. The right to apply to the Constitutional Court of the Russian Federation on the respective grounds is granted not only to the citizens and legal entities applying with an individual or a collective complaint, whom a contested norm was applied to in a particular case, but also to the High Commissioner for Human Rights in the Russian Federation, as well as to the Prosecutor General of the Russian Federation in favour of citizens;

- upon requests of courts reviews the constitutionality of a law subject to be applied by the respective court in a particular case. A court, when considering a case in any instance, having arrived at a conclusion on the inconformity with the Constitution of the Russian Federation of a law subject to be applied thereby in a particular case is

obliged to apply to the Constitutional Court of the Russian Federation with a request on constitutional review of that law; in such a case, within the period from adoption of a ruling of the court on application to the Constitutional Court and until the Constitutional Court renders its decision, either the proceedings on the case, or execution of the decision adopted by a court shall be suspended;

- provides official interpretation of the Constitution of the Russian Federation;

- adopts opinion on the observance of a prescribed procedure for charging the President of the Russian Federation with the high treason or with commission of another grave crime;

- resolves the question of the possibility to execute a decision of an interstate body for the protection of human rights and freedoms. Such a request shall be admissible if the applicant – a federal executive authority empowered with the competency in the sphere of ensuring the activity on the protection of interests of the Russian Federation within the proceedings at such an interstate body – considers the execution of such a decision impossible inasmuch as it is based on the provisions of an international treaty of the Russian Federation in the interpretation, which leads to the divergence thereof from the Constitution of the Russian Federation;

- examines the conformity with the Constitution of the Russian Federation of an issue that is submitted to a referendum of the Russian Federation pursuant to the Federal Constitutional Law regulating the conduction of a referendum of the Russian Federation.

The Constitutional Court operates in accordance with the rules of constitutional judicial procedure stipulated in the Federal Constitutional Law "On the Constitutional Court of the Russian Federation" and the Rules of Procedure of the Constitutional Court in accordance with the constitutional principles of judicial procedure.

The Constitutional Court resolves cases in sessions. Decisions are adopted either with holding of a public hearing or – if a decision can be delivered on the basis of the existing legal positions of the Constitutional Court – without holding of a hearing (in a written procedure). In the meantime, in the framework of a written judicial procedure there are additional procedural mechanisms provided for in order to ensure adversariality and equality of arms of the parties in a case.

The decisions of the Constitutional Court are binding throughout the entire territory of the Russian Federation for all bodies of state authority, bodies of local self-government, enterprises, institutions, organisations, officials, citizens and associations thereof. They shall be final and are not subject to appeal. Thus, the provisions of normative acts held contradicting to the Constitution of the Russian Federation become repealed; the provisions held constitutional in the interpretation given by the Constitutional Court of the Russian Federation become henceforth applicable only in this constitutional-law meaning: application or any different form of realisation of a normative act or particular provisions thereof in the interpretation divergent from the interpretation given by the Constitutional Court of the Russian Federation shall be impermissible. The cases of citizens or organisations, upon whose complaints a legal norm was held not conforming to the Constitution of the Russian Federation or an interpretation of the Constitutional Court of the Russian Federation was given, are subject to be revised.

C2. Procedures of handling applications by the Secretariat of the Constitutional Court of the Russian Federation

All applications submitted to the Constitutional Court are due to be registered. On average, around 15 to 18 thousand applications are filed to the Court annually. 2012 was marked with a record-high number of applications – almost 20 thousand.

Applications are registered by the Sub-Department for Paperwork Management and then forwarded to the Sub-Department for Reception of Citizens and Correspondence Work, where applications are being initially considered. At this stage the latter Sub-Department identifies the applications falling out of the Court's jurisdiction (e.g.: appeal to a decision of a court of general jurisdiction). Then applications are moved to a relevant "law branch" department of the Secretariat of the Court, where applications are examined for consistency with the following requirements:

- in rem (subject-matter) jurisdiction;
- form of the application;
- due applicant party;
- payment of a state duty.

Besides that, it is essential to meet the stipulated term for submission of an application with the Constitutional Court; an application is to be filed no later than a year starting from the final resolution of a concrete case, e.g. by a court of general jurisdiction.

If an application is not consistent with any of the aforementioned requirements, the Secretariat officers despatch a notification of non-compliance with the requirements of the legislation describing the deficiencies identified and suggesting respective corrections. In this case, an application with all the attached documents is returned to the applicant. The applicant can either correct the mistakes and re-submit the application, or lodge an appeal to the notification of the Secretariat and demand the Constitutional Court (i.e. the Judges of the Court) to re-consider the application.

The Secretariat considers applications within a period of one month.

It is notable that within the national legal system this quasi-judicial power of authority of the Court's Secretariat exists only in the sphere of constitutional justice, whereas neither within the system of courts of general jurisdiction nor in commercial courts staff members are competent to adjudicate on this matters.

First, the Secretariat considers the submitted applications only preliminarily, in order to examine their consistency with the formal requirements. Second, in case of objections the applicant has a right to lodge an appeal and demand the Constitutional Court (i.e. the Judges of the Court) to re-consider the application.

In cases when the subject-matter of an application has already been adjudicated by the Court when considering similar (in the matters of law) applications, the respective department ("law branch" department) of the Secretariat has a right to propose a draft ruling on the inadmissibility of the application and to move the case for further consideration by the Judges.

Thus, approximately 25 to 30 hundred rulings on inadmissibility of applications are adopted per year.

C3. Procedures of handling applications by the Judges of the Constitutional Court of the Russian Federation

If an application is consistent with formal requirements, the respective department of the Secretariat prepares an analytical report – opinion or note – and moves the case to the President of the Constitutional Court, who assigns one or several Judges for a consideration.

In the course of a preliminary consideration, the Judges have a right to despatch an enquiry to specify the facts of the case and the legal opinion of public authorities on the subject-matter.

The term of preliminary consideration of the applications by a Judge should not exceed 2 months. The results of the preliminary consideration are reported during the closed session of the Court, where the Judges in plenary decide whether to admit the application for consideration or to reject it.

If an application is rejected for consideration, the procedure is discontinued; if it is admitted

- the Court appoints the Reporting Judge (usually, the same Judge as for the preliminary consideration), who prepares the case for a public hearing. In 2010 and 2014 certain amendments were adopted to the Federal Constitutional Law "On the Constitutional Court of the Russian Federation". These amendments expanded the scope of applicability of written proceedings, which means that if it is possible to render a decision based solely on the already elaborated legal positions, the Court has a right to consider the case without holding a public hearing. If one of the parties objects to the written form of proceedings, though, the Constitutional Court will be obliged to hold a public hearing.

The Judges of the Constitutional Court render all decisions in plenary sessions. Decisions are rendered with either a public hearing or – if the decision can be delivered on the basis of the existing legal positions of the Constitutional Court – in written proceedings (without a public hearing) – since 2010.

Annually, the Constitutional Court of the Russian Federation admits for consideration approximately 200 applications and renders 30-35 judgments thereupon (consideration of cases on similar subject-matters is subject to integration); consideration of about 10% of the admitted applications is discontinued.

Decisions of the Constitutional Court of the Russian Federation are final and binding, non-appealable and, therefore, are not reversible. A legal norm declared unconstitutional becomes inoperative with the adoption of the respective judgment of the Constitutional Court; it means that no special decision of the legislature on this issue is necessary. In cases of concrete constitutional review the applicant's case is subject to a revision. Retroactive effect is not applicable in case of other applicants. However, other courts shall make their decisions with due regard to the Constitutional Court's decision, even if at the time of the adoption of a first instance decision the Constitutional Court's decision has not yet been issued.

Annex

Annex 1. Case Statistics

1-1. Since establishment

	Period From the period of 1995-2017	2018 (on 30.04.2018)
Final decisions (Judgements)	514	18
Among them: on the interpretation of the RF Constitution (under the procedure of Sec. 5 Art.125 of the RF Constitution)	13	-
In the abstract judicial review (under the procedure of Sec. 2 Art.125 of the RF Constitution)	69	-
In the concrete judicial review (individual applications and court requests) (under the procedure of Sec. 4 Art.125 of the RF Constitution)	402	18
(under the procedure of Sec. 2 and 4 Art.125 of the RF Constitution)	26	-
On the competence disputes (under the procedure of Sec. 3 Art.125 of the RF Constitution)	2	-
Admissibility decisions	28613	1143

Results of consideration of the cases concerning constitutionality review (under the procedure of Sec. 2 and 4 Art.125 of the RF Constitution)	The challenged provisions recognized constitutional, including revealing of their constitutional meaning	197	12
	The challenged provisions recognized unconstitutional as whole or in part	300	6

1-2. Last five years (2013-2017)

2013

Total number of applications	15101		
Final decisions (judgements)	30	Among them containing resolutions on unconstitutionality of a normative provision	With revealing of their constitutional meaning
		26	13
Admissibility decisions	2278	Among them under the reports of the judges, including public hearings	134

2014

Total number of applications	16005		
Final decisions (judgements)	33	Among them containing resolutions on unconstitutionality of a normative provision	With revealing of their constitutional meaning

		20	20
Admissibility decisions	3085	Among them under the reports of the judges, including public hearings	197

2015

Total number of applications	14622		
Final decisions (judgements)	34	Among them containing resolutions on unconstitutionality of a normative provision	With revealing of their constitutional meaning
		19	17
Admissibility decisions	3111	Among them under the reports of the judges, including public hearings	127

2016

Total number of applications	14031		
Final decisions (judgements)	28	Among them containing resolutions on unconstitutionality of a normative provision	With revealing of their constitutional meaning
		19	20
Admissibility decisions	2888	Among them under the reports of the judges, including public hearings	99

2017

Total number of applications	14638		
Final decisions (judgements)	40	Among them containing resolutions on unconstitutionality of a normative provision	With revealing of their constitutional meaning
		14	29
Admissibility decisions	3197	Among them under the reports of the judges, including public hearings	89

Annex 2. Cases

Case 1.

The Constitutional Court of the Russian Federation
Judgment
of 27th December 2012 No. 34-П in the case concerning the review of constitutionality of the provisions of Item "в" of Section 1 and Section 5 of Article 4 of the Federal Law "On the Status of a Member of the Council of Federation and the Status of a Deputy of

the State Duma of the Federal Assembly of the Russian Federation" in connection with the request of a group of deputies of the State Duma

▸ **Summary**

In the Judgment of 27th December 2012 No. 34-П the Constitutional Court gave appraisal of constitutionality of the provisions of Item "в" of Section 1 and Section 5 of Article 4 of the Federal Law on the Status of a Member of the Council of Federation and the Status of a Deputy of the State Duma.

The petitioners contested legislative provisions envisaging early termination of powers of a deputy of the State Duma in case of his/her becoming a member of a governing body of an economic company or other commercial organization, carrying out entrepreneurial or other paid activity apart from teaching, academic and other creative activity. According to the decision passed by the Constitutional Court, the contested legislative provision does not contradict the Constitution of the Russian Federation because, being aimed at prevention of conflict of interests and ensuring the principle of a deputy's independence, means that a deputy of the State Duma is not entitled: to participate in entrepreneurial and other economic activity carried out by a juridical person or to carry out economic activity on his/her own; to participate in the activity related to governing an economic company or other commercial organization, including becoming a member of such governing bodies of a commercial organization, staying in which is impossible without special personal will or to carry out governing functions in a commercial organization without formally entering the respective governing body, as well as to participate in the work of a general assembly as a higher governing body of an economic company. And if removal from participation in the work of a general assembly of an economic company without damage to its activity or property interests of the shareholder (participant) him/herself is actually impossible, he/she must hand over securities, bank stocks (shares of participation in the charter capital of an organization) owned by him/her to trust management.

The Constitutional Court has also recognized as not contradicting the Constitution of the Russian Federation the contested provision, prohibiting teaching, academic and other creative activity, financed exclusively at the expense of resources of foreign States, international and foreign organizations, foreign citizens and stateless persons, if other is not envisaged by an international treaty or the legislation of the Russian Federation, because this legislative provision does not contemplate early termination of powers of a deputy of the State Duma, if he/she, having manifested reasonable restraint and caution in the issues related to financing of the activity carried out by him/her, objectively could not know from what sources it is realized. As far as another contested legislative provision is concerned, on the basis of which the decision on termination of powers of a deputy of the State Duma is passed in the form of a resolution of the State Duma, without preliminary judicial control and by a simple majority of votes, this legislative provision has also been recognized as not contradicting the Constitution of the Russian Federation, because it contemplates the need to verify circumstances pointing at possible breach by the deputy of the State Duma of a incompatibility of deputy's mandate with another paid activity which he/she is not entitled to be engaged in. The existence of such circumstances must be confirmed and supplied by documents. Herewith both the session of a committee (commission) of the State Duma and the session of a chamber on a respective issue shall be organized and conducted on the basis of the general principles of the democratic legal procedures, including the principle audiatur et altera pars, contemplating the obligation to listen to the deputy, to give him/her the possibility to expound his/her position on the substance of the issue under consideration, to adduce arguments and submit proofs in substantiation of his/her position. The deputy of the State Duma in whose respect this issue was initiated must be informed in due time of the time and place of the session. The contested legislative provision further contemplates: the possibility to appeal of the State Duma's resolution on termination of

powers of a deputy of the State Duma in a court of law and, accordingly, the right of the Supreme Court of the Russian Federation, having considered in a priority order the application, contesting such a resolution, to verify its legality and validity, including in the part of the observance of appropriate procedure by the State Duma; extension to the citizen of the Russian Federation, in whose respect the resolution has been adopted on early termination of his/her powers of a deputy of the State Duma in consequence of his/her breach of the ban to be engaged in another paid activity apart from teaching, academic and other creative activity, of the guarantees of immunity fixed by Article 98 of the Constitution of the Russian Federation, up to entering into legal force of the decision of the Supreme Court of the Russian Federation, adopted on the outcome of consideration of the application on contesting of such resolution of the State Duma; restoration of the citizen of the Russian Federation in the status of a deputy of the State Duma of corresponding convocation in case of the Supreme Court's recognition of illegality of the resolution on termination of his/her deputy's powers adopted by the State Duma; the possibility to appeal to the Supreme Court of the Russian Federation with application on contesting the decisions (or inaction) of the State Duma in rejecting early termination of powers of a deputy of the State Duma, if initiators of consideration of a respective issue by the State Duma – deputies' faction or other persons, enjoying appropriate public-law status, consider that there are sufficient grounds for termination of powers of a deputy of the State Duma.

Case 2.

The Constitutional Court of the Russian Federation
Judgment
of 8th April, 2014 No.10-П/2014 on the case concerning the review of constitutionality of the provisions of Item 6 of Article 2 and Item 7 of Article 32 of the Federal Law "On Non-commercial Organizations", Section 6 of Article 29 of the Federal Law "On Public Associations" and Section 1 of Article 19.34 of the Administrative Offences Code of the Russian Federation in connection with complaints of the Commissioner for Human Rights in the Russian Federation, the foundation "Kostroma Centre for the Support of Public Initiatives", citizens L.G.Kuz'mina, S.M.Smirensky and V.P.Yukechev.

▸ Summary

By the Judgment of 8th April 2014 No. 10-П/2014 the Constitutional Court gave appraisal of constitutionality of the provisions of Item 6 of Article 2 and Item 7 of Article 32 of the Federal Law "On Non-Commercial Organizations", Section 6 of Article 29 of the Federal Law "On Public Associations" and Section 1 of Article 19.34 of the Administrative Offences Code of the Russian Federation.

The subject-matter of consideration were legislative provisions, on the basis of which the question is decided on recognition of a non-commercial organization, including public association, as performing functions of a foreign agent and obligation is established of a non-commercial organization, intending to carry out its activity in the indicated quality after State registration, to submit an application on its inclusion in the register of non-commercial organizations, performing functions of a foreign agent, to an authorized body (hereinafter referred to as "the Register"). The Constitutional Court also verified constitutionality of the provisions of the Administrative Offences Code of the Russian Federation, envisaging administrative responsibility for carrying out activity by a non-commercial organization, performing functions of a foreign agent, not included in the Register, in the form of administrative fine imposed on officials in the amount of 100,000 to 300,000 roubles, on juridical persons – 300,000 to 500,000 roubles.

The Constitutional Court recognized the contested interconnected provisions of the Federal Laws "On Non-Commercial Organizations" and "On Public Associations" as not contradicting the Constitution of the Russian Federation, since they are directed at ensuring transparency (openness) of activity of non-commercial organizations, receiving monetary means and other property from foreign sources and participating in political activity carried out on the territory of the Russian Federation, with the aim to influence – directly or indirectly (by way of forming public opinion) – the decisions taken by State bodies and State policy conducted by them. This regulation contemplates no interference with determination of the preferred content and priorities of such an activity and means no negative legislative appraisal of non-commercial organizations performing functions of a foreign agent. It is pointed out in the Judgment that the said legislative provisions establish notification procedure of inclusion of non-commercial organizations in the Register and do not hinder them to freely search for and receive monetary means and other property both from foreign and from Russian sources and use them for organization and carrying out political activity, including in the interests of foreign sources.

The contested norms proceed from the presumption of legality and conscientiousness of activity of non-commercial organizations and do not deprive them of the right to court protection against unfounded demands of bodies of justice or public prosecution to hand in application on inclusion in the Register, imposing the burden of proof of the need to hand in such an application on respective State bodies.

The Constitutional Court also recognized as not contradicting the Constitution of the Russian Federation the contested provision of the Administrative Offences Code of the Russian Federation, so far as it does not contemplate coming of administrative responsibility for carrying out political activity on the territory of the Russian Federation by a non-commercial organization, performing functions of a foreign agent, after handing in application on its inclusion in the Register in the established procedure to an authorized body and does not admit making officials and juridical persons administratively answerable for actions (inaction), forming signs of the objective side of corpus delicti of a given administrative offence, but having taken place prior to establishment of administrative responsibility for their commission.

At the same time, in the part of establishment of minimum amounts of administrative fine this provision of the Administrative Offences Code of the Russian Federation has been recognized as not conforming to the Constitution of the Russian Federation to the extent to which this provision, not admitting prescription of an administrative penalty below the lowest bound, established by a respective sanction, does not allow the law-applier in all cases in a proper way to take into consideration the character and consequences of the committed administrative offence, the degree of guilt of the person made administratively answerable, his property and financial status, as well as other circumstances, having substantial significance for individualization of administrative responsibility and thereby ensure prescription of a fair and proportionate administrative penalty.
Until necessary legislative amendments are made, the amount of administrative fine, prescribed for officials and juridical persons for the commission of an administrative offence, envisaged by the contested provision, may be reduced by court below the lowest bound, determined by the sanction of this norm, in cases when its imposition within the established bounds does not answer the goals of administrative responsibility and evidently entails surplus restriction of property rights of the person made administratively answerable.

Case 3.

The Constitutional Court of the Russian Federation
Judgment
of 17th February, 2015 No. 2-П/2015 on the case concerning the review of constitutionality of the provisions of Item 1 of Article 6, Item 2 of Article 21 and Item 1 of Article 22 of the Federal Law "On Prosecutor's Office of the Russian Federation" in connection with complaints of the Interregional Association of Human Rights Protective Public Associations "AGORA", Interregional Public Organization "Human Rights Protective Centre "Memorial", International Public Organization "International Historical-Enlightening, Charitable and Human Rights Protective Society "Memorial", Regional Public Charitable Organization to Help Refugees and Forced Migrants "Civic Assistance", Autonomous Non-commercial Organization for Legal, Information and Expert Services "Zabaikal'sky Human Rights Protective Centre", Regional Public Foundation "International Standard" in Republic of Bashkortostan and S.A.Gannushkina.

▸ **Summary**

By the Judgment of 17th February, 2015 No. 2-П/2015 the Constitutional Court gave appraisal of constitutionality of the provisions of Item 1 of Article 6, Item 2 of Article 21 and Item 1 of Article 22 of the Federal Law "On Prosecutor's Office of the Russian Federation"

In accordance with the contested interconnected provisions bodies of the Prosecutor's Office, within the framework of supervision over observance of laws by non-commercial organizations, hold checkups, during which prosecutor's demands following from his powers are subject to unconditional execution; carrying out supervision over the observance of laws by non-commercial organizations, bodies of the Prosecutor's Office do not substitute other State bodies; a prosecutor is entitled to verify observance of laws in connection with the information received by bodies of the Prosecutor's Office on the facts of breach of law requiring undertaking of measures by the prosecutor and to demand from heads and other officials of the examined organization to submit the necessary documents, materials, statistical and other data as well as to recruit representatives (staff-members) of other State bodies to participate in verification events.

The Constitutional Court recognized the contested legislative provisions as not contradicting the Constitution of the Russian Federation, so far as they ensure fulfilment by the Prosecutor's Office of the Russian Federation of the function of supervision placed on it as an activity determined by its destination by requirements of the Constitution of the Russian Federation, and are aimed at ensuring of legality, State and public security, protection of rights and freedoms of other persons as well as other constitutionally-significant values.

The Constitutional Court recognized the contested legislative provisions as not contradicting the Constitution of the Russian Federation also to the extent to which they:
contemplate holding by bodies of the Prosecutor's Office of checkups within the bounds of certain subject of a particular checkup, determined by the presence of a data pointing at signs of breach of laws in the activity of a non-commercial organization and its officials, which cannot be confirmed or refuted in the course of the inter-departmental interaction with a State body exercising federal State supervision over the activity of non-commercial organization (Ministry of Justice of the Russian Federation) with passing of motivated decision on this, subject to be brought to the notice of the examined organization at least at the moment of commencement of the checkup;

contemplate the possibility of prosecutor's request from heads and officials of a non-commercial organization of documents and materials, directly determined by goals

and subject of a particular checkup, which cannot be obtained from other State bodies or from open sources and having not been handed over to bodies of the Prosecutor's Office in connection with a checkup held earlier, and do not oblige the non-commercial organization to submit documents which it is not committed to have in accordance with the legislation as well as to form documents absent by the moment of bringing forward of prosecutor's demand;

admit no holding by bodies of the Prosecutor's Office of a repeated checkup, carried out in connection with facts pointing at alleged breaches of laws, which on the outcome of a checkup held earlier legal qualification has been given or should have been given to, with the exception of a checkup of elimination of breaches of laws held within reasonable term after their revelation;

contemplate the possibility to recruit for participation in holding of a checkup representatives (staff-members) of other State bodies solely with the objective of exercising subsidiary (expert-analytic) functions by them, which excludes independent holding of verification actions on behalf and within the framework of competence of respective State bodies and admits no other deviations from the procedure and periodicity of planned events established by the legislation in force and held by competent bodies of State control (supervision);

oblige bodies of the Prosecutor's Office to approve on the outcome of a checkup an act, containing ascertaining of the presence or absence of breaches of laws in the activity of a non-commercial organization, in connection with the possibility of which prosecutor's checkup was carried out, and to bring such act to the notice of the examined non-commercial organization;

contemplate court examination upon application of a non-commercial organization of legality of holding of measures of prosecutor's supervision in its respect, decisions adopted in the course of these measures as well as actions (inaction) of a prosecutor connected with them, whereas the burden of proof of the lawfulness of holding of the checkup and demands brought forward lies on the prosecutor.

At the same time, the provisions of Item 1 of Article 6 and Item 1 of Article 22 of the Federal Law "On Prosecutor's Office of the Russian Federation" have been recognized as not conforming to the Constitution of the Russian Federation to the extent to which they establish no general (maximum) terms of holding checkups by bodies of the Prosecutor's Office as well as do not regulate concrete terms of execution of prosecutor's demands.

Until appropriate legislative amendments are made, reasonableness of these terms shall be confirmed or refuted by courts in the course of consideration of respective disputes, bearing in mind that the burden of proof of their reasonableness lies on the prosecutor. At this, the Federal Law "On Protection of Rights of Juridical Persons and Individual Entrepreneurs when Carrying out State Control (Supervision) and Municipal Control" must have guiding significance when resolving questions connected among other things with determination of terms of submission of documents to a prosecutor necessary for holding of a checkup.

Case 4.

The Constitutional Court of the Russian Federation
Judgment
of 19th April 2016 No. 12-П/2016 in the case concerning the resolution of the question of the possibility to execute in accordance with the Constitution of the Russian Federation the Judgment of the European Court of Human Rights of 4 July 2013 in the

case of Anchugov and Gladkov v. Russia in connection with the request of the Ministry of Justice of the Russian Federation

▸ **Summary**

By the Judgment of 19th April, 2016 No.12-П/2016 the Constitutional Court resolved the question of the possibility to execute in accordance with the Constitution of the Russian Federation the Judgment of the European Court of Human Rights of 4th July, 2013 in the case of Anchugov and Gladkov v. Russia.

The subject-matter of consideration was the question of the possibility to execute in accordance with the Constitution of the Russian Federation, including its Article 32 (Section 3), the Judgment of the European Court of Human Rights in the case of Anchugov and Gladkov v. Russia, passed on the basis of Article 3 of Protocol No. 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms in its interpretation by the European Court of Human Rights.

The Constitutional Court has recognized as impossible execution of this Judgment of the ECtHR with regard to measures of general character, contemplating making amendments to Russia's legislation (and thereby alteration of the judicial practice based on it), which would allow to restrict in electoral rights not all convicted persons serving sentence in places of deprivation of liberty under a court sentence, so far as the prescription of Article 32 (Section 3) of the Constitution of the Russian Federation, having supremacy and supreme legal force in Russia's legal system, with all certainty means an imperative ban, according to which all convicted persons serving sentence in places of deprivation of liberty defined by the criminal law have no electoral rights with no exception.

The Constitutional Court has recognized as possible and realizable in Russia's legislation and judicial practice execution of this Judgment of the ECtHR with regard to measures of general character, ensuring justice, proportionality and differentiation of application of the restriction of electoral rights, so far as in accordance of Article 32 (Section 3) of the Constitution of the Russian Federation and the provisions of the Criminal Code of the Russian Federation concretizing it, as a general rule, the penalty in the form of deprivation of liberty and thereby deprivation of electoral rights of convicted persons having committed crimes of small gravity for the first time is excluded, and for crimes of medium gravity and grave crimes deprivation of liberty as a stricter kind of penalty from the number of those envisaged by the Particular Part of this Code for the commission of a respective crime, is prescribed under a court sentence and, consequently, entails disenfranchisement only in the event if less strict kind of penalty cannot ensure achievement of goals of the penalty.

The execution of the said Judgment of the ECtHR with regard to measures of individual character, which are stipulated by the operating legislation of the Russian Federation, in respect of citizens S.B. Anchugov and V.M. Gladkov has been recognized as impossible, since these citizens had been sentenced to deprivation of liberty for long terms for the commission of particularly grave crimes and therefore could not count, even according to criteria elaborated by the European Court of Human Rights, on access to electoral rights.

Case 5.

The Constitutional Court of the Russian Federation
Judgment
of 10th February 2017 No. 2-П/2017 in the case concerning the review of constitutionality of the provisions of Article 2121 of the Criminal Code of the Russian Federation in connection with the complaint of I.I.Dadin

▸ **Summary**

By the Judgment of 10th February 2017 No. 2-П the Constitutional Court gave appraisal of constitutionality of the provisions of Article 212 1 of the Criminal Code of the Russian Federation

The contested provisions were the subject-matter of consideration insofar as they serve as a ground for the resolution of the question of whether in an action there are signs of criminally unlawful breach of the established order of the organisation or holding of an assembly, meeting, demonstration, procession or picketing and of application of a criminal punishment in the form of deprivation of liberty to the person who committed it.

The Constitutional Court has recognised the contested provisions as not contradicting the Constitution of the Russian Federation, so far as they:

allow to expose to criminal persecution for breach of the established order of the organisation or holding of an assembly, meeting, demonstration, procession or picketing (hereinafter referred to as "respective breach") a person having earlier been made administratively answerable no less than 3 times during 180 days for administrative offences, envisaged by Article 20.2 of the Administrative Offences Code of the Russian Federation, if this person has once again breached the established order of the organisation or holding of an assembly, meeting, demonstration, procession or picketing within the bounds of a term, during which he is regarded as exposed to administrative punishment for the said administrative offences;

contemplate that making a person criminally answerable for the crime envisaged by this Article is only possible in the event if the respective breach has entailed causing or a real threat of causing harm to people's health, property of natural or juridical persons, environment, public order, public security or other constitutionally protected values;

exclude the possibility to make criminally answerable for a respective breach a person, in whose respect by the moment of the commission of an act he is being charged with, there were no judicial acts in legal force on his making administratively answerable no less than 3 times during 180 days for administrative offences, envisaged by Article 20.2 of the Administrative Offences Code of the Russian Federation;

admit making a person criminally answerable under this Article only in the event if the respective breach was intentional;

mean that actual circumstances established by judicial acts on cases of administrative offences in legal force in themselves do not predetermine court's conclusions about guilt of a person, in whose respect they have been delivered, of the commission of a crime envisaged by this Article, which must be established by court in procedures provided for by the criminal procedure law on the basis of the entire aggregate of proof, including those not examined during the consideration of cases on administrative offences committed by this person;

imply the possibility to prescribe to this person a punishment in the form of deprivation of liberty only under condition that the respective breach has entailed loss of peaceful character by the public event (if the respective breach does not fall under signs of the crime envisaged by Article 212 "Mass Rioting" of the Criminal Code of the Russian Federation) or causing or a real threat of causing substantial harm to people's health, property of natural or juridical persons, environment, public order, public security or other constitutionally protected values and attainment of the goals of criminal responsibility for the crime envisaged by this Article is impossible without prescription of this kind of punishment.

13. Tajikistan

Constitutional Court

Summary

In 1995 the Constitutional Court of Tajikistan was established, taking over a function that was previously performed by the Constitutional Control Committee. The Constitutional Court of Tajikistan consists of seven judges, including the Chairman and Vice-Chairman. One of the judges is a representative of the Gorno-Badakhshan Autonomous Region. Judges of the Constitutional Court must be between 30 and 65 years of age, with a higher legal education and having acquired at least 10 years of professional experience. They are elected for a term of 10 years. The legislature elects the members of the Court on the proposal by the state President. A majority vote of the total number of legislators is sufficient for election. Currently the Constitutional Court of Tajikistan has over 33 employees. The Constitutional Court reviews the constitutionality of various norms and actions. They include, for example, laws, joint legislative resolutions, normative legal acts by the state President, international treaties which have not yet entered into force, and normative legal acts by sub-national legislative and executive bodies. In addition, constitutional review also applies to amendments and additions to the Constitution, draft laws and other issues submitted to a nationwide referendum. Other jurisdictions include the resolution of competence disputes and solicitations by individuals complaining of the violation of their constitutional rights and freedoms by a piece of legislation or other normative legal act. In the gradual democratization process experienced by Tajikistan, the Constitutional Court, like the entire judicial system, has played an important role through its decisions. It has contributed to the creation of a civil and social society, as well as defended the constitutional rights and freedoms of individuals.

Content

A. Introduction

A1. History

The Constitutional Court of the Republic of Tajikistan was established in 1995. The Constitutional Court of the Republic of Tajikistan as a newest institution of statehood, which occupies a dominant position in the judicial power, was firstly reflected and legally regulated in Chapter 8 of the Constitution of the Republic of Tajikistan (November 6, 1994). Prior to the adoption of the Constitution in our country, constitutional control had been performed by the Constitutional Control Committee of the Republic of Tajikistan which was established in 1990.

A real basis for activity of the Constitutional Court was set by the Decree of the President of the Republic of Tajikistan No. 238 dated 15 May 1995, in accordance with which all necessary conditions for the activity of the Court have been created. Following the adoption of the Constitutional Law of the Republic of Tajikistan "On the Constitutional Court of the Republic of Tajikistan" on November 3, 1995, the Constitutional Court began is activity.

The Constitutional Court of the Republic of Tajikistan is an independent judicial body for constitutional oversight established to ensure the supremacy and direct effect of the norms of the Constitution of the Republic of Tajikistan.

A2. Basic Texts

- Constitution of the Republic of Tajikistan (enacted 1994, last amended 2016): Article 89
- The Constitutional Law of the Republic of Tajikistan on the Constitutional Court of the Republic of Tajikistan (enacted 1995, last amended 2014)

B. Organization

B1. Chairperson

The Chairman of the Constitutional Court of the Republic of Tajikistan shall be elected by the Majlisi Milli of the Majlisi Oli of the Republic of Tajikistan on representation of the President of the Republic of Tajikistan.

The Chairman of the Constitutional Court of the Republic of Tajikistan: manages organizational activities of the Constitutional Court of the Republic of Tajikistan; supervises over preparation of proceedings of the Court, convokes the proceedings and presides over them; submits for discussion issues to be addressed in court proceedings; annually sends the Message of the Constitutional Court of the Republic of Tajikistan to the President of the Republic of Tajikistan, to the Majlisi Milli and Majlisi Namoyandagon of the Majlisi Oli of the Republic of Tajikistan on the condition of the Constitutional legality in the republic; organizes the work of judges of the Constitutional Court of the Republic of Tajikistan; employs and dismisses employees of the Constitutional Court of the Republic of Tajikistan, presents them to the state awards of the Republic of Tajikistan, encourages them class and qualification ranks. The Chairman of the Constitutional Court of the Republic of Tajikistan within the limits of the powers issues instructions and orders.

B2. Justices

Number of Justices: 7

The Constitutional Court of the Republic of Tajikistan consists of seven judges, one of which is the representative of Gorno-Badakhshan Autonomous Region. Judges of the Constitutional Court of the Republic of Tajikistan shall be elected by the Majlisi Milli of the Majlisi Oli of the Republic of Tajikistan on representation of the President of the Republic of Tajikistan. Judges of the Constitutional Court of the Republic of Tajikistan shall be elected for a term of 10 years. To the post of a judge of the Constitutional Court of the Republic of Tajikistan shall be elected a citizen of the Republic of Tajikistan, who has a higher law degree, not younger than 30 and no older than 65 years old, have the experience of work over 10 years in the profession. Judges of the Constitutional Court of the Republic of Tajikistan shall be independent in their activities and are subject to the Constitution of the Republic of Tajikistan and to this Constitutional Law and other legal acts of the Republic of Tajikistan only. They assess the evidence according to their inner conviction. The judge of the Constitutional Court of the Republic of Tajikistan shall possess the immunity right. The inviolability of judges of the Constitutional Court of the Republic of Tajikistan applies to his life, honor and dignity, residential and office space, located on its use of vehicles and communication facilities, as well as correspondence, documents and things.

The trial in the Constitutional Court of the Republic of Tajikistan takes place on the basis of competitiveness and equality of the parties. Judges of the Constitutional Court of the Republic of Tajikistan have equal rights in considering cases.

Withdrawal of the judge of the Constitutional Court of the Republic of Tajikistan is carried out by Majlisi Milli of the Majlisi Oli of the Republic of Tajikistan on representation of the President of the Republic of Tajikistan, in the following cases: at his own request; satisfaction of the written request of the judge of the Constitutional Court of the Republic of Tajikistan about resignation; presence of the verdict of guilty of the Supreme Court of the Republic of Tajikistan which have come into force; on the basis of an enforceable court decision recognizing him as incapable, partially incapable, untraceable missing or dead; death of the judge; employment of the judge in the activity incompatible with his post; termination the citizenship of the Republic of Tajikistan.

B3. The Administration of the Constitutional Court

The Administration of the Constitutional Court of the Republic of Tajikistan is a component of the Constitutional Court of the Republic of Tajikistan and was established according to provisions of Article 77 of the Constitutional Law of the Republic of Tajikistan "On Constitutional Court of the Republic of Tajikistan". According to requirements of this article of the Constitutional Law, Administration of the Constitutional Court fulfils informative, research advisory, and other supplementary work. Regulation on the Administration of the Constitutional Court, its structure and staff shall be approved by the Chairman of the Constitutional Court of the Republic of Tajikistan. At the present time, the Administration of the Constitutional Court is functioning based on the Administration of the Constitutional Court, which was established by instruction of the Chairman of the Constitutional Court. The Administration of the Constitutional Court, according to duties and terms of references of the Constitutional Court, establishes contacts and initiates cooperation with the Executive Office of the President of the Republic of Tajikistan, the offices of Majlisi Milli and Majlisi Namoyandagon Majlisi Oli of the Republic of Tajikistan, High Court, High Economic Court of the Republic of Tajikistan, Council of Justice, and other governmental bodies. According to the provisions of the Regulations, main duties of the Administration of the Constitutional

Court are: legal, organizational, technical, logistics and financial support for Constitutional Court and its judges; analysis and generalization of Constitutional Court activities; systematization of existing legislation; provision of contacts and mutually beneficiary cooperation with constitutional controlling authorities of other states and international organizations; holding of protocol events and business visits of Constitutional Court judges; establishment of cooperation of the Constitutional Court with ministries and other structures of the republic; organization of informative works, ensuring cooperation with periodic publications, other official mass media, including through Internet; preparation of reports and informative and analytical materials on Constitutional Court activities; ensuring implementation of instructions and orders of the Chairman of the Constitutional Court and warrants of Constitutional Court judges etc.

As of 2017, 19 public officials work at the Administration of the Constitutional Court of the Republic of Tajikistan. Administration of the Constitutional Court of the Republic of Tajikistan is comprised of the following:

- **Head of the Administration of the Constitutional Court**: Organizes works and follows up implementation of tasks set before the Administration, manages activities of divisions of the Administration of the Constitutional Court and coordinates their activities.

- **Division of Legal Maintenance of Activity of Judges:** Legal maintenance of activities of Constitutional Court Judges, preparation of protocols of legal proceedings and archiving the cases after consideration, participation in preparation of draft orders and instructions of the Chairman of the Constitutional Court.

- **General Division and Public Service:** Organization and maintenance of records management, registration, archiving and supervision over the time of performance of incoming documents.

- **Financial and Material Division:** Financial, material and technical of activities of the Constitutional Court preparation of annual budget of expenditure of the Constitutional Court, financial plan of liabilities and dues of the Constitutional Court.

- **International Relations Sector:** Organization and ensuring cooperation of the Constitutional Court with constitutional controlling authorities of other states and international organizations.

C. Jurisdictions

According to Article 89 of the Constitution of the Republic of Tajikistan, and Article 34 of the Constitutional Law of the Republic of Tajikistan on the Constitutional Court of the Republic of Tajikistan, the Constitutional Court shall have jurisdiction over the following:

- laws, joint resolutions of Majlisi Milli of Majlisi Oli of the Republic of Tajikistan and Majlisi Namoyandagon of the Majlisi Oli of the Republic of Tajikistan, normative legal acts by the Majlisi Milli of Majlisi Oli of the Republic of Tajikistan, Majlisi Namoyandagon of the Majlisi Oli of the Republic of Tajikistan, President of the Republic of Tajikistan, the Government of the Republic of Tajikistan, guiding explanations of the plenums of the Supreme Court of the Republic of Tajikistan and the Higher Economic Court of the Republic of Tajikistan;
- international treaties of the Republic of Tajikistan, which have not yet entered into

legal force;
- the projects of changes and amendments to the Constitution of the Republic of Tajikistan, bills and other issues submitted to a national referendum;
- the application of the citizens on conformity with the Constitution of the Republic of Tajikistan, a law, other legal act, governing explanations of the plenums of the Supreme Court and the Higher Economic Court of the Republic of Tajikistan, used by state or public bodies, as well as the courts in respect to them in a particular case, violating, in their opinion their constitutional rights and freedoms;
- exercises other powers defined by the Constitution of the Republic of Tajikistan, the present Constitutional Law and other legislative acts of the Republic of Tajikistan.

C1. Subjects Entitled to Appeal to the Constitutional Court of the Republic of Tajikistan

The right to appeal to the Constitutional Court of the Republic of Tajikistan belongs to the following subjects:

- the President of the Republic of Tajikistan, Majlisi Milli and Majlisi Namoyandagon of the Majlisi Oli of the Republic of Tajikistan on conformity to the Constitution of the Republic of Tajikistan proposed changes and amendments to the Constitution of the Republic of Tajikistan, draft laws and other matters submitted for a national referendum;
- the President of the Republic of Tajikistan, joint sessions of the Majlisi Milli and Majlisi Namoyandagon of Majlisi Oli of the Republic of Tajikistan, to Majlisi Milli of the Majlisi Oli of the Republic of Tajikistan, Majlisi Namoyandagon of the Majlisi Oli of the Republic of Tajikistan, to the Government of the Republic of Tajikistan, a member of the Majlisi Milli and to a deputy of the Majlisi Namoyandagon of the Majlisi Oli of the Republic of Tajikistan, to the Supreme Court of the Republic of Tajikistan, the Higher Economic Court of the Republic of Tajikistan, the General Prosecutor of the Republic of Tajikistan, majlises of People's Deputies of the Gorno-Badakhshan Autonomous Region, regions and city of Dushanbe on conformity to the Constitution of the Republic of Tajikistan laws, joint legal normative acts of the Majlisi Milli and Majlisi Namoyandagon of the Majlisi Oli of the Republic of Tajikistan, legal acts of Majlisi Milli and Majlisi Namoyandagon of the Majlisi Oli of the Republic of Tajikistan, normative legal acts of Majlisi Milli and Majlisi Namoyandagon of the Majlisi Oli of the Republic of Tajikistan, the President of the Republic of Tajikistan, the Government of the Republic of Tajikistan and the international contracts of Tajikistan which have not come into force, guiding explanations of plenums of Supreme Court of the Republic of Tajikistan and Higher Economic Court of the Republic of Tajikistan;
- the General Prosecutor of the Republic of Tajikistan, majlises of People's Deputies of Gorno-Badakhshan Autonomous Region, regions and the city Dushanbe and to chairmen of Gorno-Badakhshan Autonomous Region, regions and the city Dushanbe on conformity to the Constitution of the Republic of Tajikistan of legal normative acts of the ministries, the state committees and other state bodies, local bodies of the government;
- the Government of the Republic of Tajikistan, the ministries, other state bodies majlises of People's Deputies of the Gorno-Badakhshan Mountainous Autonomous Region, regions, the city of Dushanbe, cities and districts, chairmen of the Gorno-Badakhshan Mountainous Autonomous Region, region, city of Dushanbe, cities and district on disputes between them about their competence;
- Commissioner for Human Rights in the Republic of Tajikistan on compliance to the Constitution, law and other normative legal acts, guidelines of the Plenum of the Supreme Court of the Republic of Tajikistan and the Higher Economic Court of the Republic of Tajikistan, applied by the relevant government or public authorities as

well as judicial authorities against citizens in a particular case, that violates, in his opinion, constitutional rights and freedoms of citizens;
- physical persons on conformity to the Constitution of the Republic of Tajikistan, law and other normative legal acts, guidelines of the plenums of the Supreme Court of the Republic of Tajikistan and the Higher Economic Court of the Republic of Tajikistan, applied by the relevant government or public authorities as well as judicial authorities against citizens in a particular case, that violates, in their opinion, constitutional rights and freedoms of citizens;
- legal persons on conformity to the Constitution of the Republic of Tajikistan, law and other normative legal acts, guidelines of the plenums of the Supreme Court of the Republic of Tajikistan and the Higher Economic Court of the Republic of Tajikistan, applied by the relevant government or public authorities as well as judicial authorities against citizens in a particular case, that violates, in his opinion, constitutional rights and freedoms of citizens;
- judges of the Supreme Court of the Republic of Tajikistan, Higher Economic Court of the Republic of Tajikistan, other judges of the Republic of Tajikistan (except the judges of the Constitutional Court of the Republic of Tajikistan) on conformity to the Constitution of the Republic of Tajikistan, law and other normative legal acts, guidelines of the plenums of the Supreme Court of the Republic of Tajikistan and the Higher Economic Court of the Republic of Tajikistan, applied by the relevant government or public authorities as well as judicial authorities against citizens in a particular case, that violates, in their opinion, constitutional rights and freedoms of citizens. (Article 40 of the present Constitutional Law on the Constitutional Court)

C2. The order of commencement of the legal proceedings and preparation of case for consideration.

The appeal to the Constitutional Court of the Republic of Tajikistan is submitted in written form. Bodies and officials, referred to in the first to fourth paragraphs of Article 40 of the present Constitutional Law on the Constitutional Court, submit to the Constitutional Court of the Republic of Tajikistan a statement and those provided for in the fifth to eighth paragraphs of that article submit an appeal with a petition. The case is considered by the Constitutional Court of the Republic of Tajikistan during six months from the date of receipt of the application (appeal or petition).

Request or petition and annexes shall be submitted to the Constitutional Court of the Republic of Tajikistan in an amount of not less than 10 copies. At the request of the judge, the appealing party has to submit a different number of copies of the said documents. To request or petition a document confirming payment of the state fee is attached.

Ground for a hearing in the Constitutional Court of the Republic of Tajikistan serves an appeal or a written petition filed to the Constitutional Court of the Republic of Tajikistan in accordance with the requirements of the present Constitutional Law on the Constitutional Court.

The basis for the proceedings in the Constitutional Court of the Republic of Tajikistan is the discovered uncertainty in the issue of the constitutionality of the laws of the Republic of Tajikistan, joint normative legal acts of the Majlisi Milli and the Majlisi Namoyandagon of the Majlisi Oli of the Republic of Tajikistan, normative acts of the Majlisi Milli of the Majlisi Namoyandagon of the Majlisi Oli of the Republic of Tajikistan, the President of the Republic of Tajikistan, the Government of the Republic of Tajikistan, other state and public bodies, international agreements of Tajikistan, that have not entered into legal force, guiding explanations of the plenums of the Supreme Court and the Higher Economic Court of the Republic of Tajikistan, the disputes

between the public authorities with regard to their competence, other circumstances arising from the competence of the Constitutional Court of the Republic of Tajikistan.

The ground for a hearing in the Constitutional Court of the Republic of Tajikistan on compliance to the Constitution of the Republic of Tajikistan the draft changes and amendments to the Constitution of the Republic of Tajikistan, or draft laws and other issues submitted to a popular referendum, is the submission of the President of the Republic of Tajikistan or Majlisi Milli and Majlisi Namoyandagon of Majlisi Oli of the Republic of Tajikistan.

Incoming statement or a petition shall be handed over by the Chairman of the Constitutional Court of the Republic of Tajikistan to a judge or judges for investigation and verification. Having checked the statement or the petition, the judge or judges within a month present a proposal to the Constitutional Court of the Republic of Tajikistan to institute or refuse to institute proceedings. The Constitutional Court of the Republic of Tajikistan, considering a proposal by the judge or judges makes a decision to institute proceedings and charges a judge or judges to prepare a case to the court hearing or makes a decision not to institute proceedings. The appellee is informed about it in a written form. The copy of the decision to initiate proceedings is sent to the parties and appellees, and a copy of the ruling on the refusal to initiate proceedings is sent to the appellee within the period of five days. In the case of repeated appeal to the Constitutional Court of the Republic of Tajikistan on the issue on which there is a definition of the Constitutional Court of the Republic of Tajikistan to refuse to institute proceedings, the appellee is sent a copy of the definition, and at the same time, he is notified of the termination of further correspondence with him on this issue. In case of instituting court proceedings, the Constitutional Court of the Republic of Tajikistan may by its decision suspend the action of the contested normative legal act until its consideration.

C3. Acts of the Constitutional Court of the Republic of Tajikistan

Acts of the Constitutional Court of the Republic of Tajikistan consists of the resolution, conclusion and definition. The Constitutional Court having considered the case adopts a resolution. The resolution is passed on behalf of the Republic of Tajikistan and is signed by presiding judge and judge-secretary of the Constitutional Court of the Republic of Tajikistan.

The Constitutional Court in the cases specified by the Constitution of the Republic of Tajikistan and the present Constitutional Law adopts a conclusion. The conclusion of the Constitutional Court is accepted and proclaimed in the order as is determined for passing of resolutions of the Constitutional Court of the Republic of Tajikistan.

On other issues, considered by the Constitutional Court and in cases identified by the Present Constitutional Law, adopts a definition.

The acts of the Constitutional Court of the Republic of Tajikistan are enacted by open vote. Judges do not have the right to abstain or not participate in the voting. The presiding judge in all cases shall vote the last. The decision of the Constitutional Court of the Republic of Tajikistan shall be considered enacted if voted for by a majority of those present at the hearing of the judges. In case of equal votes of judges it is decided that the disputed law, other normative legal act or guiding explanations of the plenums of the Supreme Court and the Higher Economic Court of the Republic of Tajikistan conform to the Constitution of the Republic of Tajikistan. The resolution and conclusion of the Constitutional Court of the Republic of Tajikistan after their adoption are

proclaimed immediately. A judge of the Constitutional Court of the Republic of Tajikistan not agreeing with the decision of the Constitutional Court of the Republic of Tajikistan has the right to express a dissenting opinion in writing.

The acts of the Constitutional Court of the Republic of Tajikistan shall enter into force from the moment of their adoption, unless they specified otherwise. Acts of the Constitutional Court of the Republic of Tajikistan shall be final and not subject to appeal. Execution of the Constitutional Court of the Republic of Tajikistan are obligatory for all state bodies, enterprises, institutions, other organizations, public associations, regardless of their form of ownership, officials and citizens to whom they are addressed.

Laws and other normative legal acts, governing explanations of the plenums of the Supreme Court and the Higher Economic Court of the Republic of Tajikistan or their separate norms recognized by the Constitutional Court of the Republic of Tajikistan not conforming with the Constitution of the Republic of Tajikistan, cease to be in force.

The decisions of courts and other authorities based on laws and other normative legal acts or guidelines of plenums of the Supreme Court and the Higher Economic Court of the Republic of Tajikistan recognized not conforming with to the Constitution of the Republic of Tajikistan are not be enforced.

In identifying specific violations of the Constitution of the Republic of Tajikistan and normative legal acts of the Republic of Tajikistan, the Constitutional Court of the Republic of Tajikistan makes a proposal for the relevant authorities and officials, that violated the Constitution, drawing their attention to violations and the need for their elimination and reports on the measures taken to the Constitutional Court of the Republic Tajikistan during the identified timeline. In the case of adoption by the Constitutional Court of the Republic of Tajikistan of a conclusion on non-observance of the order of presentation of accusation of the President of the Republic of Tajikistan with treason, consideration of charges stops. Recognition by the Constitutional Court of the Republic of Tajikistan of the non-conformity with the Constitution of the Republic of Tajikistan, or treaties of the Republic of Tajikistan that have not yet entered into force, means the invalidity of these contracts or their separate norms for the Republic of Tajikistan.

Failure of execution, improper execution or obstruction of execution of the acts of the Constitutional Court of the Republic of Tajikistan shall entail responsibilities under the legislation of the Republic of Tajikistan.

14. Thailand

Constitutional Court

Summary

The composition of the Constitutional of Thailand reflects a variety of backgrounds. Out of a total of 9 Justices, 3 are from the Supreme Court and 2 are from the Supreme Administrative Court. In addition, a Selection Committee selects 4 other persons: 1 qualified person in law, 1 person qualified in political science or public administration, and 2 qualified persons holding or having held positions in the senior civil service (see Section 200 of the Constitution for further details). The Office of the Constitutional Court contains various organizational units. This includes the Institute of Constitutional Studies, which plays a major role in academic and research activities. It is divided into three divisions (Constitutional Research and Development, International Affairs, and Constitutional Seminar and Dissemination) and one college (College of the Constitution). In terms of jurisdictions, according to Section 210 of the Constitution, the Court considers and adjudicates on the constitutionality of a law or bill; considers and adjudicates on a question regarding duties and powers of an enumerated list of state organs; and performs other duties and powers prescribed in the Constitution. The most recent Constitution was made in 2017. These new enactments also affected the powers of the Constitutional Court, for example in the context of the new chapter on the duties of the state (see Chapter V), and Section 213, which deals with the mechanism of individual complaint.

Content

A. Introduction

A1. History

The Constitution of the Kingdom of Thailand B.E. 2540 (1997) provided for the establishment of the Thai Constitutional Court. Then, when the Constitution of the Kingdom of Thailand B.E. 2550 (2007) came into force on 24th August 2007, it also provided the institution to perform the function of safeguarding the supremacy of the Constitution.

This function still continues in the current Constitution of the Kingdom of Thailand B.E. 2560 (2017), which was enacted on 6th April 2017. It states that "the Constitution is the supreme law of the State. The provisions of any law, rule or regulation or any acts, which are contrary to or inconsistent with the Constitution, shall be unenforceable." Additionally, the Constitutional Court of the Kingdom of Thailand serves as a body which realises the recognition and protection of the people's rights and liberties in practice through rulings of the Constitutional Court.

A2. Basic Texts

- The Constitution of the Kingdom of Thailand B.E. 2560 (2017) (CHAPTER XI: Constitutional Court) (Section 200 – 214)
- The Organic Act on the Procedures of the Constitutional Court B.E. 2561 (2018)

B. Organization

B1. President

The Justices of the Constitutional Court shall elect one amongst themselves to be the President of the Constitutional Court, and inform the result to the President of the Senate. Subsequently, the President of the Senate shall report to the King for appointment of the President of the Constitutional Court (as well as the other Justices of the Constitutional Court). At this juncture, the President of the Senate shall countersign the Royal Command.

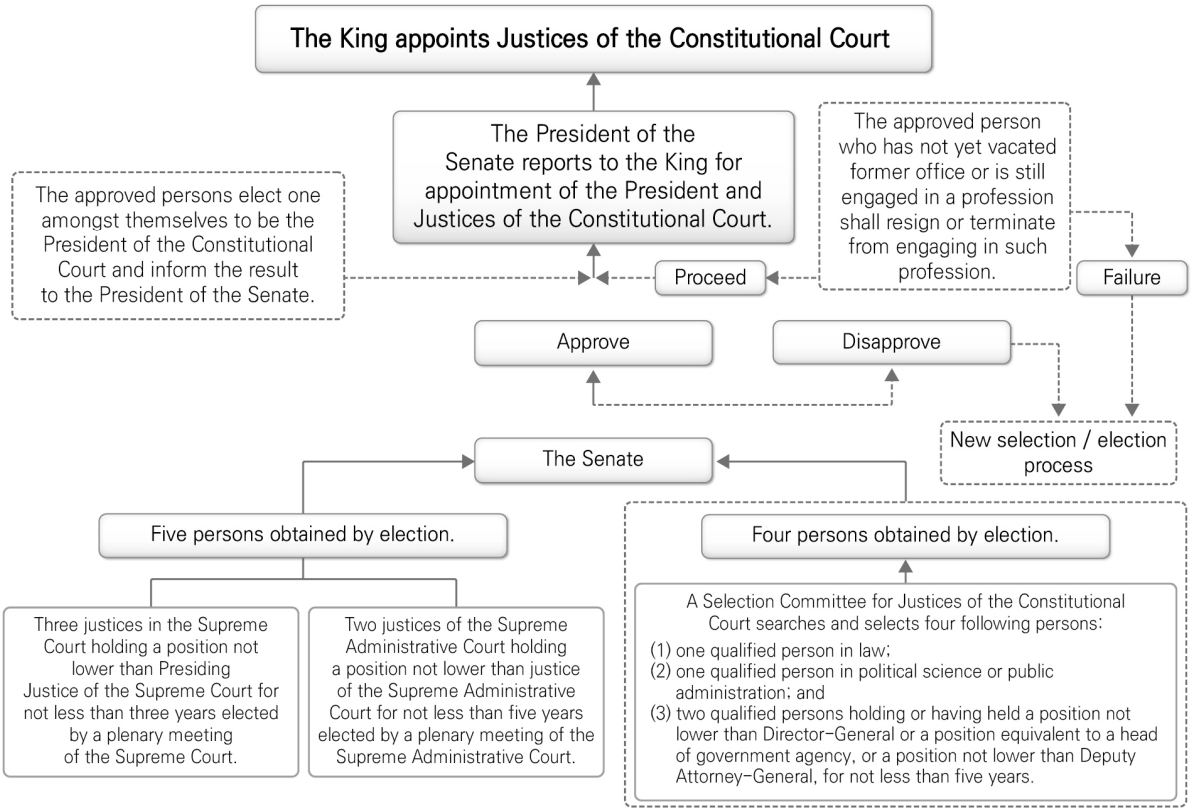
Like the Justice of the Constitutional Court, the President of the Constitutional Court shall hold office for a term of 7 years as from the date of appointment by the King and shall be retired at 75 years of age. The President of the Constitutional Court who resigns shall also vacate the office of Justice of the Constitutional Court.

The President of the Constitutional Court represents the Court organisation both in state affairs and on the international stage. He or she shall chair the meetings of the Constitutional Court Committee to administer internal affairs, and also preside over the full bench of the Constitutional Court.

B2. Justices

In addition to one President of the Constitutional Court, there are eight Justices of the Constitutional Court. Of the total of nine Constitutional Court Justices, three are from Justices in the Supreme Court; two are from the Supreme Administrative Court; one qualified person in law; one qualified person in political science or public administration; and two qualified persons obtained by selection from persons holding or having held a position not lower than Director-General or a position equivalent to a head of government agency, or a position not lower than Deputy Attorney-General.

Selection Process of Justices of the Constitutional Court



Like the President of the Constitutional Court, the Justices of the Constitutional Court are appointed by the King, hold office for a term of 7 years as from the date of appointment by the King and shall be retired at 75 years of age. In the case where a Justice of the Constitutional Court vacates office at the expiration of term, such Justice of the Constitutional Court who vacates office shall remain in office to perform duties until a newly appointed Justice of the Constitutional Court takes office.

The President and the Justices of the Constitutional Court as a panel have duties and powers as follows:

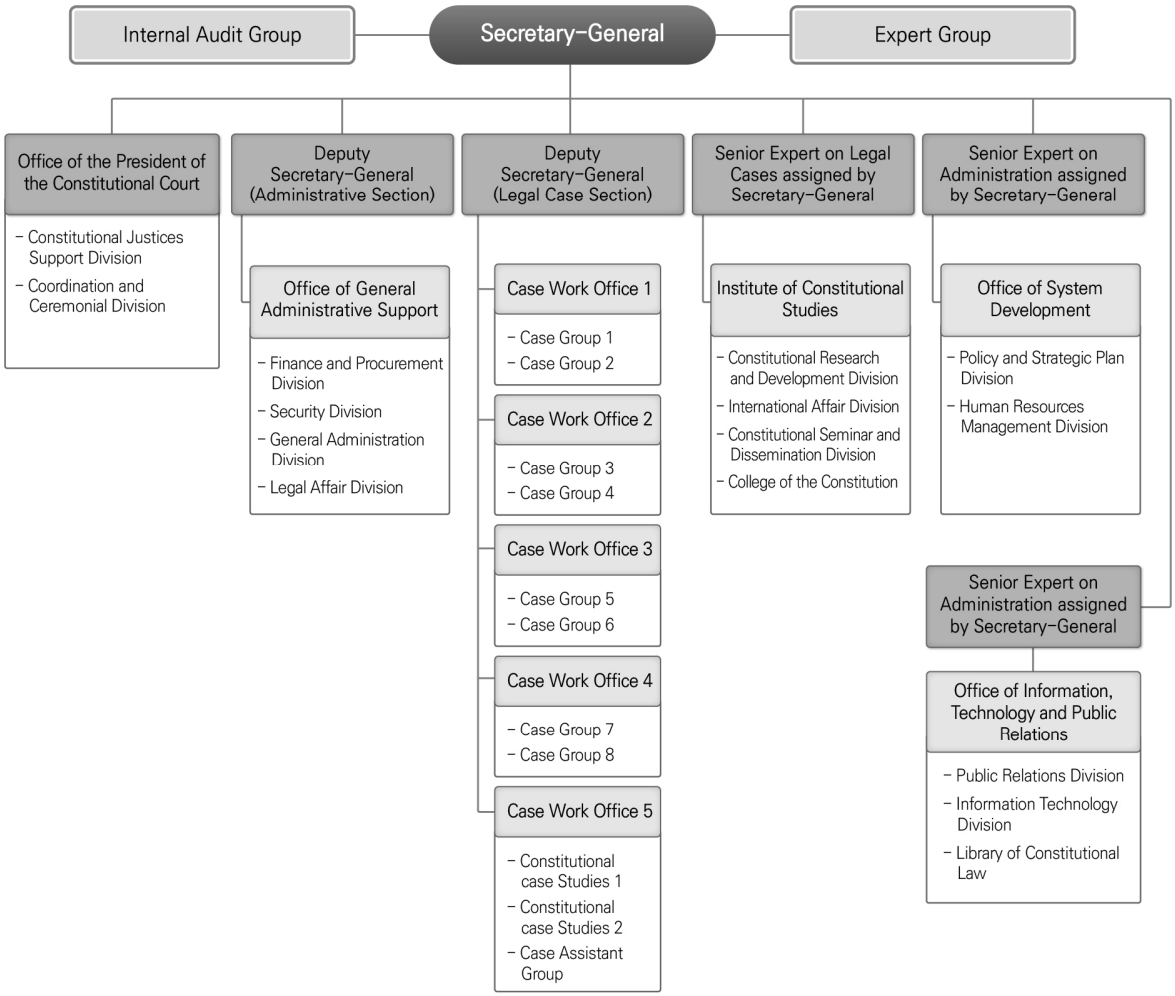
- to consider and adjudicate on the constitutionality of a law or bill;
- to consider and adjudicate on a question regarding duties and powers of the House of Representatives, the Senate, the National Assembly, the Council of Ministers or Independent Organs;
- other duties and powers prescribed in the Constitution.

B3. Office of the Constitutional Court

The Office of the Constitutional Court of the Kingdom of Thailand is an administrative unit of the Constitutional Court. The office is headed by the Secretary-General of the Office of the Constitutional Court; and there are two Deputy Secretary-Generals. The office consists of approximately 200 staff members in different 9 bureaus, 1 institute, and 2 divisions as indicated in the below diagram

- **Case Bureau 1-9:** dealing with case administration; supporting the Justices of the Constitutional Court on case management; and developing case procedural standards.
- **Bureau of the President of the Constitutional Court:** supporting the President and Justices of the Constitutional Court on general and state affairs.
- **Bureau of General Administration:** dealing with general administration and management in terms of correspondence, finance and procurement, and security management.
- **Bureau of Management System Development:** dealing with office's strategic plans and human resources development.
- **Bureau of Technology and Public Relations:** dealing with IT management, public relations, library and archive.
- **Institute of Constitutional Studies:** dealing with constitutional research; international affairs; academic publications and seminars; and training programme for other official servants.
- **Division of Expert Staff:** dealing with expert staff's affairs.
- **Division of Internal Audit:** dealing with office's internal audit and control.

Illustrative Diagram of the Organisation of the Office of the Constitutional Court



C. Jurisdictions

Section 210 of the Constitution of the Kingdom of Thailand stipulates that "the Constitutional Court has duties and powers as follows:

(1) to consider and adjudicate on the constitutionality of a law or bill;
(2) to consider and adjudicate on a question regarding duties and powers of the House of Representatives, the Senate, the National Assembly, the Council of Ministers or Independent Organs;
(3) other duties and powers prescribed in the Constitution."

C1. To consider and adjudicate on the constitutionality of a law or bill

- **Key legal provisions:** Constitution (Section 212).

- **Purpose:** Consideration and adjudication of the constitutionality of a law or bill serve the purpose of protecting the supremacy of the Constitution. Any provisions in other laws, acts or bills shall not be contrary to or inconsistent with the Constitution.

- **Causes for requests:** In the application of a provision of law to any case, if a court by itself is of the opinion that, or a party to the case raises an objection with reasons that, such provision of law falls within the provisions of section 5 of the Constitution, which states that "the Constitution is the supreme law of the State. The provisions of any law, rule or regulation or any acts, which are contrary to or inconsistent with the Constitution, shall be unenforceable," and there has not yet been a decision of the Constitutional Court pertaining to such provision, the court shall submit its opinion to the Constitutional Court for decision. During that time, the Court shall proceed with the trial, but shall temporarily stay its decision until a decision is made by the Constitutional Court.

- **Procedures**
  - **Request procedure:** A request can be made by the Court of Justice, the Administrative Court, and the Military Court. No appeal is possible against the decision of the court on the request for review.
  - **Process:**
    (1) A case shall be raised in any court; for example, the Court of Justice, the Administrative Court, and the Military Court.
    (2) If the Court of Justice, the Administrative Court, the Military Court, or a party is of the opinion that a provision of law falls within the provisions of section 5 of the Constitution, which states about the supremacy of the Constitution, such court may file such opinion or objection with reasons for the Constitutional Court's consideration.
    (3) Such court may continue its trial, but shall not give a sentence since the court needs to await the Constitutional Court's decision.
    (4) In the case where the Constitutional Court is of the opinion that the objection of a party under paragraph one does not concern a matter which calls for a decision, the Constitutional Court may refuse to accept the case for consideration.

- **Decisions and effects:** The decision of the Constitutional Court shall apply to all cases, except in a criminal case where it shall be deemed that a person who has been convicted of a crime under a provision of law decided by the Constitutional Court as being unconstitutional under section 5 has never committed such offence, or where such person is still serving the sentence, he or she shall be released. However, this does not entitle such a person to claim for any compensation or damages.

C2. To consider and adjudicate on a question regarding duties and powers of the House of Representatives, the Senate, the National Assembly, the Council of Ministers or Independent Organs

- **Key legal provisions:** Constitution (Section 210).
- **Purpose:** To make a final judgment for a question regarding duties and powers of the House of Representatives, the Senate, the National Assembly, the Council of Ministers or Independent Organs.
- **Causes for requests:** The House of Representatives, the Senate, the National Assembly, the Council of Ministers or Independent Organs (namely, the Election Commission, the Anti-Corruption Commission, the Ombudsman, etc.) may find an overlap regarding their duties and powers. Each of these institutions may file an application to the Constitutional Court to make a judgment to find what organization shall possess such duties and powers.
- **Decisions and effects:** The decision of the Constitutional Court shall be final and binding to such relevant institutions.

C3. Other duties and powers (protection of people's rights and liberties)

- **Key legal provisions:** Constitution (Section 51).
- **Purpose**: Any act provided by the Constitution is the duty of the State. If the act is for the direct benefit of the people, the people and the community shall have the right to follow up and urge the State to perform such act, as well as to take legal proceedings against a relevant State agency to provide the people or community such benefit in accordance with the rules and procedures provided by law.
- **Causes for requests:** The people and community may suffer from malfunction or delay of work of a State agency. After lodging their complaints to such State agency and the Ombudsman, but they still are of opinion that such State agency, the Ombudsman, and the Council of Ministers' consideration is not consistent with the Constitution. They have the right to submit their complaint to the Constitutional Court for consideration.
- **Procedures**
  - **Request procedure:** The people and community who suffer from malfunction or delay of work of a State agency.
  - **Process:**
    (1) Such people and community lodge their complaint to a relevant State agency, but the State agency ignores or keeps silent within 90 days.
    (2) Such people and community have the right to lodge such complaint to the Ombudsman within 30 days. If the Ombudsman is of the opinion that such State agency's performance is right and fair, the Ombudsman shall notify the people and community. In case the Ombudsman is of the opinion that such State agency's performance is wrong and unfair, the Ombudsman shall notify the Council of Ministers.
    (3) After its consideration, the Council of Ministers shall notify the people

and community regarding its order, but if such people and community still object to the Council of Ministers' order, they have the right to file the complaint to the Constitutional Court within 30 days.

- **Decisions and effects:** The Constitutional Court shall consider and adjudicate such case within 120 days since the date of complaint receipt. The Constitutional Court ruling shall be final and binding on the State agency.

C4. Other duties and powers (consideration and adjudication on qualifications of the person holding a political position)

- **Key legal provisions:** Constitution (Section 82).

- **Purpose:** To make a final judgment for qualifications of the person holding a political position. The unqualified persons shall be terminated from office of political position they belong to.

- **Causes for requests:** Members of the House of Representatives or Senators comprising not less than one-tenth of the total number of the existing members of each House have the right to lodge with the President of the House of which they are members a complaint asserting that the membership of any member of such House has terminated under section 101(3), (5), (6), (7), (8), (9), (10) or (12) or section 111(3), (4), (5) or (7), as the case may be, and the President of the House with whom the complaint is lodged shall refer it to the Constitutional Court for decision as to whether the membership of such member has terminated.

  Upon receipt of the matter for consideration, if it appears that there are reasonable grounds to suspect that the case of the member against whom the complaint is lodged is founded, the Constitutional Court shall order such member to cease the performance of his or her duties until the Constitutional Court makes a decision.

  In the case where the Election Commission is of the opinion that the membership of any Member of the House of Representatives or any Senator has terminated, it may also refer the matter to the Constitutional Court for decision.

- **Procedures**
  - **Request procedure**: The President of the House of Representatives, the President of the Senate, the Election Commission.
  - **Process:**
    (1) Members of the House of Representatives or Senators comprising not less than one-tenth of the total number of the existing members of each House have the right to lodge with the President of the House of which they are members a complaint asserting that the membership of any member of such House.
    (2) The complaint asserting the membership involves section 101(3), (5), (6), (7), (8), (9), (10) or (12) or section 111(3), (4), (5) or (7), as the case may be.
    (3) The President of the House of Representatives, the President of the Senate, as the case may be, shall refer the complaint to the Constitutional Court.
    (4) In case the Election Commission is of opinion that the membership of the member of the House of Representatives or the Senator has terminated under the Constitution, it may also refer the matter to the Constitutional Court for decision.

- **Decisions and effects:** The Constitutional Court ruling shall be final and binding on the membership of the member of the House of Representatives or the Senator, as the case may be.

Annex

Annex 1. Case Statistics

1-1. Since establishment (11 Oct 1997 – 17 May 2017)

Type	Total
Filed	1316
Order to dismiss/ not admitted	616
Ruling	685
Pending	15

1-2. Last five years (2013-2017)

2013

Type		Total	Constitutionality review of bills	Constitutionality review of law	Constitutional review of the conditions for enacting an Emergency Decree	Member of the House of Representatives, senator or committee member obtaining a direct or indirect interest in the expenditure budget.	Disputes of conflicts between two or more agencies	Qualifications of a member of the National Assembly, Minister and Election Commissioner.	Ruling on a treaty	Ruling on the protection of democratic principles in resolutions or rules of political parties	Organic Act on Political Parties/ Dissolution of a political parties	Individual complaint
Filed (2012 pending + 2013 newly filed)		121	5	34	-	-	-	3	-	36	9	25
Order to dismiss/ not admitted		63	2	7	-	-		1	-	31	1	21
Ruling		21	1	10	-	-	-	1	-	5	4	-
Judgement	Unconstitutional	6		6								
	Constitutional	4	1	3								
	Action unconstitutional but not lead to dissolve	4								4		
	Partly provisions in an act contrary/ inconsistent	1		1								

Type		Total	Constitutionality review of bills	Constitutionality review of law	Constitutional review of the conditions for enacting an Emergency Decree	Member of the House of Representatives, senator or committee member obtaining a direct or indirect interest in the expenditure budget.	Disputes of conflicts between two or more agencies	Qualifications of a member of the National Assembly, Minister and Election Commissioner.	Ruling on a treaty	Ruling on the protection of democratic principles in resolutions or rules of political parties	Organic Act on Political Parties/ Dissolution of a political parties	Individual complaint
	Terminate											
	Not terminate	1						1				
	Dissolve											
	Not dissolve											
	Dismiss	1								1		
	Other											
Pending		37	2	17	0	-	-	1	-	9	4	4

2014

Type		Total	Constitutionality review of bills	Constitutionality review of law	Constitutional review of the conditions for enacting an Emergency Decree	Member of the House of Representatives, senator or committee member obtaining a direct or indirect interest in the expenditure budget.	Disputes of conflicts between two or more agencies	Qualifications of a member of the National Assembly, Minister, Prime-Minister and Election Commissioner.	Ruling on a treaty	Ruling on the protection of democratic principles in resolutions or rules of political parties	Organic Act on Political Parties/ Dissolution of a political parties	Question on no provision of the Constitution enforceable to duties not relating to the National Assembly	Individual complaint
Filed (2013 pending + 2014 newly filed)		96	2	26	-	-	2	3	-	40	5	1	17
Order to dismiss/ not admitted		85		24	-	-	1	2	-	39	1	1	17
Ruling		11	2	2	-	-	1	1	-	1	4	-	-
Judgement	Unconstitutional	4	2	1						1			
	Constitutional	1		1									
	Action unconstitutional but not lead to dissolve												
	Partly provisions in an act contrary/ inconsistent												

Type		Total	Constitutionality review of bills	Constitutionality review of law	Constitutional review of the conditions for enacting an Emergency Decree	Member of the House of Representatives, senator or committee member obtaining a direct or indirect interest in the expenditure budget.	Disputes of conflicts between two or more agencies	Qualifications of a member of the National Assembly, Minister, Prime-Minister and Election Commissioner.	Ruling on a treaty	Ruling on the protection of democratic principles in resolutions or rules of political parties	Organic Act on Political Parties/ Dissolution of a political parties	Question on no provision of the Constitution enforceable to duties not relating to the National Assembly	Individual complaint
	Terminate	1						1					
	Not terminate												
	Dissolve	4									4		
	Not dissolve												
	Dismiss												
	Other	1					1						
Pending		-	-	-	-	-	-	-	-	-	-	-	

2015*

Type		Total	Constitutionality review of law	Ruling on a treaty	Organic Act on Political Parties/ Dissolution of a political parties	Question on no provision of the Constitution enforceable to duties not relating to the National Assembly	Consider the Draft Constitution which was amended in the relevant provision for a ruling on whether or not it was consistent with the referendum outcome
Filed (2015 newly filed)		3	-	-	3	-	-
Order to dismiss/ not admitted		-					
Ruling		1			1		
Judgement	Unconstitutional						
	Constitutional						
	Action unconstitutional but not lead to dissolve						
	Partly provisions in an act contrary/ inconsistent						
	Terminate						

Type		Total	Constitutionality review of law	Ruling on a treaty	Organic Act on Political Parties/ Dissolution of a political parties	Question on no provision of the Constitution enforceable to duties not relating to the National Assembly	Consider the Draft Constitution which was amended in the relevant provision for a ruling on whether or not it was consistent with the referendum outcome
	Not terminate						
	Dissolve	1			1		
	Not dissolve						
	Dismiss						
	Other						
Pending		2	-	-	2	-	

* Duties and powers of the Constitutional Court under the Constitution of the Kingdom of Thailand B.E. 2557 (2014) (Interim)

2016

Type		Total	Constitutionality review of law	Ruling on a treaty	Organic Act on Political Parties/ Dissolution of a political parties	Question on no provision of the Constitution enforceable to duties not relating to the National Assembly	Consider the Draft Constitution which was amended in the relevant provision for a ruling on whether or not it was consistent with the referendum outcome
Filed (2015 pending+ 2016 newly filed)		8	2	-	3	2	1
Order to dismiss/ not admitted		1				1	
Ruling		7	2	-	3	1	1
Judgement	Unconstitutional	1	1				
	Constitutional	1	1				
	Action unconstitutional but not lead to dissolve	1				1	
	Partly provisions in an act contrary/ inconsistent						
	Dissolve	3			3		
	Not dissolve						
	Dismiss						
	Other	1					1
Pending		-	-	-	-	-	

2017*

Type		Total	Constitutionality review of bills/ draft rules of procedure of the legislature	Constitutionality review of law/	Constitutional review of the conditions for enacting an Emergency Decree	Member of the House of Representatives, senator or committee member obtaining a direct or indirect interest in the expenditure budget.	Disputes of conflicts between two or more agencies	Qualifications of a member of the National Assembly, Minister and Prime-Minister	Ruling on a treaty	Ruling on the protection of democratic principles in resolutions or rules of political parties	Organic Act on Political Parties/ Dissolution of a political parties	Review on the Draft Amendment to Constitution	Ruling on whether or not the state agency perform the duty of the state in accordance with Chapter V of the Constitution	Individual complaint
Filed (2016 newly filed)		76	3	3	-	-	1	-	1	-	1	-	-	67
Order to dismiss/ not admitted		58	1											57
Ruling		3	1						1		1			
Judgement	Unconstitutional													
	Constitutional	1	1											
	Action unconstitutional but not lead to dissolve													
	Partly provisions in an act contrary/ inconsistent													
	Terminate													
	Not terminate													
	Dissolve	1									1			
	Not dissolve													
	Dismiss													
	Not require approval of the National Assembly	1							1					
	Other													
Pending		15	1	3			1		-		-			10

* Duties and powers of the Constitutional Court under the Constitution of the Kingdom of Thailand B.E. 2560 (2017)

Annex 2. Cases

- **Identification**

a) Country, b) Name of the Court, c) Date of decision given, d) Number of the decision, e) Jurisdiction (if applicable), f) Title of the decision

- **Headnotes**

- **Summary**

Case 1.

- **Identification**

a) Thailand b) Constitutional Court, c) 1st June B.E. 2559 (2016), d) 3/2559 (2016),
e) Constitutionality review, f) The Act on Offences Relating to the Submission of Bids to State Agencies B.E. 2542 (1999) was contrary to or inconsistent with the Constitution of the Kingdom of Thailand (Interim) B.E. 2557 (2014)

- **Headnotes**

Whether or not section 9 of the Act on Offences Relating to the Submission of Bids to State Agencies B.E. 2542 (1999) was contrary to or inconsistent with section 4 and section 5 of the Constitution of the Kingdom of Thailand (Interim) B.E. 2557 (2014).

- **Summary**

1. Summary of background and facts

The Supreme Court referred the objection of the second defendant to the Constitutional Court for a ruling under section 45 of the Constitution of the Kingdom of Thailand (Interim) B.E. 2557 (2014). The second defendant objected that section 9 of the Act on Offences Relating to the Submission of Bids to State Agencies B.E. 2542 (1999) was contrary to or inconsistent with section 4 and section 5 of the Constitution of the Kingdom of Thailand (Interim) B.E. 2557 (2014) since such provision of law stipulated a legal presumption of the second defendant's guilt without first requiring proof of any act or intent. The provision extrapolated an offence committed by others as a condition for presuming the second defendant's guilt and criminal liability. The provision was therefore a presumption of guilt of a suspect or defendant in a criminal case by virtue of a person's status as a condition. The provision was not a presumption of facts constituting certain elements of an offence upon the prosecution's proof of a certain act relating to the alleged offence committed by the defendant, and was contrary to the rule of law where the prosecution had the burden of proving the defendant's guilt with respect to all elements of an offence.

2. The preliminary issue considered by the Constitutional Court

The preliminary issue was whether or not the Constitutional Court could admit this application for consideration under section 45 in conjunction with section 5 paragraph two of the Constitution of the Kingdom of Thailand (Interim) B.E. 2557 (2014).

The Constitutional Court found as follows. In this application, there was an objection that section 9 of the Act on Offences Relating to the Submission of Bids to State Agencies B.E. 2542 (1999) was contrary to or inconsistent with section 4 and section 5 of the Constitution of the Kingdom of Thailand (Interim) B.E. 2557 (2014) and the plenary session of the Supreme Court decided to refer the second defendant's objection to the Constitutional Court for a ruling under section 45 in conjunction with section 5 paragraph two of the Constitution of the Kingdom of Thailand (Interim) B.E. 2557 (2014) and there had not yet been a ruling of the Constitutional Court in relation to such provision. Furthermore, the presumption in criminal procedures that a suspect or defendant was presumed innocent had been a recognized right under several constitutions in the past, and was regarded as Thailand's convention under the democratic form of government with the King as Head of State. The presumption was also derived from human rights principles forming the basis for universal criminal justice. This right was thus recognized under section 4 of the Constitution of the Kingdom of Thailand (Interim) B.E. 2557 (2014). The case was therefore in accordance with section 45 in conjunction with section 5 paragraph two of the Constitution of the Kingdom of Thailand (Interim) B.E. 2557 (2014) and article 17(13) of the Rules of the Constitutional Court on Procedures and Rulings B.E. 2550 (2007). The Constitutional Court therefore admitted this application for consideration.

3. The issue considered by the Constitutional Court

The issue considered by the Constitutional Court was whether or not section 9 of the Act on Offences Relating to the Submission of Bids to State Agencies B.E. 2542 (1999) was contrary to or inconsistent with section 4 and section 5 of the Constitution of the Kingdom of Thailand (Interim) B.E. 2557 (2014).

Section 9 of the Act on Offences Relating to the Submission of Bids to State Agencies B.E. 2542 (1999) provided a legal presumption of a defendant's guilt. The prosecution did not have to prove the act or intent of a managing partner, managing director, executive officer or authorized person in the operation of a business of a juristic person or any involvement of a person responsible for the operation of the juristic person on such matter. The only proof needed was that there was an offender under this Act which was committed for the benefit of the juristic person's business and that the defendant was a managing partner, managing director, executive officer or authorized person in the operation of the juristic person's business, or person responsible for the juristic person's operations on such matter. The presumption was not merely that the managing partner, managing director, executive officer or authorized person in the operations of such juristic person or person responsible for the juristic person's operations on such matter was a joint principal offender with such juristic person, but there was also a presumption of being a joint principal offender with "any person" who committed an offence for the benefit of such juristic person. This criminal presumption was wider than the presumption of co-liability with the juristic person. The presumption of guilt also had no reasonable connection between the facts constituting the prerequisite for presumption and the presumed facts, which was also another fundamental factor for reaching a presumption. As a consequence, the burden of proving innocence shifted to whoever was the managing partner, managing director, executive officer or authorized person in the operations of the juristic person, or person responsible for the operations of the juristic person on such matter. Moreover, under the fundamental principle of criminal liability, section 59 of the Penal Code provided that "a person shall be criminally liable upon committing…" but section 9 of the Act on Offences Relating to the Submission of Bids to State Agencies B.E. 2542 (1999) provided that a managing partner, managing director, executive officer or authorized person in the operation of a juristic person, or person responsible for the operations of the juristic person on such matter, would be a co-principal in the commission of such offence under this Act. The prosecution did not have provide any prior proof that such persons who were defendants had committed or omitted or failed to act in a way which was an infringement of the

law. The provision in such section was therefore a presumption of guilt of a suspect or defendant in a criminal case by relying on the status of a person as a condition. This was not a presumption of facts constituting an element of an offence after the prosecution provided proof of a certain act relating to the alleged offence committed by the defendant. The presumption was also contrary to the rule of law which stated that the prosecution in a criminal case had the burden of proving a defendant's guilt with respect to all elements of an offence. Furthermore, the provisions of such section draws a person into the criminal procedure as a suspect or defendant, which could result in a restriction of such person's rights and liberties, e.g. arrest or detention, without reasonable preliminary evidence that such person had committed or had any intent relating to the alleged offence.

4. Ruling of the Constitutional Court

The Constitutional Court held that section 9 of the Act on Offences Relating to the Submission of Bids to State Agencies B.E. 2542 (1999) was contrary to or inconsistent with section 4 of the Constitution of the Kingdom of Thailand (Interim) B.E. 2557 (2014). Upon such a ruling, it was no longer necessary to rule on whether or not such provision of law was contrary to or inconsistent with section 5 of the Constitution of the Kingdom of Thailand (Interim) B.E. 2557 (2014).

Case 2.

- **Identification**

a) Thailand b) Constitutional Court, c) 13th March B.E. 2556 (2013), d) 4/2556 (2013), e) Constitutionality review, f) Some provisions were neither contrary to nor inconsistent with the Constitution, but some were contrary to or inconsistent with the Constitution

- **Headnotes**

Whether or not section 36, section 37, section 38, section 39 and section 41 of the Act on Mutual Assistance in Criminal Matters B.E. 2535 (1992) were contrary to or inconsistent with section 3 paragraph two, section 29 and section 40(2), (3), (4) and (7).

- **Summary**

1. Summary of background and facts

The prosecutor had prosecuted Police Lieutenant General Somkid Boonthanom and others, a total of 5 defendants, in the Criminal Court in Case No. OR 177/2553 on charges of conspiracy to detain another person causing such person's death, and conspiracy to kill another person with intent and premeditation in order to conceal wrongdoings and to evade criminal liability for other wrongdoings that had been committed. Thereafter, the prosecutor filed a motion to examine a prosecution witness, namely Police Lieutenant Colonel Suvichai Kaewpleuk, in a Cambodian court and Saudi Arabian court pursuant to the Act on Mutual Assistance in Criminal Matters B.E. 2535 (1992). The Criminal Court found that this prosecution witness was a key evidence. In pursuance of section 228 of the Criminal Procedure Code, issues were referred to the Cambodian court and Saudi Arabian court for examination of the witness.

All five defendants filed a motion requesting a referral of an objection by the Criminal Court to the Constitutional Court for a ruling that section 12(2), section 37 and section 41 of the Act on Mutual Assistance in Criminal Matters B.E. 2535 (1992) was a provision of law contrary to or inconsistent with section 26, section 27, section 29 and section 40

of the Constitution. The objections could be summarised as follows.

1. Section 12(2) of the Act on Mutual Assistance in Criminal Matters B.E. 2535 (1992) provided that the central coordinator should send a request to examine a witness, documentary evidence or material evidence, being proceedings in court, and a request for proceedings to confiscate or seize assets, to the special prosecutor for further action. Section 37 provided that a request for cooperation from a foreign country and all documents that was going to be sent should comply with the form, rules, procedures and conditions prescribed by the central coordinator. It was argued that such provisions did not provide for a process and procedure for examining witnesses, and thus the five defendants were unable to monitor the issues which the witness was to be examined in the foreign country. It was further argued that the Thai language was not used during witness examination, that there was no measure for the translations to ensure that the defendants and defendants' attorneys to acquire a proper understanding, that the defendants were not given the right to attend the hearing, witness examination, challenge witness statements or motion for the recusal of the judge. The defendants were unable to cross-examine the witness in person, but could only submit cross-examination questions in advance without knowing whether they were consistent with the testimony given by the prosecution witness. Furthermore, the cross-examination questions would be known by the prosecution witness in advance, which was inconsistent with the principle that the examination of a witness could be conducted in the presence of the defendant and in open court. This provision of law was therefore contrary to or inconsistent with section 26, section 27, section 29 and section 40 of the Constitution.

2. Section 41 of the Act on Mutual Assistance in Criminal Matters B.E. 2535 (1992) provided that all evidence obtained under this Act should be deemed as evidence admissible by law. This provision was considered unfair and contrary to the rights and liberties of the defendants. The court and defendants were forced to accept evidence that had been unconstitutionally obtained. The provision was therefore contrary to or inconsistent with section 29 and section 40(2), (3), (4) and (7) of the Constitution.

The prosecution filed a reply to the objections of the five defendants which could be summarised as follows.

1. A witness examination conducted in a foreign court had to comply with the rules of procedure of the court in the foreign country receiving the request. The principle adhered to was that a witness examination conducted by a court of justice of the country receiving the request should be presumed as evidence obtained from a fair process.

2. The defendants and defendants' attorneys had the right to attend the witness examination, cross-examine the witness in the foreign court, file objections and refer to documents adduced in the witness's testimony, which were all deemed as proceedings in open court. This included the right to motion for the recusal of a judge pursuant to universal principles of justice. And even though a witness examination conducted by a foreign court applied the language for that country for examination, such testimony would be translated back into Thai.

3. The prosecution requested for a referral of issues for examination of this witness in a foreign court because of a necessity whereby the witness was unable to enter the Kingdom of Thailand. Therefore, the denial of a percipient witness from giving testimony in the case would be regarded as a distortion and concealment of facts, which could lead to a judgment based on lack of significant facts and a prejudice to justice. The International Cooperation in Criminal Matters Act B.E. 2535 (1992) was therefore neither contrary to nor inconsistent with the Constitution.

The Criminal Court found that there was reasonable cause and therefore referred the objections of all five defendants and the prosecution's reply to the Constitutional Court for a ruling under section 211 of the Constitution.

2. The preliminary issue considered by the Constitutional Court

The preliminary issue was whether or not the Constitutional Court had the competence to admit this application for a ruling under section 211 paragraph one of the Constitution. The Constitutional Court found that the application raised an objection on whether or not section 12(2), section 37 and section 41 of the Act on Mutual Assistance in Criminal Matters B.E. 2535 (1992) were contrary to or inconsistent with section 26, section 27, section 29 and section 40 of the Constitution. The Criminal Court was going to apply those provisions of law to a case and there had not yet been a prior ruling of the Constitutional Court pertaining to such provisions. The case was in accordance with section 211 paragraph one of the Constitution. The Constitutional Court therefore ordered the admittance of this application for consideration.

3. The issues considered by the Constitutional Court

The Constitutional Court found that all five defendants objected that provisions of the Act on Mutual Assistance in Criminal Matters B.E. 2535 (1992) were contrary to or inconsistent with the Constitution on 4 issues, as follows:

1. Whether or not section 12(2) of the Act on Mutual Assistance in Criminal Matters B.E. 2535 (1992) was contrary to or inconsistent with section 26, section 27, section 29 and section 40 of the Constitution.

2. Whether or not section 36, section 37, section 38 and section 39 of the Act on Mutual Assistance in Criminal Matters B.E. 2535 (1992) were contrary to or inconsistent with section 36 of the Constitution.

3. Whether or not section 41 of the Act on Mutual Assistance in Criminal Matters B.E. 2535 (1992) was contrary to or inconsistent with section 26, section 27 and section 39 of the Constitution.

4. Whether or not section 36, section 37, section 38, section 39 and section 41 of the Act on Mutual Assistance in Criminal Matters B.E. 2535 (1992) were contrary to or inconsistent with section 3 paragraph two, section 29 and section 40(2), (3), (4) and (7) of the Constitution.

The Constitutional Court considered whether or not the provisions of law stated in the five defendants' objections had merit for a Constitutional Court ruling under section 211 paragraph two of the Constitution.

On the first issue of whether or not section 12(2) of the Act on Mutual Assistance in Criminal Matters B.E. 2535 (1992) was contrary to or inconsistent with section 26, section 27, section 29 and section 40 of the Constitution, the Constitutional Court found as follows. Section 12(2) of the Act on Mutual Assistance in Criminal Matters B.E. 2535 (1992) provided for the central coordinator to send a request for foreign assistance to a competent authority. This provision did not pertain to the exercise of powers by a state organ and was neither a restriction of rights and liberties of a person nor a restriction of rights in the judicial process as provided under section 26, section 27, section 29 and section 40 of the Constitution. The objection on this issue was therefore without merit for a Constitutional Court ruling under section 211 paragraph two of the Constitution.

On the second issue of whether or not section 36, section 37, section 38 and section 39 of the Act on Mutual Assistance in Criminal Matters B.E. 2535 (1992) were contrary to or

inconsistent with section 39 of the Constitution, the Constitutional Court found as follows. Section 36, section 37, section 38 and section 39 of the Act on Mutual Assistance in Criminal Matters B.E. 2535 (1992) were provisions on rules and procedures for requesting foreign assistance for the purpose of preventing and suppressing crime with special characteristics. This provision did not pertain to the criminal liability of a person or the presumption of innocence of a suspect or defendant under section 39 of the Constitution. The objection on this issue was therefore without merit for a Constitutional Court ruling under section 211 paragraph two of the Constitution.

On the third issue of whether or not section 41 of the Act on Mutual Assistance in Criminal Matters B.E. 2535 (1992) was contrary to or inconsistent with section 26, section 27 and section 39 of the Constitution, the Constitutional Court found as follows. Section 41 of the Act on Mutual Assistance in Criminal Matters B.E. 2535 (1992) was a provision relating to the admissibility of evidence obtained under this Act, deeming such evidence as legally admissible. The provision neither governed the exercise of powers by a state organ nor the criminal liability of a person, nor did the provisions stipulated a presumption of guilt of a suspect or defendant, as provided under section 26, section 27 and section 39 of the Constitution. The objection on this issue was therefore without merit for a Constitutional Court ruling under section 211 paragraph two of the Constitution.

The only issue which remained to be considered by the Constitutional Court was the fourth issue on whether or not section 36, section 37, section 38, section 39 and section 41 of the Act on Mutual Assistance in Criminal Matters B.E. 2535 (1992) were contrary to or inconsistent with section 3 paragraph two, section 29 and section 40(2), (3), (4) and (7) of the Constitution.

On the issue of whether or not section 36, section 37, section 38, section 39 and section 41 of the Act on Mutual Assistance in Criminal Matters B.E. 2535 (1992) were contrary to or inconsistent with section 3 paragraph two, section 29 and section 40(2), (3), (4) and (7) of the Constitution, the Constitutional Court found as follows.

Section 36, section 37, section 38 and section 39 of the Act on Mutual Assistance in Criminal Matters B.E. 2535 (1992) was a provision on rules and procedures for requesting foreign assistance in matters pertaining to investigations, inquiries, prosecution, confiscation and other proceedings relating to a criminal case. A state agency wishing to request foreign assistance should submit the matter to a central coordinator, i.e. the Attorney-General or his/her designee. A request should be filed in accordance with the form, rules, procedures and conditions prescribed by the central coordinator, and the central coordinator should consider whether foreign assistance should be sought. The central coordinator's decision was final unless otherwise ordered by the Prime Minister. The requesting agency was bound to comply with Thailand's obligations to the country receiving the request in regard to the use of information or evidence in accordance with the purposes stated in the request. Moreover, the requesting agency had to keep confidential all requested information and evidence, except where such information or evidence was necessary for open trial as a result of an investigation, inquiry, prosecution or other proceedings relating to a criminal case as stated in the request. Hence, the provision of law merely provided for rules and procedures for submitting a request for foreign assistance in criminal matters, a process that was undertaken by the Executive. The provision of law was neither contrary to nor inconsistent with the rule of law since it did not restrict rights and liberties of the people, or rights in the judicial process, as provided under section 3 paragraph two, section 29 and section 40(2), (3), (4) and (7) of the Constitution.

On the issue of whether or not section 41 of Act on Mutual Assistance in Criminal Matters B.E. 2535 (1992) was contrary to or inconsistent with section 3 paragraph two, section 29 and section 40(2), (3), (4) and (7) of the Constitution, the Constitutional Court

found as follows.

Section 41 of the Act on Mutual Assistance in Criminal Matters B.E. 2535 (1992) did not provide details, procedures and processes for obtaining evidence. The provision compelled the defendant to be bound by evidence obtained from the prosecution's examination in a foreign court, evidence which the defendant did not have the opportunity to inspect or acknowledge, or sufficiently prepare a defence. Even though the admissibility of evidence by a court was subject to section 227 and section 227/1 of the Criminal Procedure Code, which provided for the court to exercise caution when determining the admissibility of evidence which the defendant had not crossed-examined, and that such evidence should not be solely relied upon to convict the defendant, such a rule was not an absolute prohibition. The court was still able to rely upon such evidence in conjunction with other evidence. The provision was thus unfair to the defendant. Section 40(2), (3), (4) and (7) of the Constitution recognised and protected rights in the justice process, which included the right to an open trial, to be informed of facts and have sufficient opportunity to examine documents, to present one's facts, defence and evidence, to have a proper, expeditious and fair trial, to be appropriately treated in the justice process, to have sufficient opportunity to contest a case and to receive legal assistance from an attorney. Such provision of law was also inconsistent with Article 14.3 of the International Covenant on Civil and Political Rights (ICCPR), which related to the right to be tried in the defendant's presence, the right to defend oneself in person or through legal assistance, the right to examine witnesses against oneself, and the right to obtain the attendance and examination of witnesses on one's behalf under the same conditions as witnesses against oneself. Section 41 of the Act on Mutual Assistance in Criminal Matters B.E. 2535 (1992) was therefore a provision of law which restricted rights and liberties and affected the essential substances of rights in the justice process pursuant to section 29 and section 40(2), (3), (4) and (7) of the Constitution. The provision was also inconsistent with the rule of law principle under section 3 paragraph two of the Constitution.

4. Ruling of the Constitutional Court

The Constitutional Court held that section 36, section 37, section 38 and section 39 of the Act on Mutual Assistance in Criminal Matters B.E. 2535 (1992) were neither contrary to nor inconsistent with section 3 paragraph two, section 29 and section 40(2), (3), (4) and (7) of the Constitution, and that section 41 of the Act on Mutual Assistance in Criminal Matters B.E. 2535 (1992) was contrary to or inconsistent with section 3 paragraph two, section 29 and section 40(2), (3), (4) and (7).

Case 3.

- **Identification**

a) Thailand b) Constitutional Court, c) 26th October B.E. 2559 (2016), d) 7/2559 (2016), e) Other, f) Actual facts could be done and the Constitutional Drafting Committee had the duty of revising the preamble to the Draft Constitution

- **Headnotes**

The Council of Ministers requested for a Constitutional Court ruling under section 5 paragraph two of the Constitution of the Kingdom of Thailand (Interim) B.E. 2557 (2014) in a case on the revision of the preamble to the Draft Constitution.

▸ Summary

1. Summary of background and facts

The Constitutional Drafting Committee submitted the Draft Constitution of the Kingdom of Thailand which had been revised in line with the outcome of the referendum on the additional question as well as relevant texts in the preamble pursuant to Constitutional Court Ruling No. 6/2559 to the Prime Minister for presentation to the King for royal assent on 11th October B.E. 2559 (2016). As His Majesty King Bhumibol Adulyadej passed away on 13th October B.E. 2559 (2016), it was necessary to revise the preamble to the Draft Constitution in accordance with such change. However, there was no provision in the Constitution which provided for such a procedure. The Council of Ministers therefore requested the Constitutional Court for a ruling under section 5 paragraph two of the Constitution of the Kingdom of Thailand (Interim) B.E. 2557 (2014) on whether or not the Prime Minister could revise the preamble to the Draft Constitution in accordance with the aforesaid facts.

2. The preliminary issue considered by the Constitutional Court

The preliminary issue considered was whether or not the Constitutional Court had the competence to admit the application for a ruling under section 5 paragraph two of the Constitution of the Kingdom of Thailand (Interim) B.E. 2557 (2014).

The Constitutional Court found that the case in the application raised a question which required a ruling under section 5 paragraph one of the Constitution of the Kingdom of Thailand (Interim) B.E. 2557 (2014) concerning a matter outside the scope of function of the National Legislative Assembly and the Council of Ministers submitted the application. The Constitutional Court had the competence to admit such an application for ruling under section 5 paragraph two in conjunction with section 45 paragraph two of the Constitution of the Kingdom of Thailand (Interim) B.E. 2557 (2014) and article 17(20) and article 27 of the Rules of the Constitutional Court on Procedures and Rulings B.E. 2550 (2007).

3. The issues considered by the Constitutional Court

The Constitutional Court determined that there were two issues which had to be decided, as follows.

The first issue was whether or not the preamble to the Draft Constitution could be revised to reflect the actual facts.

The Constitutional Court found as follows. After the Constitutional Drafting Committee had amended the Draft Constitution and revised the preamble to the Draft Constitution in accordance with the Constitutional Court ruling and submitted the Draft Constitution to the Prime Minister to present to the King for royal assent, it appeared on the facts that during the process of presentation for royal assent, His Majesty King Bhumibol Adulyadej passed away, thus resulting in the preamble to the Draft Constitution not being in accordance with the actual facts, and such an event had never occurred in the past. In addition, there were no provisions in this Constitution which applied specifically to this case. Hence, the matter had to be dealt with in accordance with Thailand's conventions on the democratic form of government with the King as Head of State. In the past, all Constitutions had to be enacted and would become fully effective upon royal assent granted by the King and publication in the Government Gazette. Until such process had been completed, the Draft Constitution would not be effective. This practice had become a part of Thailand's conventions on the democratic form of government with the King as Head of State.

In order to complete the Draft Constitution and ensure consistency with actual facts, prior to the Prime Minister's presentation to the King for royal assent, according to such convention of Thailand's democratic form of government with the King as Head of State, the Constitutional Court therefore found that the enactment of a law had to reflect actual facts. A necessity arising from an actual fact was paramount. This ensured that the necessary act was taken lawfully and according to the rule of law. Moreover, a revision of the preamble was not a change to the provisions which constituted the essence of the Draft Constitution. Therefore, the preamble to the Draft Constitution could be amended to reflect the actual facts that had occurred.

The second issue concerned the question of who was the person with the duty to undertake the revision of the preamble to the Draft Constitution to reflect the actual facts.

The Constitutional Court found as follows. Section 39/1 paragraph ten of the Constitution of the Kingdom of Thailand (Interim) B.E. 2557 (2014), as amended, provided that the Constitutional Drafting Committee had the duty of completing the revision of the preamble to the Draft Constitution before the Prime Minister's presentation to the King for royal assent. Although this Draft Constitution remained pending the Prime Minister's presentation to the King for royal assent, the Draft Constitution was still imperfect. The Constitutional Drafting Committee, which had the duty of preparing and revising the Draft Constitution, therefore had the duty of revising the preamble to the Draft Constitution until perfection was achieved.

4. Ruling of the Constitutional Court

The Constitutional Court held that the revision to the preamble to the Draft Constitution to reflect actual facts could be done and the Constitutional Drafting Committee had the duty of revising the preamble to the Draft Constitution to properly reflect the actual facts prior to the Prime Minister's presentation to the King for royal assent.

Case 4.

- **Identification**

a) Thailand b) Constitutional Court, c) 7th May B.E. 2557 (2014), d) 9/2557 (2014),
e) Qualification of members of the National Assembly, Ministers and Election Commissioners, f) the individual ministerial office of the Prime Minister terminated

- **Headnotes**

The President of the Senate referred an application of Senators to the Constitutional Court for a ruling on whether or not the individual ministerial office of Miss Yingluck Shinawatra, Prime Minister, terminated under section 182 paragraph one (7) in conjunction with section 268 and section 266(2) and (3) of the Constitution.

- **Summary**

1. Summary of background and facts

The President of the Senate referred the application of Mr. Phaiboon Nititawan, Senator, and others, comprising a total of 28 applicants, to the Constitutional Court for a ruling under section 91 in conjunction with section 182 paragraph three of the Constitution on whether or not the individual ministerial office of Miss Yingluck Shinawatra, Prime Minister, respondent, terminated under section 182 paragraph one (7) in conjunction with

section 268 and section 266(2) and (3) of the Constitution. The facts could be summarised as follows.

After the Council of Ministers, by Miss Yingluck Shinawatra, Prime Minister (respondent), declared policies to the National Assembly on 23rd August B.E. 2554 (2011), Prime Minister's Office Notification dated 30th September B.E. 2554 (2011) was issued to remove Mr. Thawil Pliensri from the office of Secretary-General of the National Security Council (High Level Executive), Office of the National Security Council, and to appoint such person to the office of Advisor to the Prime Minister, Permanent Official Division (Higher Level Executive), Prime Minister's Secretariat, Office of the Prime Minister, from 30th September B.E. 2554 (2011). Thereafter, Prime Minister's Office Notification dated 14th October B.E. 2554 (2011) was issued to remove Police General Vichien Photposri from the office of Commissioner-General of the Royal Thai Police and to appoint such person to the office of Secretary-General of the National Security Council as of 14th October B.E. 2554. Another Prime Minister's Office Notification was issued on 26th October B.E. 2554 (2011) to remove Police General Preawpan Damapong from the office of Deputy Commissioner-General of the Royal Thai Police and to appoint such person to the office of Commissioner-General of the Royal Thai Police as from 26th October B.E. 2554 (2011). Such actions of the respondent were not taken for the benefit of the nation and the people, but for the respondent and relatives of the respondent in order to pave the way for promoting Police General Preawpan Damapong, the respondent's relative, to the office of Commissioner-General of the Royal Thai Police. Such acts therefore constituted an exploitation of status or position of the Prime Minister to intervene for the benefit of oneself, others or a political party, being a clear violation of section 268 in conjunction with section 266(2) and (3) of the Constitution. As a consequence, the individual ministerial office of the respondent terminated under section 182 paragraph one (7) of the Constitution.

2. The preliminary issue considered by the Constitutional Court

The preliminary issue considered by the Constitutional Court was whether or not the Constitutional Court had the competence to admit this application for a ruling under section 91 in conjunction with section 182 paragraph one (7) and paragraph three of the Constitution.

The Constitutional Court found as follows. The applicants consisted of 28 Senators, being a number not less than one-tenth of the total number of existing Senators, who petitioned to the President of the Senate that the individual ministerial office of the respondent terminated under section 182 paragraph one (7) in conjunction with section 268 and section 266(2) and (3) of the Constitution, and the President of the Senate referred the application to the Constitutional Court for a ruling. The case was therefore in accordance with section 91 paragraph one in conjunction with section 182 paragraph three of the Constitution and article 17(10) of the Rules of the Constitutional Court on Procedures and Rulings B.E. 2550 (2007). The Constitutional Court thus had the competence to admit this application for consideration.

3. The issues considered by the Constitutional Court

The Constitutional Court considered the determined issues, as follows.

The first issue was whether or not after the respondent had vacated office due to the dissolution of the House of Representatives pursuant to section 180 paragraph one (2) of the Constitution, the ministerial office of the respondent also terminated.

The Constitutional Court found as follows. The Constitution provided for causes for the en masse vacation of ministerial office separately from the termination of the individual office of the Prime Minister and each Minister. In other words, the individual ministerial

office terminated as per the causes under section 182 of the Constitution. Section 182 paragraph one (1) to (8) and paragraph two provided 9 causes. There was no provision for a person whose ministerial office had terminated to continue serving. This differed from the en masse vacation of office of the Council of Ministers under section 180 paragraph one of the Constitution, who continued to perform duties under section 181 until the new Council of Ministers assumed office, excluding the Prime Minister and Minister whose ministerial office had already terminated under section 182 paragraph one (7) in conjunction with section 268 and section 266 of the Constitution. The Prime Minister and such Minister was not in a position to remain in office to continue to perform duties under section 181.

The en mass vacation of office of Ministers pursuant to section 180 paragraph one was a different situation from the termination of an individual ministerial office under section 182 paragraph one. In other words, merely an en masse vacation of office of Ministers under section 180 paragraph one did not cause the ministerial offices of the Prime Minister and Ministers to terminate under section 182 paragraph one since section 181 provided that such persons should remain in office to continue performing duties until the new Council of Ministers assumed office.

Upon a finding on the facts that the Royal Decree Dissolving the House of Representatives B.E. 2556 (2013) resulted in the dissolution of the House of Representatives on 9th December B.E. 2556 (2013) and the Ministers vacated office en masse pursuant to section 180 paragraph one (2) of the Constitution without any cause for termination of ministerial office under section 182 paragraph one, such vacation of office was therefore subject to section 181 of the Constitution which provided for the Ministers to remain in office to perform duties until the new Council of Ministers assumed office. The ministerial office of the Prime Minister and all Ministers had not yet terminated since they had to remain in office to perform duties until the new Council of Ministers assumed office. The ministerial office of the Prime Minister would terminate only upon the occurrence of a cause under section 182 paragraph one of the Constitution and the Constitutional Court had to give a ruling under section 182 paragraph one (2), (3), (5), (7) or paragraph two. Therefore, upon the applicant's submission of an application for a Constitutional Court ruling that the ministerial office of the respondent terminated under section 182 paragraph one (7) in conjunction with section 268 and section 266 of the Constitution, the Constitutional Court had the competence to admit this application for consideration.

The second issue was whether or not the respondent's actions were subject to the provisions of section 268 in conjunction with section 266(2) or (3) of the Constitution which would cause the individual ministerial office of the respondent to terminate under section 182 paragraph one (7) of the Constitution.

The Constitutional Court found as follows. Section 268 in conjunction with section 266(2) and (3) of the Constitution were provisions intended to provide security to a state official against political intervention, except where exercised within the scope of official functions. These principles under section 266(2) and (3) of the Constitution also applied to the Prime Minister and Ministers as members of the executive pursuant to section 268. The intent was to ensure rightfulness in the performance of duties by the Prime Minister and Ministers and to prevent any acts which could give rise to a conflict of interest. Section 268, however, provided an exception for acts done in the performance of public administration functions pursuant to policies declared to the National Assembly or as provided by law. The exception was necessary for the performance of legal duties of a Prime Minister and Ministers in the determination of policies and direction of national administration in order to achieve the best outcome for the nation and people. The exception was therefore needed to provide powers to command and recruit, appoint, reassign, transfer, promote, raise salaries and remove persons performing functions in the official service, without deeming such actions to be an intervention in

the performance of functions of a government official, staff or employee of any state agency. Nonetheless, the actions of a person holding the office of Prime Minister or Minister had to conform to the principles of legality combined with honesty. In regard to the exercise of functions, the law granted powers of national administration for the material benefit of the public and benefit of people from all sectors. Appointments and reassignments of persons in various offices also had to be consistent with good governance. Furthermore, the Constitution provided a limitation on the exercise of powers by all levels of state officials which had to be in accordance with the rule of law pursuant to section 3 paragraph two. No action could be committed by an unfettered discretion due to a conflict of interest or hidden agenda constituting a dishonest act.

The Constitutional Court examined the facts in the judgment of the Supreme Administrative Court, oral testimonies, affidavits, including all evidence and circumstances of the case and reached the following findings. The respondent was involved in the removal of Mr. Thawil Pliensri from the office of Secretary-General of the National Security Council and appointment to the office of Advisor to the Prime Minister, Permanent Official Division, Office of the Prime Minister. The reasons stated in the respondent's arguments were insufficient to support the claim that the issuance of order to reassign Mr. Thawil Pliensri to the Office of the Prime Minister was done for official benefit in accordance with the Council of Minister's policies declared to the National Assembly. Moreover, the transfer of Mr. Thawil Pliensri was rushed and not in accordance with normal official procedures. Hence, there was cause to believe that there were other factors behind the transfer of Mr. Thawil Pliensri from the office of Secretary-General of the National Security Council to the office of Advisor to the Prime Minister, Permanent Official Division, i.e. an intent to make the office of Secretary-General of the National Security Council vacant in order to transfer the Commissioner-General of the Royal Thai Police held by Police Genenal Vichien Photposri at that time to such office, which would in turn make the office of Commissioner-General of the Royal Thai Police vacant and create an opportunity to appoint the respondent's relative to that post. All actions of the respondent were not in any way taken for the benefit of the nation and the people. There was a concealed intent or hidden agenda for the benefit of oneself or associates, thus constituting actions contrary to ethics, virtue and legitimacy in the exercise of functions pursuant to the intents of the Civil Service Act B.E. 2551 (2008), which provided rules for the exercise of powers and duties of personnel administrators in the state sector. The law expressed a clear intent that personnel administration had to be based on merit. The official service had to treat a government official under a personnel administration system which took into account the knowledge, competency, equality, fairness, non-discrimination, non-prejudicial and political impartiality. Any appointment, reassignment and removal of Mr. Thawil Pliensri from office was part of the same process and was connected to the appointment of Police General Preawpan Damapong to the office of Commissioner-General of the Royal Thai Police. This showed a conflict of interest and hidden agenda. The respondent's involvement was deemed as an intervention in the appointment, reassignment and removal of a government official having a fixed position and salary who was not a political official, and the action was taken for the benefit of others, namely Police General Preawpan Damapong, who was a relative of the respondent, being a violation of section 268 in conjunction with section 266(2) and (3) of the Constitution.

For the foregoing reasons, the Constitutional Court ruled that the respondent had exploited her status or position as the Prime Minister to intervene or interfere in the recruitment, appointment, reassignment, transfer, promotion, salary raise or removal from office of a government official having a fixed position and salary and not being a political official for the benefit of oneself or others. The case was in accordance with section 266(2) and (3) of the Constitution and considered to be an act under section 268 of the Constitution resulting in the termination of individual ministerial office of the respondent pursuant to section 182 paragraph one (7) of the Constitution.

The next question considered was whether or not after the termination of the respondent's individual ministerial office pursuant to section 182 paragraph one (7) of the Constitution, the respondent could remain in office to perform duties under section 181 of the Constitution.

Upon an examination of section 181 and section 182 of the Constitution, the Constitutional Court found that section 181 of the Constitution provided only for the case of the Council of Ministers vacating office under section 180 paragraph one to remain in office to perform duties under a new Council of Ministers assumed office. The provision did not apply to the case where an individual ministerial office terminated under section 182. In this case, once the respondent had committed a violation of section 268 in conjunction with section 266 paragraph one (2) and (3) of the Constitution which caused her individual ministerial office to terminate under section 182 paragraph one (7), the respondent was therefore unable to remain in office to perform duties under section 181 of the Constitution.

The third issue was whether or not the termination of the respondent's individual ministerial office under section 182 paragraph one (7) of the Constitution also constituted a cause for an en masse termination of ministerial offices.

The Constitutional Court found as follows. Section 180 paragraph one (1) and section 181 of the Constitution specifically provided that the Council of Ministers vacating office due to the termination of ministerial office of the Prime Minister under section 182 should remain in office to continue performing duties until a new Council of Ministers assumed office. Therefore, upon the termination of the respondent's ministerial office under section 182 paragraph one (7) of the Constitution being a cause for vacation of office of the Council of Ministers under section 180 paragraph one (1) of the Constitution, since the Prime Minister's ministerial office terminated individually, the remaining Ministers in the Council of Ministers who did not lack qualifications or were disqualified from being a Minister should remain in office to continue performing duties until a new Council of Ministers assumed office under section 181 of the Constitution.

However, if a Minister committed an act which constituted a cause for termination of individual ministerial office as provided under section 182 paragraph one (1) to (8) of the Constitution, such Minister would also not be able to remain in office to continue performing duties until a new Council of Ministers assumed office under section 181 of the Constitution. In this regard, the appointment of a high level government official required the approval of the Council of Ministers. Therefore, in this case, if a Minister participated in the resolution which intervened or interfered with the permanent official by transferring Mr. Thawil Pliensri, being a violation of section 268 in conjunction with section 266 of the Constitution, regardless of whether the action was taken directly or indirectly, such action also constituted a cause for the individual ministerial office of such Minister to terminate under section 182 paragraph one (7) of the Constitution.

As for the issue in the applicant's request for a Constitutional Court ruling to appoint a new Prime Minister under section 172 and section 173 of the Constitution mutatis mutandis, this request was beyond the scope of application for a Constitutional Court ruling in this case. The request was inadmissible and dismissed.

4. Ruling of the Constitutional Court

By virtue of the foregoing reasons, the Constitutional Court by unanimous votes held that the respondent exploited her status or position as a Prime Minister to intervene or interfere for her own benefit or the benefit or others in regard to the recruitment, appointment, reassignment, transfer or removal from office of an official who had a fixed position or salary and not being a political official, which was subject to section

266(2) and (3) of the Constitution and deemed as an act under section 268 of the Constitution. As a consequence, the individual ministerial office of the respondent terminated under section 182 paragraph one (7) of the Constitution and the Ministers participating in the Council of Ministers meeting on 6th September B.E. 2554 (2011) were involved in the interference or intervention of a permanent official, constituting a violation of section 268 in conjunction with section 266(2) and (3) of the Constitution. Hence, the individual ministerial offices of such persons also terminated under section 182 paragraph one (7) of the Constitution.

Case 5.

▸ **Identification**

a) Thailand b) Constitutional Court, c) 30th March B.E. 2559 (2016), d) 1-2/2559 (2016), e) Dissolution of political party, f) Dissolution of Khon Kho Pood Nee Party

▸ **Headnotes**

The Political Party Registrar requested for a Constitutional Court order to dissolve Khon Kho Pood Nee Party.

▸ **Summary**

1. Summary of background and facts

The Political Party Registrar, applicant, submitted a total of two applications to the Constitutional Court for an order to dissolve Khon Kho Pood Nee Party, respondent, pursuant to section 93 in conjunction with section 42 paragraph two and section 82 of the Organic Act on Political Parties B.E. 2550 (2007), stating as follows.

The respondent received a grant under projects and plans from the Fund for Development of Political Parties for the annual periods of B.E. 2554 (2011) and B.E. 2555 (2012) pursuant to section 81 of the Organic Act on Political Parties B.E. 2550 (2007), and the funds were disbursed. Thereafter, the respondent was under a duty to prepare true and accurate reports of grant spending for the annual periods of B.E. 2554 (2011) and B.E. 2555 (2012), which had to be submitted to the Election Commission within 31st March B.E. 2555 (2012) and 31st March B.E. 2556 (2013) pursuant to section 82 of the Organic Act on Political Parties B.E. 2550 (2007).

The respondent had already submitted reports of grant spending for the annual periods of B.E. 2554 (2011) and B.E. 2555 (2012) as well as supporting documentary evidence, however the documentary evidence for the spending report was incomplete. The applicant sent a written notice to the respondent to submit additional documentary evidence in support of the political party grant spending reports for the annual periods of B.E. 2554 (2011) and B.E. 2555 (2012) within the prescribed period. If such documents could not be submitted, the grant should be returned. The respondent, however, neither submitted additional documentary evidence nor returned the grant. No reason was provided for the failure to submit documentary evidence or return of grant. Moreover, in the annual period of B.E. 2555 (2012), the respondent did not return the outstanding balance together with interests to the Fund for Development of Political Parties as reported in the spending report of grant received from the Fund for Development of Political Parties for B.E. 2555 (2012) within the period prescribed by law.

The applicant was of the opinion that even though the respondent submitted a spending report of grant from the Fund for Development of Political Parties for B.E. 2554 (2011)

and B.E. 2555 (2012) together with evidence of spending, the submission of documents was incomplete. The applicant thus relied on powers under section 82 in conjunction with section 42 paragraph two of the Organic Act on Political Parties B.E. 2550 (2007) to notify the respondent to submit documentary evidence in support of grant spending or return the grant if such documents could not be provided, as well as to return the balance together with interests as reported within the prescribed period. The respondent, however, took no action. This was a case where the respondent failed to prepare a true and accurate political party grant spending report and to submit such a report to the Election Commission within the period prescribed by law without sound reasons. The Election Commission therefore adopted a resolution to direct the applicant to submit an application to the Constitutional Court for an order to dissolve Khon Kho Pood Nee Party pursuant to section 93 in conjunction with section 42 paragraph two and section 82 of the Organic Act on Political Parties B.E. 2550 (2007), as well as an order to ban persons who had held executive positions in the dissolved respondent party from registering the establishment of a new political party or becoming a political party executive or participating in the registration of a new political party within a period of five years as from the Constitutional Court order dissolving the respondent party pursuant to section 97 of the Organic Act on Political Parties B.E. 2550 (2007), and an order to revoke the election rights of the leader and executives of the respondent party for a period of five years as from the Constitutional Court order to dissolve the respondent party pursuant to section 98 of the Organic Act on Political Parties B.E. 2550 (2007).

2. The preliminary issue considered by the Constitutional Court

The preliminary issue was whether or not the Constitutional Court could admit these applications for consideration under section 93 of the Organic Act on Political Parties B.E. 2550 (2007).

The Constitutional Court found as follows. The respondent failed to prepare a true and accurate political party grant spending report for a calendar year period and to submit the report to the Election Commission within the period prescribed by law without sound reason. This was a failure to comply with section 82 in conjunction with section 42 paragraph two of the Organic Act on Political Parties B.E. 2550 (2007), constituting a cause for dissolution of the respondent party under section 93 paragraph one. The applicant had already submitted an application to the Constitutional Court within 15 days as from the date of knowledge pursuant to section 93 paragraph two. The case was therefore in accordance with section 45 of the Constitution of the Kingdom of Thailand (Interim) B.E. 2557 (2014) in conjunction with section 93 of the Organic Act on Political Parties B.E. 2550 (2007) and article 17(20) of the Rules of the Constitutional Court on Procedures and Rulings B.E. 2550 (2007). The Constitutional Court admitted both applications for consideration and directed the respondent to submit a reply within fifteen days as from the receipt of a copy of the application. The Constitutional Court ordered further that both applications be consolidated into one trial.

3. Reply

The respondent submitted a reply together with supporting documents which could be summarized as follows. The respondent adopted a resolution in general meeting no. 1/2557 on 28th March B.E. 2557 (2014) to dissolve the respondent party and transfer assets to Yok Teng Utis Foundation (Public Charity) and Mr. Aphichatworawit Sriarawongsa, acting membership registrar of the respondent party, resigned from party membership and the position of the respondent party's membership registrar on 31st March B.E. 2557 (2014). Furthermore, the respondent party's executive committee's 4-year term expired pursuant to article 21 paragraph one Thai Pen Thai Party Rules B.E. 2551 (2008), applicable as the respondent party rules, on 25th May B.E. 2558 (2015). It was therefore requested that the Constitutional Court order the dissolution of the

respondent party without revoking the election rights of the leader and executives of the respondent party for a period of five years pursuant to section 98 of the Organic Act on Political Parties B.E. 2550 (2007) since the party executives' terms had already expired.

4. The issues considered by the Constitutional Court

The Constitutional Court found that there was sufficient evidence to make a ruling. Thus, there was no hearing pursuant to article 32 paragraph one of the Constitutional Court Rules on Procedures and Rulings B.E. 2550 (2007) and the Constitutional Court determined that there were 3 issues to be decided, as follows:

(1) Whether or not there was a cause to dissolve the respondent party under section 82 of the Organic Act on Political Parties B.E. 2550 (2007).

The Constitutional Court found as follows. The respondent had the duty to prepare true and accurate grant spending reports for the annual periods of B.E. 2554 (2011) and B.E. 2555 (2012) and to submit such reports to the Election Commission within 31st March B.E. 2555 (2012) and 31st March B.E. 2556 (2013) pursuant to section 82 of the Organic Act on Political Parties B.E. 2550 (2007). The respondent had already submitted the respondent's grant spending reports for B.E. 2554 (2011) and B.E. 2555 (2012) together with documentary evidence, but the submission of documentary evidence of spending was incomplete. The applicant relied on powers under section 42 paragraph two of the Organic Act on Political Parties to send a written notice to the respondent to submit additional documentary evidence of political party grant spending in B.E. 2554 (2011) and B.E. 2555 (2012) within a prescribed period, and if the respondent was unable to submit such evidence the grant should be returned. The respondent, however, neither submitted additional documentary evidence nor returned the grant, and did not give any reason. Furthermore, in B.E. 2555 (2012), the respondent did not return the outstanding balance together with interests to the Fund for Development of Political Parties as reported in the spending report of grant received from the Fund for Development of Political Parties for B.E. 2555 (2012) within the period prescribed by law. This was a case where the respondent failed to prepare a true and accurate report of political party grant spending for a calendar year period and to submit the report to the Election Commission within the period prescribed by law without sound reasons. Hence, there was a cause for dissolution of the respondent party under section 93 in conjunction with section 82 of the Organic Act on Political Parties B.E. 2550 (2007).

(2) Whether or not persons who had held executive positions in the respondent party could register the establishment of a new political party or become a political party executive or participate in the registration of a new political party within a period of five years as from the Constitutional Court to dissolve the respondent party pursuant to section 97 of the Organic Act on Political Parties B.E. 2550 (2007).

The Constitutional Court found as follows. Section 97 of the Organic Act on Political Parties B.E. 2550 (2007) was a provision on the consequences of a legal violation which did not give the Constitutional Court the power to order otherwise. Upon finding a cause for dissolution of the respondent party due to a violation of section 82, the Constitutional Court had to order a ban on those persons who had held executive positions in the respondent party pursuant to Notification of the Political Party Registrar Re: Acknowledgment of Changes in the Executive Committee of Thai Pen Thai Party, dated 21st January B.E. 2554 (2011) and 25th May B.E. 2554 (2011), from registering the establishment of a new political party or becoming a political party executive or participating in the registration of a new political party for a period of five years as from the dissolution of the respondent party.

(3) Whether or not the leader and executives of the respondent party who participated, connived at or neglected or knew of such act but failed to intervene or remedy such act should

have election rights revoked for a period of five years as from the Constitutional Court order to dissolve the respondent party pursuant to section 98 of the Organic Act on Political Parties B.E. 2550 (2007).

The Constitutional Court found as follows. The respondent party had the duty to report political party grant spending in a calendar year pursuant to section 82. Such spending report was prepared by the party leader and party executives who were charged with the powers and duties of administering the party in accordance with section 17 paragraph one and were collectively responsible for resolutions of the party executive committee and actions taken pursuant to section 17 paragraph three. As regards the respondent's argument that the respondent party's general meeting had adopted a unanimous resolution to dissolve Khon Kho Pood Nee Party and the entire party executive committee had retired due to the expiration of term, the Constitutional Court found that a political party dissolution would occur only upon the causes stated in section 92 paragraph one (1) of the Organic Act on Political Parties B.E. 2550 (2007) and the respondent party rules. In this case, the party rules did not provide for a cause for political party dissolution and the retiring party executive committee should continue to perform duties until a new party executive committee was acknowledged by the Political Parties. As the respondent failed to prepare correct grant spending reports for the annual period of B.E. 2554 (2011) and B.E. 2555 (2012) according to its duty, and there was credible evidence that the leader and executives of the respondent party participated, connived at or neglected or knew of the commission of such act but failed to intervene or remedy such act, an order was therefore issued to revoke the election rights of the leader and executives of the respondent party pursuant to the Notification of the Political Parties Registrar Re: Acknowledgement of Changes to the Executive Committee of Thai Pen Thai Party, dated 21st January B.E. 2554 (2011) and 25th May B.E. 2554 (2011), for a period of five years as from the date of order to dissolve the respondent party pursuant to section 98 in conjunction with section 17 and section 82 of the Organic Act on Political Parties B.E. 2550 (2007).

5. Ruling of the Constitutional Court

The Constitutional Court ordered the dissolution of Khon Kho Pood Nee Party, respondent, pursuant to section 93 in conjunction with section 82 of the Organic Act on Political Parties B.E. 2550 (2007), and banned persons who had held executive positions in the respondent party pursuant to Notification of the Political Parties Registrar Re: Acknowledgement of Changes to the Executive Committee of Thai Pen Thai Party, dated 21st January B.E. 2554 (2011) and 25th May B.E. 2554 (2011) from registering the establishment of a new political party or becoming a political party executive, or from participating in the registration of a new political party within a period of five years as from the date of Constitutional Court order to dissolve the respondent party pursuant to section 97 of the Organic Act on Political Parties B.E. 2550 (2007), and revoked the election rights of the leader and executives of the respondent party pursuant to such Notification of the Political Parties Registrar for a period of five years as from the date of Constitutional Court order to dissolve the respondent party pursuant to section 98 of the Organic Act on Political Parties B.E. 2550 (2007).

15. Turkey

Constitutional Court

Summary

Established in 1961 based on the centralized model of a posteriori constitutionality review of laws, the jurisdictions of the Court were preserved by the 1982 Constitution with minor changes. The constitutional amendment in 2010 introduced the jurisdiction of individual application and altered the structure of the Court accordingly. The 2017 constitutional amendment has transformed the political form of government from parliamentary to presidential, and the jurisdiction of the Court was expanded to include constitutionality review of presidential decrees. Per this amendment, the Court shall consist of 15 Justices. 3 are appointed by the legislature and 12 are appointed by the state President. Nominees are from the high courts, academia and high level state officials. The Court exercises constitutionality oversight through abstract and concrete review of norms through the Full Bench. The jurisdictions of the Court consist of the following: Constitutional review of laws, presidential decrees, bylaws of Parliament; adjudication of individual applications concerning human rights; dissolution and financial audit of political parties; trial of high level state officials; and the review of the lifting of parliamentary immunities. The introduction of individual applications in 2010 was a significant step for the Court. This is an especially interesting example due to its connection with the European Convention on Human Rights (ECHR): Individuals may apply to the Constitutional Court alleging violation of rights which are under the joint protection of the Constitution and the ECHR.

Content

A. Introduction

A1. History

Constitutional justice was first adopted in Turkey by the 1961 Constitution. Based on the European model of a posteriori review, the 1961 Constitution established the Turkish Constitutional Court with the power to exercise constitutionality review, *inter alia*.

The 1982 Constitution preserved centralized constitutional review with minor changes. Under the 1982 Constitution, the Court maintained its powers to exercise abstract and concrete norm review, adjudicate on dissolution of political parties, carry out financial audit of political parties, and to try high level state officials for office related offences in the capacity of the Supreme Tribunal.

The constitutional amendment of 2010 has introduced significant changes concerning the powers, structure, and composition of the Constitutional Court. The amendment expanded the jurisdiction of the Court to receive complaints from individuals concerning violations of human rights and freedoms falling under joint protection of the Constitution and the European Convention on Human Rights. The Court's structure and composition was modified accordingly and the number of justices was increased from 11 to 17.

With the recent constitutional amendment of 2017, the political form of government has been transformed from parliamentary to presidential, and the necessary alterations has been made on the jurisdiction of the Court concerning the constitutionality review. Also, the number of justices were reduced to 15 due to abolishment of the separate military justice system.

The constitutional justice system of Turkey is among the oldest in Europe. Serving to safeguard the constitutional and democratic order, the Court has built an extensive case law through constitutionality review over 50 years. Upon the launch of the individual application mechanism, the Court has adopted a rights-based approach and became an institution protecting and promoting human rights in an effective manner. The Court has delivered many decisions on key human rights issues such as right to life, freedom of religion, and freedom of expression. The adjudication of individual complaints has turned the Court into an institution that touched upon daily lives of individuals. Thereby, the Constitutional Court has gained a high level of trust from the public.

A2. Basic Texts

- Constitution of Turkey (adopted 1982, last amended 2017): Articles 146-153
- Act on Establishment and Rules of Procedures of the Constitutional Court, code no: 6216 (enacted 2011, last amended 2018)

B. Organization

B1. President

The President of the Court is elected from among its members for a term of four years

by absolute majority of the total seats, and he or she may be re-elected. Also, two deputy presidents are elected through the same procedure.

The President represents the Constitutional Court, approves its internal regulations, presides over the Full Bench and sets its agenda. The President also takes charge of the affairs of the Court and oversees its personnel and its budget. The President assigns the Justices to the Sections and sets the agenda of the Sections when necessary.

In case of vacancy, the senior deputy president will be acting President of the Constitutional Court.

B2. Justices

Number of Justices: 17 (to be reduced to 15 as prescribed by the constitutional amendment of 2017)

The composition of the Constitutional Court is based on the representation model. Justices from the judiciary, various state institutions and academy with different legal backgrounds and expertise allow the Court to maintain the diversity of experience and perspective.

Three justices are elected by the Parliament; two from among three candidates nominated for each vacant position by the Court of Accounts from among its members, and one from among three candidates nominated by the heads of the bar associations from among self-employed attorneys.

The remaining twelve justices are appointed by the President of the Republic; three from among three candidates nominated for each vacant position by the Court of Cassation from among its members, two from among three candidates nominated for each vacant position by the Council of State from among its members, three — at least two of whom being law graduates — from among three candidates nominated for each vacant position by the Council of Higher Education from among the teaching staff in the fields of law, economics and political sciences, four from among high level executives, self-employed attorneys, senior judges and public prosecutors, or rapporteurs who have served for at least five years in the Constitutional Court.

In order to qualify for appointment as a Constitutional Justice, academic staff are required to hold the title of professor or associate professor, attorneys are required to have practiced at least twenty years, high level officials are required to hold bachelor's degree and to have twenty years of experience in public service, and senior judges and prosecutors are required to have practiced at least twenty years including the training period. All those mentioned must also be over the age of forty-five.

Justices serve as a member of the Full Bench as well as members of a Section and a Commission. The Full Bench is in charge of adjudicating constitutionality review requests and dissolution of political parties, trying high-level state officials for office related offences in the capacity of the Supreme Tribunal, and carrying out financial audit of political parties. Also, the Full Bench adjudicates the individual applications that referred to itself by the Sections. The Sections adjudicate on the merits of individual applications. Commissions decide on the admissibility of individual applications.

As members of the Full Bench, Justices elect the President and Deputy Presidents of the Court and exercise voting rights on adoption of the bylaws (internal rules and regulations) of the Court. Accordingly, they indirectly participate in decision-making on important matters concerning the operation and administration of the Constitutional

Court.

The term of Justices shall be twelve years and non-renewable. The retirement age of a Justice is 65. No Justice can be removed from his or her office or retired before the legal age against his or her own will, unless impeached or criminally sanctioned with a sentence requiring dismissal from office or unable to serve due to permanent ill-health.

B3. Department of Constitutional Adjudication

Currently, around 80 Rapporteur Judges and 20 Assistant-Rapporteurs are incumbent to conduct study and research and to prepare and present reports and draft judgments concerning the cases before the Court.

- **Rapporteur Judges**

Rapporteur Judges are appointed solely by the President of the Constitutional Court, from those falling under any of the following categories: 1) judges and prosecutors with at least five years of judicial experience 2) academic staff having the doctorate or higher titles in the field of law, economics or political sciences 3) auditors of the Court of Accounts.

There is no specific term of office for Rapporteur Judges, and they may serve at the Court until the age of retirement. The President may terminate the term of a Rapporteur at any time and return them to their initial institution (judiciary or academy). All newly appointed Rapporteur Judges receive one week of training from the Chief and Coordinator Rapporteur Judges.

The Rapporteur Judges carry out judicial work for the Court, not for Justices individually, and they are directly responsible to the President of the Court. No Rapporteur Judge is assigned to Justices. Under the direction of the President, Rapporteur Judges conduct initial research and study concerning the deliberation and adjudication of cases and prepare and present non-binding reports. Upon the deliberation and adjudication of the case by Justices, Rapporteur Judges compose the judgment accordingly.

The Rapporteur Judges serve under four divisions and each division is led by a Chief Rapporteur Judge. The first division carries out the preliminary examination (admissibility review) of individual complaints under the Commissions. The second division is in charge for examining the merits of individual complaints referred to the Sections by the Commissions. The Rapporteur Judges in these two divisions (either in Commission or Section) specialize on different constitutional rights, e.g., right to life, freedom of expression, and right to property. Sufficient number of Rapporteur Judges are assigned to each right-group depending on the work load, and each group is coordinated by a Coordinator Rapporteur Judge, who is usually the senior member of the right-group. The third division primarily focuses on constitutional research and publication of the case-law of the Court. The fourth division deals with the cases concerning constitutionality review.

Assistant Rapporteurs are employed by the Court following an exam and interview. After two years of training, they must serve five years as Assistant Rapporteurs and author a thesis in the field of constitutional justice before being promoted as Rapporteur Judges. They either serve in the first division and carry out admissibility review or assist Rapporteur Judges in examining the merits of applications referred to Sections.

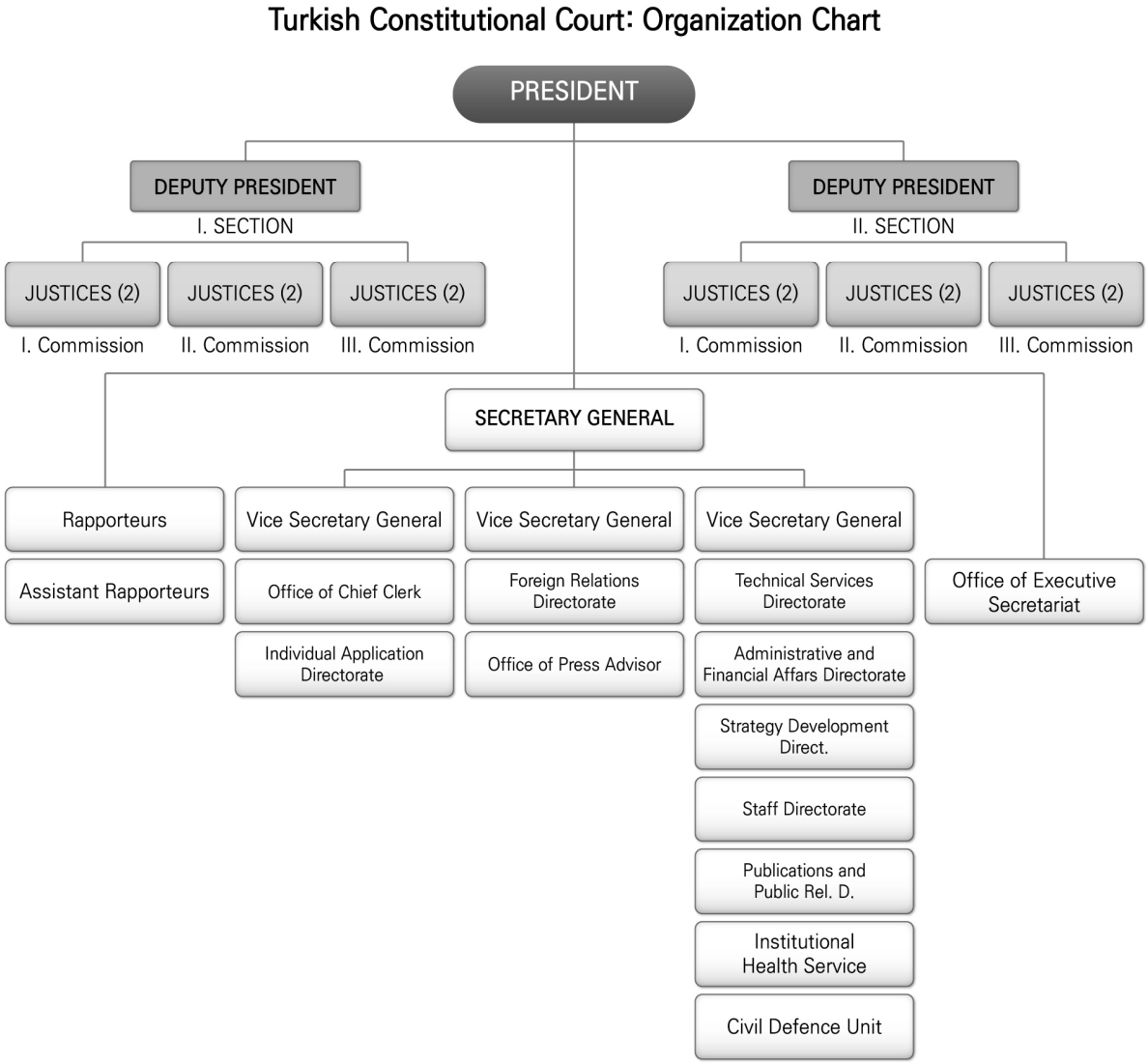
B4. Department of Court Administration

The Department of Court Administration is in charge for managing and supervising the administrative affairs of the Court. Under the direction of the President, the Secretary General oversees the work of the administrative departments, manages and supervises its employees and attends Parliament sessions to make statements on the Court's administrative issues. Three Vice Secretary Generals assist the Secretary General, each of them being responsible for different divisions. The most senior Vice Secretary General shall act on behalf of the Secretary General should he or she be unable to perform his or her duties due to unforeseeable circumstances.

As of 2018, around 240 public officials are employed at the Department of Court Administration of the Constitutional Court. It is comprised of the following:

- **Office of Chief Clerk:** Carries out the registration and other work related to the cases.
- **Staff Directorate:** Takes charge of personnel management.
- **Publications and Public Relations Directorate:** Primarily deals with publication of case materials, annual reports, books and other materials.
- **Technical Services Directorate:** Takes charge of the building management and maintenance.
- **Foreign Relations Directorate:** In charge of international relations and events.
- **Individual Application Directorate:** Carries out the work related to handling of individual applications and develops policy to improve the individual application system.
- **Administrative and Financial Affairs Directorate:** In charge of sourcing, procurement, and final accounts.
- **Strategy Development Directorate:** Developing strategies and solutions in Information Technologies to improve the efficiency of case management and other work.
- **Office of Press Advisor:** Promoting the Court's important cases and events to the public through press releases and the official website and handles all relations with the media. The Office is directly responsible to the President of the Court.
- **Office of Executive Secretariat:** Performs as the private secretariat of the President of the Court, and is in charge of protocol affairs.

The functions of units are determined with internal regulations of the Court. New units may be established upon proposal of the President and approval of the Full Bench.



C. Jurisdictions

Under Articles 69 and 148 of the Constitution, the Constitutional Court of Turkey shall have jurisdiction over the following:

1. The constitutionality of laws and presidential decrees upon the request of specified political actors and courts (annulment action and exception of unconstitutionality).
2. Individual applications concerning fundamental rights under the joint protection of the Constitution and the European Convention of Human Rights.
3. To try high level state officials in the capacity of the Supreme Tribunal for the offences related to office.
4. Dissolution and financial audit of political parties.

C1. Constitutional Review of Legislation (Annulment Action and Exception of Unconstitutionality)

- **Key legal provisions:** Constitution (Articles 148, 149, **150**, 151, **152**), Act on Establishment and Rules of Procedures of the Constitutional Court (Articles 3, **36-39**, **40-41**, 42-44).

- **Purpose:** Constitutional review of statutes and presidential decrees is in place to ensure that the Constitution is respected both by the legislative and executive bodies and, thereby, the checks and balances system is secured. The Constitutional Court preserves the supremacy of the Constitution and the rule of law by striking down legislative or executive action on the basis of unconstitutionality. Further, the Constitutional Court makes sure that constitutional principles such as equity and equality are observed in enactment and implementation of laws.

- Causes for requests

  - **Annulment Action:** The President of the Republic, the groups of two political parties which have the highest number of members in the Parliament, and a minimum of one-fifth of the total number of members of the Parliament shall have the right to apply for annulment action to the Constitutional Court, alleging unconstitutionality of, either based on procedure or substance, laws, presidential decrees, and bylaws of the Parliament. The request for constitutionality review based on procedural defects may be made only by the President of the Republic or by one-fifth of the members of the Parliament. Constitutional amendments may be reviewed only on the ground of procedural defects.

  - **The Exception of Unconstitutionality:** A court hearing a case may raise the issue of unconstitutionality before the Constitutional Court against the law or presidential decree applicable to the case, either *ex officio* or by decision upon a motion by the party. If the court does not honor a motion for constitutionality review, the issue, together with the final judgment of the first instance court, shall be decided upon by the competent authority of appeal.

- Application procedure

  - **Annulment Action:** Time limit for annulment action is sixty days after publication in the Official Gazette of the contested law, presidential decree or the Rules of Procedure (bylaws). Requests for annulment on the grounds of procedural defects may be made only in ten days from the date of promulgation of the law. In the petition, the statement of reason for unconstitutionality and the Articles of the Constitution relied upon must be provided.

    If an annulment action is to be examined on the merits, the petition for action and its annexes shall be sent to the Office of the Speaker of the Parliament, the Prime Minister and to the groups of the political parties entitled to file annulment action. Such offices can submit their written opinions regarding the action for annulment to the Court for consideration.

  - **Exception of Unconstitutionality:** Upon request to the Constitutional Court for review of a law or presidential decree, the Court hearing a case shall suspend it until the request is concluded. The Constitutional Court shall decide on the matter within five months after receiving the case. If no decision is reached within this period, the hearing court shall conclude the case under existing

legal provisions. However, if the hearing court receives the decision of the Constitutional Court before the final judgment on the merits of the case, it is obliged to comply with it.

No claim of unconstitutionality shall be made by the courts on the ground of procedural defects of legislation.

If the Constitutional Court reviews constitutionality of a legal provision upon request of a court and dismisses the case on the merits, no claim of unconstitutionality shall be made with regard to the same legal provision within ten years after publication of the decision in the Official Gazette.

For a request of constitutionality review, courts must submit reasoned requests and state relied Articles of the Constitution, along with other documents specified in the law.

- **The Review Procedure for Annulment Action and Exception of Unconstitutionality:** The review of the case shall be conducted over the file without a hearing. If deemed necessary, the Constitutional Court can summon those concerned and those who have expertise on the matter for oral explanations. The Court is bound with the request of annulment, however, not with the reasoning of the request. Also, the Court may review the contested provision under other relevant Articles of the Constitution.

  The Full Bench is in charge to review the constitutionality of contested laws or decrees. It shall convene with at least ten Justices under the chairpersonship of the President of the Constitutional Court or a deputy president designated by the President. Absolute majority is required for decision-making. Two-thirds majority of those attending the session shall be necessary to annul constitutional amendments.

- **Decisions and effect:** The Constitutional Court may find the contested rule constitutional or unconstitutional. The decisions of the Constitutional Court are final. Decisions of annulment must be reasoned and cannot be pronounced without reasoning. In the case of annulment of a provision, the Constitutional Court cannot act as a law-maker and pass judgments implying new practices.

  The annulled legal provision shall cease to have effect from the date of publication of the decision in the Official Gazette. If deemed necessary, the Constitutional Court may also specify a future date on which the annulment decision shall come into effect. That duration may be one year maximum from the date of the publication of annulment decision in the Official Gazette.

  Annulment decisions shall not be applied retroactively.

  Decisions of the Constitutional Court shall be binding on the legislative, executive, and judicial bodies, on the administrative authorities, and on natural and legal persons.

C2. Individual Application

- **Key legal provisions:** Constitution (Articles **148**, 149), Act on Establishment and Rules of Procedures of the Constitutional Court (Articles 3, **45—51**).

- **Purpose:** To provide protection against the state power by remedying human rights violations upon application of individuals.

- **Causes for request:** Everyone may apply to the Constitutional Court on the grounds that one of the fundamental rights and freedoms falling under joint protection of the Constitution and the European Convention of Human Rights has been violated by public authorities. In order to make an application, ordinary legal remedies must be exhausted. Individual application may be made only against an action or inaction of public authorities. Legislative or other regulatory norms shall not be subject to individual application.

- **Application procedure:** The individual application must be filed within thirty days after legal remedies are exhausted or, if no such remedy is available, within thirty days after the cause is known.

  - **The Application Form:** Information of the applicant and his or her counsel, the fundamental right(s) which has been allegedly infringed, the causes for infringement including the action or inaction of public authorities, the information on the process of exhausted legal remedies, reasons for the request and other necessary matters.

  - **Admissibility Review:** Admissibility review shall be made by Commissions consisting of two Justices. The application shall be found inadmissible unanimously if it does not comply with the formal requirements. Decisions of inadmissibility are final. If no unanimity is reached, the application shall be referred to Sections.

  - **Review on Merits:** The merits of the application shall be reviewed by Sections. There are two Sections of the Court. Each Section consists of five Justices (and two substitute Justices), including a Deputy President who is in charge of its direction. Justices are assigned to the Sections by the President of the Constitutional Court. The sections must convene under the chairmanship of the Deputy President with the participation of four Justices, and absolute majority is required to pass judgments. The factual and legal issues remaining within the competence of first instance or appellate courts shall not be examined through individual application remedy. The Sections may refer the case to the Full Bench if it is considered to carry significance for the case-law of the Court. The Constitutional Court has no authority to adjudicate factual and legal issues to be resolved through ordinary legal remedies, that is, the issues that remain within the competence of ordinary or appellate courts. Accordingly, the Court does not exercise an appellate review, and its authority is limited to make an examination and determination whether the fundamental rights are violated.

  - **Presentation of Opinions by Interested Agencies:** The examination of the merits shall be made over the file, a hearing may be held if deemed necessary. Any information, document or evidence may be requested from those concerned. The Minister of Justice may present to the Constitutional Court a written opinion on the application.

  - **Interim Measure:** In the course of review of merits, *ex officio* or upon the request of the applicant, the Court can decide on measures that they deem to be essential for the protection of the basic rights of the applicant. In the event of a decision for such a measure, the decision regarding the merits shall be made latest within six months. Otherwise, the decision for the measure is automatically lifted.

- **Decisions and effect:** Applications may be found inadmissible at any stage for failure to satisfy formal requirements. If admissible, the applications will be examined on the merits. The Court may find no violation or conclude that one or more rights have been violated. If a violation is found, the Court orders to redress the violation and its consequences and/or compensation. If the violation arises from a court trial/judgment, retrial may be ordered. However, the Constitutional Court cannot exercise opportuneness (suitability) review, or make a decision creating (effect of) an administrative action. It is upon the courts or public authorities to take necessary steps to redress the violation in accordance of the violation judgment. The effect of judgment is limited to the concerned individual(s). The Court cannot strike down a legislation or other secondary norms through individual application mechanism.

C3. Dissolution of Political Parties

- **Key legal provisions:** Constitution (Articles 69, 148), Act on Establishment and Rules of Procedures of the Constitutional Court (Articles 3, 52—53).

- **Purpose:** To ensure that political parties are not established and engaged to promote aims contrary to the constitutional order and democracy.

- **Causes for request:** The Chief Public Prosecutor of the Court of Cassation may file an indictment for a political party dissolution when it considers the purposes or activities of a political party are against the constitutional principles and democratic order.

- **Procedures:** After receiving the request, the President of the Constitutional Court shall assign a Rapporteur for preliminary examination. If the Court moves to proceed the case on the merits, the indictment and the attachments thereof shall be sent to the political party concerned, and the party shall provide its defence. If a written defence is submitted, it shall be passed to the office of the Chief Prosecutor of the Court of Cassation. After the oral statement of the Chief Prosecutor, the oral defence of the party shall be heard. Also, those persons in the political party against whom political ban is required may submit their written defences. If deemed necessary, the Court shall summon who are concerned or who have expertise for oral explanations. A judgment for dissolution of a political party requires two-thirds majority vote of Justices attending the session.

  Also, upon the request of Chief Prosecutor of the Court of Cassation, the Court shall give warning to political parties if it finds violations of the Political Parties Act. The defence of the concerned political party must be received. The warning shall be notified through the Office of Chief Prosecutor, and it shall be published in the Official Gazette.

- **Decisions and effect:** The dissolution of a political party shall be decided if it is established that the statute and activities of the political party violate the constitutional principles (stated in Article 68/4 of the Constitution) and that the party has become a center for such activities, considered that the members or the decision-making and administrative bodies of the party intensively engage in such activities or approves such activities explicitly or implicitly. Establishing a party that has similar principles to the dissolved party or a substitute party is prohibited. The assets of the dissolved political party are transferred to the National Treasury.

The members and founders of a political party whose acts or statements have caused the party to be dissolved are banned from politics for a period of five years from the date of the decision of the Constitutional Court.

Depending on the gravity of the activities of the political party, the Constitutional Court may decide the concerned party to be deprived of state aid wholly or partly instead of dissolution.

The decision of the Constitutional Court on adjudication of political party dissolution are final and they shall be notified to the concerned political party through the Chief Prosecutor and be published in the Official Gazette.

C4. Financial Audit of Political Parties

- **Key legal provisions:** Constitution (Articles **69**, 149), Act on Establishment and Rules of Procedures of the Constitutional Court (Articles 3, **55—56**).

- **Procedure:** Political parties shall send their financial account statements to the Constitutional Court, and the Court shall send them to the Court of Accounts for examination. Upon receiving the report of the Court of Accounts, the Court will communicate the reports to political parties and they will submit their opinion within two months. After reviewing the reports and opinion, the Court shall either approve the accounts or make other decisions specified in the law (i.e. ordering reimbursement of unlawful spending and call for an investigation of those concerned, ordering payment of unlawful income to Treasury).

  The copies of the decisions shall be sent to the concerned political party and to the office of the Chief Prosecutor of the Court of Cassation for record purposes.

  Political parties receiving financial aid from foreign states, international institutions, and natural and legal persons of non-Turkish nationality shall be dissolved.

C5. Trying the President, Ministers, and other high-level State Officials for Offences related to Office

- **Key legal provisions:** Constitution (Articles **105, 106, 148**, 149), Act on Establishment and Rules of Procedures of the Constitutional Court (Articles 3, **57—58**).

- **Causes for request:** The Parliament may initiate an investigation against the President of the Republic, Vice President or Ministers. Following the completion of investigation, the Parliament may refer the case to the Constitutional Court (in the capacity of Supreme Tribunal) with two-thirds majority of the total number of members through secret ballot. The President of the Republic against whom an investigation is decided to be launched cannot decide to hold elections.

  Other high-level state officials, i.e. the Speaker of the Parliament, General Staff, the President of the Court of Cassation, may also be referred to the Court through the procedure prescribed in the relevant laws.

- **Procedure:** The Full Bench shall try concerned state officials for office related offences in the capacity of Supreme Tribunal in accordance with the law. The Chief Public Prosecutor of the Court of Cassation or the Deputy Chief Prosecutor

shall act as the prosecutor at the trial. The trial shall be concluded in three months, if the trial is not completed within this time, a further three months shall be granted for once, and the trial shall absolutely be completed within that time. The accused must be heard by the Tribunal, and he or she may be exempted from trial after being heard.

- **Decisions and effect:** If convicted by the Supreme Tribunal for an offence that prevents from being elected (specified by law), the term of office of the President of the Republic, Vice President, or Ministers, shall cease.

- **Re-examination of the case:** Within the 15 days after the verdict is delivered, the Chief or Deputy Chief Prosecutor, the defendant or his or her counsel may file a petition for re-examination of the case. Re-examination shall be conducted over the file, however, a hearing may be held upon request of the prosecutor, defendant or *ex officio.* The final statement shall be made by the defendant.

  The scope of the re-examination is limited to the issues presented in the petition. If the petition is found to be admissible, the subject of the re-examination shall also be adjudicated. The decisions rendered upon re-examination are final.

C6. Review of the Lift of Parliamentary Immunity

- **Key legal provisions:** Constitution (Article **85**), Act on Establishment and Rules of Procedures of the Constitutional Court (Articles 3, **54**).

- **Causes for request:** If the parliamentary immunity of a parliament member (PM) has been lifted or if the loss of membership has been decided according to the first, third or fourth paragraphs of Article 84 of the Constitution, the PM in question or another PM may, within seven days from the date of the decision of the Plenary of the Parliament, appeal to the Constitutional Court seeking to annul the decision on the grounds that it is contrary to the Constitution, law or the Rules of Procedure.

- **Procedure:** The Constitutional Court shall make the final decision on the appeal within fifteen days. The Court shall obtain the required documents *ex officio.*

Annex

Annex 1. Case Statistics

1-1. Since 1982 and Last Five Years (Constitutional Review 1982-2018 May)

Type	Years	Number of Requests	Dismissed on Procedural Grounds*	Merged	Dismissed on Merits	Annulled	Pending**
Annulment Action	1982-2012	487	14	23	142	279	-
	2013	17	-	-	17	19	-
	2014	19	-	-	5	12	-
	2015	13	-	2	6	8	-
	2016	21	-	-	8	3	4
	2017	20	-	1	10	4	13
	2018	57	-	-	4	3	57
	Subtotal	634	14	26	192	328	74
Exception of Unconstitutionality	1982-2012	2372	527	673	799	342	-
	2013	143	4	28	75	26	-
	2014	180	1	43	114	29	-
	2015	98	-	7	81	20	-
	2016	114	1	15	88	15	-
	2017	157	-	35	115	11	5
	2018	44	-	4	30	5	16
	Subtotal	3108	533	805	1302	448	21
Grand Total		**3742**	**547**	**831**	**1494**	**776**	**95**

* Including conclusions of "No Ground for a Decision".
** Pending cases from the concerned year as of May 24th, 2018.

1-2. Since its Launch in 2012, On Yearly Basis and Total (Individual Application 2012-2018 March 31st)

Years	Number of Applications			Concluded				Pending**		
	New	Transferred from previous year	Subtotal	Inadmissible *	No Violation	Violation of one or more Rights	Subtotal	Commissions	Sections	Subtotal
2012	1342	-	1342	4	-	-	4	-	-	-
2013	9.897	1.338	11.235	4.897	2	25	4.924	-	11	11
2014	20.578	6.311	26.889	10.519	43	364	10.926	-	555	555
2015	20.376	15.963	36.339	14.850	54	524	15.428	39	3.921	3.960
2016	80.756	20.911	101.677	15.264	97	743	16.104	3.676	4.094	7.770
2017	40.530	85.563	126.093	88.682	69	880	89.631	13.167	4.505	17.672
2018***	8.853	36.462	45.315	6.592	9	93	6.694	8.433	220	8.653
Grand Total	**182.332**	**N/A**	**N/A**	**140.808**	**274**	**2.629**	**143.711**	**25.315**	**13.306**	**38.621**

* Includes administratively rejected, merged, and discontinued applications.
** Pending applications from the concerned year as of March 31st, 2018.
*** As of March 31st

Annex 2. Cases

- **Identification**

a) Country, b) Name of the Court, c) Date of decision given, d) Number of the decision, e) Jurisdiction, f) Title of the decision

- **Headnotes**

- **Summary**

Case 1.

- **Identification**

a) Turkey, Republic / b) Constitutional Court, Full Bench / c) 15-11-2017 / d) 2015/76 / e) Constitutional Review/Exception of Unconstitutionality / f) Blocking Access to Internet

- **Headnotes**

The administration may be vested with power to *ex officio* block access to websites solely dedicated to commit or promote crimes such as child pornography. In contrast, if the website or application is primarily used or intended for mass communication and yet contain criminal content, judge approval is required for blocking access to such websites.

- **Summary**

I. Article 8 § 4 of the Law no. 5651, dated 4 May 2007, enables the Telecommunications Communication Presidency ("the TCP") to *ex officio* order blocking access to internet content constituting the offence of obscenity. The Court requesting the annulment of the rule argued that internet is of great importance for exercise of fundamental rights and freedoms, that blocking access to internet is directly associated with the freedom of communication and that the contested rule is in breach of Article 22 of the Con stitution for imposing a restriction on the freedom of communication without the approval of a judge.

II. The Constitutional Court noted that internet has become widespread as a mass communication media and it has been increasingly preferred over the conventional means, and therefore it falls within the realm of the freedom of communication. However, it may also be used for the purposes of committing an offence or facilitating the commission of an offence. Therefore, the internet clearly differs from conventional communication means such as telephone and telegraph, and all content on the internet cannot be considered to fall into the scope of the freedom of communication.

According to the Constitutional Court, the freedom of communication safeguards the internet content or applications which are in the nature of or intended for communication or contact. However, it does not offer protection especially for internet content which merely serves for commission of offence or its facilitation. There is no unconstitutionality in enabling administration for blocking access to internet *ex officio* and without judge approval for the content serving to commit an offence or its facilitation.

On the other hand, the assurance of approval of judge with regard to the freedom of communication covers internet sites or applications that is primarily used or intended for mass communication, such as social media, but nevertheless include criminal content as well. In other words, although the internet sites or applications used or intended for communication might include criminal content, they are subject to the constitutional safeguard that requires judge approval for restriction. Therefore, enabling the TCP to block access to internet sites or applications of mass media or communication without judge approval contradicts Article 22 of the Constitution, which requires that the order of restriction of communication by due authorities under law shall be submitted for the approval of the competent judge within twenty-four hours.

In addition to the freedom of communication, blocking access to internet, which is also a means widely used for imparting, disseminating and receiving information and thoughts and for sharing comments, opinions and criticisms, is also directly associated with the freedom of expression.

The freedoms of communication and expression, which are safeguarded by Articles 22 and 26 of the Constitution, may be subject to restriction for the grounds specified in these articles, providing that such restriction complies with the requirements set out in Article 13 of the Constitution. As stipulated in Article 13, fundamental rights and freedoms may be restricted only by law without infringing upon their essence, and restrictions shall not be contrary to the requirements of the democratic order of the society and the principle of proportionality.

As regards the Article 13 requirement that fundamental rights and freedoms may be restricted only "by law", a regulation must meet legality requirement not only with respect to the form but also with respect to the substance. As noted in many judgments of the Constitutional Court, the principle of legal certainty entails that laws must be clear, precise, understandable and impartial to the extent they would not cause hesitation and doubt both for individuals and the administration; and that they must not yield to arbitrary acts and actions by the public authorities.

In the contested provision, it is merely set forth that the TCP may *ex officio* order blocking access to internet content on the ground of the offence of obscenity. It is not specified therein whether such order would be only limited to the relevant content, section and part or would extend to the whole of the web-site, or whether access thereto would be blocked gradually as stipulated in Articles 8/A and 9 of the Law. Thereby, the administration is vested, by virtue of this provision, with a power to block access to internet in a way that is indefinite in its scope and limits. As the contested provision, which is the basis for the order blocking access, fails to meet the requirements of being clear and precise, it does not comply with the safeguard provided in Article 13 of the Constitution that fundamental rights and freedoms may be restricted only "by law".

Case 2.

- **Identification**

a) Turkey, Republic / b) Constitutional Court, Full Bench / c) 15-3-2018 / d) 2018/3007 / e) Individual Application / f) *Şahin Alpay (2)*

- **Headnotes**

When the Constitutional Court finds a violation of individual liberty due to insufficient evidence for detention, the inferior court must release the person unless there is new

evidence justifying the detention.

- **Summary**

I. After the coup attempt of 15 July 2016, within the scope of an investigation conducted against the media structure of the Fetullahist Terrorist Organization/Parallel State Structure (FETÖ/PDY) stated to be the organization behind the coup attempt, the applicant was detained on remand for alleged membership of an armed terrorist organization.

In the first individual application lodged by the applicant, the Plenary of the Constitutional Court found on 11 January 2018 a violation of the applicant's right to personal liberty and security, as well as, his freedoms of expression and press.

Regarding the alleged unlawfulness of the applicant's detention on remand, the Court concluded that the investigation authorities could not sufficiently demonstrate a strong indication that the applicant committed an offence, which was a prerequisite for detention as set forth in Article 19 of the Constitution. In the judgment finding also violations of the applicant's freedoms of expression and press, the Court mainly relied on its determinations as to the alleged unlawfulness of the applicant's detention on remand.

The applicant's requests for release and his appeals to this end were dismissed by the inferior courts. In their decisions, the courts mainly relied on the assessments "that the Constitutional Court cannot assess the evidence or the merits of the case or the issues to be considered in appellate review, nor can it make a substantive review, that making an examination as to the merits of the case results in "usurpation of power", that the violation judgment delivered by overstepping legal mandate cannot be considered to be final nor binding, and consequently, it would not result in the applicant's release, if otherwise, it would contradict the legal principles concerning the courts' independence and mandating that no order or instruction could be given to the courts".

The applicant submitted a request for release following the Constitutional Court's judgment. However, his request was rejected. Therefore, he lodged another individual application on 1 February 2018.

II. In its previous judgment, the Constitutional Court examined the applicant's abovementioned allegation under Article 19 § 3 of the Constitution. One of the constitutional safeguards against detention provided therein is the existence of "a strong indication of guilt". Accordingly, it is an obligation for the Constitutional Court to examine whether there exists "a strong indication of guilt" or not.

Essentially, in every concrete case, it falls in the first place upon the incumbent courts deciding detention cases to determine whether the prerequisite for detention, i.e. the strong indication of guilt, exists. However, it is the Constitutional Court's duty to review such determinations of lower courts. The Constitutional Court's review pertains especially to the detention process and the grounds of detention order.

In its previous judgment, the Constitutional Court reviewed the case in accordance with the abovementioned scope and method. Therefore, the Court's review cannot be regarded as substantive or appellate review that remains within the competence of first instance and appeal courts.

Furthermore, as also stated in the previous judgment, the Constitutional Court's review in this respect is limited to the assessment of the lawfulness of the applicant's detention on remand, independently of the possible results of the proceedings. Therefore, the judgment in question cannot be considered to have included an assessment as to the

merits of the criminal proceedings against the applicant.

In addition, pursuant to Article 153 § 1 of the Constitution, the judgments of the Constitutional Court are final. According to the sixth paragraph of the same Article, these judgments shall be binding on the legislative, executive and judicial bodies, administrative authorities, and natural and legal persons. Therefore, there is no doubt that the Constitutional Court's judgment finding a violation with respect to the applicant is final and binding. Accordingly, the Constitutional Court's judgments finding a violation cannot be subject to constitutional or legal review by another authority. The contrary assessments of the inferior courts making a decision about the applicant's requests for release lack any constitutional or legal basis.

Where the Constitutional Court found a violation and ordered the redress of the violation and its consequences in accordance with Article 50 of Law no. 6316, what is expected from the inferior courts is not to assess the scope of duties and powers of the Constitutional Court but to redress the violation and its consequences. This cannot be construed as an order or instruction directed to courts within the meaning of Article 138 of the Constitution but rather the fulfilment of the right of access to a court in a state of law. Indeed, Article 153 of the Constitution explicitly states that the judgments of the Constitutional Courts are binding on judicial authorities as well.

In its previous judgment finding a violation, the Constitutional Court concluded that a strong indication of guilt could not be sufficiently demonstrated by the investigation authorities.

Following the Constitutional Court's such judgments finding a violation, the inferior courts must release the applicant against whom the prerequisite of detention could not be demonstrated. There is no other way to redress the violation and its consequences, save very exceptional cases where "a strong indication of guilt" can be demonstrated on the basis of new facts other than those that had been relied for detention and therefore had neither been assessed in the Constitutional Court's judgment finding a violation. It must be also stressed, however, the margin of appreciation afforded to the inferior courts in this respect is very limited compared to the initial detention order. In such cases, final assessment as to whether "a strong indication of guilt" has been demonstrated or not on the basis of new facts falls upon the Constitutional Court.

In the present case, the inferior courts have not released the applicant following the Constitutional Court's judgment finding a violation, nor have they demonstrated the existence of the abovementioned exceptional case. Therefore, the inferior courts have failed to redress the violation, found by the Constitutional Court with respect to the applicant, as well as its consequences. In this respect, in the absence of a strong indication of guilt on the part of the applicant, continuation of his detention on remand violates the safeguards provided in Article 19 of the Constitution.

It is concluded that the applicant's right to personal liberty and security has been violated due to non-implementation of the Constitutional Court's judgment on the applicant's detention on remand, in a manner also contradicting the safeguards of the right of access to a court.

The applicant is still detained on remand. Considering the nature of the violation found, there is no other way than releasing the applicant in order to redress the violation and its consequences. Therefore, the judgment must be remanded to the trial court for release of the applicant in order to redress the violation and its consequences.

Case 3.

▸ Identification

a) Turkey, Republic / b) Constitutional Court, Second Section / c) 1-2-2017 /
d) 2014/19081 / e) Individual Application / f) *T.T.A.*

▸ Headnotes

The balance between interests of employees with disease and the interest of others must be observed by considering accommodation of diseased employees in appropriate places/positions.

▸ Summary

I. The applicant started working at a company of pipe manufacturing on 14/2/2005 and was diagnosed HIV positive in December 2006.

The applicant was paid monthly salaries for six months with no permission entering to work place and performing his job. The medical report obtained by the occupational physician of the company from Aegean University School of Medicine indicated that the state of health of the applicant did not constitute an impediment for working in any position nor the applicant did have a disability.

The applicant resigned on 26/1/2009 and signed a release of claims form.

The applicant filed a lawsuit against the company on 5/11/2009 at the local labor court. The labor court characterized the claims as personal action and action for non-pecuniary damages under the article 5 of law numbered 4857.

The labor court dismissed the action for non-pecuniary damages on the ground that the claims of violation of the right to privacy were not substantiated. The labor court, however, held that the fact that applicant was paid for 6 months but was prevented from performing the job during this time by being not allowed to enter to the work place constituted a violation of the prohibition of discrimination. The court consequently held that the principle of equality was breached by the employer and entered judgment partially in favor of the applicant.

Upon appeal, the judgment was reversed on the ground that "*the employer acted with the purpose of protecting other employees*" and the case was remanded. Following, the labor court dismissed the case on 20/3/2014 in compliance with the decision of reversal. This judgment was approved by the 9. Chamber of the Court of Appeals.

The applicant stated that his removal from the work place first and then his unfair dismissal from work constituted discriminatory treatment; that the reasoning of the court for dismissing the case will prevent him from finding a new job, and that will cause serious hardships due to the high-cost of the medical treatment which may lead to a violation of the right to life and access to health.

II. The court recalled that, although it may be considered advantageous that the applicant was paid during the term he was not allowed to work and then severance payment when dismissed, the applicant was dismissed from work not because of legal reasons enlisted under the law numbered 4857 but because he was diagnosed HIV positive, in a time that the applicant most needed to work to cover the expenses of medical treatment. Therefore the applicant was subject to discriminatory treatment.

In their judgments, the labor court and the Court of Appeals emphasized the contagious nature of the disease (HIV) and considered that the only solution to eliminate that risk was removal of the applicant from the work place. However, in those judgments, the issue whether the employer has responsibility to accommodate a work place or position for the applicant that does not pose risk to other employees was not addressed. It must be also noted that the occupational physician made a recommendation to accommodate another position for the applicant, that the staff manager recommended to put the applicant to an external position such as distributor visits, and that the expert opinion obtained by the court concluded that the employer ought to put the applicant in a position that his disease does not pose risk for other employees. Despite that, the employer has failed to consider if there exists such an appropriate position for the applicant. Besides, the lack of an assessment in the judgments of the labor court and appellate court regarding the responsibility of employer to consider alternative positions for the applicant reveals that the just balance was not struck between the interest of the employer and the applicant.

The Constitutional Court found that the first instance courts failed to properly address the well-founded claims of the applicant on unfair dismissal as well as the issue of considering alternative positions for the applicant. The Constitutional Court accordingly concluded that public authorities failed to fulfil the positive obligations under the right to privacy and the right to the protection of material and spiritual existence and found a violation of both rights.

Case 4.

- **Identification**

a) Turkey, Republic / b) Constitutional Court, First Section / c) 2-2-2017 / d) 2014/1546 / e) Individual Application / f) *Recep Tarhan & Afife Tarhan*

- **Headnotes**

When the right to property is interfered, even for a legitimate purpose such as public safety, the principle of balance of interests must be observed and the loss should be compensated where appropriate.

- **Summary**

I. The applicants are owners of a property located on the Brave Woman Street, which is closed to vehicle and pedestrian traffic per decision of Ankara Transportation Coordination Center (ATCC), dated 15/3/2001, in order to maintain security of the Israel Embassy. Upon the request of habitants of the area, ATCC made a decision to lift the closure of the street. However, the decision was not implemented.

The applicants filed a petition to the Governorate of Ankara for the implementation of ATCC's decision. Upon the lack of a response from the Governorate, the applicants filed a lawsuit at Ankara Administrative Court seeking to enforce the ATCC's decision. The case was dismissed, and the judgment was approved by the Council of State.

In the meantime, a resolution was adopted by General Assembly of ATCC to inquire from the Governorate whether a risk of security exists around the Israel Embassy. The governorate responded that the removal of barriers and fences from the street would create security vulnerability. Following, ATCC has made another decision not to remove the barriers and fences on the street.

The applicants state that they received monthly rental of 3000TL before the street was closed. After the closure they had to reduce the rent to 1000TL to reach a compromise with the tenant. They continued to receive 1000TL per month for a duration of 49 months. Even though they have attempted to raise the rent after that time, the tenant terminated the contract and evacuated the property 31/12/2008.

The applicants filed a lawsuit at the Ankara Administrative Court for revoke of the decision of ATCC. The court revoked the decision of ATCC on 31/3/2010 on the ground that it was based on an abstract assumption of the existence of security risk without making a detailed inquiry and without relying on any concrete determination. Upon appeal by the administration, the Council of State quashed the judgment and remanded the case stating that the purpose of the closure of the street was maintain the security of the Embassy, and that it would not be rational nor compatible with the nature of diplomatic relations to expect the existence of concrete determinations or threats for that purpose. Following, the first instance court dismissed the case, and the dismissal was approved by the Council of State.

The lawsuit that the applicants filed to seek compensation of their loss was also dismissed. In that case, the court based its analysis on the fault liability, and the principle of strict liability was not considered.

The applicants allege that their right to property is violated because of the decrease in the amount of rental income due to closure of the street to of pedestrian and vehicle traffic.

II. The court noted that in this complaint, the interference to the property right must be assessed under the principle of proportionality. According to the Court, it is obvious that the decrease in the value of the property due to loss of rental income constitutes a burden on the applicant. The principle of proportionality requires the compensation of the burden on the applicants resulting from blockage of the street, a measure aiming to fulfill legal responsibilities arising from international law. However, in the present case, the first instance court dismissed the case finding no fault of administration, without allowing the applicant to prove the loss and the causal relation between the loss and administrative action/decision. The Constitutional Court notes that interpretation of the first instance court that requires fault liability for compensation prevents to mitigate the burden the applicants bear because of the administrative measure.

However, article 35 of the Constitution requires to employ means to balance the interest of the owner even an interference to the property right is based on the law and pursues a legitimate aim. Those means, aiming to protect the interests of the owner, may also include the compensation of the loss under the specific circumstances of a case. Although it is at the discretion of lower courts to decide whether compensation is appropriate in a specific case, an analysis solely based on fault liability in such cases would not be compatible with the notion of proportionality under article 35 of the Constitution.

In conclusion, to require the applicants to bear the whole burden resulting from a measure for the interest of the whole society does not strike a fair balance between public interest and the interest of the property owner. Such an interference to the property right puts a high burden on the side of applicants and therefore may not be considered as proportionate.

For the ongoing reasons, the Constitutional Court held that the right to property is violated.

Case 5.

▸ Identification

a) Turkey, Republic / b) Constitutional Court, Second Section / c) 13-9-2017 / d) 2014/11855 / e) Individual Application / f) *Gürkan Kaçar and others*

▸ Headnotes

The applicant, who was minor and mentally disabled, injured in an accident due to lack of appropriate public safety measures, and the administration could not unequivocally prove that the necessary measures were in place at the time of the incident, which led to violation of right personal inviolability.

▸ Summary

I. Gürkan Kaçar, one of the applicants, is mentally disabled and he was a minor at the material time. When he was playing on a railway which was separated from the street fronting his house with a ruined wall, he touched a high voltage power line. As a result, he was exposed to electric shock and got injured seriously. The Chief Public Prosecutor's Office launched an investigation. In the report prepared in the scene by the police officers, the way the applicant had been injured was confirmed, as well as it was noted that some of the grounding cables were out of order. The medical report issued by the hospital indicated that the applicant faced a life-threatening danger due to the incident, and his injuries would prevent him from performing his daily activities for fifteen days.

However, the public prosecutor carried out a scene examination more than five months after the incident and found out that the grounding cable was operating and that there were iron guardrails on both sides of the railway, which constituted a barrier between the street and the railway. The report issued by an expert, who accompanied the public prosecutor, indicated that the applicant Gürkan Kaçar was at complete fault in the incident.

The report obtained by the criminal court from the academic experts also pointed out that the applicant Gürkan Kaçar, who was mentally disabled, was found to be at complete fault in the incident. At the end of the trial, the court acquitted the accused, and the judgment was upheld by the Court of Cassation.

The applicants unsuccessfully sought compensation for injuries before the administrate court. The appeal before the Council of State was also unsuccessful.

II. The applicants maintained that; Gürkan Kaçar, the minor applicant with mental disability, got injured upon touching the cables as the protective walls near the railway lines had been demolished and the necessary security measures had not been taken, there was a neglect of duty on the part of the administration, their action for damages was dismissed following unreasonably lengthy proceedings. In this respect, the applicants alleged that their son's right to life safeguarded by Article 17 of the Constitution was violated, and they requested compensation for non- pecuniary damages.

III. The Constitutional Court emphasized that it is not clear from the available information whether an examination was made if the security measures observed during the site inspection, which was carried out more than five months after the incident, were actually available at the time of the incident. Besides, the inspection report did not provide sufficient explanation as to how the applicant Gürkan Kaçar had entered the place where the incident occurred and how he was exposed to electric shock.

Furthermore, within the scope of the action for damages, it was acknowledged; that the applicant had entered the scene from a ruined part of the wall surrounding the railway, that one of the electric cables there was broken or was cut off and picked up to play, and that it was touched to the catenary line on the railway, and therefore the applicant was injured due to electric shock. The action for damages was dismissed for lack of causal link between the damage and the administrative act.

The Constitutional Court considers that the State's obligation to protect the individuals' lives must not be interpreted in such a way as to impose an excessive burden on the public authorities, bearing in mind, in particular, the unpredictability of human conduct. However, the public authorities must take into account children, mentally disabled persons and other persons in need of protection in their prediction of human conduct while carrying out hazardous acts and they must put into practice the appropriate administrative measures in due time.

In the action for damages brought by the applicants, due regard was not paid to the fact that the administration failed to take the necessary measures for the people in need of protection, and that the supervision failure of the applicant's family did not eliminate the responsibility of the administration to do so. The applicant thereby was found to be at complete fault due to his careless conduct. However, this conclusion does not comply with the principles concerning the obligation to protect life.

In addition, the case did not include any difficulty or other element which would cause impeding of the proceedings nor the case was of complex nature to necessitate the prolonging of proceedings for an unreasonable period of 9 years. In the present case it was concluded that the case was not concluded within reasonable time in a manner that might damage the significant role of the current judicial proceedings in the prevention of similar violations of the right to life.

Consequently, the Constitutional Court found a violation of the right to life of the applicant Gürkan Kaçar, safeguarded by Article 17 of the Constitution.

PART D.

1ST RESEARCH CONFERENCE OF THE AACC SRD:

SUMMARY REPORT

1. Introduction

The formation of the Association of Asian Constitutional Courts and Equivalent Institutions (AACC) in 2010 was a milestone for greater cooperation in the field of constitutional justice in Asia. Another important step was the decision in 2016 to establish the AACC Permanent Secretariats. As a result, the AACC Secretariat for Research and Development (SRD) started its first research projects this year. This *1st Research Conference of the AACC SRD* played an integral part in fulfilling AACC SRD's purpose of deepening mutual understanding between AACC Members via collaborative research.

According to Article 3 of the AACC Statute, objectives of the AACC are the following: Protecting human rights, guaranteeing democracy, implementing the rule of law, ensuring the independence of constitutional courts and equivalent institutions, and facilitating cooperation and exchanges of experiences and information among AACC members. The first step towards reaching these objectives is to take stock of the varieties of constitutional adjudicatory systems that exist among the AACC Members.

By precisely understanding how each AACC Member is institutionally organized, and which constitutional jurisdictions each enjoys, AACC SRD can gradually, with the support of AACC Members, highlight issues of mutual interest, as well as explore common problems and solutions. Also, sharing knowledge regarding unique characteristics of each AACC Member will be of great value in the process of fostering mutual understanding. The purpose of this Conference was thus to take a significant step in finalizing a set of publications and resources, aiming to give an overview of the organization, jurisdictions and selected case law of AACC Members. The following conference report provides a summary of the presentations[22] as well as the discussions. For further in-depth content, please refer to the fact files of AACC members.

To facilitate discussion in the research sessions of the Conference (Sessions I to V), AACC SRD grouped AACC members who attended the Conference into sub-regional panels. Regional and sub-regional similarities and differences provide a stimulating basis for comparing and contrasting the jurisdictions and organizations of AACC member institutions. Session I consisted of a panel of AACC members from East and Southeast Asia, which also all share the common characteristic of operating a centralized system of review. Session II took into account AACC members from Southeast Asia who are either from the common law world, or exhibit hybrid features of constitutional adjudication, for example operating a decentralized system of review in a civil law context, or operating a centralized system of review in a common law context. Session III was a guest panel consisting of institutions from Europe. Session IV consisted of AACC members from South Asia and AACC members who are at the same time members of the Council of Europe. Session V was a panel of Central Asian AACC members.

Session VI was this Conference's concluding General Session. The aim of this General Session was to give the opportunity for AACC members and guests to discuss future cooperation, as well as the way forward for AACC SRD. The first half of the General Session consisted of a presentation on the freedom of speech by the delegate from Malaysia. The subject of the presentation served as an example of a potential future research topic for AACC SRD. The second half of the General Session was a general discussion, which started with a statement by the delegate from Kazakhstan and continued with various rounds of open discussion, touching on various themes of interest. Delegates from Malaysia and Kazakhstan took a special role in this General Session on account of their status as Deputy Secretary Generals of AACC SRD.

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22 The presentation materials are available in the archive section of the AACC SRD website (Database / Archive / Conference / 1st Research Conference), at: http://www.aaccrd.org/en/main.do

Conference details in brief:

Theme:
- Jurisdictions and Organization of AACC Members

Date:
- 29th May – 1st June 2018

Location:
- Courtyard Marriott Namdaemun, Seoul, Korea

Session chairpersons, session speakers, other AACC member delegates, and guests[23]

AACC SRD
- *Lutfi Chakim* – Researcher (Constitutional Court of Indonesia) and Seconded Officer to AACC SRD
- *Fabian Duessel* – Deputy Director

Afghanistan: ICOIC
- *Abdul Raof Herawi* – Member
- *Hedayatullah Habib* – General Secretary

Indonesia: Constitutional Court
- *Yogi Djatnika* – Acting Director of AACC Secretariat Subdivision
- *Helmi Kasim* – Researcher

Kazakhstan: Constitutional Council
- *Nurysh Tasbulatov* – Deputy Head of the Legal and International Department

Korea, Rep.: Constitutional Court
- *Jean Lee* – Rapporteur Judge
- *Gihyun Kim* – Rapporteur Judge
- *Yong Beom Choi* – Rapporteur Judge
- *Joo-Hee Jung* – Rapporteur Judge

Kyrgyz Rep.: Constitutional Chamber of the Supreme Court
- *Nazgul Nurbekova* – Head of the Court Proceedings Organization Department

Malaysia: Federal Court
- *Aslam Zainuddin* – Deputy Chief Registrar (Policy) and Deputy Secretary General of the AACC SRD

Mongolia: Constitutional Court
- *Dulaanjargal Gantuya* – Research Officer and Seconded Officer to the AACC SRD

Myanmar: Constitutional Tribunal of the Union
- *Hnin Phyu Win* – Assistant Director (Research and Training Department)
- *Khin Thandar Soe* – Assistant Director

Philippines: Supreme Court
- *Theodore O. Te* – Assistant Court Administrator and Chief of the Public Information Office
- *Melissa Dimson-Bautista* – PHILJA Attorney IV

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[23] The Constitutional Court of Azerbaijan, the Supreme Court of Pakistan and the Constitutional Court of Uzbekistan were unable to attend the Conference. However, the Constitutional Court of Azerbaijan and the Supreme Court of Pakistan made contributions to the Conference via the submission of their respective AACC Member Fact Files.

- *Theresa R Penilla* – PHILJA Attorney II

Russia: Constitutional Court
- *Sergei Sergevnin* – Head of the Department of International Relations and Research of Constitutional Review Practice

Tajikistan: Constitutional Court
- *Abdumajid Gulzoda* – Head of Staff

Thailand: Constitutional Court
- *Sumaporn Srimoung* – Acting Director of the International Affairs Division
- *Pitaksin Sivaroot* – Academic Officer

Turkey: Constitutional Court
- *Mucahit Aydin* – Rapporteur Judge

European Court of Human Rights
- *Liv Tigerstedt* – Head of Division, Deputy to the Registrar of the Filtering Section

Venice Commission
- *Tanja Gerwien* – Legal Officer

2. Session I

Date: 30 May 2018

Chair: Aslam Zainuddin (Deputy Secretary General, AACC SRD)
- ✓ Presentation 1(1): Constitutional Court of Korea (10:00-10:15)
- ✓ Presentation 1(2): Constitutional Court of Indonesia (10:15-10:30)
- ✓ Presentation 1(3): Constitutional Court of Mongolia (10:30-10:45)
- ✓ Presentation 1(4): Constitutional Court of Thailand (10:45-11:00)
- ✓ Discussion (11:00-11:40)

Presentation 1(1): Constitutional Court of Korea

Joo-Hee Jung (Rapporteur Judge)

The Constitutional Court of Korea is led by a President, who is one of nine Justices of the Court. He or she is appointed by the President of Korea from among the Justices with the consent of the National Assembly. Nominees for Justices must be legally qualified to practice law. Even though all Justices are appointed by the President of Korea, three are elected by the National Assembly and another three are nominated by the Supreme Court. Rapporteur Judges support the adjudication process. Research Officers and Academic Advisors provide additional research assistance. Administrative issues are handled by a separate Secretariat, which is led by the Secretary General. According to Art. 111(1) of the Constitution of Korea, the Constitutional Court has five jurisdictions. They are the constitutional review of legislation, impeachment, dissolution of a political party, competence disputes, and constitutional complaint. The Constitutional Court of Korea does not possess the power of abstract constitutional review. So far there have been only two cases of impeachment and one case on party dissolution. The number of cases received by the Constitutional Court has been growing steadily, including over the past five years. In 2013 the annual number of cases received

was over 1400, whereas in 2017 it was over 2600 cases. In the Korean delegation's presentation five cases were highlighted. The topics dealt with by the cases were freedom of speech, freedom of conscience, gender discrimination, presidential impeachment, and party dissolution.

Presentation 1(2): Constitutional Court of Indonesia

Helmi Kasim (Researcher)

According to Article 24C of the 1945 Constitution and Article 10 of the Constitutional Court Act, the Constitutional Court of Indonesia enjoys four authorities and one obligation. The authorities are the constitutionality review of laws against the Constitution, the resolution of competence disputes between state institutions, the dissolution of political parties, and the settlement of election disputes. The fifth jurisdiction which is described as an obligation rather than an authority is the adjudication on the alleged violation of the Constitution by the President and/or Vice President, which may lead to an impeachment. On questions of impeachment, the legislature of Indonesia has the final say, not the Constitutional Court. Throughout the presentation, the delegate from Indonesia used case law to explain the different jurisdictions of the Court. In terms of constitutional research, the Constitutional Court of Indonesia has the Center for Case Research and Case Analysis and Library Management. This Research Center is divided into two divisions: The Division of Research and Case Analysis, and the Library Management Division. Besides conducting research on law and constitutional issues, the Research Center is basically assigned with the task of assisting the Justices in deciding cases. There are various steps in which researchers provide substantial support. They include preliminary analysis of cases, in-depth study and analysis of the constitutional issues involved in the case, and assisting the Justices in the drafting of the legal opinion. If necessary, Focus Group Discussions (FGD) are held to gather further expert opinion to address issues that have not yet been addressed.

Presentation 1(3): Constitutional Court of Mongolia

Gantuya Dulaanjargal (Research Officer)

The Constitutional Court of Mongolia was established in 1992 following a broader process of constitutional reform. The Constitutional Court is made up of nine Justices. Three are nominated by the State Great Hural (the legislature), three by the President of Mongolia, and three by the Supreme Court. The term of office is six years. The Chair of the Constitutional Court is a serving Justice of the Court and fulfils his/her function as Chair for three years. The Secretary General leads the administration of the Court, which also includes a Research Center. Art. 66 of the Mongolian Constitution sets out the jurisdictions of the Court. The Constitutional Court shall make conclusions and submit them to the legislature, called the State Great Hural, on the following issues under a dispute: The constitutional conformity of laws, decrees or other decisions; election disputes; whether high ranking officials have committed a breach of the Constitution; and the impeachment of the President, Speaker or Members of the State Great Hural, and the Prime Minister. Significantly, the adjudication of the Constitutional Court will be reviewed by the State Great Hural. If the State Great Hural disagrees with the Court's first decision, then the decision comes back to the Court, which will then sit *en banc* and make a second and final judicial decision. During the presentation, the delegate from Mongolia introduced a case on the separation of powers, involving the final adjudication on the constitutionality of allocating financial resources by the State Great Hural.

Presentation 1(4): Constitutional Court of Thailand

Sumaporn Srimoung (Acting Director of International Affairs Division) and *Pitaksin Sivaroot* (Academic Officer)

Out of a total of nine Justices, three are from the Supreme Court and two are from the Supreme Administrative Court. In addition, a Selection Committee selects four other persons: One qualified person in law, one person qualified in political science or public administration, and two qualified persons holding or having held positions in the senior civil service (see Section 200 of the Constitution for further details). The Office of the Constitutional Court contains various organizational units. This includes the Institute of Constitutional Studies, which plays a major role in academic and research activities. It is divided into three divisions (Constitutional Research and Development, International Affairs, and Constitutional Seminar and Dissemination) and one college (College of the Constitution). In terms of jurisdictions, according to Section 210 of the Constitution, the Court considers and adjudicates on the constitutionality of a law or bill; considers and adjudicates on a question regarding duties and powers of an enumerated list of state organs; and performs other duties and powers prescribed in the Constitution. The Constitution of the Kingdom of Thailand has often been revoked, and the most recent constitution was made in 2017. These enactments also affected the powers of the Constitutional Court, for example in the context of the new chapter on the duties of the state (see Chapter V), and Section 213, which deals with the mechanism of individual complaint.

Discussion

Judicial appointments; constitutional complaint; caseload management; ex ante review of legislation; individual access to constitutional justice; constitutional checks on constitutional adjudication; division of labour between constitutional and supreme courts.

Judicial appointments

- Recent constitutional reforms in Thailand led to the specification that two of its Constitutional Court Justices should be from the senior civil service. One of the reasons behind this requirement is that experience in public administration is one of the desirable attributes of a Constitutional Court Justice in Thailand, and adds to the diversity of backgrounds and experiences of members of the Constitutional Court.

Constitutional complaint

- Constitutional complaint at the Constitutional Court of Korea does not include complaint against judgments of an ordinary court. Therefore, questions were raised over how in such a situation the right to fair trial is safeguarded, especially in a context where irregularities may take place in proceedings of ordinary courts, and how individuals can challenge such alleged irregularities under the right to fair trial. The delegation from Korea explained that despite the absence of constitutional complaint against judgements, Art. 68(2) of the Constitutional Court Act allows a special type of constitutional complaint. Under this provision, a constitutional complaint can be made against legislation if an ordinary court has refused the request to refer that legislation for review to the Constitutional Court, in a situation where the constitutionality of that legislation relevant to the case at hand is in doubt. Furthermore, despite the lack of constitutional complaints against judgements, the fundamental rights of individuals are protected in the following ways. First, there is case law of the Constitutional Court of Korea which states that when an ordinary court applies a law which has already been declared

unconstitutional by the Constitutional Court, this is an exceptional case and can be brought before the Constitutional Court. Second, indirect control over judicial decisions takes place in cases where judicial decisions which may infringe fundamental rights may come about due to the fact that the applied law itself may be unconstitutional. In such a case, individuals can ask the Constitutional Court to rule on the constitutionality of the law in question (by Art. 68(2) of the Constitutional Court Act) rather than the judicial decision itself.

- Constitutional complaint can only be considered by the Constitutional Court of Korea if an individual files a complaint. The Constitutional Court of Korea has no proactive powers in this regard and so has to wait for an individual to file a complaint, since it is a court of law. Constitutional complaint judgements have retroactive power in cases where the provision in question concerns criminal punishment and is deemed unconstitutional.
- Since, strictly speaking, there is currently no constitutional complaint at the Constitutional Court of Indonesia, questions were raised regarding any existing discussion on introducing such a constitutional jurisdiction. The delegation of Indonesia stated that yes, indeed, discussion exists. One of the Constitutional Court Justices' Ph.D. dissertation is on the subject of constitutional complaint. However, the key hurdle is that to introduce constitutional complaint, the Constitution should be amended first. Amending Indonesia's Constitution is, however, very difficult and may take a long time. The theme of the 2015 AACC Short Course held in Jakarta was on constitutional complaints. The choice of topic was aimed to trigger the possibility of the Constitutional Court of Indonesia being given the authority to adjudicate on constitutional complaints. However, it seems that there is no way around constitutional amendment. Also, by looking at Turkey's experience in introducing constitutional complaint, a country as populous as Indonesia introducing constitutional complaint would definitely involve major procedural changes at the Court to cope with an inevitable surge in the number of cases. These and other reasons are why until now there has not been a move to introduce constitutional complaint in Indonesia. However, there are good arguments that in order to improve the protection of fundamental rights, the mechanism of constitutional complaint should be introduced. Constitutional complaint could be introduced by being recognized as forming part of constitutional review or also via judicial interpretation at the Constitutional Court. There have been various examples of cases where individuals have brought cases which in substance are similar to constitutional complaint cases. However, the introduction via constitutional amendment is the most proper method.

Caseload management

- The European Court of Human Rights (ECtHR) annually receives ca. 60,000 cases via its individual complaints mechanism, and the ECtHR has had to procedurally reform itself several times to cope with the heavy caseload. Today, even a single judge can decide on the admissibility of cases.
- In the context of Indonesia, a panel of three justices can advise the petitioner to withdraw if the case is considered as inadmissible. However, if the petitioner refuses to withdraw the case, then the matter will go to the full bench of nine justices. The full bench takes into account the inadmissibility advice of the panel, and therefore in a case where it was deemed by the panel as inadmissible, the full bench normally also will not take too long to decide the case. This acts as a filtering mechanism.

Ex ante review of legislation

- It is compulsory for the Constitutional Court of Thailand to review draft organic laws, having to decide within 15 days after the draft law has been sent to the Court.

Individual access to constitutional justice

- At the Constitutional Court of Mongolia, individual access to constitutional justice can also take place in terms of abstract matters. According to Art. 9 of the Law of Mongolia on the Constitutional Court (1992), individual citizens can submit petitions or applications on matters concerning the breach of the Constitution.

Constitutional checks on constitutional adjudication

- In Mongolia, there is an in-built procedural legislative check on the powers of the Constitutional Court. According to Art. 66 of the Constitution, the legislature can actually take a vote on the first judgement made by a panel of the Constitutional Court. If the judgement is rejected by the legislature, then the case goes back to the Court, which then sits *en banc* to decide the case again. This second judgement will then be final. This rather special procedure may seem unusual in many jurisdictions. In Mongolia, debate over the necessity and merits of this procedure currently exists.

Division of labour between constitutional and supreme courts

- Indonesia operates under a system where the division of labour between the Constitutional Court and the Supreme Court is very clear. The Constitutional Court has authority only to adjudicate at the level of constitutional law. Basically cases of challenging the legality of government action should go to the Supreme Court.

3. Session II

Date: 30 May 2018

Chair: Gihyun Kim (Rapporteur Judge, Constitutional Court of Korea)

- ✓ Presentation 2(1): Federal Court of Malaysia (14:00-14:15)
- ✓ Presentation 2(2): Constitutional Tribunal of Myanmar (14:15-14:30)
- ✓ Presentation 2(3): Supreme Court of the Philippines (14:30-14:45)
- ✓ Discussion (14:45-15:30)

Presentation 2(1): Federal Court of Malaysia

Aslam Zainuddin (Deputy Chief Registrar (Policy))

The Federal Court of Malaysia stands at the apex of the Malaysian judiciary. It is the final appellate court in both civil and criminal matters. The jurisdiction of the Court is the following: Exclusive original jurisdiction on the validity of laws and the resolution of disputes; appellate jurisdiction to determine appeals from the Court of Appeal and the High Court; referral jurisdiction to determine any question that arises before any court as to the effect of any provision of the Constitution; and advisory jurisdiction as to the effect of any provision of the Constitution which has arisen or appears likely to arise. Led by the Chief Justice of Malaysia, members of the Federal Court consist of Federal Court judges. Judges of the Federal Court are appointed by the King, acting on the advice of the Prime Minister, after consulting the Conference of Rulers. There are a total of fifteen Federal Court Judges. The Chief Registrar's Office not only serves the Federal Court, but also functions as the administrative arm of the Malaysian judiciary, of both the superior and the subordinate courts. Apart from personnel and financial responsibilities, it oversees the day to day administration of the 480 courts which operate throughout Malaysia. The presentation was rounded off with an introduction to five cases, which covered the following subjects: The exercise of judicial power, the jurisdiction of the Syariah Courts, the presumption of innocence, legislative

competencies, and acts of sedition.

Presentation 2(2): Constitutional Tribunal of the Union of Myanmar

Hnin Phyu Win (Assistant Director)

The Constitutional Tribunal of the Union is a very young institution, having only been established in 2011. Its functions and duties include the following: To interpret the provisions of the Constitution, to review the constitutional conformity of laws and executive measures, to resolve competence disputes, to review matters intimated by the President relating to Union territory, and to perform functions and duties conferred by laws enacted by the legislature. The Office of the Tribunal includes organizational units such as the Administrative Division, the Procedural and Research Division and the Judicial Division. The Procedural and Research Division conducts research on whether promulgated laws are in conformity with the Constitution, and sends the decisions of the Tribunal to the respective institutions for publication in the state official gazette. Furthermore, it publishes research papers of the Tribunal's researchers. It also enacts orders, directives and procedures, and conducts research on constitutions, judgements, existing laws and international laws. Research contains a strong comparative element. Specifically, subjects of research include the constitutional adjudicatory bodies, as well as the political systems, elections, administration, legislation and judicial branches of other countries.

Presentation 2(3): Supreme Court of the Philippines

Theodore O. Te (Assistant Court Administrator and Chief of the Public Information Office)

The Philippine Supreme Court stands at the top of the country's judicial hierarchy. By constitutional design, the 1987 Philippine Constitution provides the Supreme Court with distinct features of a constitutional court. This is evident in two of the Supreme Court's greatest powers. The first is the power of judicial review (Art. VIII, sec. 1), and the second is the power to make rules and regulations to protect and enforce constitutional human rights (Art. VIII, sec. 5(5)). The judicial review power grants authority to the courts to determine the existence of grave abuse of discretion on the part of any branch, agency or instrumentality of the government. The power to make rules directly implicates the duty of the courts to protect and enforce constitutional rights, referring to the Bill of Rights (Article III) and social justice rights (Art. XIII). The presentation goes on to demonstrate the power of judicial review by the Supreme Court via three recent cases, which focus on the presidential power to declare martial law. More specifically, these cases deal with the constitutionally-designed interaction among the three branches of government. In the exercise of the second major power of the Court, the Court has created two human rights writs, as well as writs concerned with the protection of the environment (e.g. the Writ of *Kalaksan*). The human rights writs are the Writ of *Amparo*, which addresses extra-legal killings and enforced disappearances and threats to life, liberty and security, and the Writ of *Habeas Data*, which addresses threats to the right to privacy and security.

Discussion

Function of specific state institutions; regional representation in the apex court; the power to protect fundamental rights; judicial restraint; judicial-legislative relations; international treaties; the writ of amparo.

Function of specific state institutions

- In Malaysia, the Conference of Rulers plays a role in judicial appointments. This body is made up of a total of nine Sultans. They are constitutional monarchs, rather like the Queen of the United Kingdom. When a candidate for judge is nominated, the Prime Minister will refer the name to the Conference of Rulers for their approval. They can either approve or object. The King of Malaysia is chosen by and from among the Conference of Rulers every five years according to a system of rotation. It is a constitutional body with an advisory role in government.
- The Sessions Court of Malaysia has jurisdiction as part of the lower courts, hearing both civil and criminal cases. Whether cases are filed in the Sessions Court, rather than at the Magistrates' Court, depends on the size of the financial civil claims involved, or the expected severity of the criminal sentence as set out in the law i.e. the Subordinate Courts Act 1948.

Regional representation in the apex court

- In the Federal Court of Malaysia, there is no need for representation of each state of the federation. Judicial appointment is based on professional qualifications and experience. Arguably one regional element could be that the Conference of the Rulers has to be consulted.
- At the Constitutional Tribunal of Myanmar, there is no need for representation of regions. Out of the nine members, three are appointed by the President, three by the lower house of Parliament and three by the upper house of Parliament.

The power to protect fundamental rights

- In Myanmar, cases relating to fundamental rights are submitted by individuals first to the Supreme Court. The Constitutional Tribunal of Myanmar may then receive submissions from the Supreme Court. Currently, issues relating to the treatment of human rights would be handled by the Human Rights Commission, and there has not yet been a case at the Constitutional Tribunal of Myanmar.
- The power to promulgate rules and regulations to enforce human rights protection is specifically given only to the Supreme Court of the Philippines, and not to all other courts. One reason is that the 1987 Constitution was established as a result of the 'People Power Revolution' of 1986, ending over twenty years of martial law. To enhance rights protection and balancing the institutionally passive nature of the judiciary, the Supreme Court of the Philippines was thus given the power to create rules which could include remedies and writs. These rules may incorporate very progressive remedies such as the writ of continuing mandamus. Such writs are not legislation, but are effective because it binds lawyers and all courts, including the parties who go to court. This power to promulgate rules to enforce human rights is arguably an innovation established by the framers of the 1987 Constitution to make up for the passive and 'weak' position of the judiciary vis-à-vis the other branches of the state. However, it is important to remember that only the Supreme Court can make such rules.

Judicial restraint

- If the Philippine Supreme Court can avoid a question of constitutionality, then it probably will do so. An example would be the refusal to discuss the constitutionality of the death penalty if the defendant was not given the death penalty. Yet if the Supreme Court deems a question to be important enough, or unavoidable, then it will be addressed. However, there is no way to predict whether the Court will address a certain issue or not.

Judicial-legislative relations

- One may assume that due to the power of the Supreme Court of the Philippines to make certain rules and regulations, there may be resistance from the legislature within this context. However, that is not the case. As a result of the principle of generality, the legislature passes laws which applies to everyone. The Supreme

Court's rules are narrower since they are created to regulate the judicial profession. So those who have to abide by the rules are litigants, lawyers and judges. However, there have been cases where the court has struck down a law because the law defied the practice under the rules of the court. An example was the attempt by the legislature to limit the use of plea bargaining in certain circumstances.

International treaties

- The Supreme Court of the Philippines recognizes the difference between international law, domestic law and municipal law. When it comes to treaties, the first step is to look at form. For example, was the international agreement according to the form prescribed by the Constitution? Was it concluded by the person with the power and authority to do so? After such questions, the Court may move on to other grounds of constitutionality. Of course, when the Court upholds or annuls a treaty or international agreement, this is only enforceable and applicable within the Philippines. Ratification is of great significance. If ratification was carried out according to the proper procedures, then the Court exercises great restraint unless it feels that there is something gravely wrong with the treaty.
- In Malaysia, treaties are part of foreign affairs and thus under the jurisdiction of the executive. Of course, after ratification the rights that are granted by the treaty will be enforced by the judiciary. However, if it is a convention that is not ratified, then it cannot be judicially enforced, since Malaysia is a dualist country. Any international treaty must be made into domestic law for it to have legal effect in Malaysia.

The writ of amparo

- The Supreme Court of the Philippines can issue the writ of amparo. This writ has its origins in Latin America, and the Supreme Court of the Philippines is the only AACC member with such a writ. In the Philippines the amparo is narrower than in Latin America, since in the Philippines it is mainly designed to address threats or violations under the right to life, liberty and security. Specific contexts are extrajudicial killings and enforced disappearances. Yet it is a fluid concept, since the court has discretion to determine in a specific case what the amparo, what the help, is supposed to be. Examples of the extension would include securing documents such as medical and health certificates.
- The basic procedure of amparo in the Philippines involves the following. The petition is filed asking for the writ of amparo, and the court determines whether the person is entitled to file the writ of amapro. If deemed to be entitled, then the court will require the respondent to make a return, which means a comment under oath. The court will require specific information in cases such as enforced disappearance or extrajudicial killings, requiring the respondent to comment on specific matters under oath. Respondents are therefore required to produce accurate information. In the end the court will decide if the writ of amparo is to be granted as the final remedy. Whatever the content of the final remedy will be depends on the court in terms of its appreciation of what is necessary. That is why the writ of amparo is very flexible.

4. Session III

Date: 30 May 2018

Chair: M. Lutfi Chakim (Seconded Officer, AACC SRD)

- ✓ Presentation 1: Venice Commission (15:45-16:00)
- ✓ Presentation 2: European Court of Human Rights (16:00-16:15)
- ✓ Discussion (16:15-16:45)

Presentation 3(1): Venice Commission

Tanja Gerwien (Legal Officer)

In a nutshell, the Venice Commission is an independent advisory body of the Council of Europe, focusing on constitutional law, providing legal opinions and reports and studies. It was established in May 1990 and counts 61 member states since 2016. Individual members of the Venice Commission are appointed by their respective member states for a four-year renewable mandate. The members act independently and in an individual capacity. They consist of eminent lawyers specialized in public or international law, and can include professors, judges etc. The preparation of an opinion goes through various stages, which includes a request for an opinion, selection of rapporteurs, preparing the draft opinion, country visit, discussion and adoption at the Venice Commission's plenary session, and submission to the requesting authority. Once adopted by the plenary, the opinion is public and published on the website of the Venice Commission (www.venice.coe.int). Apart from opinions, the Venice Commission also undertakes studies and reports, organizes and participates at conferences, offers other publications and provides trainings. The Secretariat consists of twenty-eight persons, and is divided into four divisions: Democratic Institutions and Fundamental Rights; Elections, Referendums and Political Parties; Constitutional Justice; and Neighbourhood Cooperation. Examples of activities and other publications/resources include the Joint Council on Constitutional Justice (JCCJ), which is composed of members of the Venice Commission and liaison officers appointed by the constitutional courts of the member states and steer cooperation between the constitutional courts and the Venice Commission; the World Conference on Constitutional Justice (WCCJ), which unites 112 constitutional courts and councils and supreme courts in Africa, the Americas, Asia , Australia/Oceania and Europe to promote constitutional justice – understood as constitutional review including human rights case-law – as a key element for democracy, the protection of human rights and the rule of law; the CODICES Database (www.codices.coe.int), which contains summaries (précis) and full texts of around 10 000 decisions, mainly in English and French, but also in more than 40 other languages and the electronic-Bulletin on Constitutional Case Law (e-Bulletin), sent out to subscribers three times a year in English and French and each issue contains important judgments handed down by the courts. The contributions to the *e-Bulletin* are supplied by liaison officers.

Presentation 3(2): European Court of Human Rights

Liv Tigerstedt (Head of Division, Deputy to the Registrar of the Filtering Section)

This presentation focused on aspects of research and communication at the European Court of Human Rights (ECtHR). In 2001 the Directorate of the Jurisconsult was created to ensure clear and consistent case-law. The Jurisconsult advises and informs the ECtHR on case-law matters and the development of jurisprudential principles; monitors draft judicial texts to preserve the consistency and coherence of case-law; ensures research on international, national, and comparative law; performs internal and external

dissemination of information about the ECtHR's case-law; and develops relations with superior courts and other international institutions, including the European Union (EU). The Jurisconsult is supported by two divisions. One is the Case-Law Information and Publications Division (CLIP), which is an information unit, produces publications and runs the HUDOC Database. The other is the Research Division, the main task of which is to prepare research reports to assist the ECtHR in the examination of pending cases. There are three types of such research reports: Comparative law reports, reports on the ECtHR's case-law, and reports on international/EU law. One research request can include questions relating to all three types. If so, three separate reports are prepared. The Research Division also provides an Admissibility Guide, Guides on the Court's case-law according to ECHR Article, and case-law contributions to the Annual Report. It further is in charge of the Superior Courts' Network, which started in 2016.

Discussion

Caseload management; research capacity; opinions of the Venice Commission; linguistic issues.

Caseload management

- The European Court of Human Rights (ECtHR) works with internal timelines. Unfortunately there are some very old cases still pending. Measures implemented in 2014 provides a detailed application form for individuals to file individual complaints. The ECtHR covers 47 member states and about 800 million people. It is therefore very important that individuals file their complaints correctly. Explanatory material, including in video format, is available in all official languages of the member states. If the submissions are either incorrectly filled out or required documents are missing, the submission is simply returned stating that it does not comply with the rules of submission, indicating what is missing, and that the Court will not deal with the case. These submissions are not kept by the Court. There is a time-limit of six months to submit a case, starting from the last domestic decision. Therefore, if applicants lodge their complaint in good time, they have enough time to re-submit a case.
- When receiving completed applications, the ECtHR can, due to the filing format, easily identify what the issue is. Lawyers can point out defects of the case, which can easily be recorded in the data system, such as reasons why the case can be deemed inadmissible. Every two to four weeks new cases from a particular country would be grouped together and sent up to the single judge who is responsible for dealing with clearly inadmissible cases against a particular country. This procedure to dispose of inadmissible cases usually takes about three months.
- Cases at the ECtHR which reveal potential issues under the Convention should be communicated to the respondent State within one year and finally disposed of within three years. Unfortunately in reality, cases often do take longer to finalise. The Court therefore tries to work from both ends, working on the oldest cases while at the same time trying not to build up a new backlog when dealing with new cases. In terms of deploying personnel to deal with cases, the Court tries to adapt to the variety in the complexity and volume of cases from different countries.

Research capacity

- The basic research at the ECtHR is always done by the case lawyer. The research division itself is involved in bigger cases, where the relevant research officer will use all the available material to draft a report.

Opinions of the Venice Commission

- Opinions of the Venice Commission are purely advisory. However, sometimes the Council of Europe, other international organisations or individual states will call

upon the country concerned to implement the recommendations.

Linguistic issues

- Official languages of the ECtHR are English and French. Therefore draft judgements are always either in English or French. It is the case lawyer who does the translation of all domestic documents in the judgments/decisions. These draft judgments/decisions are then checked by the language division to see that the English/French is correct (grammatically/linguistically). However, to check whether the actual translation is correct, it is the case-lawyer, his/her supervisor, if any, and the national judge who are responsible.
- Opinions of the Venice Commission are drafted in either English or French. It depends on the group of rapporteurs chosen for the specific opinion. Their comments will be drafted either in English or French. The Venice Commission secretariat member will then draft the actual opinion also in English or French. Translations of the opinions into English and French are available on the Venice Commission's website.

5. Session IV

Date: 31 May 2018

Chair: Theodore O. Te (Assistant Court Administrator, Supreme Court of the Philippines)

- ✓ Presentation 1: Independent Commission for Overseeing the Implementation of the Constitution of Afghanistan (10:00-10:15)
- ✓ Presentation 2: Constitutional Court of Turkey (10:15-10:30)
- ✓ Presentation 3: Constitutional Court of the Russian Federation (10:30-10:45)
- ✓ Discussion (10:45-11:30)

Presentation 4(1): ICOIC of Afghanistan

Hidayatullah Habib (General Secretary)

Established in 2010, the Independent Commission for Overseeing the Implementation of the Constitution (ICOIC) of Afghanistan has seven members. They are nominated by the President of the Republic and receive a vote of confidence from the legislature. The ICOIC President is elected from and via the members through internal elections and serves for a period of four years. Each ICOIC member also heads up a respective department. In addition to the General Secretariat, there are six professional departments. Access to the ICOIC is only permitted to an enumerated number of state institutions. The jurisdictions of the ICOIC are the following: To interpret the constitution at the request of the President of the Republic, National Assembly, the Supreme Court, and government; to oversee the compliance of governmental and non-governmental institutions with the provisions of the Constitution; to provide legal advice to the President and National Assembly in relations to constitutional matters; to conduct research, for example finding contradictions of laws with the Constitution and suggest measures to resolve such contradictions; present specific proposals concerning the development of legislation in response to rulings regarding the Constitution; reporting to the President in the event of violations of constitutional provisions; the approval of by-laws and relevant guidelines. The presentation was rounded off by two cases, respectively concerning election laws and national security.

Presentation 4(2): Constitutional Court of the Russian Federation

Sergei Sergevnin (Head of the Department of International Relations and Research of Constitutional Practice)

The Constitutional Court of the Russian Federation was founded in 1991. Alterations were made in 1993 regarding the composition, competence, organization and procedures of the Court. The competencies of the Court consist of the following: Upon the request of an enumerated number of state institutions, the Court considers the issue of an abstract constitutional formality of an enumerated list of different types of norms and acts; resolves competence disputes; upon complaints on violation of constitutional rights and freedoms reviews the constitutionality of a law applied by a court in a particular case where a judicial decision entered into force; upon requests of courts reviews the constitutionality of a law subject to be applied by the respective court in a particular case; provides official interpretation of the Constitution; adopts an opinion on the observance of a prescribed procedure for charging the President of the Russian Federation with high treason or with commission of another grave crime; resolves the question of the possibility to execute a decision of an interstate body for the protection of human rights and freedoms; and examines the conformity with the Constitution of an issue that is submitted to a referendum of the Russian Federation. The Constitutional Court resolves cases in sessions and its decisions are final and binding throughout the entire territory of the Russian Federation. Each judge of the Constitutional Court is appointed to the office by the Council of the Federation through a secret ballot upon nomination put forward by the President of the Russian Federation. The presentation also included three cases, respectively on the execution of a judgement of the European Court of Human Rights, review of the constitutionality of Art. 212.1 of the Criminal Code, and the review of the constitutionality of legislative provisions related to migration registration of foreign and stateless persons.

Presentation 4(3): Constitutional Court of Turkey

Mücahit Aydin (Rapporteur-Judge)

Established in 1961 based on the centralized model of a posteriori constitutionality review of laws, the jurisdictions of the Court were preserved by the 1982 Constitution with minor changes. The constitutional amendment in 2010 introduced the jurisdiction of individual application and altered the structure of the Court accordingly. The 2017 constitutional amendment has transformed the political form of government from parliamentary to presidential, and the jurisdiction of the Court was expanded to include constitutionality review of presidential decrees. Per this amendment, the Court shall consist of 15 Justices. Three are appointed by the legislature and twelve are appointed by the state President. Nominees are from the high courts, academia and high level state officials. The Court exercises constitutionality oversight through abstract and concrete review of norms through the Full Bench. The individual applications are dealt with by the Commissions and Sections. There are six Commissions, which carry out preliminary review of the admissibility of individual applications, consisting of two Justices each. Two Sections adjudicate the merits of the applications, which are convened with four Justices each, functioning respectively under the Chairmanship of Deputy Presidents of the Court. Applications with significant impact on the Court's case law can be relinquished for consideration by the Full Bench. The jurisdictions of the Court consist of the following: Constitutional review of laws, presidential decrees, bylaws of Parliament; adjudication of individual applications concerning human rights; dissolution and financial audit of political parties; trial of high level state officials; and the review of the lifting of parliamentary immunities. The introduction of individual applications in 2010 was a significant step for the Court. This is an especially interesting example due to its connection with the European Convention on Human Rights (ECHR): Individuals may

apply to the Constitutional Court alleging violation of rights which are under the joint protection of the Constitution and the ECHR.

Discussion

The procedure and effect of decisions; individual complaint; time limits.

The procedure and effect of decisions

- The decisions of the Independent Commission for the Implementation of the Constitution of Afghanistan (ICOIC) are final and binding. The decision is shared with the government and other ministries, the media and the public.
- The ICOIC of Afghanistan's duty is not just to oversee but also to interpret the constitution. In this context, the ICOIC oversees various entities, including the National Assembly, government and non-government entities. Reports are submitted to the State President. In the case where the State President is deemed to have acted unconstitutionally, the ICOIC's report is also submitted to the State President.
- The seven members of Afghanistan's ICOIC decide on whether to give advice on the matter of unconstitutionality.

Individual complaint

- Every citizen can lodge an individual complaint to the Constitutional Court of Russia. Preconditions are the exhaustion of all domestic legal procedures, within one year from the final decision's date. In terms of encouraging the application for individual complaint, the Court sends a letter to the applicant before the decision is made so that the applicant may request the Court to hold its decision. Approximately two times per month the Court holds a closed meeting on deciding the admissibility of cases. Individual complaint is a significant mechanism for individuals to access constitutional justice, since in Russia only official bodies can submit petitions for constitutional review in the procedure of abstract constitutional control.
- Individual complaint was introduced in Turkey around fifty years after the establishment of the Constitutional Court of Turkey. This is partly related to Turkey's membership of the European Court of Human Rights (ECtHR). Generally, individual complaints to the ECtHR increased significantly over the years. Therefore Turkey decided that human rights issues should have a chance to be resolved at the national level. The reform in Turkey was designed partly to alleviate the workload at the European level.

Time limits

- At the Constitutional Court of Turkey there exists a ten-year ban on bringing a case against norms through the abstract review. No request can be made against the same norm after a request against that norm has already been dismissed on the merits by the Constitutional Court. Redundant complaints will not be admitted for review. Even though this may sound as a drastic measure, it nevertheless maintains the consistency of case-law and yet allow the Court to re-address the issue after ten years with an eye on the changing legal and social dynamics. This rule does also alleviate the great caseload burden of the Court. If a case falls into the ten-year ban policy, it will be rejected automatically.
- In Turkey, the case is suspended for five months after the final judgment by the ordinary court. This is in place to allow cases to be handled efficiently. In practice, the timeframe may even exceed five months.

6. Session V

Date: 31 May 2018

Chair: Jean Lee (Rapporteur Judge, Constitutional Court of Korea)

- ✓ Presentation 1: Constitutional Council of Kazakhstan (14:00-14:15)
- ✓ Presentation 2: Constitutional Chamber of the Supreme Court of Kyrgyz Republic (14:15-14:30)
- ✓ Presentation 3: Constitutional Court of Tajikistan (14:30-14:45)
- ✓ Discussion (14:45-15:30)

Presentation 5(1): Constitutional Council of Kazakhstan

Nurysh Tasbulatov (Deputy Head of Legal and International Department)

The Constitution of 1995 established a new quasi-judicial body for constitutional review, the Constitutional Council. The French model of constitutional control was very much perceived as the suitable model. The Constitutional Council of Kazakhstan is a collegiate body which consists of seven members. The term of office is six years and is non-renewable. The competence of the Constitutional Council includes the following: Official interpretation of the norms of the Constitution; ex ante constitutional review of legislation, constitutional review of international treaties; resolution of competence disputes related to the conduct of a set of enumerated elections and referenda; constitutional review of parliamentary resolutions; and opinions on the compliance with established constitutional procedures for early release or dismissal of the Head of State. In addition, the Constitutional Council considers appeals of courts regarding laws and other normative legal acts that infringe the rights and freedoms of a person and citizen enshrined in the Constitution. An enumerated number of state organs can apply for this appeal, including courts. Citizens therefore have the opportunity to exercise in the Council the protection of their constitutional rights and freedoms indirectly through courts of general jurisdiction. A serious modernization of the institution of constitutional control was carried out in 2017. For example, the right of the President of the Republic to object to the decision of the Constitutional Council was abolished. The mechanism of constitutional control by the Constitutional Council of Kazakhstan is being gradually modernized in line with global trends.

Presentation 5(2): Constitutional Chamber of the Supreme Court of the Kyrgyz Republic

Nazgul Nurbekova (Head of Department)

In 1993 the Constitutional Court of the Kyrgyz Republic was established. In 2010, it became the Constitutional Chamber of the Supreme Court of the Kyrgyz Republic. It consists of the Chairman, Deputy Chairman, and nine Justices. The Secretary General heads up the administration of the Chamber. The Expert and Analytical Department provides scientific and legal expertise, prepares scientific and analytical notes, and assists in the preparation of draft acts of the Constitutional Chamber. The jurisdictions of the Chamber consist of the following: Declaration of unconstitutionality in the event of contradiction of laws and other normative regulatory acts with the Constitution; pronouncing on the constitutionality of international agreements which have not yet entered into force for the Kyrgyz Republic; pronouncing on draft laws concerned with changes to the Constitution. In terms of the constitutional oversight of laws and other normative regulatory acts, private persons or legal entities can file a motion of petition, an enumerated number of state organs can present a petition, and judges can request a petition. Decisions of constitutionality, part-constitutionality and unconstitutionality can

be made. Regarding the constitutional oversight over international agreements, subjects who can address the Chamber are the following: Parliament, faction(s) of Parliament, the President, the Government, and the Prime Minister. Key considerations when assessing a law on constitutional amendment are the following: Fundamental rights and freedoms and the admissibility of their restrictions; principles of a democratic and secular state based on the rule of law; the procedures of changing the Constitution as stipulated in Art. 114 of the Constitution.

Presentation 5(3): Constitutional Court of Tajikistan

Abdumajid Gulzoda (Chief of the Constitutional Court Apparatus)

In 1995 the Constitutional Court of Tajikistan was established, taking over a function that was previously performed by the Constitutional Control Committee. The Constitutional Court of Tajikistan consists of seven judges, which includes the Chairman and Vice-Chairman. One of the judges is a representative of the Gorno-Badakhshan Autonomous Region. Judges of the Constitutional Court must be between 30 and 65 years of age, with a higher legal education and having acquired at least 10 years of professional experience. They are elected for a term of 10 years. The legislature elects the members of the Court on the proposal by the state President. A majority vote of the total number of legislators is sufficient for election. Currently the Constitutional Court of Tajikistan has over 33 employees. The Constitutional Court reviews the constitutionality of various norms and actions. They include, for example, laws, joint legislative resolutions, normative legal acts by the state President, international treaties which have not yet entered into force, and normative legal acts by sub-national legislative and executive bodies. In addition, constitutional review also applies to amendments and additions to the Constitution, draft laws and other issues submitted to a nationwide referendum. Other jurisdictions include the resolution of competence disputes and solicitations by individuals complaining of the violation of their constitutional rights and freedoms by a piece of legislation or other normative legal act. In the gradual democratization process experienced by Tajikistan, the Constitutional Court, like the entire judicial system, has played an important role through its decisions. It has contributed to the creation of a civil and social society, as well as defended the constitutional rights and freedoms of individuals.

Discussion

Models of constitutional adjudication; access to constitutional justice; jurisdictional powers; election disputes; judicial appointment; regional judicial cooperation.

Models of constitutional adjudication

- Kazakhstan is the only AACC member in the region of Central Asia to have adopted the model of a Constitutional Council, following the French model. At the time of establishment, this model was chosen for many reasons, one of which was the close relationship between Kazakhstan's legal system and that of France.
- The creation of a specialized body for constitutional control in Tajikistan is an example of integrating models of modern legal systems into the legal system of Tajikistan. Having the competence of the Constitutional Court enshrined in a separate article of the Constitution ensures its effectiveness in exercising judicial power and ensuring the supremacy of the Constitution. The Constitutional Court of Tajikistan accumulates and integrates the positive characteristics and highlights of all modern models of constitutional control relating to different legal system.

Access to constitutional justice

- In Kyrgyzstan, petitions can be submitted by individual citizens as well as by state organs such as the state President. The difference is only in the name of the petitions. Private persons and legal entities submit under one jurisdiction, whereas state organs and officials submit petitions under other jurisdictions. In terms of form they are the same. When individuals submit a petition during a relevant case, the ordinary court stops court proceedings for the duration of the petition.
- The Ombudsman in Kyrgyzstan is elected by Parliament and can submit petitions like other state organs and officials.
- If one party of a case at the Constitutional Chamber of the Supreme Court of Kyrgyzstan submits to stop the procedure, then the Chamber can decide to stop the procedure. Various grounds exist for the withdrawal of a case.
- Various persons, groups and entities are granted access to constitutional justice in Tajikistan. They include other courts and judges, the General Prosecutor, the Commissioner for Human Rights, regional and local authorities, as well as individuals and legal entities.

Jurisdictional powers

- The Constitutional Court of Tajikistan reviews acts and legislation regarding their constitutionality. They include laws, joint regulatory legal acts of the legislature, acts of the President and the Government of the Republic, international treaties that have not yet entered into force, and guiding explanations of plenums of the Supreme Court. The decisions of the Constitutional Court of Tajikistan are final.
- The necessity of constitutional justice to be fair, efficient, independent and impartial is particularly important since today there is practically no sphere in the state that may not be affected by the activities of the Constitutional Court of Tajikistan, for example in the sphere of protecting the rights, freedoms and interests of the citizen.
- An example of a very important case at the Constitutional Council of Kazakhstan was made in the field of family law. A local court stopped proceedings to apply for an opinion from the Constitutional Council on someone who gave birth outside of marriage and who argued to receive benefits for herself too. In such a situation, usually benefits are designed for the child, and not for the mother. She argued that this violated her rights of motherhood. After consultations the Constitutional Council concluded that her rights were not violated. It is a crucial case on the regulation of family life. The decision was made in order to protect the institution of marriage.
- In Kyrgyzstan, abstract and concrete review are both possible. There are indeed many cases of abstract constitutional control.

Election disputes

- When it comes to petitions regarding elections in Kazakhstan, members of Parliament themselves, or on the request of citizens can file an application to the Constitutional Council. The Council only looks at matters of constitutionality, any other grievances regarding elections are dealt with by another body.
- In Kazakhstan there has yet not been a precedent for incorrectness of a presidential election. However, according to the rules for such cases, re-election may be possible, or a declaration of unconstitutionality.
- In Tajikistan, the resolution of electoral disputes falls within the competence of the Supreme Court.

Judicial appointment

- Justices of the Constitutional Chamber of the Kyrgyz Supreme Court are elected by Parliament, based on the selection by a council responsible for the selection of Justices.
- The Constitutional Court of Tajikistan has the right to commence its activities subject to the election of at least two thirds of its composition.

Regional judicial cooperation

- In Central Asia, there is regional judicial cooperation as a distinct group. For example most of Central Asian countries are member of Association of Asian Constitutional Courts and Equivalent Institutions. Also there is more cooperation within broader organizational contexts, such as Conference of Constitutional Control Organs of Countries of New Democracy. Kazakhstan also works well together with the Venice Commission, often asking for input and advice.
- Kyrgyzstan also contributes to the Venice Commission's CODICES database.
- The Constitutional Court of Tajikistan pays special attention to international cooperation with other constitutional courts. It is a member of the Conference of Constitutional Control Organs of the Countries of New Democracy, and since 2012 holds membership of the Association of Asian Constitutional Courts and Equivalent Institutions (AACC), and also participates in the Congresses of the World Conference on Constitutional Justice. The Constitutional Court of Tajikistan also enjoys bilateral cooperation, having signed memoranda of understanding with constitutional courts of seven countries.

7. Session VI

Date: 31 May 2018

Chair: Fabian Duessel (Deputy Director, AACC SRD)

a) Freedom of speech in the digital age
b) The way forward for AACC SRD

The aim of the General Session was to give the opportunity for AACC members and guests to discuss future cooperation, as well as the way forward for AACC SRD. The first half of the General Session consisted of a presentation on the freedom of speech by the delegate from Malaysia. The subject of the presentation served as an example of a potential future research topic for AACC SRD. The second half of the General Session was a general discussion, which started with a statement by the delegate from Kazakhstan and continued with numerous rounds of open discussion, covering various themes of interest. Delegates from Malaysia and Kazakhstan took a special role in this General Session on account of their status as Deputy Secretary Generals of AACC SRD.

a) Freedom of speech in the digital age

Presentation

Aslam Zainuddin (Deputy Chief Registrar (Policy) of the Federal Court of Malaysia)

Freedom of speech in the digital age is an increasingly important issue, which may serve well as a potential research topic for AACC SRD. This presentation aims to introduce some current issues surrounding this subject. Within the evolution of free speech, one key issue is to what extent government can restrict free speech. On the one hand, freedom of speech is not absolute. Yet on the other hand, restrictions are only legitimate under specific circumstances. With the new technologies available in the digital age, this question has gained new dimensions.

With the rise of digital media, new regulations for free speech are implemented. For example, the Malaysia Communications Act (CMA) 1998 contains prohibitions on offensive content, the improper use of network facilities or network service, and imposes

fines and jail sentences upon conviction. In 2018 the Anti Fake News Act (AFN) was passed in Malaysia. The aim is to address the issue of 'false' news and rumor-mongering. Fake news is defined as 'news, information, data and reports which is or are wholly or partly false' and included features, visuals and audio recordings. It covers digital publications and social media and also applies to offenders outside Malaysia, including foreigners, if Malaysia or a Malaysian citizen is affected. The first conviction under the AFN occurred in April 2018. After a survey of the global perspective, issues to be discussed include the following: What is the legal definition of speech?

Discussion

Relevance of the subject; Malaysian Anti Fake News Act; protecting and limiting free speech; cross-border issues; legislative and judicial responses; sovereignty; implementation and enforcement; related rights such as the right to privacy.

Relevance of the subject

- The discussion which followed the presentation was lively and raised many further issues and questions. The presentation topic was an interesting and very timely topic. Taking Europe as an example, it is inevitable that more and more cases on this issue will be lodged at the ECtHR, coming from many different sides. It could be from people whose websites were taken down, victims of hate speech or victims of fake news. This will also highlight how different countries deal with this issue, and how the doctrine of the margin of appreciation of the ECtHR is going to be applied in this context. In Europe there are also some examples of norms such as the Convention on Cybercrime. Freedom of speech in the digital age is definitely a topic where a lot more research is to be done.

Protecting and limiting free speech

- When providing guidance for the protection of free speech, it is clear that when free speech is to be limited, criteria must be clearly listed. It is vital to have a situation where free speech can only be limited in specific circumstances, and that these circumstances are free from ambiguity.

Cross-border issues, and legislative and judicial responses

- Related to the issues discussed, there are three further issues that can underpin further research. First is the cross-border issue. For example, we are now dealing with 'borderless speech' and we need to think about how this element affects other legal issues such as criminalization. Second, it would be fruitful to research how legislative branches of different countries have dealt with the freedom of speech in digital media. Third, it would then be important to see how courts have dealt with issues like these. Free speech in the digital age as a research subject is probably big enough to be the topic of two to three conferences.

Sovereignty

- Following up on the idea of borderless free speech, the issue of sovereignty will also become significant. Related to sovereignty is also the potential of interference by different branches of government, for example when a court judgement may disrupt lengthy negotiations by government with media companies on the best solutions for regulation. Therefore international treaties on such regulation may be needed.

Implementation and enforcement

- Implementation may always remain a problem, since media companies can sometimes be more powerful than governments. This especially becomes problematic when these media companies cooperate with some governments and not with others.

Related rights such as the right to privacy

- Closely related to freedom of speech in the digital age is of course the right to privacy. In the digital world, the misuse of information and occurrences of involuntary actions will become more frequent. Also the 'right to be forgotten' is also an important issue.

b) The way forward for AACC SRD

The following is a very brief overview of the themes of the discussions on the way forward for AACC SRD and AACC member institutions. It also incorporates issues raised at an opening statement by Nurysh Tasbulatov (Deputy Head of Legal and International Department) speaking on behalf of Bakyt Nurmukhanov (Secretary General of the Constitutional Council of Kazakhstan). Following the statement of Mr. Tasbulatov, the discussion was organized around specific topics, where all AACC members, guests, as well as AACC SRD staff were given the chance to comment and share ideas and suggestions.

Comments on the Conference; next steps with the Conference materials; future research themes and research projects; recruitment of seconded officers.

Comments on the Conference

- Discussion of new ideas for organization and methodology, as well as potential substantive research themes for future conferences.

Next steps with the Conference materials

- Details were put forward about plans to publish materials in three stages: Conference proceedings in terms of the presentations and papers, the individual AACC member fact files, and a book publication based on these fact files.

Future research themes and research projects

- Can include building on the topic 'organization and jurisdictions of AACC members', going further in depth on each of the jurisdictions and certain organizational aspects. Conferences act as opportunities to generate publications with input from all AACC members.

Recruitment of seconded officers

- Regarding the recruitment process of seconded officers, the progress so far, and upcoming application deadlines were discussed. Suggestions on how to improve the secondment program were given by AACC members and guests, which AACC SRD will endeavor to take into account.

Further details of the discussion on the way forward for AACC SRD are recorded in a separate internal document for AACC members.

8. Conclusion

This *1st Research Conference of the AACC SRD* demonstrated the diversity of the membership of the AACC and the great potential for further comparative constitutional research. The presentation and discussion summaries in this Conference Report provide snapshots of AACC members' jurisdictions and organization, and point to common issues of interest. Building on the experience and results gained at this Research Conference, AACC SRD will be able to move forward in providing further useful materials, and more opportunities for discussion and exchange among AACC members, and also contribute to the work of the global research community.

Organized by
Chanju Lee (Deputy Director)
Fabian Duessel (Deputy Director)

Fact Files drafted by
AACC Members

Additional materials drafted by
Fabian Duessel (Deputy Director)
Sora Kang (Assistant Director)

Jurisdictions and Organization of AACC Members