4TH INTERNATIONAL SYMPOSIUM OF THE AACC SRD

Access to Justice : Constitutional Perspectives

May 29 MON - June 1 THU , 2023

The Westin Josun Seoul, Korea

4TH INTERNATIONAL SYMPOSIUM OF THE AACC SRD

Conference Handbook

1.Overview

- **Title** : 4th International Symposium of the AACC SRD
- **Date** : May 29 (Mon) – June 01 (Thu), 2023
- **Venue** : Westin Josun Seoul 2F
- **Theme** : Access to Justice : Constitutional Perspectives

2. Program at a Glance

	5. 29 (Mon)	5. 30 (Tue)	5. 31 (Wed)	6. 1 (Thu)
09:00	Arrival	**Registration** (09:30 ~ 10:00) Orchid Lobby	**Session 2** Current Issues on Access to Justice (09:30 ~ 10:10) Orchid Room	**Cultural Program & Lunch** (09:00 ~ 13:30) Dalgaebi
10:00		**Opening Ceremony** (10:00 ~ 10:20) Orchid Room	**Coffee Break** (10:10 ~ 10:30) Orchid Room	
11:00		**Coffee Break** (10:20 ~ 10:40) Orchid Lobby **Session 1-1** Individual Access to Constitutional Justice (10:40 ~ 12:00) Orchid Room	**Session 3** Constitutional Rights Ensuring Access to Justice (10:30 ~ 12:10) Orchid Room	
12:00		**Official Luncheon** (12:10 ~ 13:10) Cosmos & Violet Rooms	**Luncheon** (12:10 ~ 14:00) Cosmos & Violet Rooms	
13:00				
14:00		**Session 1-2** Individual Access to Constitutional Justice (14:00 ~ 15:20) Orchid Room	**Session 4** General Session (14:00 ~ 15:00) Orchid Room	Departure
15:00		**Visit Constitutional Court of Korea** (16:10 ~ 17:00)	**Break** (15:00 ~ 16:20), (transport departs at 16:30)	
16:00				
17:00		**Visit AACC SRD** (17:20 ~ 17:40)		
18:00		**Visit HIKR Ground** (18:00 ~ 18:30)	**Han River Yacht Experience** (17:30 ~ 18:30)	
19:00	**Welcome Reception** 19:00 ~ 20:30 Tulip & Cosmos & Violet Rooms Host : President Namseok Yoo	**Dinner** (18:40 ~ 20:00) Jinjinsura	**Farewell Dinner** (18:40 ~ 20:30) Villa de Noche Host : President Namseok Yoo	
20:00				

3. Daily Program

May 29 (Mon)

19:00 - 20:30 | **Welcome Reception**

May 30 (Tue)

09:30 - 10:00 | **Registration**

10:00 - 10:20 | **Opening Ceremony**

Opening Video

Opening Remarks Namseok Yoo, Pesident of the Constitutional Court of the Korea

Congratulatory Remarks (Video) Chinbat Namjil, President of the AACC and Chief Justice of the Constitutional Court of Mongolia

Keynote Speech Jongmun Park, Secretary General of the AACC SRD / Constitutional Court of Korea

10:20 - 10:40 | **Group Photo and Coffee Break**

Session 1-1: Individual Access to Constitutional Justice

Session Chair – Federal Court of Malaysia | Tun Tengku Maimun Tuan Mat, Chief Justice

10:40 - 10:50 | **Aniruddha Bose**
Justice, Supreme Court of India

10:50 - 11:00 | **Saldi Isra**
Deputy Chief Justice, Constitutional Court of Indonesia

11:00 - 11:10 | **Aizhan Zhatkanbayeva**
Justice, Constitutional Court of Kazakhstan

11:10 - 11:20 | **Hyungbae Moon**
Justice, Constitutional Court of Korea

11:20 - 11:30 | **Chinara Aidarbekova**
Justice, Constitutional Court of the Kyrgyz Rep.

11:30 - 12:00 | **Discussion**

12:10 - 13:10 | **Official Luncheon**
Remarks – Constitutional Court of Korea | Kiyoung Kim, Justice

Session 1-2: Individual Access to Constitutional Justice

Session Chair – Supreme Court of Bangladesh | Hasan Foez Siddique, Chief Justice

14:00 - 14:10 | **Mohammad El Haj Kacem**
President, Supreme Constitutional Court of Palestine

14:10 - 14:20 | **Balajon Idriszoda**
Justice, Constitutional Court of Tajikistan

14:20 - 14:30 | **Kenan Yaşar**
Justice, Constitutional Court of Türkiye

14:30 - 14:40 | **Omar Belhadj**
President, Constitutional Court of Algeria

14:40 - 14:50 | **Mark O'Regan**
Justice, Supreme Court of New Zealand

14:50 - 15:20 | **Discussion**

16:10 - 18:30 | **Visits to the Constitutional Court of Korea, AACC SRD and HIKR Ground**

18:40 - 20:00 | **Dinner ('Jinjinsura' – Korean Restaurant)**

May 31 (Wed)

Session 2: Current Issues on Access to Justice
Session Chair – Constitutional Court of Indonesia | Saldi Isra, Deputy Chief Justice

09:30 - 09:40 | **Mison Lee**
Justice, Constitutional Court of Korea
09:40 - 09:50 | **Marvic Mario Victor F. Leonen**
Senior Associate Justice, Supreme Court of the Philippines
09:50 - 10:10 | **Discussion**

10:10 - 10:30 | **Coffee Break**

Session 3: Constitutional Rights Ensuring Access to Justice
Session Chair – Supreme Court of India | Aniruddha Bose, Justice

10:30 - 10:40 | **Hasan Foez Siddique**
Chief Justice, Supreme Court of Bangladesh
10:40 - 10:50 | **Ajjikuttira Somaiah Bopanna**
Justice, Supreme Court of India
10:50 - 11:00 | **Tun Tengku Maimun Tuan Mat**
Chief Justice, Federal Court of Malaysia
11:00 - 11:10 | **Buyandelger Batsukh**
Justice, Constitutional Court of Mongolia
11:10 - 11:20 | **Kyaw Min**
Justice, Constitutional Tribunal of Myanmar
11:20 - 11:30 | **Punya Udchachon**
Justice, Constitutional Court of Thailand
11:30 - 11:40 | **Askarjon Gafurov**
Deputy Chairman, Constitutional Court of Uzbekistan
11:40 - 12:10 | **Discussion**

12:10 - 14:00 | **Luncheon**

Session 4: General Session
Session Chair – Constitutional Court of Korea | Kiyoung Kim, Justice

14:00 - 15:00 | **Wrap up and Discussion**

17:30 -18:30 | **Han River Yacht Experience**

18:40 - 20:30 | **Farewell Dinner**

June 1 (Thu)

09:30-13:30 | Cultural Program & Lunch (Korean restaurant 'Dalgaebi')

4.Contact Information

Contact Point	Name	Tel	Email
Emergency Contact	Mr. Elijah Kang	(Office) +82-02-3288-9691 (Mobile) +82-10-7376-2245	elijah.jbk@recommnine.co.kr
Administrative Support	Ms. Sora Kang	(Office) +82-02-767-6108 (Mobile) +82-10-5434-7303	iod@ccourt.go.kr

5. Venue Information

Accommodation

Westin Josun Seoul 106, Sogong-ro, Jung-gu, Seoul / Tel: +82-2-771-0500

- **All guest rooms are non-smoking, and smoking in the building is prohibited. Please use the designated smoking zone.**
- **Breakfast restaurant:** The executive lounge is located on the 20th Floor and will open from 6:00 AM to 10:00 AM.

Restaurant

Dinner (May 30)

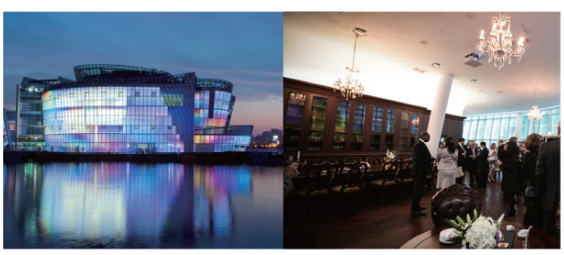
Jinjinsura

Korean restaurant located in Central Seoul, offering a variety of traditional Korean dishes.

Farewell Dinner (May 31)

Villa de Noche, Gavit Island

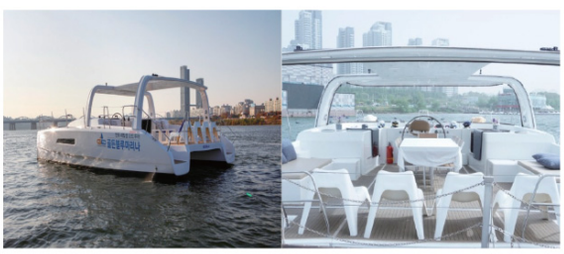
"Sebitseom" is a cultural complex situated on the Han River in the heart of downtown Seoul. It holds the distinction of being the world's first floating structure with buildings that can float on water.
"Sebitseom" comprises three illuminated islands: Gavit, Chaevit, and Solvit. Villa de Noche, a restaurant that specializes in Western cuisine, is located on Gavit Island.



Han River Yacht Experience (May 31)

(In case of rain, it will be canceled.)

This program offers a yacht ride (maximum capacity of 30 people) where you can experience the river breeze and enjoy the panoramic view of Seoul while cruising along the Han River for approximately 30 minutes.



6. Cultural Program* (*Optional)

National Palace Museum of Korea and Gyeongbokgung Palace

Gyeongbokgung Palace was the first and largest of the royal palaces built during the Joseon Dynasty. Built in 1395, Gyeongbokgung Palace was located at the heart of the newly appointed capital of Seoul (then known as Hanyang) and represented the sovereignty of the Joseon Dynasty.

Tour Schedule

09:00 – 09:20	Transportation by bus (depart from the hotel at 9AM)
09:20 – 09:50	Wearing a rented Hanbok (traditional Korean clothing)
10:00 – 12:00	Visit to the National Palace Museum of Korea, Gyeongbokgung Palace Tour
12:00 – 12:20	Returning a rented Hanbok
12:30 – 13:30	Tour Lunch (Korean Restaurant 'Dalgaebi')

7. General Information of Korea

Credit Card	The majority of big hotels and stores accepts a credit card. Sometimes small restaurants and stores do not take a credit card. Therefore participants are advised to check before you pay.
Currency	The unit of the Korean currency is Won. Coin denominations are 10, 50, 100, and 500. Banknotes are 1,000, 5,000, 10,000 and 50,000. The exchange rate is subject to the market fluctuations. As of May 2023, USD 1 is approximately KRW1,316.
Electricity	The basic power supply is 220V AC/60 in Korea. Most hotels may provide outlet converters for 110V and 220V. If you need the outlet converters, please ask at the hotel individually.
Internet	Internet service is often provided in public places such as airports, train stations, and bus terminals in Korea. PC rooms and internet cafes are also great places to go and they are mostly open 24 hours.
Time Difference	Time in Korea is 9 hours ahead of Greenwich Mean Time. (GMT+9)
Climate	Average temperature in Seoul during the Symposium season might be between 13-27°C. It is suggested to bring a jacket to keep you warm in the evening in case of temperature difference between day and night.
Emergency Phone Number	1339 : Infectious Disease Emergencies 1330 : Korea Tourism Information 119 : Fire, Medical Emergencies, Rescue, First Aid, Disaster, Report 112 : Police

8. List of Participants

No	Country	Organization	Full Name	Title/Position
1	Azerbaijan	Constitutional Court of Azerbaijan	Farhad ABDULLAYEV	Chairman
2			Humay AFANDIYEVA	Justice
3			Rauf GULIYEV	Secretary General
4	Bangladesh	Supreme Court of Bangladesh	Hasan Foez SIDDIQUE	Chief Justice
5			Mohammad Saifur RAHMAN	Registrar
6	India	Supreme Court of India	Aniruddha BOSE	Justice
7			Ajjikuttira Somaiah BOPANNA	Justice
8			Pavanesh DHARWAR	Registrar
9	Indonesia	Constitutional Court of Indonesia	Saldi ISRA	Deputy Chief Justice
10			MUHIDIN	Head of Registrar
11			Indah APRIYANTI	Head of Permanent Secretariat
12			Pan Mohamad Faiz Kusuma WIJAYA	Expert Assistant
13			Andriani Wahyuningtyas NOVITASARI	Expert Assistant
14			Muchtar Hadi SAPUTRA	Secretary
15			Ade RAHMAT	Security Officer
16	Kazakhstan	Constitutional Court of Kazakhstan	Aizhan ZHATKANBAYEVA	Justice
17			Zere UTEBAYEVA	Secretary General
18	Kyrgyz Republic	Constitutional Court of the Kyrgyz Republic	Chinara AIDARBEKOVA	Justice
19			Lunara ZHOLDOSHEVA	Justice
20	Korea	Constitutional Court of Korea	Kiyoung KIM	Justice
21			Hyungbae MOON	Justice
22			Mison LEE	Justice
23	Malaysia	Federal Court of Malaysia	Tun TENGKU MAIMUN Tuan Mat	Chief Justice
24			FIRDAUS MD Isa	Deputy Registrar
25	Mongolia	Constitutional Court of Mongolia	Buyandelger BATSUKH	Justice
26			Mukhiit ROM	Director
27			Onu-Dari NAMBAT	Senior Officer
28	Myanmar	Constitutional Tribunal of Myanmar	Kyaw MIN	Justice
29			May Hsu HLAING	Assistant Director
30	Palestine	Supreme Constitutional Court of Palestine	Mohammad EL HAJ KACEM	President
31			Khaled TALAHMA	Justice
32	Philippines	Supreme Court of the Philippines	Marvic Mario Victor Famorca LEONEN	Senior Associate Justice
33			Haydn-Joyce Yu TAN	Court Attorney V
34	Tajikistan	Constitutional Court of Tajikistan	Balajon IDRISZODA	Justice
35			Sanovar BADALOVA	Chief Human Resources and Special Affairs Specialist
36	Thailand	Constitutional Court of Thailand	Punya UDCHACHON	Justice
37			Sivaporn CHALERMWONG	Director of International Affairs
38			Wilawan PRASERTSAK	Constitutional Academic Official
39	Türkiye	Constitutional Court of Türkiye	Kenan YASAR	Justice
40			Yusuf Enes KAYA	Rapporteur Judge
41	Uzbekistan	Constitutional Court of Uzbekistan	Askarjon GAFUROV	Deputy Chairman
42			Nilufarkhon SAID-GAZIEVA	Secretary General
43	Algeria	Constitutional Court of Algeria	Omar BELHADJ	President
44			Abbas AMMAR	Justice
45	New Zealand	Supreme Court of New Zealand	Mark O'REGAN	Justice

4TH INTERNATIONAL SYMPOSIUM OF THE AACC SRD

Presentations

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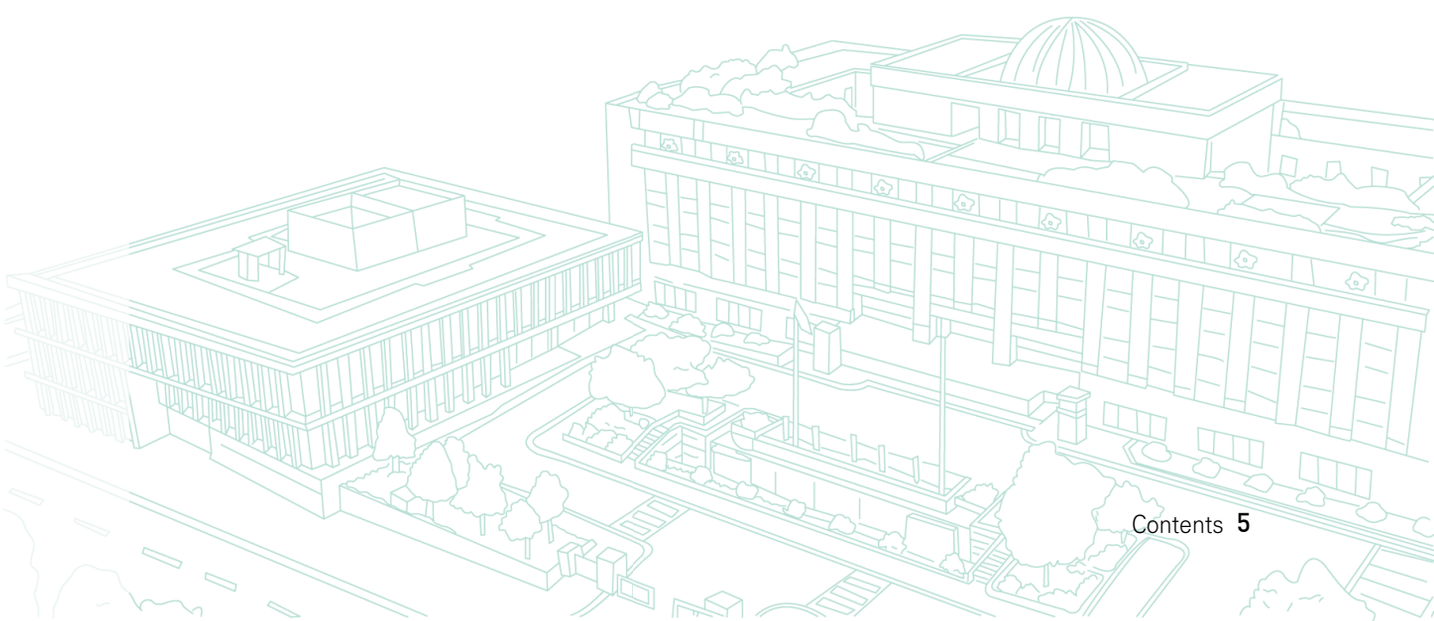
[Session 3] Constitutional Rights Ensuring Access to Justice



4TH INTERNATIONAL SYMPOSIUM OF THE AACC SRD

Opening Ceremony

Opening Remarks

Yoo Namseok
President of the Constitutional Court of Korea

Honorable heads of AACC members,
Justices and delegates,
Distinguished guests,

On behalf of the Constitutional Court of Korea, I would like to extend my sincere gratitude and warm greetings to all of you who have visited Korea for attending the 4th International Symposium of the AACC Secretariat for Research and Development (AACC SRD).

This International Symposium holds even greater meaning as it marks our return to an in-person conference in four years after successfully overcoming the challenges of the COVID-19 pandemic. The fact that 16 AACC members made the effort to attend this symposium despite the long journey speaks to the joy of reunion that we all shared, including myself.

Since its establishment in 2010, the AACC has significantly grown in number and substance over the past 13 years. The number of members has increased threefold from 7 to 21. The three permanent secretariats, established to provide systematic support for regular exchanges and cooperation among member institutions, have now become well-established and are effectively performing their roles.

Now, we can safely say that the AACC has positioned itself as a successful regional association of constitutional review bodies.

Undoubtedly, our shared goals of ensuring human rights and democracy and promoting the rule of law through constitutional adjudication require consistent and long-term efforts.

The Constitutional Court of Korea is committed to supporting the Association's journey of learning from each other's experience and sharing insights among member institutions, and advancing towards our shared goals through its AACC SRD activities.

The topic of this International Symposium held as part of this effort is Access to Justice: Constitutional Perspectives. 'Access to Justice' is directly linked to our Association's goals of ensuring human rights and the rule of law, and is a necessary precondition for achieving it.

In this two-day Symposium, participants will be invited to have in-depth discussions on the themes of the sessions, which include individual access to constitutional justice, current issues on access to justice, and constitutional rights ensuring access to justice. The outcomes of the discussions will surely be reflected in our annual research book, scheduled for publication at the end of this year.

Ensuring equal access to justice for promoting the rule of law is a topic of consistent discussion to achieve sustainable development in the global community, but there has not been a long history of study on this issue.

In this context, the outcomes of the joint study by Asian constitutional review bodies is invaluable to say the least.

This year's Symposium is graced with the presence of the Constitutional Court of Algeria and the Supreme Court of New Zealand as special guests.

I am confident that our research will benefit from a broader perspective that extends beyond Asia and enable us to further deepen our thinking. I would like to extend my genuine welcome and gratitude to all of you for your remarkable effort.

Distinguished delegates, This year marks the 35th anniversary of the Constitutional Court of Korea.

From just 39 cases in its first year of 1988, the annual caseload has steeply increased, and today we handle around 3,000 cases per year. The accumulated caseload is projected to reach over 50,000 by the end of this year.

Living up to this trust and expectation, our Court is dedicated to being a solid guardian in safeguarding citizens' fundamental rights while striving to get closer to the public.

I am particularly honored to welcome our esteemed guests to our Court in such a meaningful year. I am glad to welcome you again during our scheduled visit to the Court building after today's sessions.

Reiterating my gratitude to all participants, I hope that this Symposium will serve as a productive platform of exchange where we could share insights as well as friendship.

Thank you.

Keynote Speech

Park Jongmun
Secretary General of the AACC SRD
Secretary General of the Constitutional Court of Korea

Honorable delegates of AACC members,
Distinguished guests,

As Secretary General of both the AACC SRD and the Constitutional Court of Korea, I am glad to welcome you to the 4th International Symposium of the AACC SRD.

The annual international conference, which is planned and organized by the AACC SRD, is a highly significant event held as part of the collaborative research activities among AACC members.

Despite the unprecedented challenges posed by the COVID-19 pandemic, the annual conference has been held without fail over the past three years in the form of an online event. Also, we were able to publish the annual research book, the outcome of our joint research.

Taking this opportunity, I would like to extend my sincere gratitude to all member institutions for their participation and contribution.

The topic of our 6th research book and this International Symposium is Access to Justice: Constitutional Perspectives.

Session 1 will explore how individuals in AACC members' countries are given access to constitutional proceedings and constitutional adjudicatory bodies. Member institutions with active individual complaints will be able to share their own experiences concerning requirements, procedures, types of decisions and their effects.

Session 2 will discuss current issues related to access to justice. AACC members will be invited to share their thoughts on recent changes resulting from the COVID-19 pandemic, as well as developments in information and technology, and their response to these changes.

During Session 3, we will look at how constitutional rights ensuring access to justice are codified in the respective constitutional texts and relevant landmark cases.

The General Session will summarize the presentations and discussions of the two-day Symposium and discuss the operation of the AACC SRD. I would be grateful if you could share your valuable inputs to facilitate closer cooperation between AACC members and the AACC SRD.

During last year's online conference, I expressed my wish to warmly welcome all of you to Seoul this year. I am so delighted that the wish has come true.

I truly hope that this valuable forum will make a substantial contribution to the development of the rule of law in all AACC members' countries.

Thank you.

4TH INTERNATIONAL SYMPOSIUM OF THE AACC SRD

[Session 1-1]

Individual Access to Constitutional Justice

Chair

Tun Tengku Maimun Tuan Mat
Chief Justice, Federal Court of Malaysia

Presenters

Aniruddha Bose
Justice, Supreme Court of India

Saldi Isra
Deputy Chief Justice, Constitutional Court of Indonesia

Aizhan Zhatkanbayeva
Justice, Constitutional Court of Kazakhstan

Hyungbae Moon
Justice, Constitutional Court of Korea

Chinara Aidarbekova
Justice, Constitutional Court of the Kyrgyz Rep.

Presentation 1

Individual Access to Constitutional Justice

Aniruddha Bose
Justice, Supreme Court of India

Individual Access to Constitutional Justice

Justice Aniruddha Bose, Supreme Court of India

Distinguished dignitaries and guests, it is both an honour and privilege for me to participate in this symposium organised by the Association of Asian Constitutional Courts and Equivalent Institutions Secretariat for Research and Development. The subject of the symposium is also of great relevance for today's world.

Since time immemorial, dispute resolution has been an integral part of sovereign function in almost all the civilisations. Our country, India, has been no exception and we have had various codes conceived by great sages, who were also jurists and lawmakers of very high calibre. Dispensation of justice has always been an essential part of the governance system. We have a written Constitution and the values and morality implicit in this document guide all facets of our governance that includes justice delivery system. Our Constitution, comprising of 448 Articles in total, lays a strong emphasis on justice delivery system, with Rule of Law as its foundation. Access to justice is emerging as a strong thread running through various aspects of our justice delivery system. The Preamble to our Constitution sets the tone of this legal philosophy, with its main aim to achieve social, economic and political justice. The Directive Principles of the State Policy contained in Part IV of this document is the lodestar for all the governing institutions of our Republic. Equal justice and free legal aid are two essential Constitutional concepts ingrained in this part of the Constitution.

Now to what extent we have been successful in implementing these constitutional values? The number of pending cases which are awaiting disposal in various judicial fora in our country are no doubt high, of about 50 million. But there is a super-text to this. Our approximately 1.4 billion people have the choice of having their grievances resolved by a three-tier Court System, with about 3478 District Court complexes in around 762 districts at its base, supervised by 25 High Courts with constitutional and appellate jurisdiction and the Supreme Court of India at the Apex. Then there are several Tribunals in specialised subjects which one can access, for instance on consumer and environmental issues. Our Constitution recognises all the basic Human Rights as Fundamental Rights and also lays down an effective mechanism for implementation of such rights. Enforcement of Rights has been an inalienable part of our constitutionalism and we are striving to achieve this

objective through multi-polar approach, of which I shall give a pen-sketch now.

First, is of course providing Court system with trained professional judges. We have almost 3500 Court complexes which reflects our efforts to take justice at the doorstep. Secondly, it is Constitutional right for every citizen, as also in some cases for non-citizens to approach superior Courts for enforcing the fundamental rights and legal rights. Our evolving legal system has special orientation to gender sensitivity. The Indian Supreme Court, through judicial directive, had formulated a mechanism for redressal of victims of sexual harassment in workplace (Vishaka and Others -vs- State of Rajasthan and Others [(1997) 6 SCC 241]) which was later on translated into a statute by the legislature. Legal questions are being debated in Courts over LGBTQI+ rights in various forms. We have one of the most progressive regimes recognising right of women to make reproductive choice. We have been signatories to almost all major international treaties on Human Rights and Gender Justice. In fact, it was at the instance of the Indian delegate at the UN the wording of the first Article of the Universal Declaration of Human Rights, 1948 was changed from "All men are born free and equal" to "All human beings are born free and equal". This is a telling symbol of our gender sensitivity.

For those who may not be able to afford their litigation expenses, there is statutory provision for bearing such expenses by the State agencies. This support system is available to a person coming from economically weaker section of the population as also women, physically challenged persons, industrial workmen, victims of trafficking. To reduce pressure on formal Court system, informal dispute resolution mechanism with statutory backing have been created, through which the disputing parties can settle their controversy in an informal manner which could be enforced as judicial decree. There is an apparently contradictory approach in discouraging litigation by persuading potential litigants to follow the ADR (Alternative Dispute Resolution) course as also encourage them to enforce their rights by accessing various mechanisms to reach the law Courts. But in reality, these two paths are supplemental to each other, the ultimate aim being to ensure that justice is done. In 2022, the number of litigations that were decided by the law Courts in India are in the region of 25.2 million. Through the informal system, in total of 9.75 million pre-litigation as well as pending disputes were settled in the first National Lok Adalat (Lok Adalat broadly means people's Court) of 2023.

What we have consciously avoided, as a measure for managing large number of litigations is outpricing the system for majority of the litigating public. One of our great Judges had once commented that Courts are not like hotel rooms that we can ask a potential boarder to look for another hotel on the excuse that all the rooms are booked. Our Courts have also evolved a unique

variant of class action litigation-we call it public interest litigation. A large segment of the population who could otherwise have had remained excluded from the docket are having their rights enforced through this genre of litigation, where a public spirited individual bring their cause directly to the Constitutional Court.

Information Technology initiatives are playing an increasingly bigger role in legally empowering the average Indians and also enhancing the scope of their participation in the justice delivery system. Instead of creating a digital apartheid, which many apprehended at the initial phases of online activities – internet based technology has become a great leveller in the legal field. Using Information and Communications Technology tools, many lawyers as also individuals can argue their cases online, through computer screens, from locations of their choice. This kept the system functioning particularly during the pandemic period. Between March 2020 and October 2022, little over three hundred thousand cases were conducted by this mode in the Supreme Court itself. This system is still functioning now. A litigant, for instance, from the Nicobar Islands (part of an archipelago on Bay of Bengal) can argue her case or at least observe her case being conducted about 3000 kms away in the capital city of Delhi.

There are 22 languages specified in the Indian Constitution and there are many more dialects. An average Indian litigant mostly speaks in her mother language of the region she hails from. Again, deploying Artificial Intelligence tools, we are at present simultaneously translating all the judgments delivered by the Supreme Court in 13 such languages.

Being a part of the legal community for about four decades, the question which often surfaced in my mind was as to whether we were building a litigatious society by making law courts so easily available for a citizen to reach. When the colonial court system started, there had been many great judges laying down important principles of law. These were often at variance with the English common law, which the colonisers sowed on our soil. But if one looks at the litigant profile of early 20th Century or late 19th Century, we find it is mostly big land owners and business houses who could afford to litigate. Today, the courts are crowded, and along with the elites, dismissed workmen, estranged wives, evicted cultivators are also seeking justice from the same fora. All get the same quality of justice which was earlier available only to the privileged few. One of the prerequisites of a just and egalitarian society is level playing field for all segments of population. And one of the prerequisites of such level playing field is where there is justice for all. That is what we are striving for in India, and I am proud to say, we have largely achieved.

Presentation 2

Individual Access To Constitutional Justice In Indonesia

Saldi Isra
Deputy Chief Justice, Constitutional Court of Indonesia

Individual Access To Constitutional Justice In Indonesia[1)]

Saldi Isra[2)]

A. Introduction

Indonesia is a country that is based on *Pancasila*[3)] as the state ideology and the 1945 Constitution of the Republic of Indonesia (1945 Constitution) as the highest source of law. The recognition of Human Rights (*Hak Asasi Manusia* or HAM), specifically the principle of equality before the law, has been guaranteed in the Indonesian legal system as set out in Article 28D paragraph (1) of the 1945 Constitution. This provision guarantees the recognition, protection, fair legal certainty, as well as equal treatment for everyone. As an implementation of the fulfilment of these constitutional guarantees, every judicial institution shall be required to be able to open up the access to justice as wide as possible for the justice seekers.

Individual access to constitutional justice can conceptually be interpreted by the existence of the various different mechanisms that enable violations of individual's constitutionally guaranteed rights, either separately or jointly with others, to be brought before the Constitutional Court.

The establishment history of the Constitutional Court of the Republic of Indonesia (*Mahkamah Konstitusi Republik Indonesia* or MK RI) in the constitutional structure of Indonesia is inseparable from the experience of state administration that is characterized by authoritarian power.[4)] The idea

1) The paper was presented at the 4th International Symposium of the AACC Secretariat for Research and Development (AACC SRD) which was organized by the Constitutional Court of the Republic of Korea from 29 May to 1 June 2023 in Seoul.
2) Deputy Chief Justice of the Constitutional Court of the Republic of Indonesia. Professor of Constitutional Law, Faculty of Law, Andalas University.
3) Pancasila is the state ideology of Indonesia consisting of five principles, namely (1) belief in the One and Only God, (2) just and civilised humanity, (3) the unity of Indonesia, (4) democratic life led by wisdom of thoughts in deliberation amongst representatives of the people, and (5) achieving social justice for all the people of Indonesia. These principles are explicitly stated in the Preamble of the 1945 Constitution.
4) The idea of forming the Constitutional Court of the Republic of Indonesia was formulated in the provisions of Article 24C paragraph (2) and Article 24C of the Third Amendment to the 1945 Constitution which were ratified at the MPR (People's Consultative Assembly) Annual Session on 9 November 2001. See Constitutional Court of the Republic of Indonesia, *Cetak Biru: Membangun Mahkamah Konstitusi sebagai Institusi Peradilan yang Modern dan Terpercaya* [*Blue Print: Blueprint: Building the Constitutional Court as a Modern and Reliable Judicial Institution*] (Jakarta: Secretariat General and Registrar Office of the Constitutional Court of the Republic of Indonesia, 2004), p. 4.

of establishing the Constitutional Court of the Republic of Indonesia is to develop a better administration of power and state. There are at least 4 (four) reasons behind and which became the ground for the establishment of the Constitutional Court of the Republic of Indonesia, namely: (1) as an implication of the implementation of constitutionalism; (2) to strengthen the checks and balances mechanism between any branches of any state power; (3) to become the embodiment of a clean state administration; and (4) to strengthen the protection of human rights.[5)]

The provisions regarding the authority of the Constitutional Court of the Republic of Indonesia are set out in Article 24C paragraph (1) and paragraph (2) of the 1945 Constitution as follows:

(1) The Constitutional Court shall have the authority to adjudicate at the first and final instances whose decisions shall be final and binding to review the legislations against the Constitution, to decide on any disputes over the authority of state institutions whose powers are granted by the Constitution, to decide on the dissolution of political parties, and to decide on any disputes regarding the results of general election;

(2) The Constitutional Court shall be required to pass down the decision on the opinion of the House of Representatives regarding any alleged violations by the President and/or Vice President according to the Constitution;

Therefore, the existence of the Constitutional Court of the Republic of Indonesia which was born from the constitutional reform into the state administration system has been designed in a *sui generis* manner with the function as the guardian of the constitution and the protector of human rights.

The implementation of individual access to constitutional justice is realized through the authority to review the constitutionality of the legislations against the Constitution (judicial review) and the authority to decide on any disputes regarding the results of general election. The guarantee of providing individual access to constitutional justice is implemented by the Constitutional Court of the Republic of Indonesia in accordance with the mandate of Article 27 paragraph (1) of the 1945 Constitution which states, "*Every citizen shall have the same*

5) Jimly Asshiddiqie and Mustafa Fakhri, *Mahkamah Konstitusi, Kompilasi Ketentuan Konstitusi, Undang-Undang dan Peraturan di 78 Negara* [Constitutional Court, Compilation of Constitutional Provisions, Laws and Regulations in 78 Countries] (Depok: Center for Constitutional Law Studies, Universitas Indonesia, 2005), p. 1. Please also refer to Himawan Estu Bagijo, *Negara Hukum & Mahkamah Konstutusi, Perwujudan Negara Hukum Yang Demokratis Melalui Wewenang Mahkamah Konstitusi Dalam Pengujian Undang-Undang* [*The Rule of Law and the Constitutional Court, the Embodiment of a Democratic Rule of Law through the Authority of the Constitutional Court in Reviewing Laws*] (Yogyakarta: Gramedia Pustaka Utama, 2014), p. 140.

position before the law and the government with no exceptions". Therefore, contextually, in the implementation of judicial review authority, the Constitutional Court of the Republic of Indonesia must be able to open and provide access to every individual Indonesian citizen who feels that his/her constitutional rights have been harmed by the enactment of any legislations.

Based on the above explanation, this paper will specifically discuss the experience of the Constitutional Court of the Republic of Indonesia in opening and providing individual access to constitutional justice in Indonesia.

B. Individual Access to Constitutional Justice

As briefly discussed in the above introduction, the Venice Commission has conceptualized the term *individual access to constitutional justice* as:

> "*the various different mechanisms that enable violations of individuals' constitutionally guaranteed rights, either separately or jointly with others, to be brought before a constitutional court or equivalent body. Access mechanisms are either: indirect or direct. Indirect access refers to mechanisms through which individual questions reach the Constitutional Court for adjudication via an intermediary body. Direct access refers to the variety of legal means through which an individual can personally petition the Constitutional Court i.e., without the intervention of a third party*".[6]

Furthermore, The Venice Commission describes that individual access to constitutional justice is also closely related to the authority of the constitutional court in implementing its authority in the matters of judicial reviews. In this case, the Venice Commission divides the individual access to constitutional justice into indirect access to individual justice and direct access to individual justice.[7]

Indirect access to individual justice is a very important tool to ensure the respect for the human rights of every individual human being at the constitutional level. The advantage of such indirect individual access is that the entity submitting the complaint is usually well informed and has the necessary legal capabilities to prepare a valid petition. They can also serve as a filter to avoid

6) European Commission for Democracy through Law (Venice Commission), "Study on Individual Access to Constitutional Justice, adopted by the Venice Commission at its 85th Plenary Session (Venice, 17-18 December 2010), On the Basis of Comments by Mr Gagik Harutyunyan (Member, Armenia), Ms Angelika Nussberger (Substitute Member, Germany), Mr Peter Paczolay (Member, Hungry)*,"* Study No 538/2009, Strasbourg, 27 January 2011, p. 7.

7) Ibid.

overburdening the Constitutional Court or to dismiss any unreasonable or repetitive case petition. However, indirect access has obvious disadvantages, since its effectiveness shall depend heavily on the capacity of these entities to identify potentially unconstitutional normative actions and their willingness to submit them to the Constitutional Court or any equivalent body. In this regard, the Venice Commission sees an advantage in combining both direct and indirect accesses, thereby creating a balance between the various existing mechanisms.[8)]

Meanwhile, direct individual access is based on several models which are implemented in the *actio popularis* countries, where everyone shall have the right to take any action against any norm after its enactment. Even if there is no personal interest, individual petition can be made by the petitioner by simply petitioning for the Constitutional Court to review the constitutionality of any norm, therefore the decision shall be under the discretion of the Court. In addition, there are also the *quasi actio popularis* model, in which the petitioner does not need to be directly affected by the enactment of a norm, but the petitioner may petition for the review of such norm within the framework of a particular case. Another mechanism is the mechanism for direct individual petition by filling out various sub-forms. Among these mechanisms, *actio popularis* could create clear risks of burdening the Court.The constitutional review process usually consists of several formal requirements and petition filters to avoid overburdening and abuse of remedies before the courts. *First*, to commence a court hearing, there is often a time limit for submitting any petition. However, the time limit must be reasonable and shall allow for sufficient time to prepare for a petition by any individual or by such individual's advocate. The Constitutional Court must also be able to extend the time limit in any extraordinary cases (public interest cases). *Second*, free legal aid must also be provided where necessary. *Third*, the fee for submitting the petition must also be affordable. *Fourth*, the decisions passed down by the Constitutional Court shall be final and it should be possible to reopen any cases only in any extraordinary circumstances. *Fifth*, the resolution of remedy shall be needed in any countries with concentrated constitutional control to avoid overburdening the Constitutional Court. *Sixth*, it should be ensured that the available remedy is appropriate to remedy the petition of the petitioner, for example to expedite any process in the case of an overly lengthy process.[9)]

In the implementation, the individual and public access to justice are often confronted with the

8) Ibid.

9) F.C. Susila Adiyanta, "Urgensi Good Judiciary Governance pada Pelayanan Administrasi Lembaga Pengadilan Konstitusi sebagai Jaminan bagi Akses Publik untuk Memperoleh Keadilan [The Urgency of Good Judiciary Governance in the Administrative Services of the Constitutional Court as a Guarantee for Public Access to Obtain Justice]," *Jurnal Masalah-Masalah Hukum* Vol. 48. No. 3, July 2019, p. 259.

unequal forces in terms of social, cultural, political and economic capacities which may visibly influence such conflict resolution in an unequal manner, and may even influence the passing down of any court decisions that are hurtful to the values of justice. In order to have the access to justice from the constitutional court, the people must go through an administrative process, namely, they must go through a bureaucratically determined procedure. Within a hierarchy of public service entities, the executive, legislative or judicial bodies are required to provide their services with simple, inexpensive, transparent and accountable procedures.

The benchmark for high quality of service shall be seen from the satisfaction of the service recipients. The higher the satisfaction level of the service recipients, the higher the service quality. However, the lower the satisfaction level, the lower the level of service quality. To fulfil a satisfactory service, the standards of service are needed as benchmarks which shall be used as the reference for assessing the service quality as a commitment or promise from the service provider to the service recipients in providing quality service. Therefore, the quality service mechanism is a service that is fast, pleasant, does not contain any errors, and follows the predetermined processes and procedures.

From reviewing several results of research, including the results of research by Julius Court and his colleagues in the article entitled "*The Judiciary and Governance in 16 Developing Countries*", there are indications that the judicial arena is still problematic in many countries. In general, individual access to justice through formal justice institutions is still relatively low. Individual access to justice by expecting the attention from the state shall also be a goal in the context of a state.

In principle, the judicial arena is an integral part of the political process approach to the government institutions. However, it is also quite different from any other formal institutional entities, its *raison d'être* stems from the social or political dynamics in other arenas. In a social community, individuals as the civil society, can sometimes having a conflict between one another. These conflicts are within the private space. On the other hand, it can also be within the public space, namely if it comes from someone's interaction with any government agencies.[10)]

Within this public conflict, there is an imbalance of or unequal position between the individual (*naturlijke person*) as well as private legal entity (*privatrecht person*) and the government which represents the state. The government as a representative of the state has extraordinary authority, which shall be more dominant than any individual or private legal entity as parties facing each

10) Ibid., p. 260

other in any legal conflicts or disputes.

The conflicts between the government and individual as well as private legal entity shall involve not only one person, but also groups or organizations. Therefore, every society, in the developed or developing countries, institutions and institutional structures are needed to resolve any disputes between the parties. This is where formal institutions are needed to provide services and protection in the form of individual or public access to obtain justice.[11)]

From a historical perspective, in several developing countries, including in Indonesia, individual access to justice is not obtained solely through formal institutions, but also through indigenous institutions, some of which are still recognized for their existence. Likewise in various literature studies, the pre-modern society usually rely on the authorities to settle their conflicts. In such arena, many functions of conflict resolution through non-formal institutions were strictly separated from the formal conflict resolution system, and such systems had even been institutionalized in a judiciary institution established by the state. The establishment of this institution was based on positive legal products in the form of legislations and supplemented by the implementing regulations and the enforcement were controlled by the authorized authority.[12)]

Among the applicable procedural principles in reviewing the constitutionality of any norms of legislations, the Constitutional Court of the Republic of Indonesia must decide on the cases in a timely manner to respect the right to access constitutional justice. In an adversarial system, the parties present before any ordinary courts must also be given the possibility to present their opinion at the constitutional level. In this context, the following section will discuss the experience of the Constitutional Court of the Republic of Indonesia in providing the individual access to constitutional justice in Indonesia.

C. The Experience of Constitutional Court of Indonesia

The Constitutional Court of the Republic of Indonesia in providing and expanding the individual access to constitutional justice implements a direct access to individual justice model. The Constitutional Court of the Republic of Indonesia provides access to every Indonesian citizen to directly submit a petition to review any legislation whose enactment has or shall have the potential to harm his/her constitutional rights, both through the formal or material review. The 1945

11) Albert Kauffman, "Effective Litigation Strategies to Improve State Education and Social Service System," *Journal of Law and Education* 4, 2016, p. 45.

12) Simon Butt and Sofie Arjon Schütte, "Assessing Judicial Performance in Indonesia: The Court for Corruption Crimes," *Crime, Law, and Social Change* 62, 2014, p. 603.

Constitution provides limited authority to the Constitutional Court to exercise the judicial control over any legislative act through the means of constitutional review of the legislation. In addition, the direct access to individual justice can also be found within the authority of the Constitutional Court when deciding on any disputes regarding the results of general election.

1. Constitutional Review of the Legislation

Constitutional review of the legislation is a review of the constitutional value of any legislation, both from a formal and material perspective, or procedural and substantive review. Therefore, at the first level, the constitutional review must be distinguished from the legal review. The Constitutional Court of the Republic of Indonesia conducts the constitutional review of the legislation, while the Supreme Court of Indonesia conducts the legal review based on the legislation.

The system for implementing the constitutional review of the legislation in Indonesia, as regulated by Article 24C paragraph (1) of the 1945 Constitution and Article 10 of the Constitutional Court Law, is an effort available to the citizens to defend their constitutional rights through the constitutional proceeding by using the mechanism of judicial review against the constitution. At least, the existing judicial review system assumes that the violations to any constitutional rights of the citizen shall only occur if the legislators, namely the DPR (House of Representatives) and the President, formulated any legislations which are factually violate the constitutional rights of the citizens. In fact, the violations of the constitutional rights of the citizens do not only occur because of any "errors" in the legislation but also because of the actions or negligence of the public officials. This situation has become the cause of the recent phenomena, in which there are those who believe that their constitutional rights have been violated submit the petition for judicial review, even though the norms being reviewed do not contain any content material that is unconstitutional in nature. In addition, they also try other ways by making legal constructions as if there has been a dispute over the authority of the state institutions in the hope that this will be able to remedy for the loss of their constitutional rights and/or authorities.

The absence of the authority of the Constitutional Court of the Republic of Indonesia, for instance, in handling the cases of constitutional complaint and constitutional question can be an obstacle as well as a challenge to provide individual access to constitutional justice.[13] The absence

13) Saldi Isra and Pan Mohamad Faiz, *Indonesian Constitutional Law: Selected Articles and Developments in Post-Constitutional Reform* (Depok: Rajawali Pers, 2021), pp. 179-197.

of the authority of the Constitutional Court of the Republic of Indonesia to adjudicate the cases of constitutional complaint is also contradictory to the history of the establishment idea of the Constitutional Court. In fact, in addition to upholding the principles of rule of law as previously mentioned, the establishment of the Constitutional Court of the Republic of Indonesia was also based on the desire to provide maximum protection for the democracy and the fundamental rights of citizens.[14] The granting of the authority to adjudicate the cases of constitutional complaints to a special judicial body, namely the constitutional court, shall contribute to the efforts in strengthening the respect for fundamental human rights and freedoms, intensifying the protection of these rights, and reinforcing their constitutional degree. This is because the protection of human rights shall only receive proper priority if the special judicial body, *in casu* the Constitutional Court exercises its constitutional review authority on the real cases that arise in practice.

However, even though the Constitutional Court of the Republic of Indonesia does not have the authority to adjudicate the cases of constitutional complaint and constitutional question, the Constitutional Court of the Republic of Indonesia shall continue to make the efforts to widely open the individual access to defend their constitutional rights by designing the procedures for judicial review, as follows.

1.1 Petitioner in Judicial Review

The petitioner is a legal subject who fulfils the statutory requirements to submit the judicial review petition to the Constitutional Court of the Republic of Indonesia. The fulfilment of these conditions shall determine the legal standing of a legal subject to become valid in order to be qualified, including the formal requirements, as set out in Article 51 paragraph (1) of the Constitutional Court Law and as further explained explicitly in Article 4 paragraph (1) of the Constitutional Court Regulation Number 2 of 2021 concerning the Procedures in Judicial Review Cases, as follows.

The Petitioner is a party who considers that his/her constitutional rights and/or authorities have been impaired by the enactment of a legislation, namely:

a. **Any individual person as an Indonesian citizen;**

b. The indigenous law community units as long as they still exist and are in accordance with

14) Trevor L. Brown and Charles R. Wise, "Constitutional Courts and Legislative-Executive Relations: The Case of Ukraine," *Political Science Quarterly* Vol. 119, No. 1, 1994, p. 155. See also John Ferejohn and Pasquale Pasquino, "Rule of Democracy and Rule of Law" in Josė María Maravall and Adam Przeworski, *Democracy and Rule of Law* (Cambridge: Cambridge University Prees, 2003), p. 251.

community development and the principles of the Unitary State of the Republic of Indonesia as regulated in the legislation;

c. Public or private legal entity; or

d. State institutions

In the Elucidation of Article 51 paragraph (1) of the Constitutional Court Law, the term "individual" shall include "a group of people who have the same interests". In practice, there are cases where the petitioner is an individual individually or as a group of people who have the same interests. The example of a case in which the petitioner is an individual, among others, is the Case Number 17/PUU-VI/2008 regarding the Judicial Review of Law Number 32 of 2004 concerning Regional Government and Law Number 12 of 2008 concerning the Second Amendment to Law Number 32 of 2004 concerning Regional Government against the 1946 Constitution of the Republic of Indonesia. Meanwhile, the case in which the petitioners consist of a group of people who have the same interests, among others, is the case related to the Judicial Review of Law Number 7 of 2004 concerning Water Resources. In such cases, there were 53 petitioners in the Case Number 058/PUU-II/2004, there were 16 petitioners in the Case Number 059/PUU-II/2004, and there were 868 petitioners, who are farmers, in the Case Number 060/PUU-II/2004, while there were 2,063 petitioners in the Case Number 008/PUU-III/2005, in addition there was also the Case Number 063/PUU-II/2004, in which the total number of Petitioners in this case reached 3,001 individual petitioners.

Regarding the formal requirements, the individual petitioner for judicial review must be an Indonesian citizen. However, in practice, there have been petitions for judicial review by three foreign nationals, namely in the Decision of the Constitutional Court Number 2-3/PUU-V/2007 in relation to the Review of Law Number 22 of 1997 concerning Narcotics. In its decision, the Constitutional Court considers that foreign citizens do not have the legal standing to submit the petition for judicial review, therefore the petition was inadmissible (*niet ontvankelijk verklaard*). However, there were dissenting opinions from few Judges in this case stating that foreign citizens should be given the legal standing in specific circumstances.

Furthermore, Article 51 paragraph (1) of the Constitutional Court Law regulates that the Petitioner shall be a party who considers that his/her constitutional rights and/or authorities have been harmed by the enactment of any legislation. The loss of the constitutional rights as experienced by the Petitioner in the judicial review against the 1945 Constitution, based on Article 51 paragraph (1) of the Constitutional Court Law, and further elaborated in the Decision Number

006/PUU-III/2005 and Decision Number 11/PUU-V/2007, has the following criteria:

a. The existence of the constitutional rights of the Petitioner as granted by the 1945 Constitution of the Republic of Indonesia;
b. Whereas the Petitioner considers that his/her constitutional rights have been harmed by the legislation being reviewed;
c. Whereas the loss of the constitutional rights as referred to by the Petitioner is specific or special and actual or at least potential which according to reasonable reasoning can be ascertained to occur;
d. There is a causal relationship between the loss and the enactment of the Legislation being petitioned for review;
e. There is a possibility that by granting the petition, the alleged loss of the constitutional rights will not or will no longer occur.

1.2 Time Limit for Submitting a Petition for the Judicial Review

In submitting a petition for a formal or procedural judicial review, namely reviewing the basis of the establishment process of any legislation that is not in accordance with procedures, in addition to seeing whether or not the Petitioner has the legal standing, the Constitutional Court is also required to assess the time limit (expiration) of any submission of a formal review. Based on Decision Number 27/PUU-VII/2009 it has been determined that the time limit for submitting any petition for a formal judicial review shall be no more than 45 days after the legislation is enacted. This limitation is enforced to ensure that the submission process for formal judicial review does not drag on and the case can be decided immediately by the Constitutional Court in a short time, and so that any legislation does not immediately apply to the public which could potentially harm the constitutional rights of the citizen.

Meanwhile, there is no time limit for submitting the material judicial review. However, the petition for a formal judicial review can be submitted together with the material judicial review. For example, in Case Number 009-014/PUU-III/2005 concerning the Judicial Review of Law Number 30 of 2004 concerning the Position of Notary Public, the formal judicial review was carried out on the basis of a legal defect in the establishment of the legislation, while the material judicial review was carried out on the substance of the law that is in contrary to the 1945 Constitution.

1.3 Example of the Decisions of the Constitutional Court Accommodating Individual Access to Constitutional Justice

a. In the Decision Number 011/PUU-II/2005 regarding the Judicial Review of Law Number 20 of 2003 concerning the National Education System, dated 19 October 2005, the Constitutional Court stated that the Elucidation of Article 49 Paragraph (1) of Law Number 20 of 2003 concerning the National Education System (National Education System Law) is in contrary to the 1945 Constitution. The Court considers that the Elucidation of Article 49 Paragraph (1) stipulates that the fulfilment of education funding can be carried out in stages, however the 1945 Constitution stipulates that the education budget shall be prioritized for at least 20% of the State Budget without conducting it in stages. Fathul Hadie Utsman et al., as the Petitioners, are individuals and a group of Indonesian citizens (Warga Negara Indonesia or WNI) consisting of students, university student, teachers, lecturers, principals, and other parties who have interests and are related to the implementation of education. The Petitioners in their petition argued that the allocation of education funds conducted in stages in the amount that is less than 20% of the State Budget and Regional Budget has violated the 1945 Constitution.

In its legal considerations, among others, the Constitutional Court considered that in principal the implementation of the Constitutional provisions should not be delayed. the 1945 Constitution in a *expressis verbis* manner has determined that a minimum of 20% of the education budget must be prioritized and it should be reflected in the State Budget and Regional Budget which should not be reduced by any legislations that are hierarchically placed below the Constitution. The elucidation of Article 49 paragraph (1) of the National Education System Law has also established a new norm which shall obscure the norm contained in Article 49 paragraph (1) which it wishes to elucidate, therefore the provisions in the Elucidation of Article 49 paragraph (1) are also in contrary to the principles and theory of legislations that are generally accepted in the science of law. Furthermore, the Constitutional Court declared that education in Indonesia is falling behind, therefore it was time for education to become a top priority for development in Indonesia, the realization of which shall include the prioritizing of education in the budgeting sector. The elucidation of Article 49 paragraph (1) of the National Education System Law is an excuse for the Government, both the Central Government and Regional Governments, for not fulfilling the 20% portion of the education budget in the State Budget and Regional Budget. Thus, the Constitutional Court of the Republic of Indonesia revoked the Elucidation of Article 49 paragraph (1) of the Education

System Law and declared that the Elucidation of the reviewed Article is in contrary to the 1945 Constitution and shall have no binding legal force.

b. In the Decision Number 100/PUU-X/2012 concerning Judicial Review of Law Number 13 of 2003 concerning Manpower, dated 19 September 2012, The Petitioner named Marten Boiliu is an individual Indonesian citizen who works as a security officer, he submitted the petition without being represented by an advocate. In principal, the petitioner considered that Article 96 of the Manpower Law had hindered his constitutional rights to claim the payment of worker/labourer wages and all payments arising from employment relations because of a provision of expiration, namely that the claim could not be made after it exceeds the period of 2 years since the emergence of the rights. The Petitioner also wished that the Constitutional Court may provide an interpretation in accordance with Article 28D paragraph (2) of the 1945 Constitution, or that at least the expiration date for claiming the payment of worker wages will be extended to 5 years. Marten Boiliu argued that the background for the judicial review being submitted was due to the unfair treatment by PT Sandhy Putra Makmur (SPM) for unilaterally terminating 3,000 employees, including himself, on 2 July 2009 without giving the severance pay.

   The Constitutional Court of the Republic of Indonesia in its decision declared that the right of the Petitioner to claim the payment of workers/labourer wages and all payments arising from employment relations is a right that arises because the Petitioner has made sacrifices in the form of work performance. Furthermore, the Court declared that the wages and all payments arising from employment relations are the rights of the workers that must be protected as long as the workers do not commit any acts that are detrimental to the employer. Therefore, the wages and all payments arising from the employment relations cannot be written off due to the reason that a certain time has passed. The wages and all payments arising from employment relations are private property rights and may not be taken over arbitrarily by anyone, either by individuals or through the provisions of the legislations. Therefore, the Court is of the opinion that Article 96 of the Manpower Law is proven to be in contrary to Article 28D paragraph (1) and paragraph (2) of the 1945 Constitution and was declared to have no binding legal force.

   The impact of this decision, workers can claim the payment of wages and all payments arising from the employment relations without any time limit or expiration. This decision also provided fresh air for any workers whose wages are not paid by the company because of the provisions, including long service pay and compensation. Through the decision of the

Constitutional Court submitted by a security officer without being represented by an advocate, now workers and labourers in Indonesia can claim their rights without worrying about any expiration date.

c. The Constitutional Court of the Republic of Indonesia also opens the individual access for constitutional justice for the university students to submit the petition for the judicial review of the legislations to the Constitutional Court, either with or without being represented by advocates. For example, in Case Numbers 11-14-21-126 and 136/PUU-VII/2009 regarding the Judicial Review of the Education Legal Entity Law, dated 31 March 2010 submitted by university students and the parents, the Court passed down a decision to annul the Education Legal Entity Law, because it is considered to completely hand over the national education to the market mechanisms without any protection from the state. In fact, the mandate of the 1945 Constitution requires the state to take great responsibility for the implementation of education that is accessible and affordable to all citizens.

d. In the Constitutional Court Decision Number 37/PUU-XVIII/2020, dated 28 October 2021, the Petitioners consist of three Indonesian citizens and one public legal entity. The Petitioners submitted a procedural and substantive review of the constitutionality of Law Number 2 of 2020 related to the stipulation of the Interim Emergency Law on the Covid-19 pandemic. The reason for the procedural review provided by the Petitioners is that the Regional Representatives Council (DPD) was not involved in discussing the Covid-19 Pandemic Law, and decision-making that was carried out virtually has the potential to violate people's sovereignty because the absence of members can reduce the implementation of the people's mandate entrusted to the People's Representative Council (DPR). Meanwhile, in the substantive review, the Petitioners argued that the Law was contrary to the principles of the rule of law, the principle of people's sovereignty, the supervisory function, the function of the DPR's budget, and the principles of state financial management because the determination of widening the state budget deficit should not be carried out only by the government without involving the DPR. and DPD.

In its decision, the Court is of the opinion that the global Covid-19 pandemic has had a significant impact on the economic conditions of a country, including Indonesia. As an anticipatory measure relating to the use and management of state finances, the Court considers that strong control by the government is needed. One of the control systems in the state of emergency and law in time of crisis is to limit the validity period of the Interim Emergency Law on the Covid-19 Pandemic to a maximum of two years. According to the Court, if the

enactment of the law is to be extended, the government must obtain prior approval from the DPR.

e. The Petitioner in Case Number 2/PUU-XX/2022 is an Indonesian citizen named Hardizal. The Petitioner was a former convict in a psychotropic case and has completed all court sanctions. However, the Petitioner felt that his constitutional rights had been violated by the vague phrase "and other acts of violating decency" stipulated in the Regional Head Election Law, which resulted in the revocation of the recommendation from the political party that nominated him.

In its decision, the Court is of the opinion that the law must be interpreted as "exempt for perpetrators of disgraceful acts who have obtained a court decision that has permanent legal force and have completed serving their criminal term, and honestly or openly announced their identity background as a former convict." This case, which was filed directly by an Indonesian citizen, shows the existence of individual access to constitutional justice in fulfilling his political rights in elections.

2. Case Resolution on Dispute over General Election Results as General Election Constitutional Disputes

In relation to providing individual access to constitutional justice in the field of case resolution on Dispute over General Election results, the Constitutional Court does not only factually pass down the decisions based on quantitative studies (the General Election results numbers) but also examines the qualitative perspective (the fulfilment of constitutional principles) of the administration of the General Election. In Case number 062/PHPU-B-II/2004 concerning the dispute over the results of the presidential election in 2004, the Court explained the importance of protecting the constitutional principles of administering the General Election, namely direct, general, free and confidential principles as mandated in Article 22E Paragraph (1) and Paragraph (5) of the 1945 Constitution, which in principal require that the administration of General Election shall uphold the values of constitutional justice.

In the General Election disputes in Indonesia, the Constitutional Court does not only function as an appellate or cassation court of various General Election-related disputes, because settlement mechanisms has been provided first in the form of sectoral and local legal remedies, such as any matters related to General Election crimes and General Election administration disputes. The Constitutional Court of the Republic of Indonesia in context of General Election disputes functions as a judicial institution at the first and final levels who shall decide on any disputes over the General

Election results, therefore it is related to the final resolution of any disputes that are quantitative or qualitative in nature in relation to the constitutionality of the administration of General Election.

Constitutional disputes over the General Election results are cases with speedy trial characteristic, because the resolution time is determined by a very restrictive time frame, where the petition must be submitted within 3 x 24 hours or 3 business days after the General Election results are determined and announced by the General Election Commission. Furthermore, the Constitutional Court of the Republic of Indonesia must decide on such case within a very short period of time, namely 14 working days for any disputes over the results of the Presidential Election, 30 working days for any disputes over the results of the Legislative Election, and 45 working days for any disputes over the results of the Regional Head Election.

In resolving any disputes over the results of Legislative Election, in principal the petitioners who are allowed to submit the petitions are the political parties. However, in order to provide a wider individual access, the Constitutional Court of the Republic of Indonesia expands the interpretation of the legal subjects who are allowed to submit the petitions, it shall not only be restricted to the political parties, but shall also include any individual legislative candidates. However, any individual submission of petitions for any disputes over the results of the Legislative Election must first obtain the approval from the Chairperson and the Secretary General of their respective political parties. Therefore, to realize fair General Election in the context of case resolution on disputes over General Election results, the access is opened not only by allowing the political parties to submit their petitions to the Constitutional Court, but also by allowing the petitions to be submitted by each legislative member candidates who are competing for the seats in the House of Representatives or the Regional Representative Council.

D. Conclusion

The Constitutional Court of the Republic of Indonesia as a judicial institution in carrying out its role as the guardian of the constitution and as the protector of human rights has provided individual access to constitutional justice by implementing the direct individual access to constitutional justice method.

The implementation of the direct individual access to constitutional justice method has implication and has positive impact towards strengthening the protection of human rights for individual Indonesian citizens and providing a solid foundation for the implementation of constitutional guarantees of democracy in Indonesia. This direct individual access can be done by

every Indonesian citizen when submitting any petition for judicial review of the constitutionality of any legislation and by each legislative candidate when submitting any petition for any dispute over the results of the General Election.

As a form of commitment to the implementation of constitutional supremacy, Indonesia also continues to strive to strengthen the individual access to constitutional justice in the future. One of them is the possibility to refer the constitutional complaint and constitutional question to the authority of the Constitutional Court. However, the decision to expand this authority shall be left entirely to the legislators, namely the House of Representatives and the President, in the context of strengthening and protecting the human rights and the democratic principles.

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Presentation 3

Evolution of Constitutional Control

Aizhan Zhatkanbayeva
Justice, Constitutional Court of Kazakhstan

Evolution of Constitutional Control

Aizhan Zhatknbayeva
Judge of the Constitutional Court of the Republic of Kazakhstan

Good morning, dear colleagues!

On behalf of the Constitutional Court and on my own behalf, let me begin this presentation with welcoming the participants to today's event and to express my gratitude to the host Country for the invitation.

Our country is going through a phase of significant constitutional reforms. The aim of these reforms is to implement measures to strengthen the protection of the fundamental human rights, an important step of which has been the transformation of the constitutional review body.

On December 2022, the Constitutional Court has been composed of 11 judges, including the Chairman and the Deputy Chairman. The Court's staff comprises 70 personnel from the Constitutional Court Staff. With its new status, the Constitutional Court commenced operations at the start of 2023.

The key result of this work is that citizens, the Commissioner for Human Rights and the General Prosecutor can now apply directly to the Constitutional Court to enforce rules which they consider to be contrary to the Constitution as unlawful. The list of other subjects of appeal to the Constitutional Court remains unchanged. These are President of the Republic of Kazakhstan; Chairman of the Senate of the Parliament; Chairman of the Mazhilis of the Parliament; Deputies of the Parliament (at least 1/5 of the total number of deputies); Prime Minister and Courts (representation).

In the course of its work, the Constitutional Court carries out preliminary constitutional control and makes determinations regarding the legality of: Presidential elections, Parliamentary elections, and National referendums. Examines the conformity with the Constitution: prior to the President's signature of laws passed by the Parliament; prior to the ratification of international treaties. It provides official interpretations of constitutional norms, renders opinions on draft amendments to the Constitution, and addresses other cases as stipulated in paragraphs 1 and 2 of Article 47 of the Constitution. The Constitutional Court's jurisdiction also includes subsequent constitutional control, which assesses the constitutionality of laws and other legislative acts,

including specific provisions. Based on a comprehensive analysis of its practice, the Constitutional Court annually delivers the Message "On the State of Constitutional Legality in the Republic" to the Parliament.

The public has high expectations of the Constitutional Court. As of May 22, 2023, the Constitutional Court has received about 3,000 appeals from citizens. The appeals raise the issues of pension provision, access to information, compliance with labor laws, penitentiary system, social security, etc. (full list is presented on the following slide). This activity indicates a vivid desire on the part of citizens to participate in the promotion of constitutional rights and human rights safeguards.

From the beginning of the year until May, the outcome has been 17 regulatory judgments and more than 40 appeals are being examined by Judges. The Constitutional Court handed down final decisions regarding access to justice, access to public service, the use of the image of a person in the media, and the exercise of criminal justice.

A notable aspect of the Constitutional Law "On the Constitutional Court of the Republic of Kazakhstan" of 2022 is its clear definition of the types of regulatory decisions that the Constitutional Court can make. These include: recognition of a normative legal act or its provisions as compliant with the Constitution or as not compliant with the Constitution, or as not compliant with the Constitution.

Normative resolutions take effect from the date of adoption and are binding across the entire territory of the Republic. They are final and not subject to appeal. In the event that normative legal acts or their specific provisions are recognized as unconstitutional, state bodies are required, within 6 months of the publication of the Constitutional Court's decision, to submit a draft law to the Mazhilis of the Parliament or adopt other normative legal acts. The Constitutional Court may establish a different timeframe if necessary.

The Constitutional Court has just entered into operation, so awareness-raising work is being carried out among the public, lawyers, legal advisers and universities.

The Constitutional Court has established a Scientific Advisory Council to examine the views of the scientific and expert community. It consists of more than 30 scientists. Scientists and specialists are also involved in constitutional proceedings as experts. The political authorities are invited to participate in the meetings in order to ensure a qualitative and comprehensive examination of the applications by Judges. This corresponds to a recommendation of the Venice Commission of the 1994.

Hence, a distinctive feature of the work of all constitutional review bodies remains the combination of theoretical, scientific approaches with an in-depth knowledge of practice and current realities.

In conclusion, I want to acknowledge that there are challenges involved in creating a new legal system. Undoubtedly, the early years of its establishment coincide with ongoing political and economic transformations, making the task for the Constitutional Court challenging yet realistic. This institution should strive to strike an optimal balance among the interests of the state, society, and the individual, taking into account the ever-evolving dynamics of these stakeholders.

The Constitutional Court of Kazakhstan has the objective of finding an appropriate balance between the interests of the state, society and the individual, while continuing to ensure the establishment of a rule of law that effectively addresses the modern needs of individuals, society, and the state, while remaining grounded in reality.

Thank you for attention!

Приветствую Вас, уважаемые коллеги и участники симпозиума!

Жатканбаева Айжан Ержановна
Судья Конституционного Суда РК

ВЫСТУПЛЕНИЕ
на 4-м Международном симпозиуме Секретариата по исследованиям и развитию Ассоциации азиатских конституционных судов и эквивалентных институтов (ААКС СИР)

Позвольте от имени Конституционного Суда и от себя лично приветствовать участников сегодняшней лекции и выразить благодарность ее организаторам за приглашение.

Наша страна проходит этап значительных конституционных реформ. Целью данных реформ является приведение в действие механизмы по усилению защиты фундаментальных прав граждан, важным шагом которой стала трансформация органа конституционного контроля.

В декабре 2022 года был сформирован состав из 11 судей Конституционного Суда. Их деятельность обеспечивает Аппарат. Конституционный Суд начал свою работу с 1 января 2023 года.

Ключевым результатом данной работы является то, что теперь граждане, Уполномоченный по правам человека и Генеральный Прокурор могут напрямую обратиться в Конституционный суд с заявлениями о признании незаконными норм, которые по их мнению противоречат Конституции. Перечень других субъектов обращения в Конституционный Суд остался неизменным. Это – Президент Республики Казахстан, Председатели Сената и Мажилиса Парламента, депутаты Парламента (не менее 1/5 от общего числа депутатов), Премьер-Министр и суды.

Компетенция КС включает предварительный и последующий конституционный контроль. **К предварительному относится:** правильность проведения выборов

Президента, депутатов Парламента и республиканского референдума; соответствие Конституции принятых парламентом законов до их подписания Президентом РК и международных договоров, до их ратификации; официальное толкование норм Конституции. **Последующим** конституционным контролем признается проверка на предмет конституционности законов и иных нормативных правовых актов на основании обращений. На основе обобщения практики своей работы Конституционный Суд обязан ежегодно направлять Парламенту послание о состоянии конституционной законности.

В обществе имеются большие позитивные ожидания от деятельности Конституционного Суда. По состоянию на май т.г. в адрес Конституционного Суда поступило около 3000 обращений граждан.

В обращениях затрагиваются вопросы пенсионного обеспечения, доступа к информации, соблюдения трудового законодательства, уголовно-исполнительной системы, социального обеспечения и др. *(полный перечень отображен на слайде).* Данная активность сигнализирует о сильном желании граждан участвовать в продвижении конституционных прав и гарантий защиты прав человека.

С начала года по май по итогам рассмотрения вынесено 17 нормативных постановлений, более 40 обращений изучаются Судьями. Конституционный Суд вынес итоговые решения в части доступа к правосудию, доступа к государственной службе, использования изображения человека в СМИ, осуществления уголовного правосудия.

По итогам рассмотрения КС принимает одно из трёх решений: соответствующими Конституции или соответствующими данном самим Судом истолковании, либо о признании несоответствующими Конституции.

Нормативные постановления Конституционного Суда вступают в силу со дня их принятия, являются общеобязательными на всей территории республики, окончательными и обжалованию не подлежат. В случае рекомендации КС об изменении закона или другого НПА госорганы должны принять меры в срок не позднее 6 месяцев после опубликования решения КС, либо в иной указанный Судом срок.

Конституционный Суд только начал свою деятельность, поэтому проводится разъяснительная работа среди населения, адвокатов, юридических консультантов, университетов.

В целях изучения мнения научного и экспертного сообщества создан научно-консультативный совет. В его состав входят более 30 ученых. Также ученые и специалисты привлекаются к конституционному производству в качестве экспертов. К участию в заседаниях приглашаются политические власти, чтобы обеспечить качественное и всестороннее изучение обращений судьями. Это соответствует рекомендации Венецианской Комиссии 1994 года.

Таким образом, отличительной особенностью деятельности всех органов конституционного контроля остается сочетание теоретических, научных подходов с глубоким знанием практики, современных реалий.

В завершении своего выступления отмечу, что создать новую систему правовых отношений бывает непросто. Действовать Конституционному Суду в первые годы его становления и сложно, и одновременно реально в свете происходящей политической и экономической трансформации. Особый отпечаток на его работу накладывают ожидания граждан защиты, помощи от государства и слабой инициативы государственных органов.

Конституционный Суд Казахстана ставит целью нахождение оптимального баланса между интересами государства, общества и человека при дальнейшем обеспечении такого верховенство права, которое будет отвечать современным вызовам и при этом не оторвано от реальности.

Благодарю за внимание!

Presentation 4

Individual Access to Constitutional Justice

Hyungbae Moon
Justice, Constitutional Court of Korea

Individual Access to Constitutional Justice

Hyungbae Moon
Justice, Constitutional Court of Korea

1. Introduction

The Republic of Korea (hereinafter "Korea") ensures individual access to constitutional justice in the form of constitutional complaints. Grounds for request of constitutional complaints are categorized into two types under Article 68 of the Constitutional Court Act: 1) constitutional complaint as a remedy against rights violations 2) constitutional complaint as a means of constitutional review of statutes.

2. Constitutional Complaint as a Remedy against Rights Violations

A. Overview

Article 68(1) of the Constitutional Court Act provides that any person whose fundamental rights guaranteed by the Constitution are infringed due to exercise or non-exercise of the governmental power, may request adjudication of a constitutional complaint with the Constitutional Court. This ensures individual access to constitutional justice and allows individuals to directly seek remedies for violations of their rights. This type of cases is categorized as "Hun-Ma" type.

"Individuals" who are guaranteed access to constitutional adjudication are not confined to Korean citizens. Foreigners, private corporations and other associations without legal capacity may apply to the Constitutional Court if it concerns the infringement of fundamental rights recognized by the Constitution.

B. Requirements

(1) Exercise or Non-Exercise of State Power

a. Exercise of State Power by the National Assembly

Since legislative power is included in state power, individuals may file a constitutional complaint on a statute. As treaties concluded and promulgated under the Constitution and the generally recognized rules of international law shall have the same effect as domestic laws (under

Article 6(1) of the Constitution), they are subject to constitutional complaints.

Non-exercise of legislative power is also subject to constitutional complaints. Legislative omissions are categorized into "genuine legislative omission" which refers to the legislator's failure to exercise its legislative power on matters for which it has a constitutional legislative duty and "pseudo legislative omission" which implies a situation where an enacted law is found to be defective as the legislative content is incomplete, insufficient and unfair.

In the case of genuine legislative omission, a constitutional complaint may be filed 1) when the legislature fails to enact statutes that are expressly mandated under the Constitution or 2) when the legislature fails to take any legislative action although such obligation is construed under the Constitution.

In the case of pseudo legislative omission, a constitutional complaint should be grounded on the unconstitutionality of the defective feature of the challenged statute.

b. Administrative Acts

1) Administrative Legislation

An enforcement decree and enforcement rule enacted by the Executive is subject to constitutional complaint when it directly infringes upon fundamental rights without waiting for a separate enforcement action.

Administrative rules, which are internal regulation of administrative organizations, are not subject to constitutional complaint in principle. However, where a statute grants an administrative agency the authority to supplement the specific content of a statute, the administrative rule may be subject to constitutional complaint because it is externally binding in combination with a higher law. Also, if its repeated implementation creates an administrative practice, it may be subject to constitutional complaint because the administrative agency is self-bound to follow the practice, which is externally binding.

2) Administrative Omission

A constitutional complaint against an administrative omission is permissible when the subject of state power fails to act although it has a constitutionally-derived obligation to act. Here, a "constitutionally-derived obligation to act" refers to cases where the obligation to act is expressly prescribed in the Constitution; where it is derived from constitutional interpretation; and where it is specifically provided for in a statute.

(2) Possibility of Rights Infringements

A constitutional complaint is inadmissible if the complainant makes vague allegations that are not specific enough to identify a possible violation of fundamental rights.

(3) Legal Relevance

The Constitutional Court has established through its case law that individuals may apply for a constitutional complaint when 1) their fundamental rights are 2) presently and 3) directly infringed.

a. Self-relatedness

Self-relatedness is recognized only for the direct victim of the exercise or non-exercise of state power, and if a person has only an indirect, factual and economic interest in the state action or merely suffers a reflective disadvantage from it, the person becomes the third party and cannot file for a constitutional complaint.

b. Presentness

The complaint should be presently relevant to the exercise of state action. However, if a violation of rights is predicted with certainty to occur in the future, it is recognized to meet the presentness requirement to ensure effective remedies for the rights violation.

c. Directness

The directness requirement is particularly important in a constitutional complaint against a statute. To bring a constitutional complaint against a statute itself, a restriction of freedom, imposition of obligations or deprivation of rights or legal status must be caused by the statute itself and not through an enforcement action by an administrative agency. If the violation of a fundamental right is caused by a planned enforcement action of an administrative agency, it is the exercise of the agency's will that brings about the violation, so the directness requirement is not recognized with respect to the underlying statute.

However, even if there is a specific enforcement action, exceptions to the directness requirement are made in case where 1) there is no remedy procedure for the enforcement action, 2) even if there is, if rights are not redressable by any other means, or 3) the content of the underlying normative act has already changed the relationship of rights and duties or established the legal status of the

citizens before the enforcement action.

d. Subsidiarity (Exhaustion of Legal Remedies)

Since a constitutional complaint is the remedy of last resort for rights violations, if any remedial process is provided by other statutes, no one may request adjudication on a constitutional complaint without having exhausted all such processes (Proviso in Article 68(1) of the Constitutional Court Act).

However, there are exceptions to the requirement for the exhaustion of legal remedies. One such exception applies where the applicant failed to go through a pre-trial procedure for a legitimate reason and so cannot put him or her at a disadvantage. Another exception arises where there is no chance of implementing a pre-trial procedure because there is little possibility for remedying the infringed rights even after the procedure or it is objectively unclear whether a remedial process is available.

If a fundamental right is infringed by the statute itself, an individual can directly lodge a constitutional complaint because a person cannot bring a suit challenging the validity of the statute itself to the ordinary courts.

e. Period of request for adjudication

A constitutional complaint as a remedy against rights violations shall be filed within 90 days after the existence of the cause is known, and within one year after the cause occurs.

3. Review of Judicial Decisions

A. Prohibition in Principle

Article 68(1) of the Constitutional Court Act excludes judgments of the courts from the subjects of constitutional complaints. Therefore, filing a constitutional complaint against rulings, decisions and orders from the courts is prohibited.

B. Permission through Exceptions

However, the Constitutional Court ruled that to the extent that the provision is interpreted to exclude from constitutional challenge those judgments that enforce the laws struck down in whole or in part by the Constitutional Court and thereby infringe upon people's basic rights, the provision in question would be unconstitutional.

In this context, the Constitutional Court considered that the Supreme Court's ruling that upheld the administrative action to impose taxation under a provision of the former Income Tax Act even after the Constitutional Court' decision of limited unconstitutionality on the challenged provision violates the binding force of the unconstitutionality ruling, and thus a constitutional complaint against the ruling must be allowed. Therefore, the Constitutional Court ruled that the judgment infringes on the complainant's fundamental right to property and annulled both the judgment and the original administrative action (96Hun-Ma172, etc., December 24, 1997).

Also, the Constitutional Court ruled that within the context of Article 68(1) of the Constitutional Court Act, "judgements of the courts" do not include "judgements of the courts that violate the binding force of a decision of unconstitutionality against a statute", and such judgements violate the Constitution (2014Hun-Ma760, etc.).

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

A. Overview

If the constitutionality of a statute is a precondition of the judgment of an original case, the applicant should, in principle, file a constitutional complaint against the judgment that applied the alleged unconstitutional statute only after having exhausted all instances of the judicial system, unless the court requests adjudication on the constitutionality of the statute.

However, under the current constitutional adjudication system that excludes courts' judgements from the subjects of constitutional complaint, the party cannot challenge the constitutionality of the normative act in the form of a constitutional complaint against judicial judgements after all instances of the courts. This in turn results in restricting individual access to constitutional justice against judicial action.

Accordingly, Article 68(2) of the Constitutional Court Act provides for a constitutional complaint as a means of constitutional review of statutes. It allows the party to request adjudication on a constitutional complaint if the motion for such adjudication is denied. This type of cases is categorized as "Hun-Ba" type.

Similar to a constitutional complaint as a remedy against rights violation, this type of constitutional complaint allows individuals to request the annulment of the statute infringing on their fundamental rights. However, the difference is that this type of complaint can only be filed in relation to a specific case.

A constitutional complaint as a means of constitutional review of statutes is a unique

constitutional adjudication process that can be hardly found in other countries and complements some drawbacks of the current constitutional complaint system that does not permit complaints against judicial judgments.

B. Requirements

(1) Subjects of Review: Statutes

Since the constitutionality of a law is subject to a constitutional complaint as a means of constitutional review of statutes, administrative legislations such as Enforcement Decrees and Enforcement Rules cannot be subject to constitutional complaints as a means of constitutional review of statutes (Article 107(2) of the Constitution).

(2) The Premise of Trial

A constitutional complaint as a means of constitutional review of statutes is admissible where the unconstitutionality of a statute has become the premise (precondition) of a trial and does not need to meet the filing requirements under Article 68(1) of the Constitutional Court Act.

As for the "premise of trial", first, a specific case shall be pending in court; second, the statute subject to constitutional review shall be applied in connection with the trial of the case; and third, the content of the decision by the court presiding over the case depends on whether the statute is unconstitutional."

(3) Period of Request for Adjudication

The adjudication of a constitutional complaint under Article 68(2) shall be requested within 30 days after a denial of a motion to request adjudication on the constitutionality of the statute is notified (Article 69(2) of the Constitutional Court Act).

C. Effects of a Decision to Uphold a Constitutional Complaint

Where a constitutional complaint prescribed in Article 68(2) is upheld and when the court's case related to the instant constitutional complaint has already been decided by final judgement, the party may request a retrial of the case before the Court (Article 75(7) of the Constitutional Court Act).

Since the applicant can remove the flaw of the judgement that applied an unconstitutional statute pursuant to the Constitutional Court's decision of upholding, this complements the drawback of the current system that bans complaints against judicial judgments.

5. Final Decision

There are four types of final decisions in relation to constitutional complaint cases; 1) rejection; 2) dismissal or a decision of constitutionality; 3) a decision of upholding or unconstitutionality; and 4) a declaration that the case is concluded by a petitioner's withdrawal of the request for adjudication or upon his/her death. A request is rejected when the request is made unlawfully. A request is dismissed when the request is unfounded. A decision of upholding or unconstitutionality is made when Justices deem the request to have reasons and is justified.

While the Constitutional Court Act only has express provisions on provisional disposition concerning adjudication of a political party dissolution and adjudication on competence dispute (Articles 57 and 65), pursuant to Article 40 of the Act, the provision on provisional disposition in the Civil Procedure Act and the provision on suspension of execution in the Administrative Litigation Act (Article 23) shall apply mutatis mutandis to the procedure for adjudication of the Constitutional Court as long as it is not contrary to the nature of constitutional adjudication. Accordingly, the Constitutional Court permits a provisional disposition in a constitutional complaint case.

The Constitutional Court may grant a provisional disposition in the following conditions:

1. where it is not clear whether a review on the merits is unlawful or without reason;

2. where there is a need to prevent irreparable damage that could arise from the continued exercise or non-exercise of state power and there is an urgent need to suspend the effect; and

3. where the disadvantage that may arise if the request is dismissed by the final decision after granting a provisional disposition is outweighed by the disadvantage that may arise if the request is upheld after dismissing a provisional disposition (when balancing these two)

6. Overload of Constitutional Review Bodies: Prior Review

Ensuring broad protection of individual access to constitutional justice inevitably leads to an increase in caseload. This surge in caseload overloads constitutional review bodies.

Since its launch, the Constitutional Court has received 48,068 cases as of March 31, 2023. Among them, 37,248 cases are constitutional complaints as a remedy against rights violations and 9,588 cases are constitutional complaints as a means of constitutional review of statutes, which makes up around 97.4 percent of total cases.

In order to ensure individual access to constitutional justice while preventing the quality of the judgement from potentially deteriorating due to the high caseload, the Constitutional Court Act

provides for the establishment of Panels each of which consists of three Justices in the Constitutional Court and has the panels conduct a prior review of a constitutional complaint (Article 72(1)).

The Panels do not review on the merits but the formal requirements of admissibility. The Panel shall dismiss a constitutional complaint without prejudice in a unanimous decision 1) where the adjudication on a constitutional complaint is requested, without having exhausted all the remedial process provided by other statutes, or against the judgement of an ordinary court; 2) where the adjudication on a constitutional complaint is requested after expiration of the time limit; and 3) where the request for adjudication on a constitutional complaint is unlawful and the unlawfulness cannot be corrected (Article 72(3) of the Constitutional Court Act).

Where the Panel cannot reach a unanimous decision of dismissal, it shall transfer the constitutional complaint to the full bench by a decision. When a dismissal without prejudice is not decided within 30 days after filing a constitutional complaint, it shall be deemed that a decision to transfer to the full bench is made.

7. Conclusion

Constitutional justice has democratic implications as a means to realize the Constitution. Particularly, in a representative democracy where citizens' political participation is restricted, a constitutional complaint is not only a means to remedy individual's rights, but also a manifestation of citizens' active and participatory approaches to bring the community's legal system in line with constitutional principles and promote constitutional legitimacy of laws.

The constitutional complaint system ensures individuals to directly challenge unconstitutional exercise of state power and allows a party to a case to request constitutional review of a statute applied in relation to the trial of the case if the motion for such request was dismissed in the trial court. Thus it provides broad protection of individual access to constitutional justice. This ultimately contributes to realizing citizens' political aspirations to participate in the community decision-making process.

Presentation 5

Access to justice: Contribution of the Constitutional Court of the Kyrgyz Republic

Chinara Aidarbekova
Justice, Constitutional Court of the Kyrgyz Rep.

Unofficial translation

Access to justice: Contribution of the Constitutional Court of the Kyrgyz Republic

Chinara Aidarbekova
Judge of the Constitutional Court of the Kyrgyz Republic

Dear Participants of the Conference!

Ladies and Gentlemen!

Allow me first of all, on behalf of the Constitutional Court of the Kyrgyz Republic and on my own behalf, welcome all the participants and thank the organizers for the invitation to speak at such a representative and traditional event!

Undoubtedly, the theme of today's Symposium is highly relevant, as access to justice constitutes a fundamental element of any legal system that serves to restore the violated rights and freedoms of subjects across a diverse range of legal relations.

The Constitution of the Kyrgyz Republic guarantees every individual the right to seek judicial protection for their rights and freedoms, as stipulated in the Constitution, laws, and international treaties to which the Kyrgyz Republic is a party. To realize this constitutional guarantee, the country has established a three-tiered system of general jurisdiction courts, which operate under the framework of enacted laws that provide a wide range of procedural tools for safeguarding the rights and freedoms of citizens. Additionally, a specialized Constitutional Court has been established to oversee the constitutionality of laws and other regulatory legal acts.

The right to seek judicial protection, as stipulated by the Constitution, is an unrestricted right, which guarantees individuals the legally recognized ability to approach a general jurisdiction court for any matter, except in instances where the individual voluntarily relinquishes this right by transferring their dispute to another competent body.

The Constitutional Court is a crucial institution that helps ensure the realization of citizens' right to judicial protection, including access to justice, particularly for vulnerable groups of the population. In its practice, the body of constitutional control has frequently addressed the

interpretation of this constitutional provision in conjunction with disputed legal norms, within the context of both abstract and concrete normative control.

It should be noted that the Constitutional Court of the Kyrgyz Republic does not have the authority to consider individual constitutional complaints. However, ordinary citizens and legal entities are entitled to submit applications to the Constitutional Court regarding issues that directly impact their constitutional rights and freedoms, within the framework of normative control.

Since 2013, the Constitutional Court has adopted approximately 130 final decisions, of which nearly 40 percent pertained to matters related to access to justice.

Several legal positions adopted by the Constitutional Court are particularly noteworthy, which have significantly influenced the practice of general jurisdiction courts and other state bodies involved in the process of realizing citizens' right to judicial protection.

In a case where the constitutionality of the introduction of a state fee before the consideration of the case in civil proceedings was disputed, the Constitutional Court noted that an important component of the exercise of the right to judicial protection is access to judicial protection, which in turn implies the creation by the state of organizational and procedural conditions that allow without any restrictions to receive a fair restoration of violated rights. Such conditions are the territorial proximity of the courts to the population, the availability of the organizational infrastructure of the courts, reasonable terms for the consideration of cases, the possibility of free appeal of judicial acts, as well as reasonable court costs that take into account the rights of poor citizens to be exempted from such costs. Determining the proper balance between the interests of the person applying to the court for the protection of their violated rights and interests of justice, is a necessary condition for the legislator to determine reasonable limits on the rates of the state duty and a clear procedure for granting benefits for its payment. State duty rates should reflect reasonable limits and not burden the person in such a way that their payment becomes a real obstacle to access to justice. Accordingly, the issue of establishing a requirement to pay a state fee when applying to a court in civil cases, in itself, is not a violation of the right to access to justice and, as a result, does not limit a person's right to judicial protection.

In the next case, where the constitutionality of the state duty rate for property disputes was challenged (it was 10 percent of the amount of the claim), the Constitutional Court noted that the level of judicial protection of citizens' rights is an indicator of the democratic nature of society itself. Accessibility of justice means the inadmissibility of adopting norms that block citizens' access to justice. Without access to justice, individuals are unable to fully exercise their right to

judicial protection. Only a truly secured right to judicial protection gives meaning to a person's appeal to the court. In this regard, access to justice should be considered as a principle of the procedural branches of law, and as a principle that permeates all legislation on the judiciary and legal proceedings. In this sense, access to justice is directly related to certain conditions. When determining the size of the state fee, it is necessary to correlate the amounts that can be received from its collection and the costs of financing judicial activities in civil cases, based on the fact that the state fee is a targeted fee, the purpose of which is that it should only in a certain measure to cover the costs of relevant public activities, in this case, the activities of the administration of justice. However, the amount of the state duty, fixed in the contested norm at 10 percent of the amount of the claim, is disproportionately high, given the relatively low income and living standards of the country's population. Accordingly, when applying to the judicial authorities for civil disputes related to property of high value, persons have to pay an unreasonably high state fee, which is burdensome and actually makes going to court impossible, despite the formal availability of justice. Due to the disproportionately high rates of state fees, a number of civil claims are excluded from the jurisdiction of the courts, thereby providing some immunity from civil liability to certain categories of persons - which does not comply with the principle of equality of all before the law and the court, and also violates the right to judicial protection.

In another case, where the question of the constitutionality of the ban on the review in cassation of judicial acts of the appellate instance, issued on complaints against the decisions of the investigating judge, was considered, the Constitutional Court noted the following. The inadmissibility of restricting the right to judicial protection and the right to re-examination of the case by a higher court suggests that persons should have the opportunity to go to court on any issue, unless the person himself waives this right, and there should also be the possibility of appealing against a judicial act to a higher court. The system established by the legislator for appealing against decisions of authorized officials to terminate a criminal case in pre-trial proceedings is insufficient in terms of ensuring everyone's right to effective restoration of their rights through the courts. Accordingly, these procedural decisions should not be limited to the assessment of the investigating judge and the appellate instance, but should go through all the stages of the system for reviewing judicial acts established by law, including the cassation instance. Only in this case, the implementation of constitutional guarantees on the right to judicial protection and its integral part - the right to re-examination of the case by a higher court, can be considered complete.

In another case, where the question of the constitutionality of limiting the list of judicial acts for

revision due to newly discovered circumstances within the framework of administrative proceedings was considered, the Constitutional Court indicated that proceedings based on newly discovered circumstances are one of the forms of verifying the legality and validity of judicial acts that have entered into force. The main purpose of this institution is to verify the correctness of the act issued by the court in the light of newly discovered circumstances and to cancel the judicial act in case of its illegality or groundlessness. Ultimately, the revision of a judicial act on the basis of newly discovered circumstances serves as a means of fully implementing the principle of objective truth. The legislator, pursuing the goal of procedural economy and legal certainty of judicial acts, preventing protracted trials and violating the principle of considering a case within a reasonable time, as well as abuse of the right by unscrupulous participants in trials, excluded interim judicial acts from the number of acts allowed for revision due to newly discovered circumstances. Depending on the legal nature, interim judicial acts differ significantly in the degree of significance and the occurrence of legal consequences. Some of them are of a pronounced auxiliary nature, others are of independent value and can significantly affect the outcome of the case, while affecting the most important interests of both the individual and society and the state. Such interim judicial acts, in their functional orientation, have all the features of final acts and are able to influence both the development of the judicial process (restoration of the limitation period) and the preemptive effect on it (refusal to accept proceedings, application of the limitation period, termination of the proceedings). They sometimes play a decisive role in the outcome of the case, give rise to legal consequences that go beyond the scope of procedural legal relations. Based on the goals of providing fundamental guarantees to participants in legal proceedings, they should not be considered as judicial acts, the revision of which, due to newly discovered circumstances, can be postponed to the stage after the consideration of the case on the merits and the issuance of a final decision.

And finally, I will cite one more case in which the Constitutional Court considered the constitutionality of the normative provision of the Plenum of the Supreme Court of the Kyrgyz Republic, which provides for a ban on consideration by the courts of the decisions of the commission on granting rights to a land plot, created by authorized bodies when granting rights to land plots. In this case, the constitutional control body adopted a number of important legal positions that expanded the limits of normative control over the acts of the judicial system, which are inherently normative in nature.

Thus, it was noted that the Constitutional Court, based on its legal nature, actively influences the

law-making process and the adopted normative legal acts; responds to the revealed shortcomings and contradictions of normative legal acts to the Basic Law, depriving them of legal force. A specific control function aimed at ensuring the hierarchical subordination of the Constitution of all acts of a normative legal nature, the position of the Constitutional Court in determining the limits of constitutional control is decisive and should cover the scope of rule-making from top to bottom, and cannot depend on legislative definitions. In other words, the nature of constitutional control determines its functioning as the main guarantor of legality in the entire field of rule-making, covering the scope of constitutional review of any acts of government bodies of a normative nature. At the same time, it is noted that the scope of constitutional control is expanding in direct proportion to the expansion of the scope of legal regulation. Accordingly, any normative legal regulation, regardless of the legislative framework, should be subject to constitutional control, with the inadmissibility of formal reasons to bypass such a check. Thus, there can be no acts of a normative nature, as determined and assessed by the Constitutional Court itself, that would not fall under the scope of constitutional control, otherwise the principle of the supremacy of the Constitution and the rule of law will be violated. that the scope of constitutional control is expanding in direct proportion to the expansion of the scope of legal regulation.

Globalization and the rapid expansion of the spheres of human life lead to the need not only for dynamic changes in legislation in all branches of law, but also for the reconstruction of the structural elements of the legal system, the emergence of new legal technologies, forms and sources of law, ways and means of legal influence on social relations. The speed of such changes, the novelty and complexity of the tasks facing the legislator in fundamentally new socio-economic and political conditions inevitably lead to a decrease in the quality of adopted laws, both in terms of their technical and legal form and legal content, to the emergence of conflicts and ambiguities in legislative material. In such circumstances, an important phenomenon for the legal system are the interpretative acts of the judicial system itself, which play an increasing role in ensuring correct and uniform law enforcement practice. However, the need to verify the constitutionality of the decisions of the Plenum of the Supreme Court arises only when they are endowed with regulatory functions inherent in normative legal acts, the universally binding legal significance of which for the law enforcement activities of lower courts can give rise to serious risks of infringement of human and civil rights and freedoms.

In this case, the acts of the executive branch and the local self-government body, explained by the contested decision of the Plenum of the Supreme Court, had a serious shortcoming, which,

when applied in aggregate, led to a restriction of citizens' access to justice. Having assessed them for compliance with the Constitution, the body of constitutional control concluded that, regardless of the procedural form of legal proceedings, the presence of a fixed procedure providing for the obligation of any authorized body of state power to denounce their decisions in legal acts is an indispensable condition for the full implementation of the constitutional right of everyone to judicial protection.

As a result of the decisions of the Constitutional Court, the legislator and executive authorities are forced to change their normative legal acts, which will certainly improve access to justice for citizens and increase the level of democracy and legal certainty in society.

Today, the number of appeals from citizens who consider the constitutional court as an effective tool for restoring their violated rights is increasing. Undoubtedly, the abstract form of control has provided a greater number of citizens in the country with the opportunity to protect their rights through constitutional justice, as evidenced by statistical data from the court.

Since the formation of the Constitutional Chamber of the Supreme Court of the Kyrgyz Republic (2013), and currently the Constitutional Court, as of December 31, 2022, the Constitutional Court received 766 appeals, of which only 127 appeals (17%) were accepted for consideration. The main reason for refusals to accept appeals for processing is their non-compliance with the accessibility requirements established by the constitutional Law “On the Constitutional Court of the Kyrgyz Republic”.

The Constitutional Court attaches great importance and makes great efforts to increase the legal awareness of citizens about the procedure for applying to the supreme body of constitutional control. The Constitutional Court systematically conducts information seminars and summer schools on constitutionalism for judges, lawyers, representatives of state bodies, human rights organizations, legal scholars, members of Parliament and the media. At such events, special attention is paid to the rules and procedures for filing appeals to the Constitutional Court, the legal positions of the body of constitutional control expressed in its decisions are explained, as well as the procedure for applying and implementing its decisions.

In conclusion, I would like to emphasize that the trust on the part of society is one of the key factors for the existence and effectiveness of the Constitutional Court. Based on its legal nature, it makes a significant contribution to increasing the level of accessibility of justice to citizens and their associations, clearly following the letter and spirit of the Basic Law, bringing a special legal culture to society - the recognition and application of a proactive position of constitutional loyalty

by everyone, and also brings to society peace and development stability in general.

I am confident that the international symposium will not only facilitate a comprehensive discussion of the issues pertaining to effective access to justice, but also enable an effective exchange of experiences, ultimately leading to the adoption of best practices to ensure the protection of the rights and freedoms of every person through judicial means. I would also like to express my sincere gratitude to the AACC Secretariat for Research and Development for organizing this event at such a high level!

Thank you for attention!

4TH INTERNATIONAL SYMPOSIUM OF THE AACC SRD

[Session 1-2]

Individual Access to Constitutional Justice

Chair

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Chief Justice, Supreme Court of Bangladesh

Presenters

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President, Supreme Constitutional Court of Palestine

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Justice, Constitutional Court of Tajikistan

Kenan Yasar
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Omar Belhadj
President, Constitutional Court of Algeria

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Presentation 1

The Individual Access to Constitutional Justice

Mohammad El Haj Kacem
President, Supreme Constitutional Court of Palestine

The Individual Access to Constitutional Justice

Presentation of the Supreme Constitutional Court of Palestine

The direct contact of the citizens with constitutional justice is an important and practical guarantee to protect the rights from any threat since the individuals know better when their rights are violated which confirms the positive role of the individuals in practicing their business and this gives them satisfaction and a reassuring sense of justice which contributes to the increase of confidence in the Judiciary and to the embodiment of judicial security by spreading a general sense of fairness. It also contributes to enhancing the legal and human rights culture to the various social segments, instead of remaining exclusive to the political and intellectual elite, in a manner that establishes the supremacy of the Basic Law (the Constitution) in the mind of the citizen as a normative reference for measuring the extent to which the entire legal system represents the provisions and principles of the Constitution.

The citizen's defense of his acquired rights, which were approved and fortified by the Basic Law (the Constitution), makes him aware of their impact on his reality and position, and raises his positive role in self-advocacy by enabling him to assert his constitutionally guaranteed rights.

The judicial empowerment of the citizen by encouraging him to access the constitutional judiciary is an important opportunity to test the independence and effectiveness of the judicial system and to find out the progress made in achieving harmony between the various types of courts and their complementarity in protecting the rights of citizens since judicial procedure provides for the freedom of litigation and the use of defense, in addition to the guarantees provided by the openness of the sessions, the multiplicity of degrees of litigation, the use of means of evidence and the causation of judgments, which achieves the effectiveness of oversight and embodies the principle of the supremacy of the constitution.

Accordingly, the Palestinian legislator’s openness to individuals by devoting the right of access to constitutional justice -through the direct, original Action and the rebuttal of the unconstitutionality of laws and regulations that violate the fundamental freedoms and rights-, thus he has finally joined the countries that operate under judicial oversight, as he is committed to promoting and respecting the basic rights of citizens.

Thus, we will discuss:

Firstly: The Direct Constitutional Action (the direct, original action)

Secondly: The Rebuttal of Unconstitutionality (before the trial court)

Firstly: The Direct Constitutional Action

1. The Direct, Original Action in Palestine

This oversight means that the aggrieved person d who is affected by a specific law or provision in a law files an original Action before the competent court (the Supreme Constitutional Court) in which he requests a ruling to nullify or prohibit it for violating the Basic Law (the Constitution).

- The Article No. (27) of the Law of the Supreme Constitutional Court No. 3 of 2006 and its amendments discussed the Direct, Original Action stipulating that: "The Court shall assume judicial oversight over constitutionality as follows: 1. By means of a direct, original action which an aggrieved person files before the Court with reference to the provisions of Article 24 of this Law.

- The terms of admissibility of the direct, original Action:
  - In order to submit the direct, original action, the Court stipulated the existence of the damage suffered by the plaintiff as a result of the challenged legislative provision in the Action submitted before the Constitutional Court.
  - The damage suffered by the plaintiff must be a direct actual damage from the contested text conditional on the presence of a direct personal interest of the plaintiff.
  - In the direct original Action, it is not sufficient that the challenged legislative texts are in themselves contrary to a provision in the Basic Law (the Constitution). Rather, by applying these texts to the plaintiff, these texts must have violated the basic rights guaranteed by the Basic Law (the Constitution) in the sense that the plaintiff suffered direct and not potential harm.
  - The scope of the constitutional case must be defined (by a text or several texts, not the law as a whole) so that the constitutional judge can intervene in the direct oversight of the constitutionality.

- The direct, original Action shall only be accepted when submitted by persons who are harmed as a result of the contested text. If the constitutionality of the challenged text was not applied to the plaintiff or he was not addressed by its provisions, or if the violation of the rights claimed by the plaintiff is not related to this text, then his interest is denied in filing a constitutional action.
- The direct, original action shall not be accepted unless through a lawyer whose experience and practice of the legal profession is not less than ten years in accordance with the provisions of Article (31) and signed by the plaintiff's power of attorney.
- The direct, original action requires judicial fees pursuant to Article (45) of the Law of the Supreme Constitutional Court No. 3 of 2006 and its amendments.

Secondly: connection of the constitutional action by rebuttal

When the plaintiff resorts to judiciary, he shall follow the right formal procedures stipulated in the Law of the Supreme Constitutional Court No. (03) of 2006 and its amendments on the rebuttal of the unconstitutionality in order to establish the adversarial. Moreover, his action shall be based on a right and he shall have a case, i.e. the litigator allows him to resort to Judiciary in order to protect the alleged right, thus, if these conditions are not completed, then the defendant has the right to respond to what his opponent claims with a rebuttal that cannot be directed to anything other than the litigation, then it is formal or due to the origin of the right claimed by his opponent, then it is objective, or for the action itself, then it is a rebuttal of the non-admissibility of the action.

In order to discuss the provisions of communication with the court by rebuttal of the unconstitutionality submitted to the trial court by one of the litigants of the substantive Action requires that we address the following:

1. Determine the concept of serious rebuttal and its nature "practical steps to submitting the rebuttal and estimating the seriousness"

The Article No. (3/27) of the Law of the Supreme Constitutional Court No. (03) of 2006 and its amendments stipulates that:

"If the adversaries rebut, during the hearing of an Action before a Court that a provision in a law, decree, regulation or system is unconstitutional, and the court or panel deems that the rebuttal is

serious, it shall adjourn the hearing of the Action and determine for the person raising the rebuttal an appointment within a period not to exceed (60) days to file an action before the Supreme Constitutional Court. If the action is not filed within the permitted time, the rebuttal shall be deemed as if it had never taken place."

What is learned from this text is that it is necessary for one of the opponents of a substantive action to rebut "an action filed with objective demands such as a request for a specific right and the plaintiff's discharge from a specific debt" before one of the trial courts of the unconstitutionality of a text in which the court estimates the seriousness, then what does "estimating the seriousness" mean?

Estimating the seriousness of a rebuttal means that the trial judge verifies – according to his discretionary power- that the presented rebuttal is not intended to maliciousness or to prolong the conflict.

The judge's way to do this is to verify two essential things:

Firstly: the adjudication of the constitutional issue shall be productive in the substantive dispute, which is the Law, or in other words, that the contested text is likely to be applied to the dispute in the original case in any way, and that the judgment of unconstitutionality of a text will benefit the opponent in the substantive case.

If the trial judge finds that the contested text does not relate to the presented dispute, then he shall dismiss the rebuttal of the unconstitutionality of a text.

Secondly: The judge must verify that the contested text bears the points of view, i.e. there is a suspicion that this text is unconstitutional.

Regarding the assessment of the seriousness, it is not necessary to outweigh the unconstitutionality of the text in question since we adopt the principle of centralized oversight, and if the court that is adjudicating the substantive case expands in estimating the rebuttal, it will lead to the intervention of that court - unlawfully– in the role of the constitutional judge.

And regarding the estimation of the seriousness of the rebuttal, the involvement of the trial court in the constitutional matters and adjudicating the case shall not terminate the jurisdiction of the Supreme Constitutional Court since it is the only Court that decides on the constitutionality of legal texts under the Constitutional oversight and its standards.

2. The Inadmissibility of adjudicating the substantive case before adjudicating the constitutional issue
" the anticipation of the trial court for the ruling of the Constitutional Court"

After the completion of the process of assessing the seriousness of the rebuttal of the unconstitutionality of a text, and the permission by the trial court to the one who raised this claim to file a constitutional action within the specified deadline, and the actual filing of this action, and the Constitutional Court's contact with it, the question arises about the extent of the permissibility of reversing the declaration of the unconstitutionality? And the extent to which it is permissible to waive the rebuttal of unconstitutionality by the person who raised it? Is it permissible for the trial court to take any action in the substantive case before deciding on the constitutional issue?

The summary of the Supreme Constitutional Court's jurisprudence is that the trial court must abide by the estimation of seriousness and authorize the person who raised the rebuttal of unconstitutionality to file a constitutional action, and when he files the constitutional action, the trial court must refrain from taking any action in the substantive case in anticipation of the Supreme Constitutional Court's judgment to act based on that judgment with the pending case.

Presentation 2

Access to Constitutional Justice in the Republic of Tajikistan

Balajon Idriszoda
Justice, Constitutional Court of Tajikistan

Access to Constitutional Justice in the Republic of Tajikistan

Balajon Idriszoda
Justice, Constitutional Court of Tajikistan

Dear conference participants!

Allow me, on behalf of the Constitutional Court of the Republic of Tajikistan, to welcome you and wish you fruitful work.

One of the key tasks of a modern democratic and legal state is to ensure the rule of law and protect the rights and freedoms of the individual.

The principles of the rule of law and a democratic society, international human rights standards unambiguously imply the possibility of judicial protection of violated rights. Article 19 of the Constitution of the Republic of Tajikistan establishes that everyone is guaranteed judicial protection. Everyone has the right to demand that his case be heard by a competent, independent and impartial tribunal established by law. It follows from this provision of the Constitution that justice in the Republic of Tajikistan can only be administered by courts. No other bodies or persons have the right to assume judicial functions. It is not allowed to create various emergency courts, Sharia courts, "troikas", the implementation of lynching on the basis of blood feud, etc.

Articles 5, 17, 19, 84 of the Constitution of the Republic of Tajikistan establish the priority constitutional goal of justice - the protection of the rights and freedoms of man and citizen. Thus, judicial protection is one of the necessary conditions for the legal protection of an individual, characterized by granting a person broad constitutional rights and the existence of an effective mechanism for their legal protection. The level of judicial protection of the rights of citizens is considered as the main indicator of the place of the judiciary in society, an indicator of the democracy of the society itself.

Without access to justice, a person cannot exercise his right to judicial protection, and an indication of the security of his rights with justice makes it meaningful for a person to go to court for the protection of violated rights. The judicial system is established by the Constitution and the Constitutional Law of the Republic of Tajikistan "On Courts of the Republic of Tajikistan". In Art. 84 of the Constitution of the Republic of Tajikistan states that “the judiciary is independent and is

exercised on behalf of the state by judges. The judiciary protects the rights and freedoms of man and citizen, the interests of the state, organizations, institutions, legality and justice.

Judicial power is exercised by the Constitutional Court, the Supreme Court, the Supreme Economic Court, the Military Court, the court of the Gorno-Badakhshan Autonomous Region, the courts of the regions, the city of Dushanbe, cities and districts, the Economic Court of the Gorno-Badakhshan Autonomous Region, the economic courts of the regions and the city of Dushanbe.

One of the central places in the judicial system for the protection of human rights is given to the Constitutional Court. The Constitutional Court of the Republic of Tajikistan is the body of judicial power for the protection of the Constitution of the Republic of Tajikistan. Its powers are specified in Art. 89 of the Constitution. No other court in the territory of the Republic of Tajikistan has the right to exercise these powers. By its nature, the Constitutional Court is called upon to help citizens in their dispute with the authorities, including the one that issued the illegal act. In recent years, amendments and additions have been made to the Constitutional Law "On the Constitutional Court", in accordance with which the powers of the Constitutional Court and the circle of subjects entitled to apply to this body have been expanded. This indicates an increase in the role of the Constitutional Court in the judicial system of the country. Some of these changes also apply to human rights. In particular, it should be noted that one of the subjects of the appeal to the Constitutional Court is the Commissioner for Human Rights on issues of violation of the constitutional rights and freedoms of citizens on the compliance of laws and other legal acts with the Constitution of the Republic of Tajikistan.

Also, citizens can now apply to the Constitutional Court on violation of constitutional rights and freedoms related to the applied or applicable law and other legal act in a specific legal relationship, as well as on the compliance with the Constitution of the Republic of Tajikistan of the law, other legal acts and guiding explanations of the Plenums of the Supreme Court of the Republic of Tajikistan , the Supreme Economic Court of the Republic of Tajikistan, applied by the court against them in a particular case. These changes will increase the effectiveness of the protection of human rights in the activities of the Constitutional Court and increase its authority among the population.

The Constitutional Court is the only body designed to find the optimal balance between power and freedom, public and private interests, to protect the individual, society and the state from unreasonable encroachments, to maintain the state of protection and security of the constitutional and legal status of each and every subject of legal relations. This approach stems from the

constitutional powers of the Constitutional Court.

In the system of separation of powers, the Constitutional Court is a unique public-power subject, designed to find the optimal balance between power and freedom, public and private interests, to protect the individual, society and the state from unreasonable encroachments, to maintain the state of security and security of the constitutional and legal status of each and every subject social and legal relations.

When resolving specific cases on the constitutionality of the contested legislative provisions, the Constitutional Court reveals the content of the constitutional norms, evaluates the verifiable provisions of the sectoral legislation in their systemic interconnection, at the same time affirming, on the basis of the constitutional imperatives of the supremacy and direct action of the Constitution, the immediacy of the action and the rights and freedoms of man and citizen in themselves - both for the legislator and for all law enforcers.

In this regard, in its activities, the Constitutional Court of the Republic of Tajikistan uses modern trends that form the basis of the system of constitutional control and constitutional justice. On the one hand, this is the definition of a uniform understanding of the constitutional rights and freedoms of man and citizen, on the other hand, the idea of a hierarchical order in the legal system, which allows for control over the law-making activities of public authorities.

The international legal aspect is present in the resolution by the Constitutional Court of many cases related to the protection of human rights and freedoms. Recognizing this or that law, another normative act or some of their provisions as appropriate and inconsistent with the Constitution, he often states in his decisions a contradiction or, conversely, the compliance of the contested legal provisions with the generally recognized principles and norms of international law, and international treaties. Since the ratification of the main human rights documents, in particular the International Covenant on Civil and Political Rights, as well as the International Covenant on Economic, Social and Cultural Rights, an approach has been introduced in the practice of the Constitutional Court of the Republic of Tajikistan, when the generally recognized principles and norms of international law are used as fundamental principles, in accordance with which the state implements the rights and freedoms of man and citizen, enshrined in the Constitution. The Constitutional Court not only draws on international legal reasoning as an additional argument in favor of its legal positions developed on the basis of the Constitution, but also uses it both to clarify the meaning and significance of the constitutional text, and to identify the constitutional and legal meaning of the law under review. The Constitutional Court of the Republic of Tajikistan, developing with the use of international legal arguments legal positions that are of a general nature

and binding on courts, other state bodies and officials, in practice implements the constitutional provision on the belonging of international legal principles and norms to the national legal system. By giving its decision additional weight at the expense of international law, the Constitutional Court demonstrates that it considers international law to be an important criterion to be met by the legislation and practice of courts. Often, the decision of the Constitutional Court, with the legal position contained in it and the interpretation of the constitutional and legal meaning of the law under review, guides the legislator, courts, citizens in relation to the application of international law, respectively, when improving legislation, resolving cases, defending their own rights. Thus, we can state that when making decisions, the Constitutional Court of the Republic of Tajikistan proceeds from a number of fundamental ideas set forth in the Universal Declaration of Human Rights and other international legal acts on human rights. The leading of them is the recognition of human dignity and the principle of equality and inalienability of human rights and freedoms arising from it. It is on these principles that he builds his legal positions. The Constitutional Court, through its activities, contributes to ensuring the principle of equality of all before the law and the court, the elimination of discrimination, unfair conditions for the implementation of fundamental rights and freedoms of man and citizen, and in practice embodies the requirements that are laid down in Article 5 of the Constitution of the Republic of Tajikistan. In particular, in the case "On the conformity of the Constitution of the Republic of Tajikistan with the Decree of the Presidium of the Supreme Council of the Republic of Tajikistan dated November 14, 1993 No. 134 "On the suspension of the operation of Articles 6, 28, 48, 49, 53, 53.1, 85, 90, 92, 97, 221.1 and 221.2 of the Code of Criminal Procedure of the Republic of Tajikistan", approved by the Law of the Republic of Tajikistan dated December 28, 1993, No. 944 "On approval of Decrees of the Presidium of the Supreme Council of the Republic of Tajikistan on amendments and additions to certain legislative acts", in terms of appealing to the court of arrest or extension of the term detention and judicial verification of the validity of the arrest or extension of the period of detention "The Constitutional Court of the Republic of Tajikistan in its decision notes that this Decree is contrary to Article 19 of the Constitution of the Republic of Tajikistan, since in accordance with this provision of the Constitution, every citizen is guaranteed judicial protection and the right to demand consideration of his case by a competent and impartial tribunal.

Summing up the above, it should be noted that the application of international norms and standards in the field of human rights by the Constitutional Court is an important mechanism for the protection of human rights, as well as a source of law, thanks to which contradictions and conflicts of legislation are eliminated. As a national judicial body of constitutional control, the

Constitutional Court of the Republic of Tajikistan orients the development of the national legal system, its lawmaking and law enforcement practice in general in the direction of compliance with the modern understanding of the rights and freedoms of man and citizen, enshrined in the main international human rights documents.

ДОСТУП К КОНСТИТУЦИОННОМУ ПРАВОСУДИЮ В РЕСПУБЛИКЕ ТАДЖИКИСТАН

Уважаемые участники конференции!

Позвольте от имени Конституционного суда Республики Таджикистан приветствовать Вас и пожелать Вам плодотворной работы.

Одними из ключевых задач современного демократического и правового государства является обеспечение верховенства закона и защиты прав и свобод личности.

Принципы правового государства и демократического общества, международные стандарты прав человека однозначно предполагают возможность судебной защиты нарушенных прав. В статье 19 Конституции РТ устанавливается, что каждому гарантируется судебная защита. Каждый вправе требовать, чтобы его дело было рассмотрено компетентным, независимым и беспристрастным судом, учрежденным в соответствии с законом. Из этой нормы Конституции вытекает, что правосудие в Республике Таджикистан может осуществляться только судами. Никакие другие органы и лица не вправе принимать на себя судебные функции. Не допускается создание различных чрезвычайных судов, шариатских судов, «троек», осуществление самосуда по мотиву кровной мести и т.п.

Статьи 5, 17, 19, 84 Конституции РТ закрепляют приоритетную конституционную цель правосудия – защиту прав и свобод человека и гражданина. Таким образом, судебная защита – одно из необходимых условий правовой защищенности личности, характеризующееся предоставлением лицу широких конституционных прав и наличием эффективного механизма их правовой защиты. Уровень судебной защиты прав граждан рассматривается как основной показатель места судебной власти в обществе, показатель демократичности самого общества.

Не имея доступа к правосудию, лицо не может реализовать свое право на судебную защиту, а указание на обеспеченность его прав правосудием придает смысл обращению лица в суд за защитой нарушенных прав. Судебная система устанавливается Конституцией и Конституционным Законом Республики Таджикистан «О судах Республики Таджикистан». В ст. 84 Конституции РТ говорится, что «судебная власть является независимой и осуществляется от имени государства судьями. Судебная власть защищает права и свободы человека и гражданина, интересы государства, организаций, учреждений, законность и справедливость

Судебную власть осуществляют Конституционный суд, Верховный Суд, Высший экономический суд, Военный суд, суд Горно-Бадахшанской автономной области, суды

областей, города Душанбе, городов и районов, Экономический суд Горно-Бадахшанской автономной области, экономические суды областей и города Душанбе».

Одно из центральных мест в судебной системе защиты прав человека отводится Конституционному суду. Конституционный суд Республики Таджикистан является органом судебной власти по защите Конституции Республики Таджикистан. Его полномочия указаны в ст. 89 Конституции. Никакой другой суд на территории РТ не имеет право осуществлять эти полномочия. По своей природе Конституционный суд призван помогать гражданам при их споре с властью, в том числе с той, которая издала незаконный акт. В последние годы были внесены изменения и дополнения в Конституционный закон «О Конституционном суде», в соответствии с которыми были расширены полномочия Конституционного суда и круг субъектов, имеющих право обращаться в данный орган. Это свидетельствует о повышении роли Конституционного суда в судебной системе страны. Ряд этих изменений касается и прав человека. В частности, следует отметить, что одним из субъектов обращения в Конституционный суд становится Уполномоченный по правам человека по вопросам нарушения конституционных прав и свобод граждан о соответствии Конституции Республики Таджикистан законов и других правовых актов.

Также в Конституционный суд теперь могут обращаться граждане о нарушении конституционных прав и свобод, связанных с примененным или подлежащим применению законом и другим правовым актом в конкретном правоотношении, а также о соответствии Конституции Республики Таджикистан закона, других правовых актов и руководящих разъяснений Пленумов Верховного Суда Республики Таджикистан, Высшего экономического суда Республики Таджикистан, примененных судом в их отношении в конкретном деле. Эти изменения повысить эффективность защиты прав человека в деятельности Конституционного суда и повысить его авторитет среди населения.

Конституционный суд является единственным органом, призванным находить оптимальный баланс между властью и свободой, публичными и частными интересами, защищать личность, общество и государство от необоснованных посягательств, поддерживать состояние защищенности и безопасности конституционно-правового статуса всех и каждого субъекта правовых отношений. Такой подход вытекает из конституционных полномочий Конституционного суда.

В системе разделения властей Конституционный суд является уникальным публично-властным субъектом, призванным находить оптимальный баланс между властью и свободой, публичными и частными интересами, защищать личность, общество и государство от необоснованных посягательств, поддерживать состояние защищенности и безопасности конституционно-правового статуса всех и каждого

субъекта социальных и правовых отношений.

Разрешая конкретные дела о конституционности оспариваемых законодательных положений, Конституционный суд раскрывает содержание конституционных норм, оценивает проверяемые положения отраслевого законодательства в их системной взаимосвязи, одновременно утверждая на основе конституционных императивов верховенства и прямого действия Конституции непосредственность действия и самих по себе прав и свобод человека и гражданина – как для законодателя, так и для всех правоприменителей.

В этой связи в своей деятельности Конституционный суд Республики Таджикистан использует современные тенденции, которые заложены в основу системы конституционного контроля и конституционного правосудия. С одной стороны, это определение единообразного понимания конституционных прав и свобод человека и гражданина, с другой стороны - идея иерархического порядка в правовой системе, что позволяет осуществлять контроль над законотворческой деятельностью органов государственной власти.

Международно-правовой аспект присутствует при разрешении Конституционным судом многих дел, связанных с защитой прав и свобод человека. Признавая тот или иной закон, иной нормативный акт либо отдельные их положения соответствующими и не соответствующими Конституции, он в своих решениях нередко констатирует противоречие или, наоборот, соответствие оспариваемых законоположений общепризнанным принципам и нормам международного права, и международным договорам. В практике Конституционного суда Республики Таджикистан с момента ратификации основных документов по правам человека, в частности Международного пакта о гражданских и политических правах, а также Международного пакта об экономических, социальных и культурных правах, внедрен подход, когда общепризнанные принципы и нормы международного права используются в качестве основополагающих принципов, сообразуясь с которыми в государстве реализуются права и свободы человека и гражданина, закрепленные Конституцией. Конституционный суд не только привлекает международно-правовую аргументацию в качестве дополнительного довода в пользу своих правовых позиций, вырабатываемых на основе Конституции, но и использует ее как для разъяснения смысла и значения конституционного текста, так и для выявления конституционно-правового смысла проверяемого закона. Конституционный суд Республики Таджикистан, вырабатывая с применением международно-правовых аргументов правовые позиции, носящие общий характер и обязательные для судов, других государственных органов и должностных лиц, на практике реализует конституционное положение о принадлежности международно-правовых принципов

и норм к национальной правовой системе. Придавая своему решению дополнительный вес за счет международного права, Конституционный суд демонстрирует, что считает международное право важным критерием, которому должны соответствовать законодательство и практика судов. Нередко решение Конституционного суда, с содержащимися в нем правовой позицией и толкованием конституционно-правового смысла проверяемого закона, ориентирует законодателя, суды, граждан в отношении применения международного права, соответственно при совершенствовании законодательства, решении дел, отстаивании собственных прав. Таким образом, мы можем констатировать, что при вынесении решений Конституционный суд Республики Таджикистан исходит из ряда фундаментальных идей, изложенных во Всеобщей декларации прав человека и других международно-правовых актах по правам человека. Ведущей из них является признание достоинства человека и вытекающий из него принцип равенства и неотъемлемости прав и свобод человека. Именно на этих принципах он строит свои правовые позиции. Конституционный суд своей деятельностью способствует обеспечению принципа равенства всех перед законом и судом, ликвидации дискриминации, несправедливых условий реализации основных прав и свобод человека и гражданина, и на практике воплощает те требования, которые заложены в статье 5 Конституции Республики Таджикистан. В частности по делу «О соответствии Конституции Республики Таджикистан Указа Президиума Верховного Совета Республики Таджикистан от 14 ноября 1993 года № 134 «О приостановлении действия статей 6, 28, 48, 49, 53, 53.1, 85, 90, 92, 97, 221.1 и 221.2 Уголовно-процессуального кодекса Республики Таджикистан», утверждённого Законом Республики Таджикистан от 28 декабря 1993 года, № 944 «Об утверждении Указов Президиума Верховного Совета Республики Таджикистан о внесении изменений и дополнений в некоторые законодательные акты», в части обжалования в суд ареста или продления срока содержания под стражей и судебной проверки обоснованности ареста или продления срока содержания под стражей» Конституционный суд Республики Таджикистан в своем постановлении отмечает, что данный Указ противоречит статье 19 Конституции Республики Таджикистан, так как в соответствии с данной нормой Конституции каждому гражданину гарантируется судебная защита и право требовать рассмотрения его дела компетентным и беспристрастным судом.

Подводя итог вышеизложенному, следует отметить, что применение международных норм и стандартов в области прав человека Конституционным судом является важным механизмом защиты прав человека, а также источником права, благодаря которому устраняются противоречия и коллизии законодательства. Как национальный судебный орган конституционного контроля, Конституционный суд

Республики Таджикистан ориентирует развитие национальной правовой системы, ее законотворчество и правоприменительную практику в целом в направлении соответствия современному пониманию прав и свобод человека и гражданина, закрепленных в основных международных документах по правам человека.

Presentation 3

Individual Application in Türkiye

Kenan Yasar
Justice, Constitutional Court of Türkiye

Individual Application in Türkiye

Kenan Yasar
Justice, Constitutional Court of Türkiye

Honourable Presidents and Justices,
Distinguished participants, Ladies and Gentlemen,

It is an honour to participate and address in this international symposium held by the Korean Constitutional Court, and I am delighted to be here today. I would like to thank the Constitutional Court of Korea for the organization of this symposium and for their warm hospitality.

Today, I am going to deliver a speech on the individual application in Türkiye.

Distinguished Participants,

The individual application mechanism was introduced for the very first time into the Turkish legal system, by the constitutional amendment of 2010. It took nearly two years before entering into force on 23 September 2012.

Prior to the introduction of such mechanism at the national level, Turkish citizens had already the right of individual application to the European Court of Human Rights (ECHR), since 1987, after having exhausted all the national effective remedies.

Since 2012, the individuals have also the right of individual application to the Constitutional Court. It is also considered as an effective remedy to be exhausted before applying to the ECHR.[1)]

Undoubtedly, the individual application mechanism is a means of ensuring the effective protection of the fundamental rights and freedoms enshrined by the Constitution at the national level.

Through this mechanism, each individual have had a new domestic remedy in Türkiye whereby he/she could raise allegations of any violation of fundamental rights and freedoms.

As a matter of fact, the political will amending the Constitution has envisaged the individual application mechanism as an institution that will entrust *"the Constitutional Court with the protection and improvement of rights and freedoms"*.

1) See among many others, *Hasan Uzun v. Türkiye* (dec.), no. 10755/13, §§ 25-27, 30 April 2013; *Koçintar v. Türkiy*e (dec.), no. 77429/12, § 41, 1 July 2014; *Kaya and Others v. Türkiye* (dec.), no. 9342/16, 20 March 2018.

Also in the report issued by the Parliamentary Constitutional Committee, it is indicated that the Constitutional Court so far perceived as a body *"protecting the State and the system, in pursuit of the Statist understanding"* will be considered as a tribunal *"which from now on renders judgments in pursuit of, and affords protection to, the freedoms"* with the introduction of individual application.

Esteemed Participants,

Let me give an insight on application criteria to the Constitutional Court.

As a rule, "everyone" may file an individual application before the Constitutional Court.

Private legal persons (associations, foundations, commercial partnerships etc.) may file individual application on the grounds that the rights granted only for legal persons such as freedom of association or right to legal remedies were violated.

Public legal persons are not entitled to the right to individual application.

Anyone who claims that any of his/her fundamental constitutional rights was violated is first required to use other administrative and judicial mechanisms before resorting to this remedy, therefore individuals are obliged to exhaust "all administrative and judicial remedies prescribed by law" for a procedure, act or neglect that are claimed to cause violation.

Distinguished Participants,

For the examination of merits of an individual application, the right alleged to be intervened by public authorities should be guaranteed by the Constitution and secured under the European Convention on Human Rights (Convention).

In other words, it is not possible to give admissibility decision for an application filed for alleged violation of a right that is not jointly covered by the Constitution and the Convention.[2)]

The starting date for the competence of the Constitutional Court in individual applications is 23 September 2012. So, the Court can examine individual applications to be lodged against final acts and decisions that are finalized after 23 September 2012.

The individual application should be made within thirty days starting from the date of the final decision.

Claims of violations that can be the subject of individual application will be examined only if there is an act, action or neglect by the bodies who exercise the public power of the State of Republic of

2) See *Onurhan Solmaz* (dec.), App. No: 2012/1049, 26 March 2013, § 18.

Türkiye or an act or neglect that can be attributed to public authority. On the other hand, individual application cannot be filed in principle against acts of private persons. Exception to the rule which stipulates that individual application cannot be filed against acts of private persons or institutions is that public authorities have a positive obligation in prevention of violations of constitutional rights.

Individual application can only be introduced by those whose actual and personal rights are directly affected by an act, action or neglect claimed to result in violation. Only individuals who personally become a victim due to violation of a fundamental right may resort to the remedy of individual application. Therefore, individual application is not designed as an abstract application or *actio popularis*.

Since individual application procedure is not regulated as a remedy that allows the claim of concrete unconstitutionality of a public regulation, legislative procedures (laws, bylaws etc.) and regulatory procedures of administration (internal rules, regulations etc.) cannot be subject of an individual application directly. In addition, an individual application cannot be filed in any way whatsoever against judgments of the Constitutional Court and acts excluded from judicial review by the Constitution.

Distinguished Participants,

First I should note that individual application has been one of the most important judicial reforms in 2010. Besides I also mention that the last 11-year's period of individual application has undergone arduous times. Within this period, following the coup attempt staged on 15 July 2016, a state of emergency was declared, and subsequently, the Court faced an excessive workload of individual applications in mass. In fact, not merely during the state of emergency, but from the very beginning, Türkiye has undertaken such an excessive workload as to be incomparable with that of the other countries operating individual application mechanism.

The statistics on the individual application with 11-year past might give a better insight into the challenges experienced with respect to the Court's workload.

Since 23 September 2012, the Constitutional Court has received more than 500,000 individual applications, 390,000 of which have been adjudicated and 118,000 of which are pending. Nearly 50,000 of the pending applications, amounting to 45% thereof, concern the right to be tried within a reasonable time.

It is apparent that the high rate of the complaints about the excessive length of proceedings out of the pending applications is the case also for the Court's judgments finding a violation. Within this

11-year's period of individual application, the Constitutional Court has issued nearly 70,000 judgments finding a violation, 80% of which concerns merely the right to be tried within a reasonable time.

It is also evident that taken together with the judgments finding a violation of the right to a fair trial along with the violations of the excessive length of proceedings, 85% of the total violation judgments is then consisted of the cases related to the right to a fair trial. Among the fundamental rights and freedoms with the highest rate of infringement are the right to property (5%), freedom of expression (5%), as well as the right to respect for private and family life (2%).

Indeed, the statistics as to the pending cases and violations in individual application point to the fair trial, notably the excessive length of proceedings.

Distinguished Participants,

Now let me continue with some remarks regarding the individual application in the light of these statistics.

I can say that individual application today faces two challenges.

The first challenge is the ever-increasing workload, whereas the second one is the pursuance, in a consistent and coherent manner, of the case-law established with a rights-based approach over a period of 11 years. The successful future of the individual application depends on the ability to effectively cope with these two challenges.

The Constitutional Court has taken the necessary measures from the outset in terms of workload by ensuring judicial administration through a dynamic approach. In this regard, the Court has concluded an average of 60,000 individual applications annually in the last two years, on one hand, and issued decisions identifying the structural and systemic problems leading to violations, on the other.

Some of these judgments were rendered by applying the pilot judgment procedure, which is intended to ensure the conclusion of a large number of applications on similar matters before the Court.

The Court rendered similar judgments also in previous years, whereby it identified structural problems leading to violations of rights.[3] Through these judgments, the Court has strived for both

3) For the pilot judgment where it was concluded that there had been no effective legal remedy to challenge the deportation order, see *Y.T.* [Plenary], no. 2016/22418, 30 May 2019; for the pilot judgment regarding the blocking of access to internet, see *Keskin Kalem Yayıncılık ve Ticaret A.Ş. and Others* [Plenary], no. 2018/14884, 27 October 2021; and for the pilot judgment where a structural problem was identified in relation to Article 220 § 6 of the Turkish Criminal Code, see *Hamit Yakut* [Plenary], no. 2014/6548, 10 June 2021.

eliminating the structural problems as to fundamental rights and freedoms, and reducing the workload before it.

The decisions of the Court are binding upon legislative, executive and judicial organs, administrative authorities, and natural and legal persons. In other words, legislative, executive and judicial branches have no power to modify or delay the execution of the decisions of the Constitutional Court.

Esteemed Participants,

For 61 years, the Constitutional Court has been acting as a supreme judicial body that reviews the constitutionality of laws and for the last 10 years, it has also been acting as a supreme judicial body that examines individual applications.

In this context, it would not be wrong to analyse the history of the Turkish constitutional judiciary by dividing it into two periods: the first 50 years and the following 11 years. The reason for this is not only the change in the field of jurisdiction, but also the change in the judicial paradigm that started with the individual application. This change has taken place from an ideology-based approach to a rights-based approach.

The TCC has stated in many judgments on individual application that the approach that should dominate the constitutional judiciary is the rights-based paradigm. According to the Court, constitutional provisions on political rights and freedoms in particular "*can fully fulfil their functions if they are interpreted in the context of the development of pluralist democracy and in a rights-based manner*."[4)]

The rights-based approach is based on the assumption that freedom is the rule and restriction is the exception. This approach requires the constitution to be interpreted in favour of freedoms by giving priority to fundamental rights.

Distinguished participants,

Before my concluding remarks, I would like to express my satisfaction that the paradigm change initiated upon the individual application mechanism has been fulfilled to a significant extent that would also cover the constitutionality review.

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4) *Ömer Faruk Gergerlioğlu* [Plenary], App. No: 2019/10634, 1 July 2021, § 50; *Ali Kuş* [Plenary], App. No: 2017/27822, 10 February 2022, § 50.

Employing its rights-based approach, the TCC has issued and continues to issue, in the processes of both constitutionality review and individual application, decisions and judgments which would shape and steer the Turkish legal practice.

Thank you for your attention.

Presentation 4

The Evolution of Access of Individuals to Constitutional Justice in Algeria

Omar Belhadj
President, Constitutional Court of Algeria

The Evolution of Access of Individuals to Constitutional Justice in Algeria

Omar Belhadj
President, Constitutional Court of Algeria

In the Name of Allah, the Merciful, the Beneficent, prayers and peace be upon the Most Honourable of the Messengers

Your Excellency Mr. Namseok Yoo, President of the Constitutional Court of the Republic of Korea,

Ladies and Gentlemen, Presidents of the Constitutional Courts and of the Equivalent Institutions,

Ladies and Gentlemen,Attendance,

Peace be upon you,

First and foremost, I extend my sincere thanks and gratitude to NamSeok Yoo, President of the Constitutional Court of the Republic of Korea, for the generous invitation I have received to attend and participate in the fourth symposium on:"Access to Justice: Constitutional Prospectives", and for the warm welcome and hospitality in Seoul.

I would also to immensely thank the Research and Development Secretariat of the Asian's Association of Constitutional Courts and Equivalent Institutions under the patronage of the Constitutional Court of the Republic of Korea for choosing this topic, which has become inherent to the development ofthe constitutional judiciary in our time,

The Algerian Constitutional Court has organized on the occasion of the first anniversary of its inauguration, on December 5th and 6th, 2022, an international symposium entitled"the Right of Citizensto Access to Constitutional Justice in the Light of Comparative Systems", and we were honoured by the attend and participate of the Constitutional Court of the Republic of Korea.

Ladies and Gentlemen,

Since being elected in December of the year 2019, the President of the Republic, Mr. Abdelmadjid Tebboune, has launched deep reform workshops, the first was conducting a thorough and comprehensive revision of the Constitution, when Mr. the President initiates to amend the

Constitution, which was endorsed by the Algerian people on November 1th, 2020, thus establishing for a Constitution that enshrines the principles of true democracy, a true balance between powers, protects the rights and freedoms of citizens, and enshrined the independence of the judiciary and the principles of fair governance and oversight in all its dimensions.

The Constitutional Founder, according to the constitutional amendment of 2020, was keen to ensure the supremacy of the Constitution by establishing a constitutional Court in chargeof ensuring the observance of the Constitution,with widejurisdiction wide powers, most of them are new for the first time in the field of monitoring the constitutionality of laws, regulating the conduct institutions and the activities of public authorities, ruling on disputes that may ariseamong the constitutional authorities, and the interpretation of the provisions of the Constitution.

Ladies and Gentlemen,

Oversight of the constitutionality of laws in Algeria has known two main phases, the first of which was long, extending since the adoption of the 1989 Constitution until the constitutional amendment of 2016, and was characterized in its entirety by what is known as tribal and compulsory oversight and institutional notification, which was limited to the President of the Republic and the presidents of eachChamber of Parliament, while the second phase of it The constitutional amendments of 2016 paved the way for it, before the constitutional founder strengthened it according to the constitutional amendment of 2020.

Oversight of the constitutionality of laws in the 2020 constitution has witnessed an unprecedented development, through strengthening parliamentary notification, devoting oversight over the constitutionality of orders when the President of the Republic initiates in emergency matters, oversight of whether laws and regulations conform with international treaties, and oversight of the constitutionality of regulations within a month of the date of their publication. The mechanism for defending unconstitutionality has also expanded to include regulatory provisions after it was limited to legislative provisions.

Ladies and Gentlemen,

In line with the constitutional and international developments which are taking place in the constitutional and jurisprudential movement in the world, the 2020 Constitution embodies a large number of rights and freedoms, and ensured that they were surrounded by various constitutional guarantees and mechanisms to insure their respect. Perhaps the defence of unconstitutionality is

the most important of these ones due to its direct implication with the litigant.

Granting theindividuals the right to resort to the constitutional judiciary throughthe exception of unconstitutionality constitutes a major stepin the field of constitutional judiciary in my country. This mechanism provides the possibility to notify the Constitutional Court upon a referral from the Supreme Court or the Council of State, when one of the parties in a trial before the jurisdiction that The legislative or regulatory provision upon which the issue of litigation reliesmayadversely affect his rights and freedoms guaranteed by the Constitution.

Ladies and Gentlemen,

Since its inauguration, the Algerian Constitutional Court has been very active in the area of monitoring the constitutionality of laws. Forty-three (43) decisions have been issued between the field of constitutional oversight and the control of Conformity to the Constitution and the exception of unconstitutionality.

The control of the constitutionality of lawshas known for the first time in the history of constitutional justice in Algeria two notifications coming from deputies regarding laws voted by Parliament.

Ladies and Gentlemen,

The highest thing that brings together the Constitutional Courts and Equivalent Institutions Members of your Association is the protection of the human rights, the application of the principles of the rule of law, and the consolidation of the independence of the constitutional judiciary which are lofty goals enshrined by the constitutional founder in Algeria under the constitutional amendment of 2020, which establishes for the state of law based on democratic governance, fundamental rights and freedoms, the independence of the judiciary, surrounding constitutional justice with guarantees of independence, particularly through giving priority to the elements of competence and election to its members, and keeping them aside from political debate.

Ladies and Gentlemen,

Algeria, as you know, plays a fundamental role in the care of the constitutional justice in the African continent, on its initiative, the Summit of the Assembly of Heads of State and Government of the African Union at its fifteenth ordinary session, held on July 27, 2010 in Kampala, Uganda, approved the establishment of the Symposium of African Constitutional Judicial Bodies, which

was officially announced during the founding symposium held on May 7 and 8, 2011 in Algeria, which hosts its headquarters, in the presence of twenty-five (25) courts and constitutional councils, to include today forty-eight (48) parties.

Ladies and Gentlemen,

Our participation today in the activities of this symposium is an opportunity to learn about the experiences and expertises of constitutional Jurisdictions in the Asian regional space, and to interact with best practices and appropriate and effective legal frameworks to harness constitutional Jurisdictions in protecting the rights and freedoms of citizens and contributing to building a state of law, I fully hope that it will be an occasion for the consolidation of relations of cooperation and friendship and the continuation of interaction between our court and the courts and equivalent institutions that belong to this space of yours.

Finally, once again I express my deepest gratitude to Mr. Namseok Yoo, President of the Association of Asian Constitutional Courts and Equivalent Institutions, for having honored us by inviting us to attend this symposium, wishing you success in the service and development of constitutional justice.

Thank you for listening, May peace be upon you.

Presentation 5

Declarations of Inconsistency with the New Zealand Bill of Rights Act

Mark O'Regan
Justice, Supreme Court of New Zealand

Declarations of Inconsistency with the New Zealand Bill of Rights Act

Hon Justice Mark O'Regan
Supreme Court of New Zealand | Te Kōti Mana Nui o Aotearoa

I extend my thanks to the Honourable President and other Justices of the Constitutional Court of Korea for their invitation to the Supreme Court of New Zealand to send a representative to this symposium. It is a great honour to represent my Court here. I also extend my greetings to all other delegates. It is a pleasure to talk to you today.

I begin by explaining the constitutional context in New Zealand. New Zealand is a unitary state with no written constitution and no separately designated Constitutional Court. The Supreme Court of New Zealand | Te Kōti Mana Nui o Aotearoa is the court of final appeal for New Zealand but its jurisdiction is exclusively an appellate one. It has no original jurisdiction and there is no provision for the Government to seek advisory opinions from the court.

New Zealand's unwritten constitution is comprised of some Acts of Parliament, Acts of the United Kingdom Parliament that remain in force in New Zealand (including Magna Carta and the Bill of Rights 1688), prerogative powers, court decisions, conventions (or recognised practices), international conventions to which New Zealand is a party and, uniquely to New Zealand, the Treaty of Waitangi, which was signed in 1840 by a representative of the British Crown and representatives of the Māori inhabitants of New Zealand.

Although New Zealand does not have a supreme law, it does have a bill of rights, the New Zealand Bills of Rights Act 1990, which affirmed and codified certain human rights protected by New Zealand law. However, unlike similar instruments in other countries, the Bill of Rights Act does not give New Zealand courts the power to strike down legislation passed by Parliament that is inconsistent with the rights recognised by the Bill of Rights Act. The New Zealand constitutional system is premised on the sovereignty of Parliament. In fact, the Senior Courts Act 2016, which governs the jurisdiction and operation of the High Court, Court of Appeal and Supreme Court, includes in its purpose provision, section 3, the following statement: "Nothing in this Act affects New Zealand's continuing commitment to the rule of law and the sovereignty of Parliament". The Supreme Court of New Zealand does, however, have an important role in interpreting and

enforcing the Bill of Rights Act as it applies to acts and omissions of the executive branch of Government, the courts and other public institutions.

The Bill of Rights Act is an ordinary statute of the New Zealand Parliament and could, therefore, be amended by a simple majority vote in the House of Representatives. It does not have any provisions dealing with remedies for breaches. It is most commonly invoked in criminal proceedings in connection with determinations as to whether evidence obtained in breach of the accused person's rights is admissible in that person's trial. But in addition, the Court of Appeal decided in the 1990s that damages could be awarded for breaches.[1)]

Despite its limitations, the Bill of Rights Act has an important influence on the conduct of Government and public officials and on the legislative process. I highlight, in particular, sections 4 to 7 of the Bill of Rights Act.

Section 6 deals with the interpretation of enactments. It requires that, if a provision in an enactment can be given a meaning that is consistent with the rights and freedoms contained in the Bill of Rights Act, that meaning must be preferred to any other meaning.

Section 5 provides that the rights and freedoms contained in the Bill of Rights Act may be subject to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

However, if a statutory provision is inconsistent with the Bill of Rights Act, section 4 provides that a court may not invalidate the statute or decline to apply it.

Section 7 provides for the vetting of bills introduced to the House of Representatives for consistency with the Bill of Rights Act. The Attorney-General is required to bring to the attention of the House of Representatives any provision in a bill introduced to the House that appears to be inconsistent with any of the rights and freedoms contained in the Bill of Rights Act. However, if a report to that effect is received by the House of Representatives, there is no impediment to the House of Representatives nevertheless passing the bill and, as just noted, a court would be required to give effect to the resulting enactment and to enforce it.

My topic today is Individual Access to Constitutional Justice. It may seem from the brief summary above that there is not a lot of room for this in New Zealand. But recently the Supreme Court has ruled that courts have jurisdiction to make declarations of inconsistency in relation to laws that are inconsistent with the Bill of Rights Act. This does provide an opportunity for an individual who believes their rights have been infringed to challenge this in Court.

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1) *Simpson v Attorney-General (Baigent's case)* [1994] 3 NZLR 667.

The case in which the Supreme Court ruled that courts have jurisdiction to make declarations of inconsistency, Attorney-General v Taylor, related to voting rights for prisoners.[2] The relevant provision of the Bill of Rights Act in relation to voting rights is section 12, which provides that every New Zealand citizen who is of or over the age of eighteen years has the right to vote in elections of members of the House of Representatives.[3] The enactment which gives effect to the right to vote is the Electoral Act 1993, which sets out the detailed processes for the conduct of elections in New Zealand.

In 2010, the Electoral (Disqualification of Sentenced Prisoners) Amendment Act 2010 became law. The 2010 Act amended the Electoral Act in a way that provided that any person detained in a prison under a sentence of imprisonment imposed after the passing of the Act was disqualified from registration as an elector. So it created a blanket ban on prisoners voting.

When the 2010 Act was under consideration in the House of Representatives, the Attorney-General submitted a report to the House as required by section 7 of the Bill of Rights Act, highlighting that the restriction on voting rights contained in the 2010 Act would be inconsistent with section 12 of the Bill of Rights Act.[4] The report highlighted the apparent inconsistency between a blanket ban on prisoner voting and an absolute right to vote. It then went on to consider, in terms of section 5 of the Bill of Rights Act, whether the limit on voting rights could be demonstrably justified in a free and democratic society. The Attorney-General reported that, in his view, it could not be justified under section 5.

Despite this, the bill was passed and the 2010 Act became law.

A number of prisoners applied to the High Court for a declaration of inconsistency (that the 2010 Act was inconsistent with section 12 of the Bill of Rights Act). Consistently with the position taken by the Attorney-General in his section 7 report, the Attorney-General did not argue that the 2010 Act was consistent with section 12: his counsel conceded that it was not, but argued that the court did not have jurisdiction to make a declaration of inconsistency. This argument was based on the fact that the Bill of Rights Act does not include a remedies provision so there is no express statutory power to make declarations of inconsistency. Both the High Court and the Court of Appeal decided that, notwithstanding the absence of a remedies provision in the Bill of Rights Act, the court did have jurisdiction to make a declaration of inconsistency and such a declaration was made in the High Court and upheld in the Court of Appeal.[5]

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2) *Attorney-General v Taylor* [2018] NZSC 104, [2019] 1 NZLR 213.

3) Section 12 affirms article 25 of the International Covenant on Civil and Political Rights.

4) Christopher Finlayson, *Report of the Attorney-General under the New Zealand Bill of Rights Act 1990 on the Electoral (Disqualification of Convicted Prisoners) Amendment Bill* (17 March 2010).

The Supreme Court gave the Attorney-General leave to appeal against the Court of Appeal decision. The Court decided by a majority that the courts did indeed have the power to make declarations of inconsistency and upheld the declarations made by the lower courts. This meant New Zealand's rights regime was brought into conformity with that of similar jurisdictions, which have human rights legislation that is not supreme law. However, in those other jurisdictions, the power to issue a declaration of inconsistency (or declaration of incompatibility) is provided for in the legislation itself.[6] The New Zealand Parliament had already conferred a similar jurisdiction on the Human Rights Review Tribunal in relation to rights against discrimination.[7]

Just prior to the hearing of the Taylor appeal by the Supreme Court, the Government announced an intention to propose to Parliament an amendment to the Bill of Rights Act to include a provision granting express statutory power to the courts to grant declarations of inconsistency. In light of the Court's decision in *Taylor*, this proposal was amended to set out the process to be followed in the event that a declaration of inconsistency is made. Legislation has now been passed to give effect to this proposal.

The New Zealand Bill of Rights (Declarations of Inconsistency) Amendment Act 2022 amends the Bill of Rights Act to require the Attorney-General to notify the House of Representatives of the court's declaration of inconsistency within six sitting days after the declaration becomes final. It also requires the Minister responsible to present the Government response to the House of Representatives within six months of the AttorneyGeneral notifying the House.

The AttorneyGeneral's notice to the House triggers a process of parliamentary consideration of the declaration. Under that process, a Select Committee will consider the declaration and may make any recommendations to address the declaration. The Select Committee will report its findings to the House within four months of the AttorneyGeneral's notice, and the Government must present its own response within six months of the notice (or by a date otherwise decided by the House). A parliamentary debate on the declaration, the Select Committee report and the Government response must be held within six sitting days of the Government response being presented.

There is no statutory requirement for the Government or the House to respond in any particular

5) *Taylor v Attorney-General* [2015] NZHC 1706, [2015] 3 NZLR 791; *Attorney-General v Taylor* [2017] NZCA 215, [2017] 3 NZLR 24.

6) See the Human Rights Act 2004 (Australian Capital Territory); Charter of Human Rights and Responsibilities Act 2006 (Victoria, Australia); Human Rights Act 2019 (Queensland, Australia), Human Rights Act 1998 (United Kingdom); European Convention on Human Rights Act 2003 (Republic of Ireland).

7) Human Rights Act 1993, section 92J.

way to a declaration of inconsistency. The processes established for considering declarations are intended to promote reconsideration of significant rights issues by Parliament and the Executive in the light of advice from the courts. But, ultimately, Parliament is under no obligation to change legislation that has been found to be inconsistent with the Bill of Rights Act.[8)]

Since the Taylor case, the Supreme Court has made one further declaration of inconsistency.[9)] This also concerned voting rights. The claim was made by Make it 16 Inc, a body set up to advocate for the lowering of the voting age from 18 years to 16 years. The Attorney-General did not seek to argue that the provision setting the age at 18 years was justified in a free and democratic society, though there may well have been good grounds to do so. So the declaration was to the effect that the provision prescribing the 18 years limit was inconsistent with the right in section 19 of the Bill of Rights Act (which provides that it is unlawful to (among other things) discriminate against a person aged 16 years or older on the grounds of age) and that this had not been justified in terms of section 5 of the Bill of Rights Act. So it may be open for the Attorney-General to argue in a future case that it is, in fact, justified.

This new jurisdiction is still in its infancy. But it can be expected that citizens will avail themselves of the opportunity to challenge Acts of Parliament that limit their rights, even if the remedy may not, ultimately, end up bringing about a change in the offending legislative provision.

Let me conclude by thanking the Constitutional Court of Korea or hosting this conference.

8) However, the Electoral Act provisions dealing with prisoner voting rights have, in fact, been amended after the declaration of inconsistency in the *Taylor* case was made: Electoral (Registration of Sentenced Prisoners) Amendment Act 2020.
9) *Make it 16 Inc v Attorney-General* [2022] NZSC 134.

4TH INTERNATIONAL SYMPOSIUM OF THE AACC SRD

[Session 2]

Current Issues on Access to Justice

Chair

Saldi Isra
Deputy Chief Justice, Constitutional Court of Indonesia

Presenters

Mison Lee
Justice, Constitutional Court of Korea

Marvic Mario Victor F. Leonen
Senior Associate Justice, Supreme Court of the Philippines

Presentation 1

Current Issues on Access to Justice

Mison Lee
Justice, Constitutional Court of Korea

Current Issues on Access to Justice

Mison Lee
Justice, Constitutional Court of Korea

Access to justice (constitutional justice) is an essential element in the democratic process. Though the Constitution sets out the fundamental rights, they will become useless if everyone is not guaranteed full access to the Constitution and the Constitutional Court.

The development of modern ICT (Information and Communication Technology) has had a significant influence not only on the environment but on the change and the development of the justice system itself, and constitutional justice is no exception. Along with the development of ICT, the Constitutional Court of Korea has prepared various measures for the people to have electronic access to constitutional justice or the Constitutional Court, thereby further strengthening the accessibility to constitutional justice and guaranteeing the people's fundamental rights. I will elaborate on each in more detail.

1. Impacts of the Development of ICT on Constitutional Justice

A. Electronic Constitutional Justice System

(1) In order to bring more convenience to the people and enhance the efficiency of adjudication proceedings, the Republic of Korea revised the Constitutional Court Act in 2009 to provide a legal basis for the preparation, submission, and service of electronic documents required for proceedings at the Constitutional Court. (Constitutional Court Act Articles 76 and 78) Accordingly, from March 2010, without any inconvenience of visiting the Constitutional Court, citizens can now submit documents, such as a written request for adjudication on constitutional complaints, check the service documents, and peruse case records in the Constitutional Court of Korea e-Court online.

(2) Parties or relevant persons in various adjudication proceedings can submit a written request and others in the form of electronic documents after making electronic signatures. Any electronic document submitted this way has the same force as the submitted written

documents in accordance with the Constitutional Court Act. The Constitutional Court can also deliver various documents, such as correction orders and decisions, electronically with the consent of the parties or relevant persons.

(3) In 2010, of all the cases filed at the Court (1720 cases), 272 cases, which accounts for 15.8%, were electronically filed. Since then, the proportion has grown steadily. From 2019, about 50% of cases have been submitted online, becoming even more common.

(4) With the help of the electronic constitutional justice system, which has been in service for more than ten years, people could enjoy more convenience, and the protection of fundamental rights has been strengthened. For the Constitutional Court of Korea, e-delivery, which shortens the period of delivery, has increased work efficiency and saved the budget more than conventional mail delivery.

B. Video Trial System

(1) To further guarantee the people's rights to trial in response to changes in the future environment following the development of ICT and disastrous circumstances such as COVID-19, since September 14, 2021, the Constitutional Court of Korea has established rules to conduct video proceedings on the preparatory procedures for adjudication and on the date of inspection by rapporteur judges and to broadcast live hearings and pronouncements ex officio to enhance further public confidence and accessibility in the cases that are of great public interest or public benefits.

(2) When it is necessary to organize the parties' claims and evidence to efficiently and intensively proceed with proceedings, the Constitutional Court of Korea shall initiate the preparatory procedures for adjudication; if the parties have difficulties attending the adjudication, the Constitutional Court of Korea shall, with the consent of the parties, proceed with the preparatory procedures using the internet video conferencing devices. (Article 11 of the Adjudication Rules of the Constitutional Court)

(3) A rapporteur judge shall conduct an examination on the review and judgment of cases by opening an inspection session, etc. In cases where it is difficult for the person subject to inspection to be present in the courtroom, a rapporteur judge shall open the inspection session with the internet video conferencing devices upon his/her consent. (Article 11-2 of the Adjudication Rules of the Constitutional Court)

(4) No person shall record videos, take photographs, or broadcast in the courtroom without

permission of the presiding judge (Article 19 of the Adjudication Rules of the Constitutional Court); the presiding judge shall, if deemed necessary, ex officio allow for broadcasting of hearings or pronouncements through media such as the internet and television. (Article 19-3 of the Adjudication Rules of the Constitutional Court)

2. Impacts of COVID-19 on Constitutional Justice

A. The COVID-19 pandemic was a disaster that was of an unprecedented scale and a tragic incident that caused too many different types of damage to countries worldwide. However, considering the nature of modern disasters, the damage may be alleviated depending on the institutional conditions of the affected areas. In the case of Korea, though the pandemic caused much damage, thankfully in constitutional justice, the electronic constitutional justice system mentioned earlier helped minimize the inconvenience of the people.

The number of cases filed annually with the Court has dramatically increased to more than 2500 since 2017. Despite the COVID-19 pandemic in 2019, the increasing trend has not been weakened; instead, the number of cases being filed has even increased compared to before the pandemic. One of the factors that made this possible seems to be the electronic constitutional justice system. The electronic filing at the Court has stayed around 30% for many years, but it has risen to around 50% since 2019, the period when the pandemic broke out. Thanks to the electronic constitutional justice system, claimants could easily access constitutional justice during the challenging times of the pandemic. On the other hand, we can also see that the pandemic has provided people with an opportunity to become more familiar with the electronic system. Given that the proportion of electronic filing up until March this year is about 55%, it seems that it is unlikely that it will go down even if the pandemic comes to an end.

B. As previously mentioned, the Constitutional Court of Korea partially introduced a video trial system using ICT starting from September 14, 2021, in order to preemptively deal with the recurrence of the pandemic or other sorts of disasters. As the system has only been recently implemented, we don't yet have a case of it being used. Using the video trial system, we expect a brighter future with the Constitutional Court's trial preparatory procedures and inspection being smoothly executed even in disturbing circumstances such as the pandemic,

and the hearing or pronouncement being broadcast in real-time through media such as the internet and television.

3. Other Policies for Improving Accessibility in Constitutional Justice

A. Court-Appointed Counsel

In order to strengthen the protection of the people's fundamental rights and improve the quality of adjudication, the Republic of Korea has adopted the compulsory attorney representation rule (Article 25 Section 3 of the Constitutional Court Act), and in order to make up for its deficiency, the Court also runs the court-appointed counsel system in the constitutional complaint system (Article 70 of the aforementioned Act). In other words, if a person who intends to request adjudication on a constitutional complaint has no financial resources to appoint an attorney, the Constitutional Court appoints an attorney who is paid his or her remuneration from the National Treasury upon the request. Further, if the Constitutional Court deems it necessary to appoint an attorney for the public interest, it may ex officio appoint a court-appointed counsel. This court-appointed counsel system allows everyone to access constitutional justice regardless of their economic conditions, thereby practically protecting their fundamental rights.

Each year, the Constitutional Court of Korea accepts about 90% of its court-appointed counsel requests (except for cases that are dismissed or rejected due to obvious inadmissibility) and appoints attorneys for about 150 cases of constitutional complaints.

B. Utilization of Various Media

Korea has various promotional means to publicize the constitutional justice system and improve accessibility, with ICT being used in multiple ways. In 2020, the Constitutional Court opened the library and exhibition hall in the newly built Annex building so that everyone could have easy access. There is also a group tour program, and we do have special facilities for people with low vision, older people, and children. Anyone can learn about constitutional justice easily and with much fun through liberal arts books, exhibitions, lectures, digital photography, and quiz games. So far, more than 10,000 people have visited the exhibition hall and the library, and we are expecting as many as tens of thousands of people to visit the library and the exhibition hall every year as the pandemic ended. The legal resources room in the library is also open to jurists and lawyers, encouraging and supporting private research on constitutional justice.

The Constitutional Court discloses the full texts of all decisions, publications, such as various

research documents and annual reports, as well as videos of hearings and pronouncements on major decisions. We also provide a sign language interpretation video. We are running a separate website for children, and the number of annual access last year exceeded 1 million as there were many remote learning users in elementary schools during the pandemic. The Court also displays major decisions in card news, videos, and cartoons, distributing constitutional fairy tales as audio clips. Through the latest social media, such as blogs, YouTube videos, and various social networking services, we are letting more people know about constitutional justice. Souvenirs for visitors and subway advertisements are also used for promotional purposes.

C. Research and Education in the Constitutional Research Institute

The Constitutional Court runs the Constitutional Research Institute for research and education on the Constitution and constitutional justice. The Constitutional Court continuously publishes research materials on various topics related to constitutional justice and uploads them on the website, while organizing curriculum for the members of the Court, civil servants, teachers, college students, and employees of overseas constitutional adjudicatory bodies as well as internships for law school students. In addition, the Institute promotes the participation of the people in the development of constitutional justice in various ways by holding constitutional law moot court competitions, constitutional class contests, and other lectures and academic conferences on a regular basis.

4. Conclusion

In order to make a safe environment for constitutional justice to remain intact even during disastrous circumstances like the COVID-19 pandemic and to make it easier for more people to access it, it is imperative that we actively make use of the state-of-the-art ICT like artificial intelligence in the realm of constitutional justice. (Since April 2022, the Constitutional Court of Korea has run “Hunjae Talk,” an artificial intelligence chatbot, which is also available on mobile phones, for public inquiry service on the website, to provide consultation 24/7 with regards to constitutional adjudication proceedings and case filings.) In the meantime, if we take attentive care to the disadvantaged, such as people with disabilities and older people, to help them with technology, the active utilization of ICT will be of great help in accomplishing our task of strengthening fundamental rights through improving accessibility in constitutional justice. I hope that you found the case of Korea that I’ve just introduced to you helpful. Thank you.

Presentation 2

Issues on Access to Justice and Legal Aid as a Means of Gesturing Towards the Rule of Justice and Empowerment of the Philippine People

Marvic Mario Victor F. Leonen
Senior Associate Justice, Supreme Court of the Philippines

Issues on Access to Justice and Legal Aid as a Means of Gesturing Towards the Rule of Justice and Empowerment of the Philippine People[1)]

Marvic Mario Victor F. Leonen
Senior Associate Justice, Supreme Court of the Philippines

The Philippine Judiciary is a public office and therefore a public trust; its primary function is to "vindicate the truth, [such] that the true administration of justice is the cornerstone of civilization and the essential assurance of the happiness of mankind."[2)] It touches too wide a range of human values, and deals with numerous social issues.[3)] Yet, it is beset by numerous temptations[4)] and has not enjoyed an esteemed reputation,[5)] and has been seen as a "medium for personal convenience and enrichment."[6)]

Society perceives lawyers and magistrates of the Supreme Court of the Republic of the Philippines (Supreme Court) as skillful technicians who perpetuate a system of impunity by manipulating the legal system and taking advantage of procedural rules and loopholes with only one goal: to advance a client's or the majority's interests, unmindful of universal principles of right and wrong.[7)] Legal professionals are perceived as advocates only of established interests,[8)] obscuring real issues, and capitalizing on the problems of our countrymen.[9)] Thus, the public confidence in the integrity of our justice system and access to justice suffers greatly.[10)] This

1) Excerpts from the Keynote Address of Senior Associate Justice Marvic Mario Victor F. Leonen entitled *More than Aid: A Prologue to Transcending the Rule of Law Gesturing Towards the Rule of Justice and Empowering Our People*, *delivered* on November 28, 2022 in Bacolod City on the occasion of the First National Summit on Access to Justice.
2) Charles H. Tuttle, The Ethics of Advocacy, 18 A.B.A. J. 849 (1932).
3) J. B. L. Reyes, Objectives of Legal Education in Present-Day Philippine Society, 12 ATENEO L.J. 314 (1963).
4) *Id*.
5) Therese Desiree K. Perez & Rufino Ranulfo Z. IV San Juan, The Revolutionary Imperative of Lawyers in the Philippines, 70 PHIL. L.J. 493 (1996).
6) Bonifacio and Magallona, A Survey of the Legal Profession in the Philippines 177 (1987).
7) Lourdes A. Sereno, Lawyers' Behavior and Judicial Decision-Making, 70 PHIL. L.J. 476 (1996), *citing* Robert C. Post, On the Popular Image of the Lawyer: Reflections in a Dark Glass,75 CAL. L. REV. 379 (1987).
8) Bonifacio and Magallona, A Survey of the Legal Profession in the Philippines 177 (1987).
9) Therese Desiree K. Perez & Rufino Ranulfo Z. IV San Juan, The Revolutionary Imperative of Lawyers in the Philippines, 70 PHIL. L.J. 493 (1996).
10) Asian Development Bank, Background Note on the Justice Sector of the Philippines, Asian Development Bank, available at https://www.adb.org/sites/default/files/publication/27525/background-note-justice-sector-phils.pdf

perceived failure to deliver justice and impeded access to justice have inevitably led to the erosion of the public's trust in the Philippine government;[11] the public now sees peace and prosperity as elusive concepts.[12]

"The steady deterioration of peace and order, the growing dissatisfaction in the administration of justice and the loss of confidence"[13] in the legal profession are matters of importance to the Philippine Judiciary. This is considering the Supreme Court's direct hand in balancing the needs of our country for commercial development and the needs of our country for social justice.[14]

In the Supreme Court's Strategic Plan for Judicial Innovations for 2022-2027, Chief Justice Alexander G. Gesmundo and the Associate Justices of the Supreme Court,[15] guided by the principles of timeliness, fairness, transparency, accountability, equality, inclusivity, and technological adaptiveness,[16] resolved to perform and deliver meaningful results on the Judiciary's fundamental function: to secure swift and fair justice for all.[17] Our task, in simple words, is ultimately to safeguard meaningful freedoms, and to enable genuine access to justice to everyone, most especially to marginalized identities, sectors, and communities.[18]

Our society is one where millions live in squalor in our cities. For many, night and rain signal the desperate hunt for shelter. Cardboards and dark waiting sheds are their finest finds. For many families living in shanties, the next meal is always a struggle. Millions do not eat three good meals a day. Hunger is not a concept; it is a way of life. Seeing their children go hungry is not a theoretical ethical problem; it is a reality.

Poverty, inequality, corruption, and the weakening of the Rule of Law create the democratic deficit. They also contribute to despondency. Despondency provides conditions for all types of

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(last accessed on May 10, 2023).

11) *Id.*

12) *Id.*

13) Irene R. Cortes, The Law Curriculum: Assessment and Recommendations in the Light of the Needs of a Developing Society, 47 PHIL. L.J. 446 (1972).

14) Excerpts from the Keynote Address of Senior Associate Justice Marvic Mario Victor F. Leonen, entitled *Resist Injustice*, delivered on June 25, 2020 on the occasion of the Oath-Taking Ceremony for the Successful 2019 Bar Candidates, available at https://www.youtube.com/watch?v=h-DdCtoZUb8 (last accessed on May 10, 2023).

15) The incumbent Associate Justices of the Philippines are as follows: the undersigned as Senior Associate Justice, Associate Justice Alfredo Benjamin S. Caguioa, Associate Justice Ramon Paul L. Hernando, Associate Justice Amy C. Lazaro-Javier, Associate Justice Henri Jean Paul B. Inting, Associate Justice Rodil V. Zalameda, Associate Justice Mario V. Lopez, Associate Justice Samuel H. Gaerlan, Associate Justice Ricardo R. Rosario, Associate Justice Jhosep Y. Lopez, Associate Justice Japar B. Dimaampao, Associate Justice Jose Midas P. Marquez, Associate Justice Antonio T. Kho, Jr., and Associate Justice Maria Filomena D. Singh.

16) Supreme Court of the Philippines, *Strategic Plan for Judicial Innovations 2022-2027*, 7, available at https://sc.judiciary.gov.ph/3d-flip-book/spji/ (last accessed on May 10, 2023).

17) *Id.*

18) *Id.* at 8–9.

addiction or violent fundamentalist religious extremism. All these provide social instability. All these present the most significant obstacles to achieving access to justice.

Access to justice means more than legal aid. However, the ordinary concept of legal aid, together with its various nuances (i.e., developmental legal aid, public interest lawyering, and alternative lawyering) is still important. Nonetheless, law and the current practice of law—including traditional legal aid—if left by themselves, have the tendency to support the social, political, and economic system, which fosters the injustices and inequalities prevalent in Philippine society.

Access to justice by the privileged, powerful, and those with resources is different from access to justice for those who are poor, or whose groups, communities, or identities are marginalized and oppressed. Access to Justice with both access and justice understood as powerful generic terms is different from accessibility to justice forums.

As such, performing tasks related to access to justice is a significant way of doing justice for so long as they are done so deliberately—guided by a consciousness of our biases—and done beyond the traditional notion of legal aid. It thus becomes imperative to understand the values, premises, and standpoints congealed in our existing laws or judicial doctrines, and seek to make them address social justice.

We should address the role of law in disempowering labels, roles, and stereotypes that maintain the marginalization and oppression of some identities and the role of law. True access to justice should contribute to its deconstruction.

Given all this, I advance the following assertions:

First, while legal aid as traditionally understood cannot be universally mandatory, it can be encouraged—but never to the exclusion of all other forms of assistance and policy advocacy.

Universally making traditional legal aid mandatory for all lawyers will only superficially address access to justice. It only looks good on policy papers because compulsion to do what is noble may only have the opposite effect; it may mitigate passion. Mandatory legal aid can only require a finite number of hours and will mean that cases will not be handled until its resolution. Those who most need the services of good counsel will then have to contend with lawyers who merely handle their cases out of obligation, temporarily, and without dedication.

Perhaps, the more sensible alternative would be that traditional legal aid be made mandatory for law firms with more than twenty lawyers and with a threshold income. This will be like some form of obligation for doing well within our economy.

Second, legal aid or access to justice should never be under the umbrella of only one organization. There should be interaction, inter-organizational coordination, and referrals—but no one group dominating the rest. If we are to encourage diversity in our approach to access to justice, we also need to acknowledge that each organization will have their own core competencies and will address access to justice uniquely.

Third, we should however have a common goal: addressing corruption. Exposing and prosecuting these cases and an analysis of its various reincarnations—should be part of access to justice.

I need not belabor this point except to say that without addressing corruption, any policy reform initiative will be undermined. We have seen this happen many times. We are seeing this happen to many social goals from environment, to energy, to advocacy for various identities and many others.

Fourth, clinical legal education must provide more space to accommodate those who would like to do actual research and policy advocacy.

Fifth, law schools should reform such that legal education becomes heterodoxical, and seriously look at the content of their courses on legal method and legal theory. The legal academe should be empowered and the law curriculum should be seriously reviewed. Law schools should not become elaborate bar review centers; but it must add two important competencies: skills to practice and advocate, as well as critical thinking skills that will allow more lawyers to make the law more legible in the context of our society.

Shari'ah and Indigenous Laws should be made part of the curriculum. So should alternative dispute systems as well as skills that are important to achieve genuine resolution of disputes. This includes such subjects as negotiation.

Sixth, continued research on the impact of laws and procedure on our ability to provide justice must be undertaken. This requires an understanding of the requirements of "justice" as well as "access" from a philosophical, historical, sociological, and economic point of view.

Seventh, the profession should be encouraged to be sensitive to and evolve more public interest cases in the proper way. This requires the skills to communicate and empower those who are marginalized and oppressed.

Last, besides having a full communication plan on access to justice, we propose an annual symposium that will evaluate our progress towards a better and more authentic access to justice in all its dimensions.

Our collective vision should be to make law relevant. The only way that can happen is when we take the time to reflect critically on what we do and proceed with conscious, deliberate, and critical effort to practice law and decide our cases. Perhaps then, with the collective effort of the members of the Supreme Court, we can provide more than just the rule of law, but the rule of justice. Perhaps then, we do not contribute to the disempowerment of the already weak, marginalized, and the oppressed, we do not maintain inequality. Perhaps then, we can lead by defining for the profession the possibility that law is no longer for the powerful, but rather a tool to truly liberate our people, and cause major discomfort for those who stand for greed.

We cannot live with the status quo. Not if we are true to the tenets of justice. Not if we are true to the soul of our profession. Our people deserve much more.

The process of securing and preserving meaningful freedoms is often accompanied with painful experience. Often, it takes a huge amount of courage and the same amount of conviction to do what may seem unpopular, dangerous, inconvenient, but right.[19)]

As a collegial body, the Supreme Court of the Republic of the Philippines takes a holistic approach to accomplish our goal of enabling greater and more inclusive access to justice for all.

19) Excerpts from the keynote of Senior Associate Justice Marvic Mario Victor F. Leonen, entitled *Resist Injustice*, delivered on June 25, 2020 on the occasion of the Oath-Taking Ceremony for the Successful 2019 Bar Candidates, available at https://www.youtube.com/watch?v=h-DdCtoZUb8 *(last accessed on May 10, 2023).*

4TH INTERNATIONAL SYMPOSIUM OF THE AACC SRD

[Session 3]

Constitutional Rights Ensuring Access to Justice

Chair

Aniruddha Bose
Justice, Supreme Court of India

Presenters

Hasan Foez Siddique
Chief Justice, Supreme Court of Bangladesh

Ajjikuttira Somaiah Bopanna
Justice, Supreme Court of India

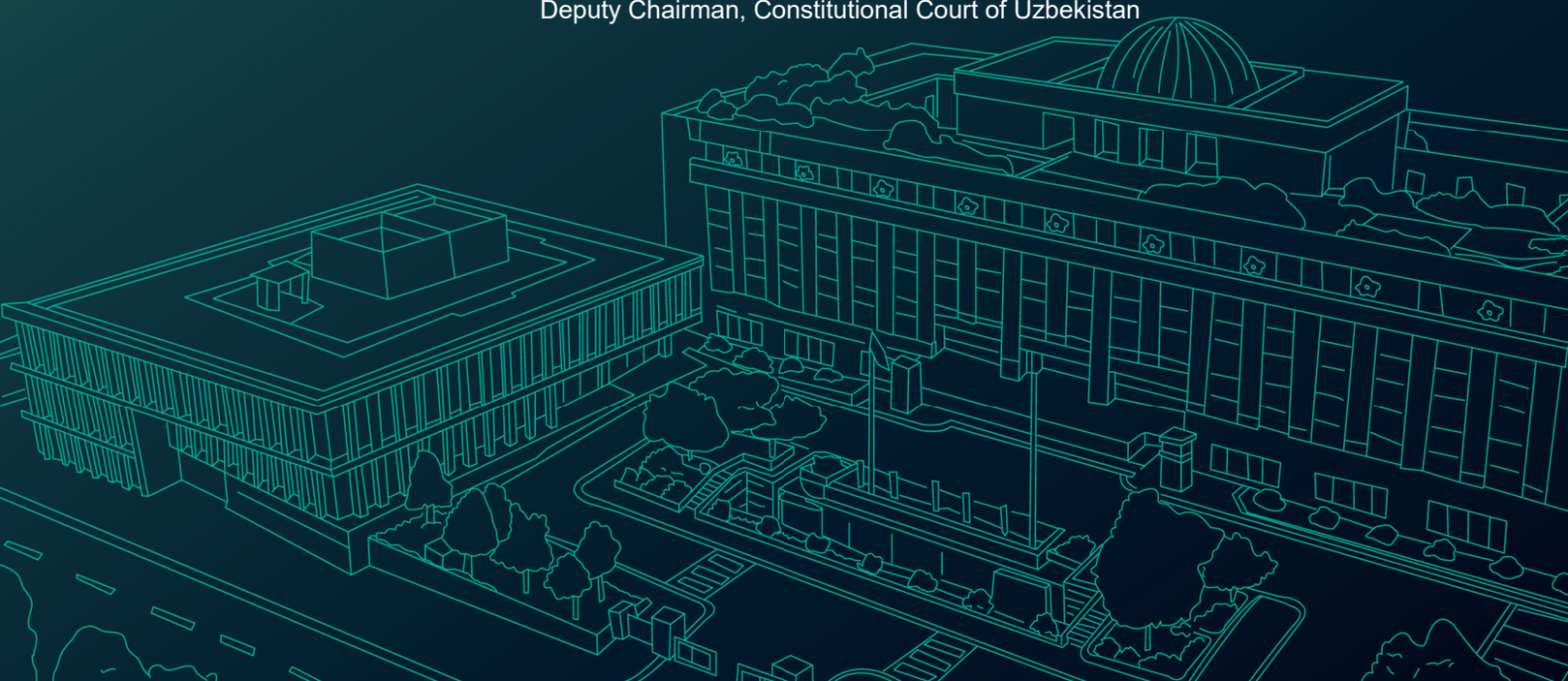
Tun Tengku Maimun Tuan Mat
Chief Justice, Federal Court of Malaysia

Buyandelger Batsukh
Justice, Constitutional Court of Mongolia

Kyaw Min
Justice, Constitutional Tribunal of Myanmar

Punya Udchachon
Justice, Constitutional Court of Thailand

Askarjon Gafurov
Deputy Chairman, Constitutional Court of Uzbekistan



Presentation 1

Constitutional Rights Ensuring Access to Justice

Hasan Foez Siddique
Chief Justice, Supreme Court of Bangladesh

Constitutional Rights Ensuring Access to Justice

Hasan Foez Siddique
Chief Justice, Supreme Court of Bangladesh

My Dear Fellow Judges from different countries;
Distinguished Delegates;
Ladies and Gentlemen.
Assalamualikum and
Good Afternoon.

1. It is my privilege and honour to address such a distinguished gathering of noteworthy attendees in this beautiful city of Seoul. My heartfelt gratitude goes to Honourable President and Judges of the Constitutional Court of South Korea and to the members of the court secretariat and everyone else who have contributed immensely to organize this event and offered us such overwhelming hospitality.

Distinguished Guests,

2. Blessed with incredible intelligence, driven by an unparalleled conscience, and, most importantly, entrusted with compassion, love, and sensitivity; humankind derives much of its greatest prowess from the ability to do justice-to enforce rights, to correct wrongs, and to eliminate disparities.

   In terms of constitutional safeguards, it has now been a well-settled principle, regardless of countries, boundaries, jurisdictions, or legal systems, that everyone has certain fundamental rights to be respected, realized, and governed in accordance with the law. In fact, the noble idea of rule of law, ushering humanity into the wonderful realm of civilization, is built upon the super solid foundation of every individual's right to access to justice.

Distinguished Participants,

3. Based on the preambular pledges of establishing the rule of law, fundamental human rights, equality and justice, and premised on the vision of building a fair, just and non-discriminatory

society, the Constitution of Bangladesh serves as the supreme instrument of the country through which the idea of 'access to justice' gets successful accomplishment. In fact, the administration of justice in Bangladesh is structured in a manner that ensures the availability and accessibility of justice for every citizen.

The subordinate courts function in every district of Bangladesh. Besides, in remote areas, there are a number of 'chowki' courts, meaning specialized courts established in places where communication with district headquarters is highly difficult. Even during the pandemic, Supreme Court of Bangladesh took timely steps to establish virtual courts in order to facilitate the availability of justice.

Honourable Delegates,

4. Sir James Mathew, an Irish judge, once said, "Justice is open to all like the Ritz Hotel." Behind this remark lies an age-old complaint that the cost of litigation prevents the poor from getting justice. In line with the commitment made to the internationally recognized principle of equality of justice, states are obliged to provide a universal legal aid landscape in order to make legal services accessible to all.

   While the unequivocal provisions relating to 'liberty', 'equality before law', 'equal protection of law', 'due process of law', 'right to have counsel and defence in case of arrest and detention' and 'right to have fair trial' in the Constitution of Bangladesh paved the way for a legal aid scheme for all citizens of our country. In addition, the Legal Aid Services Act, 2000, a ground-breaking legislation, was enacted in 2000, enabled the government to provide free legal aid services to poor litigants. This law is now proactively helping the previously unheard and unaddressed population with justice with the existing legal framework, and thus securing it for all our people, irrespective of their economic status.

5. The Supreme Court of Bangladesh began its journey in 1972 by formally acknowledging its sublime responsibility to build an equitable social order through ensuring rule of law. As the guardian of the Constitution, this Court is entrusted with the power to interpret the Constitution and to make any order, including judicial review, to do complete justice. Over the last five decades, our Supreme Court has proved itself to be a driving force behind ensuring access to justice for all citizens and protecting the rights of marginalized people.

6. The constitutional framework for ensuring access to justice has now become one of the most quintessential features of modern democracies. While constitutions, laws, regulations, or even international charters are now in unanimous harmony to acknowledge and enforce fundamental rights, access to justice, being another form of right itself in many instances, guarantees an effective and straightforward mechanism of fair trial through which justice can be established with a free and independent judiciary. The Constitution of Bangladesh guarantees the fundamental rights of the citizens and also provides mechanisms for the enforcement of these constitutional rights. If fundamental rights are violated, the aggrieved persons can move to the High Court Division of the Supreme Court for relief by filing appropriate petitions.

   In this regard, Public Interest Litigation and issuance of Suo moto rule have also been developed by our Supreme Court to provide adequate legal remedies to the socially vulnerable, backward and minority groups who would otherwise have limited access to justice.

Esteemed Presence,

To illustrate my point, I would like to share a few epoch-making roles of the Supreme Court of Bangladesh, which have significantly expended the horizon of access to justice in our constitutional evolution.

In 2020, in Suo moto Rule No. 14 of 2020, two children in Dhaka were unlawfully evicted by their uncle from their ancestral home after the demise of their father. The issue escalated when featured on TV, catching the attention of the High Court Division of the Supreme Court of Bangladesh.

The Court issued a suo moto order at midnight ensuring the children's safe return to their home, with immediate police protection. This was a prompt, and unconventional step taken by the highest court of the country for the enforcement of fundamental rights, boosting people's faith in the judiciary. The Supreme Court of Bangladesh emerged as the vanguard of legal integrity as it remains ever vigilant, tirelessly safeguarding the constitutional rights of all citizens to access justice.

7. Even earlier, in fact as far back as 1997, in Dr. Mohiuddin Farooque v Bangladesh case, when the locus standi of the petitioner was challenged on the ground that he was not personally

affected by an ongoing flood control project, and the project was challenged for its potential adverse effect on more than one million human lives, the Supreme Court of Bangladesh opined that a person might institute proceeding to enforce constitutional rights even without having personally suffered any legal grievance. It came up with a liberal interpretation of the term "person aggrieved," which means not only a person who is personally aggrieved, but also one whose heart bleeds for his less fortunate fellow beings for a wrong done by the government or a local authority if not fulfilling its constitutional or legal obligations".

Distinguished Dignitaries,

8. In no circumstance, justice should be regarded as a privilege. It is an inviolable right attached to the person, property and the dignity of every individual. In 2003 in the case of Bangladesh Legal Aid Services Trust vs. Bangladesh, the Supreme Court in a pioneering decision, ensured that persons suspected of crimes are not subject to torture, arbitrary arrest or summary execution by the police. They must be treated under due process of law.

9. As a matter of fact, in order to ensure good governance, justice must be made equally accessible to all citizens, without any consideration of their social or economic status. From the perspective of bringing changes in society, the famous Bangali Poet Rabindra Nath Tagore remains relevant even today. In his Nobel winning masterpiece "Gitanjali" he wrote: "Those whom you push down will chain you down Those whom you leave behind will pull you behind." It is our moral responsibility to ensure that every human being is furnished with equal treatment under the law, and that justice is administered with unswerving integrity and objectivity to every member of our society. It is only by upholding this principle of justice and equality that we can create a truly just and equitable society, in which every person is able to live with dignity, respect, and freedom.

Distinguished Dignitaries,

10. This symposium holds great promise as a forum for international dialogue, bringing together judges, legal scholars, and jurists from across the globe. I have no doubt that this gathering will generate fresh perspectives and innovative ideas, helping shape the key contemporary issues of law and justice. The exchange of ideas between our colleagues will bring a new horizon to our thinking and allow us to explore noble solutions to complex legal challenges.

With these few words, I would like to conclude but not before thanking you for giving me a patient hearing.

All good wishes to you all.

Allah Hafeez

Presentation 2

Constitutional Rights Ensuring Access to Justice

Ajjikuttira Somaiah Bopanna
Justice, Supreme Court of India

Constitutional Rights Ensuring Access to Justice

Ajjikuttira Somaiah Bopanna
Justice, Supreme Court of India

Distinguished Judges, dignitaries, ladies and gentlemen,

I am honoured to be invited here today to attend the 4th International Symposium organized by Association of Asian Constitutional Courts and Equivalent Institutions Secretariat for Research and Development (AACC SRD) to discuss and deliberate on the topic "Access to Justice : Constitutional Perspectives".

In this session, I would be speaking on the topic "Constitutional Rights Ensuring Access to Justice".

In India and all other civilised nations around the world, access to justice is and has always been recognised as an integral component of the right to life. No form of government can reasonably disregard the importance of the right to access to justice as it is an inalienable facet to the life and liberty of citizens.

CONSTITUTIONAL PROVISIONS DEALING WITH ACCESS TO JUSTICE

The Indian Constitution is called a living document, open to change and dynamic. The Constitution displays the multifaceted history of India and her ability to adapt to change.

The stage is set through Article 13 of the Constitution of India whereby all laws in force in the territory of India immediately before the commencement of the Constitution, in so far as they were inconsistent with or in derogation of the Fundamental Rights enshrined in Part III of the Constitution were declared to the extent of such inconsistency, to be void. Further, as per Art. 13, the State shall not make any law which takes away or abridges Fundamental Rights and any such law to the extent of inconsistency would be void, which will ensure applicability of only relevant laws and provide for access to justice based on such laws.

Access to fair justice is a constitutional guarantee in India. Article 14 of the Constitution lays down the principle of non-discrimination by assuring every person of the right to equality before the law and equal protection of laws. Article 21 guarantees that no person will be deprived of their

life or personal liberty except in accordance with procedure established by law. The responsibility to protect these basic rights of the common man has been cast on judiciary and legal profession.

The Supreme Court in ***Anita Kushwaha v. Pushap Sudan*, (2016) 8 SCC 509** has held that there is no hesitation in holding that access to justice is indeed a facet of right to life guaranteed under Article 21 of the Constitution. It was further added that access to justice may as well be the facet of the right guaranteed under Article 14 of the Constitution, which guarantees equality before law and equal protection of laws to not only citizens but non-citizens also. The fundamental right to access to justice is so important that any citizen or non-citizen can even directly approach the Supreme Court in violation thereof, under Art. 32 of the Constitution in appropriate cases. Even otherwise the power is also vested in the High Courts under Art. 226 of the Constitution to issue writs in the nature and manner as provided thereunder.

Articles 14 and 22(1) also make it obligatory for the State to ensure equality before law and a legal system which promotes justice on a basis of equal opportunity to all.

Ordinarily, justice refers to fairness, equality, moral behaviour, lawfulness, and order, but often, justice can hold different meanings to different groups of people. I will speak mainly on two facets of justice; justice for all and the need for speedy justice.

Since the dawn of the Constitution, the State action is to be in accordance with the Directive Principles of State Policy which find place in Part IV of the Constitution. Article 38(1) directs the State to strive to promote welfare of the people by securing and protecting as effective as it may a social order in which justice — social, economic and political — shall inform all institutions of the national life. Clause (2) of Article 38 directs the State, in particular, to minimize the inequalities in income, not only amongst individuals but also amongst groups of people residing in different areas or engaged in different vocations. By the 42nd amendment to the Constitution, 1976, Article 39A was added to the Directive Principles of State Policy. Art. 39A provides that: "*The State shall ensure that the operation of the legal system promotes justice, on a basis of equal opportunity, and shall in particular, provide free legal aid, by suitable legislation or schemes in any other way, to ensure opportunities for securing justice are not denied by reason of economic or other disabilities*". Through the words of the Constitution itself, India aims to follow the doctrine of distributive justice whereby we aim to achieve a non-exploitive and equal social order.

In furtherance of the objectives of access to justice through free legal aid, The National Legal Services Authority (NALSA) was constituted under the Legal Services Authorities Act, 1987. In every State, State Legal Services Authority has been constituted to give effect to the policies and directions of the NALSA and to give free legal services to the people and conduct Lok Adalats in

the State.

EQUAL ACCESS TO JUSTICE

I believe justice is truly achieved when there is justice for all, irrespective of the socio-economic classes they belong to. Social Justice forms part of the basic structure of our Constitution and when all persons are treated fairly, and as equals, the values of our Constitution are upheld.

True justice can be achieved when the poorest of the poor have the same access to the rights guaranteed to them under the Constitution as the most privileged.

History bears proof that the poor and the disadvantaged have been deprived of justice for many years: they have had no access to justice on account of their poverty, ignorance and illiteracy. While the Constitution guarantees the same rights to all its citizens, the socially and economically weaker section of society often is unaware of the rights and benefits conferred upon them. With large movements of Legal Aid in the country, these problems are now being addressed at a grassroot level as well as at a National Level.

This divide of justice has also been attempted to be tackled by way of Judicial Activism. The Supreme Court has developed the process of public interest litigation with the goal of making justice easily accessible to the underprivileged and poorer segments of society. The Supreme Court has consistently demonstrated the greatest concern for the welfare of the vast majority of people in the nation who live in destitution, misery and has grown to represent the ambitions of millions of people across the nation.

In the history of PILs, even ordinary letters from public minded individuals have been treated as writ petitions in order to ensure complete justice to the disadvantaged sections of society.

SPEEDY JUSTICE

The second aspect I wish to enunciate upon is the speedy access to justice. Litigations spanning over decades and over generations may not be the most just as the common man aggrieved by the actions of some, approaching the Courts, may not even be alive to see the fruits of their struggle.

Justice delayed is justice denied. Right of speedy justice is a constitutional reality which has to be given its due respect. Constitutional guarantee of speedy justice is an essential safeguard in order to prevent oppressive incarceration.

Recently, the Supreme Court of India has undertaken the e-courts initiative that will not only enable greater accessibility to justice but digitising of judiciary on such a large scale will usher in

speedy justice delivery.

Further, specialized Courts dealing with limited subject matters, as well as fast track courts help aid in solving this obstacle.

CONCLUSION

I would like to conclude by reiterating the words of Martin Luther King, "Injustice anywhere is a threat to justice everywhere". The right to justice is a basic right to all individuals and the right to justice cannot be achieved without proper access to justice. The words of the Indian Constitution and its enforcement through the pronouncements by the Supreme Court of India have held the right to access to justice at the highest pedestal, sacrosanct and intrinsic to the life of individuals and inviolable to their liberty.

Presentation 3

Constitutional Rights Ensuring Access to Justice

Tun Tengku Maimun Tuan Mat
Chief Justice, Federal Court of Malaysia

Constitutional Rights Ensuring Access to Justice

Tun Tengku Maimun Tuan Mat
Chief Justice, Federal Court of Malaysia

[1] Allow me to begin by expressing my gratitude to the organisers for giving me the opportunity to share Malaysian experience on how we ensure access to justice from the perspective of constitutional rights.

[2] Malaysia is a multi-racial country with a cultural and religious diversity. Our social architecture is founded and governed by the Federal Constitution, which is the supreme law of the land. The Federal Constitution is not only a guide for the institutional pillar of the nation, but it is also a guide for every citizen of our country. As the third arm of the government, the Judiciary serves to fulfil the needs of society for justice and access thereto through the interpretation and application of the principles and values of the Federal Constitution.

Codification of the Constitutional Rights

[3] Access to justice vis-à-vis the constitutional rights is codified in Part II of the Federal Constitution of Malaysia which are collectively referred to as 'Fundamental Rights/Liberties'. Since Malaysia does not have an express Constitutional Court, the duty to ensure access to justice and to uphold and enforce constitutional rights is the shared responsibility of all levels of the Superior Courts.

[4] In broad terms, Malaysian constitutional jurisprudence has developed in a manner so as to interpret the constitutional/fundamental rights as widely as possible. Raja Azlan Shah CJ (Malaya) advised[1] that a Constitution being a living document cannot be interpreted pedantically. Further, fundamental liberties must be interpreted 'prismatically'.[2] In other words, not only must the Courts give effect to the constitutional /fundamental rights guaranteed literally by the black letter of the Federal Constitution, but the said rights must also be read to include implied rights, over and

1) *Dato Menteri Othman bin Baginda & Anor v Dato Ombi Syed Alwi bin Syed Idrus* [1981] 1 MLJ 29.
2) *Lee Kwan Woh v Public Prosecutor* [2009] 5 MLJ 301, at paragraph 8.

above the literal guarantee.

[5] The first provision of the Federal Constitution on constitutional/fundamental rights is Article 5. It codifies the right to life and personal liberty. Life is the ultimate right of a human being. The Malaysian Courts have accorded Article 5 a broad construction. The seminal authority in this context is the decision of the Court of Appeal in Tan Tek Seng.[3] In that case, a headmaster in a government school was dismissed on grounds that he had been convicted of a criminal offence, though on appeal, he was later released on a bond of good behaviour. Regardless, as a result of his conviction, the Government dismissed him from their employment.

[6] The Court of Appeal concluded that his dismissal from the public service was a disproportionate punishment. Central to its judgment was the notion that the right to life should be read broadly so as to include the 'quality of life'. This is what the Court of Appeal held:[4]

> "… '[L]ife' appearing in art 5(1) does not refer to mere existence. It incorporates all those facets that are an integral part of life itself and those matters which go to form the quality of life. Of these are the right to seek and be engaged in lawful and gainful employment and to receive those benefits that our society has to offer to its members. It includes the right to live in a reasonably healthy and pollution free environment."

[7] The above passage is a clear example of the expansion of the definition of the word 'life' employed in Article 5 of the Federal Constitution. It is also an apt example of the role played by the Courts in the protection of the said government school headmaster's constitutional right to life.

[8] The Malaysian Courts have also decided that Article 5 (1) of the Federal Constitution fundamentally guarantees the right to a fair trial. See for example *Yahya Hussein Mohsen Abdulrab v Public Prosecutor* [2021] 9 CLJ 414; *Dato' Seri Anwar bin Ibrahim v Public Prosecutor* [2010] 2 MLJ 312, *Public Prosecutor v Gan Boon Aun* [2017] 3 MLJ 12.

[9] Another constitutional right codified in the Federal Constitution is equality before the law

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3) *Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor* [1996] 1 MLJ 261.
4) *Ibid*., at page 288.

and equal protection of the law as stipulated in Article 8(1) of the Federal Constitution. Article 8(1) declares that all persons are equal before the law and are entitled to the equal protection of the law. The expression 'equality before the law' prohibits discrimination between persons who are in similar situation or circumstances, but it does not prohibit different treatment of un-equals. The Federal Court in *Badan Peguam Malaysia v Kerajaan Malaysia*[5] reiterated that Article 8(1) does not declare that all persons must be treated alike, rather the persons in like circumstances must be treated alike.

[10] Article 8(2) of the Federal Constitution forbids discrimination on the grounds of race, descent, place of birth or any gender. The word 'gender' was added to the Federal Constitution by the Constitution (Amendment) (No 2) Act 2001 [Act A1130] which came into force on 28.9.2001. Issue on discrimination against women arises out of the cases on citizenship of children born overseas to Malaysian mothers and foreign fathers where the Court of Appeal by majority held that those children are not entitled to be granted Malaysian citizenship automatically, having regard to the current provisions in the Federal Constitution on citizenship, where it only provides for citizenship through fathers. The government has, on 17 February 2023 announced that the constitutional provisions on citizenship will be amended accordingly to address the issue of discrimination against women.

[11] There are exceptions to the equality clause though, as set out in clause 5(a) – (f) of Article 8 of the Federal Constitution. Some of the exceptions are:

(ii) personal law, i.e. some personal laws do not apply to Muslims in Malaysia, for example, the Probate and Administration Act 1959 and the Wills Act 1959. In relation to these matters, Muslims are subject to Islamic law under the purview of the Syariah Courts.

(iii) laws for aboriginal people where under the Federal Constitution, the aboriginal people of Malaysia enjoys a special position (see *Adong Kuwau & Ors v Kerajaan Negeri Johor & Anor* [1997] 1 MLJ 418; *Sagong bin Tasi & 6 Ors v Kerajaan Negeri Selangor & 3 Ors* [2002] 2 MLJ 591).

[12] A citizen of Malaysia has an absolute constitutional right to live anywhere in Malaysia, pursuant to the right to freedom of movement as found in Article 9 of the Federal Constitution. This

5) *Badan Peguam Malaysia v Kerajaan Malaysia* [2008] 2 MLJ 285

right however is subject to any law relating to (i) security of Malaysia or any part thereof; (ii) public order; (iii) public health; and (iv) the punishment of offenders. Clause (3) of Article 9 recognises the special position of Sabah and Sarawak and Parliament by law may impose restrictions on the freedom of movement and residence with respect to the states of Sabah and Sarawak.[6)]

[13] The Malaysian Federal Constitution also codifies the right of every citizen to (i) freedom of speech and expression; (ii) to assemble peaceably and without arms and (iii) to form association. These rights are however not without restrictions. Freedom of speech can be restricted on the grounds of interest of security of the Federation or any part thereof; friendly relations with other countries; public order, public morality and restriction designed to protect the privileges of Parliament, the Legislative Assembly or to provide contempt of court, defamation or incitement of any offence. The following legislations have the effect of restricting the rights under Article 10(1) of the Federal Constitution:

(ⅰ) Printing Presses and Publication Act 1984;
(ⅱ) Official Secrets Act 1972; and
(ⅲ) Sedition Act 1948.

As for freedom of association, the right is being regulated and governed by:

(ⅰ) Societies Act 1966;
(ⅱ) Trade Union Act 1966; and
(ⅲ) Universities and University Colleges Act 1971.

Notwithstanding the restrictions, the Malaysian Courts have nevertheless enforced the right to freedom of speech and expression.

[14] In *Mohd Faizal bin Musa v Kementerian Keselamatan Dalam Negeri,*[7)] four (4) books authored by the appellant were banned by the respondent/Minister under section 7(1) of the Printing Presses and Publication Act 1984 on the ground that the publication of the appellant's books was prejudicial to public security and order. The issue in this case was whether the

6) see *Datuk Syed Kechik bin Syed Mohamed v Government of Malaysia & Anor* [1979] 2 MLJ 101; *Pihak Berkuasa Negeri Sabah v Sugumar Balakrishnan* [2002] 3 MLJ 72; *Ambiga a/p Sreenevasan v Director of Immigration, Sabah* [2018] 1 MLJ 633

7) *Mohd Faizal bin Musa v Kementerian Keselamatan Dalam Negeri* [2018] 3 MLJ 14

impugned order made by the Minister suffers from illegality, irrationality, procedural impropriety and unreasonableness.

[15] The High Court decided in favour of the Minister. On appeal to the Court of Appeal, the decision of the High Court was reversed. While acknowledging that the right to freedom of expression is not absolute, the Court of Appeal held that the order by the Minister to ban the books was illegal and that the order amounted to a restriction on the appellant's constitutional and fundamental right to freedom of expression.

[16] In *The Edge Communication Sdn Bhd v Ketua Setiausaha Kementerian Dalam Negeri & Anor,*[8] The Edge filed an application for judicial review to quash the order of the respondent/Minister in suspending the appellant's publication, namely 'The Edge' and 'The Edge Financial Daily' for three months. Both publications had reported about the possible financial mismanagement of 1MDB. The High Court held inter alia that the suspension was unconstitutional and in violation of Article 10(1) of the Federal Constitution. The decision of the High Court was affirmed by the Court of Appeal.

[17] On freedom of assembly, section 9(1) of the Peaceful Assembly Act 2012, requires an organiser of a peaceful assembly to give notice to the Officer in Charge of the Police District in which the assembly is to be held. By section 9(5), any person who fails to give notice commits an offence and shall on conviction, be liable to a fine not exceeding RM10,000.00.

[18] In *PP v Yuneswaran a/l Ramaraj,*[9] a case which concerns the constitutionality of section 9(5), the Court of Appeal held inter alia that section 9(5) was not unconstitutional and that the purpose of the Peaceful Assembly Act 2012 is to facilitate the exercise of a right granted by Article 10(1) of the Federal Court, and not to restrict it.

[19] On freedom of religion which is codified in Article 11 of the Federal Constitution, every person has the right to profess and practice his religion and subject to clause (4), to propagate it. Clause (4) in essence prohibits the propagation of any religious doctrine or belief among persons professing the religion of Islam. Given the fact that Islam is the religion of the Federation of Malaysia, the limitation under clause (4) of Article 11 is reasonable and logical.

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8) *The Edge Communication Sdn Bhd v Ketua Setiausaha Kementerian Dalam Negeri & Anor [2016] MLJU 1842*
9) *PP v Yuneswaran a/l Ramaraj* [2015] 6 AMR 271

[20] Moving on to education, Article 12 of the Federal Constitution codifies –

(ⅰ) prohibition with regard to education;
(ⅱ) the right of a religious group to establish and maintain an institution for the education of children in its own religion;
(ⅲ) prohibition of requiring a person to take part in any religious ceremony or worship other than his own; and
(ⅳ) the right of a parent to determine the religion of a child under the age of 18.

[21] It is pertinent to highlight that the Malaysian Federal Constitution does not provide for right of education. Article 12(1) merely prohibits discrimination against any citizen on the grounds of only race, descent or place of birth in the administration of any educational institution maintained by the public authorities, and particularly with regard to the admission of students or the payment of fees. The prohibition against discrimination applies only to Malaysian citizens. Although the right to education is not expressly conferred by the Federal Constitution, the Government of Malaysia since Independence has made education available to all citizens absolutely free for primary/elementary and secondary/middle education.

[22] For foreigners and non-citizens who lawfully reside in Malaysia, they may study in private institutions or private international schools. In this regard, the court had also given protection to foreigners who studied in International Schools as evident in the case of *Jacob Renner & Ors v Scott King, Chairman of Board of Directors of the International School of Kuala Lumpur & Ors.*[10] In Jacob Renner, the 1st plaintiff suffered from moderate spastic dipelgia that affected his motor movement. After completing his elementary school at the Melawati campus of the defendant's school, he was expected to be transferred to the Ampang campus for his middle school. However, he was denied entry to the Ampang campus due to his physical disability. The plaintiffs appealed to the defendant's board. The appeal was rejected.

[23] The plaintiffs filed an application for an interlocutory injunction restraining the defendants and/or their servants/agents from excluding, preventing, precluding or hindering the 1st plaintiff from attending and commencing middle school at the Ampang campus. The High Court granted the interlocutory injunction prayed for. In coming to the aid of the plaintiffs, the High

10) *Jacob Renner & Ors v Scott King, Chairman of Board of Directors of the International School of Kuala Lumpur & Ors* [2000] 3 CLJ 569

Court stated that where the overriding education needs of children were likely to be threatened, this would necessitate the tilting of the balance of justice in favour of providing continuation of education for the affected children.

[24] The right to property is encapsulated in Article 13. The law through the Land Acquisition Act 1960 allows for compulsory acquisition of land by the State Authority if the land is needed inter alia for a public purpose. In the event of compulsory acquisition of land, the law requires the owner to be compensated for the deprivation of his property.

[25] In *Jais bin Chee & Ors v Superintendent of Land & Surveys Kuching Division,*[11] it was held by the Court of Appeal that in order not to infringe Article 13 of the Federal Constitution, adequate compensation should be construed to mean fair and adequate compensation.

[26] Article 13 of the Federal Constitution has also received a broad construction. In interpreting the right to property, Mokhtar Sidin JCA (sitting in the High Court) said as follows:[12]

> "In modern legal system, property includes practically all valuable rights, the term being indicative and descriptive of every possible interest which a person can have in any and every thing that is the subject of ownership by man and including every valuable interests, it can be enjoyed as property and recognized as such equitable interests as well as legal interests and extending to every species of valuable rights or interests in either real or personal property or in easements, franchises and incorporeal hereditaments."

[27] In that case, the plaintiffs, the indigenous people of Johor had successfully established their native customary rights over lands and that by such native custom, they had acquired a right to property over those lands. The lands were acquired by the State Government. The plaintiffs alleged that the acquisition was done without compensation. The State Government argued that the relevant written law did not expressly mandate the payment of compensation. Reading Article 13 into the relevant law, the High Court held that the State Government was required by law to compensate the plaintiffs for the deprivation of their property. It was the first Malaysian case to

11) Jais bin Chee & Ors v Superintendent of Land & Surveys Kuching Division [2014] 6 MLJ 439
12) *Adong bin Kuwau & Ors v Kerajaan Negeri Johor & Anor* [1997] 1 MLJ 418, at page 433.

recognise native customary rights in Malaysia.

[28] In *Raqeem Rizqin Enterprise & Yg Lain lwn Ketua Polis Negara & Satu lagi,*[13] a case which concerns the freezing and seizure of assets/properties under the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001, the Court of Appeal acknowledged the need to balance the wide powers of the enforcement agency and the need to protect the rights of possession and peaceful enjoyment of the property guaranteed under Article 13 of the Federal Constitution. It was there held that where there are certain follow up actions to be taken within a prescribed period, and those actions had not been taken, the assets or properties seized must be released.

[29] Recently, on 9 December 2022, as a result of a broad construction of Article 13, the Federal Court in the case of *Wiramuda (M) Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri* (W-01(A)-513-10/2020) declared section 4C of the Income Tax Act 1967 unconstitutional. By section 4C, the Director General of Inland Revenue was given the power to impose tax on compensation received by a company for its land compulsorily acquired by the government. It was held by the Federal Court that the effect of section 4C was to diminish the value of compensation awarded to the company and thus rendering Article 13 on adequate compensation, illusory.

Conclusion

[30] Access to justice would be futile if the courts are unable to grant effective remedy to an aggrieved litigant. In all the cases cited earlier, the Malaysian Courts have indeed granted suitable and effective remedies in addressing the grievances of the litigants.

[31] Apart from the express constitutional rights contained in the Federal Constitution, the examples adumbrated above are but some instances indicating how the Malaysian Judiciary has been making a continuing and proactive effort at ensuring access to justice by enforcing such constitutional rights. And the decided cases demonstrated that the interpretation of these rights had evolved over time where the courts are taking a broader interpretation in favour of upholding and enforcing such rights.

13) *Raqeem Rizqin Enterprise & Yg Lain lwn Ketua Polis Negara & Satu lagi* [2019] 8 CLJ 41

Presentation 4

Right to Access to Justice Guaranteed by the Constitution of Mongolia

Buyandelger Batsukh
Justice, Constitutional Court of Mongolia

Right to Access to Justice Guaranteed by the Constitution of Mongolia

Buyandelger Batsukh
Justice of the Constitutional Court of Mongolia

Dear Chair of the Symposium,

Your Excellencies Presidents, Chairmen, Chief Justices, and Justices of the Constitutional Courts,

Ladies and Gentlemen,

First of all, I'd like to extend my gratitude for the opportunity to participate in the 4th International Symposium organized by the AACC Secretariat for Development and Research and deliver a presentation.

On behalf of the Constitutional Court of Mongolia and on my own behalf, I'd like to express my warm greetings to the Constitutional Court of the Republic of Korea and the Secretariat, who are organizing this symposium in its country, and all of you, Justices, guests, and participants, and wish you all the very best.

I am confident that the symposium will be fruitful and successful.

1. Legal status of the Constitutional Court of Mongolia

Part 1 of Article 64 of the Constitution of Mongolia states: "The Constitutional Court of Mongolia shall be the competent organ with powers to exercise supreme supervision over the enforcement of the Constitution, to make a conclusion on the breach of its provisions, and to decide constitutional disputes, and is the guarantor for strict observance of the Constitution", which determined the main competence of the court. Also, Article 66 of the Constitution establishes and legitimizes the constitutional competence of the Constitutional Court. Within the framework of this norm of the Constitution, the Law on Constitutional Court and the Law on Constitutional Court Procedure were adopted and put into effect.

Citizens (including foreign citizens and stateless persons lawfully residing in the territory of

Mongolia) may appeal to the Constitutional Court of Mongolia for any jurisdictional disputes stipulated in the Constitution. The Constitutional Court of Mongolia examines and decides disputes regarding a violation of the Constitution, on its own initiative pursuant to the petitions or information from citizens, and/or at the request of the State Great Hural, the President, or the Prime Minister, or the Supreme Court, or the Prosecutor General.

The purpose of the procedure for examining and resolving disputes by the Constitutional Court of Mongolia is the full and objective consideration and resolution of disputes about violations of the Constitution from all sides, and ensuring strict observance of the Constitution and constitutionality.

Thus, the decision of the Constitutional Court of Mongolia has established itself as a benchmark in society and contributes toward ensuring the highest legal force of the Constitution and its strict observance.

2. Legal regulation guaranteeing the "right to access to justice".

Article 8 of the Universal Declaration of Human Rights states, "Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law." Article 10 states that "Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him."

In addition, paragraph 1 of Article 14 of the International Covenant on Civil and Political Rights[14] states that "All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children."

They are considered fundamental international norms that establish the basis for access to

14) Mongolia joined the International Covenant on Civil and Political Right on January 5, 1968 and ratified it on November 18, 1974.

justice.

However, according to Part 1 of Article 14 of the Constitution of Mongolia, "All persons lawfully residing within Mongolia shall be equal before the law and the courts." Paragraph 14 of Article 16 guarantees "The right to appeal to the court to protect such rights if he/she considers that the rights or freedoms as prescribed by the laws of Mongolia or by international treaties have been violated; and shall have the right to be compensated for damage illegally caused by others; right not to testify against oneself, his/her family, or parents and children; right to defense; right to receive legal aid; to have the documents of evidence examined; right to a fair trial; right to be trialed in his/her own presence; right to appeal against court decisions, and right to request a pardon. It shall be prohibited to demand, compel or use force to testify against himself/herself. Every person shall be presumed innocent until proven guilty by the court through due process of law. The punishment and penalties imposed on the convicted shall not be applicable to his/her family members or relatives" and thus ensured the right to appeal to the court.

As a result, the requirements for the right to appeal to the court, to a fair trial, and to appeal against court decisions are regulated in more detail by the Law on Constitutional Court Procedure, Laws on Administrative, Civil, and Criminal Procedure, and the Law on Infringement offenses resolving.

Citizens, claiming that the legal norms enshrined in some laws are formulated in such a way that makes it impossible to appeal to the court or appeal against its decisions, took the matter to the Constitutional Court of Mongolia.

3. Some examples of constitutional disputes related to the right to appeal to the court, examined and resolved by the Constitutional Court of Mongolia.

3.1. Citizens applied to the Constitutional Court claiming that the right to file a complaint in defense of their violated rights under the Law on Banking was granted only to certain shareholders, as a result of which other shareholders lost the constitutionally protected right to access to justice, and thus, violated Article 14 of the Constitution, according to which no person shall be discriminated against a person on the basis of property and assets.

The Constitutional Court of Mongolia, in its Resolution No.01 of 1998, ruled that the provisions of Part 1 of Article 41 of the Law of Mongolia on Banking, which, in connection with the appointment of a banking successor, besides leading to discrimination on the basis of property and assets, the rights of depositors and clients to appeal to the court was restricted on the basis of shares

in the authorized capital of the bank, shares in the number of deposits, as well as the shares of other payments payable by the bank, violated the right of everyone to be equal before the law and the court, to go to court with a complaint regarding the protection of their violated rights, and the right to a fair trial.

3.2. On August 9, 2007, the State Great State Hural (Parliament) of Mongolia adopted an amendment on simplified criminal proceedings to Chapter 48 of the Code of Criminal Procedure /from Article 414 to Article 419/. Citizens applied to the Constitutional Court for violating the provisions of paragraph 14 of Article 16 of the Constitution in connection with the provision of Article 418.2 of the Code of Criminal Procedure of Mongolia, which states that "the judge, in the presence of the defendant, victim, attorney, and prosecutor, issues a ruling on the case within 72 hours after receiving the case and the court decision is not subject to appeal".

In its ruling No.08 of 2008, the Constitutional Court of Mongolia stated that the provision "decision cannot be appealed" in part 2 of Article 418 of the Code of Criminal Procedure of Mongolia does not allow the appeal of a judgment of conviction or acquittal issued as a result of simplified proceedings, and thus, the defendant, the victim, their attorney are deprived of the opportunity to exercise their right to appeal against the court decision.

The International Covenant on Civil and Political Rights states that everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.

Thus, the provision of paragraph 2 of Article 418 of the Code of Criminal Procedure "...a judgment cannot be appealed" was considered to be a violation of paragraph 14 of Article 16 of the Constitution, which provides for "...the right to appeal against a court decision...".

3.3. Part 4 of Article 25 of the Law on the Courts of Mongolia, approved by the State Great Khural of Mongolia on January 15, 2021, states that "The Supreme Court shall ensure the uniformity of the application of the law by reviewing the decision of the appellate court in accordance with the grounds and procedures provided for in the law", in paragraph 25.7.5 of the same article states that the Supreme Court "In order to ensure the uniformity of the application of the law, the Supreme Court shall review the decision of the appellate court in the following cases:" and the subparagraph 25.7.5.a states as "eliminate differences in the application of the law by the first instance and appellate instance courts;", subparagraph 25.7.5.b states as "interpreted and applied the law differently from the official interpretation of the Supreme Court;", subparagraph 25.7.5.c states as "serious violations in the court proceedings affected the court's decision.". This legalization determined the purpose of the functions of the Court of Cassation and specified the

cases for case reviews by the supervisory procedure.

As a result, in accordance with the above law, amendments and changes were made to the Laws on Administrative, Criminal, and Civil Procedure, which are fully subject to the powers of the legislator.

However, legitimizing the fact that the Supreme Court considers the decision of the subordinate court in cases where "courts of first and appellate instances applied the law differently" or "the law was interpreted and applied differently than the official explanation of the Supreme Court", leads to the conclusion that this did not fully meet the goal of ensuring the uniformity of application of the law and limited the possibility for the parties to the case to appeal to the court of supervisory instance. Taking into account these circumstances, in its conclusion No.02 of 2023, the Constitutional Court of Mongolia ruled that the above narrowly regulating legislation makes it impossible for the Supreme Court to review cases that violate the uniformity of the application of the law, which directly violates the right of a citizen to a fair trial, guaranteed by the Constitution. This decision of the Constitutional Court of Mongolia will be final if accepted by the Parliament. In case of non-acceptance, it will be decided at a Full bench meeting of the Constitutional Court.

Thus, I have tried to give you a brief overview of the legal regulation of ensuring the right to access to justice in Mongolia and how the Constitutional Court of Mongolia protects this right.

I wish you all the best in all your future endeavors, and once again wishing you success at this symposium.

Thank you for your attention.

Presentation 5

Constitutional Rights Ensuring Access to Justice

Kyaw Min
Justice, Constitutional Tribunal of Myanmar

Constitutional Rights Ensuring Access to Justice

H.E. Mr. Kyaw Min
Justice, Constitutional Tribunal of Myanmar

Access to justice is an essential fundamental right and a central concept in the broader field of justice because it is a necessary part of making the rule of law fair for everyone. If there is not access to justice for the common people, Rule of law is worthless.

In the three constitutions that have been practiced in Myanmar, relevant provisions have been enacted to guarantee access to justice. If the 2008 Myanmar Constitution is being analysed, we found that in the Preamble of the 2008 Myanmar Constitution also states about Motives for writing constitution including Justice, "We, the National people, firmly resolve that we shall: xxx stalwartly strive for further burgeoning the eternal principles namely justice, liberty, equality and perpetuation of peace and prosperity of the National people", xxx. And then, Section 6 sets out the basic principles, and clause (e) of that section states that, "enhancing the eternal principles of Justice, Liberty and Equality in the Union;". Therefore, it can be seen that Myanmar really emphasizes justice.

The role of judiciary is vital in ensuring access to justice. Only if the judiciary is independent and free from bias, people can get fair and justice. So, the Section 19 of the 2008 Myanmar Constitution defined the judicial principles as follows:

a. to administer justice independently according to law;

b. to dispense justice in open court unless otherwise prohibited by law;

c. to guarantee in all cases the right of defence and the right of appeal under law.

In the Section 21(a) of 2008 Myanmar Constitution, "Every citizen shall enjoy the right of equality, the right of liberty and the right of justice, as prescribed in this Constitution."

It is found that the constitutions of various countries of the world enshrine constitutional rights for their citizens in various forms. In Myanmar, the most of the Constitutional Rights mentioned in the Chapter I, Basic Principles and Chapter 8 , Citizens, Fundamental Rights and Duties of the Citizens of the Constitution of the Republic of the Union of Myanmar (2008). These Rights are equal rights before law; the right to equal provide legal protection; equal opportunities to work; the

right of women to enjoy the same rights as men for the same work; the right to life; freedom of expression; the right to assemble peacefully without weapons, freedom to practice religion and customs; right of settlement; freedom of worship; the right to vote freely and so on.

If these constitutional rights are violated, people have the right to apply for writs to the Supreme Court of the Union. The Supreme Court of the Union is vested the power to issue the five kinds of Writs, that are Writ of Habeas Corpus, Writ of Mandamus, Writ of Prohibition, Writ of Quo Waranto, and Writ of Certiorari by the 2008 Constitution.

In Myanmar, Courts of the Union are formed as Supreme Court of the Union, High Courts of the Region, High Courts of the State, Courts of the Self-Administered Division, Courts of the Self-Administered Zone, District Courts, Township Courts and the other Courts constituted by law; Courts-Martial; Constitutional Tribunal of the Union.

Without affecting the powers of the Constitutional Tribunal and the Courts-Martial, the Supreme Court of the Union is the highest Court of the Union. The Courts-Martial shall be constituted to adjudicate Defence Services personnel. The Constitutional Tribunal set up to interpret the provisions of the Constitution, to scrutinize whether or not laws enacted by the Pyidaungsu Hluttaw, the Region Hluttaws and the State Hluttaws and functions of executive authorities of Pyidaungsu, Regions, States and Self-Administered Areas are in conformity with the Constitution, to decide on disputes relating to the Constitution between Pyidaungsu and Regions, between Pyidaungsu and States, among Regions, among States, and between Regions or States and Self-Administered Areas and among Self-Administered Areas themselves, and to perform other duties prescribed in the Constitution.

Speedy trial is an important factor in access to justice to the people. Although it is not detail express in the 2008 Constitution, The Supreme Court of the Union serve as a mission. Moreover, Legal aid is also important component of strategies to enhance access to justice. Legal aid is the constitutional right of citizens in the 2008 Constitution as mention in Article 347 of the Constitution, the State must grant equal rights to anyone in the law, as well as the right to equal protection of the law. So, the Legal Aid Law (Pyidaungsu Hluttaw Law 10, 2016) is enacted to enjoy the right to equality, liberty and justice to legal aid and to assist in the regular and timely handling of cases. People will provide free legal service to help, there is formed Union Legal aid Board, Regional / State Legal aid Board, District Legal aid Board and Township Legal Aid Boards. These are organization mechanism to provide free legal aids plus speedy trial before court which helps to reach access to justice.

I would like to conclude my presentation here, that people can get access to justice, the courts in

Myanmar adjudicate the cases fair and speedy in accordance with the Law. The Citizen who want to constitutional remedy can be requested to the Supreme Court of the Union by mean writs. While the Supreme Court of the Union sit the case on the Citizens' rights, there is need to decide whether on constitutionality or not, it may apply a case to the Constitutional Tribunal of the Union by means of prescribed manner. And then, Under the 2008 Constitution and the Constitutional Tribunal of the Union Law, an individual citizen cannot access directly to the Tribunal. Although the individual citizen who exhausted his rights can access to the Tribunal through his concerned representatives. If his loss or grievance may affect the interests of other citizens or public interest, the Concern Representative can present and discuss the other Representatives in the House and then, the 10 percent of the Representatives submit the petition to the Tribunal with the manner prescribed by the Tribunal Law.

Presentation 6

Constitutional Rights Ensuring Access to Justice

Punya Udchachon
Justice, Constitutional Court of Thailand

Constitutional Rights Ensuring Access to Justice

Dr. Punya Udchachon LL.D., Ph.D.
Justice of the Constitutional Court of the Kingdom of Thailand

Honourable President of the Constitutional Court of the Republic of Korea,
Distinguished Participants,
Ladies and Gentlemen,

First of all, on behalf of the Constitutional Court of the Kingdom of Thailand, I would like to sincerely thank the President of the Constitutional Court of the Republic of Korea to invite me for the 4th International Symposium of the AACC Secretariat for Research and Development today.

Constitutional rights ensuring access to justice are the most important issue and have become a major focus on all sectors in the legal community such as government, regulators, state agencies and people. In a modern world, the access to justice involves fairness, equality, morality and social participation. People should enjoy rights to access to both procedural and substantive justice. According to section 68 paragraph one of the Constitution of the Kingdom of Thailand, 2017, "the State should organise a management system of the justice process in every aspect to ensure efficiency, fairness and non-discrimination and shall ensure that the people have access to the justice process in a convenient and swift manner without delay and do not have to bear excessive expenses."

Ladies and Gentlemen,

Under the provisions of the Constitution, the people shall have
the right to file their complaints to the Constitutional Court through four channels that I am going to discuss further.

Firstly, a person or community which is a direct beneficiary of the performance of state duties under Chapter V, Duties of the State, of the Constitution, and has suffered a loss as a consequence of a failure to perform duties of the State, or the performance of duties was deficient or unduly

delayed, shall enjoy their rights under these following criteria.

(1) An applicant shall be a "person" or "community" that is a direct beneficiary of the performance of state duties as prescribed in the Chapter on "Duties of the State" of the Constitution, and has lost such benefits as a result of failure to perform duties of the State, or the performance of duties was deficient or unduly delayed.

(2) Such applicant shall file a request to the relevant agencies before. If they fail to function adequately, fail to operate within 90 days since the date of complaint receipt, or still perform dysfunction, the applicant shall file their written objection again within 30 days since the day of acknowledgement or notification or deemed as so.

(3) Such applicant shall file their complaint to the Ombudsman within 30 days that the State agency fails to perform correctly according to their duties stipulated in the constitution since the day of issuing a written objection as described in (2).

Once the Ombudsman considers that such State agency performs duties correctly in accordance with the Constitution, both the applicant and the agency shall get notified. In contrast, if the Ombudsman is of opinion that such agency fails to do so, the Council of Ministers shall be notified about that matter.

(4) The Council of Ministers shall consider the Ombudsman's opinion and issue an order as may be reasonable. In this case, such person or community shall also get notified about the said order. If they view that the State agency's act still does not meet such order as provided in the Constitution, they shall have rights to file their application to the Constitutional Court within 30 days since they receive the Council of Ministers' notification to rule whether or not failure of the State's act, malfunction or delay takes place.

Secondly, in the application of a provision of law to any case, if the Courts of Justice, the Administrative Court, or the Military Court by itself is of opinion that, or a party to the case raises an objection with reasons that, such provision of law falls within the Constitution and there has not been yet a Constitutional Court ruling pertaining to such provision, one of the said three Courts shall submit its opinion to the Constitutional Court for decision. It found that up to 80% of the applications have been filed to the Constitutional Court through this channel.

Thirdly, a person whose rights or liberties guaranteed by the Constitution are violated, has the right to submit a petition to the Constitutional Court for a decision on whether such act is contrary to or inconsistent with the Constitution. However, there are some exceptions for this channel, such

as the act of the government's action, a matter pending trial by another court, or a matter which another court has rendered a final judgment or order.

Finally, a person's application is submitted to the Ombudsman, and the latter is of opinion that a provision of law causes a question in constitutionality. The Ombudsman shall submit the case with opinions to the Constitutional Court thereof without delay. Some case examples of this channel include the rights of married women relevant to their surnames, the right of disabled persons for their application for examination of a judge trainee, to name but a few.

Ladies and Gentlemen,

No matter which channel applications are filed through to the Constitutional Court of the Kingdom of Thailand, the Court adheres to the rule of law firmly into three following aspects.

Firstly, in terms of procedure, the legislature's enactment shall be legal and constitutional. The statutory execution of the executive shall be equal. The judiciary shall perform fair trials. Also, the act of government shall be lawful in light of legal authorization.

Secondly, the substantive aspect includes the principle of law governing the retrospective legislation (ex post facto law), denial of unfair discrimination, presumption of innocence, rejection of ultra vires, justifiable exercise of state power, constitutionality of law, as well as fair and unbiased trials.

Finally, the institutional characteristic involves the separation of powers, judicial independence and impartial constitutional justice procedures.

Taking a Constitutional Court ruling as an example, I would like to illustrate Ruling No. 1/2023 dated 9th January 2023 Re: the State authorised the private sector to engage in electricity production.

Section 56 paragraph two of the Constitution is a provision protecting a proprietary right or ownership of the basic structure or network of basic public utility services of the State which are essential for the people's subsistence or state security, including a power plant or electric power stations which can refer also to the network of powerhouses owned by a private company. Even though a business allowed to generate electricity holds a proportion or production capacity above 51%, such fraction of capacity is not relevant to the basic structure or network of basic electricity services pursuant to section 56 paragraph two of the Constitution. In addition, the State shall still

enjoys its privilege or power to control the business to supply electricity for state security without lowering the ownership proportion of such basic structure or network or affecting the security of the State.

Section 56 paragraph three and paragraph four is a provision protecting the people's interests in case of the basic utility services undertaken by the State that are necessary for individual living. Electricity bills made to consumers can reflect on an actual cost and appropriate investment benefits. When the State encounters a hindrance to establish enough power plants to meet the national demand -- costing too enormously to massive public debts, it is necessary to allow a business to hold a share in electricity services for power sufficiency and distribution. With this respect, I would like supplement that on order to supply adequate electricity for the future, Thailand's generation plan has been made under demand prediction relevant to the nation's economic growth. Nonetheless, an increase in natural gas prices can affect electricity costs, regardless of over-demanding uninterruptible power. The bills made to the people, thereby, do not cause any direct variation with the private sector's engagement in such generation at all.

As a consequence, the authorization of a business for electricity services does not exert any impacts to state security nor cause over-billing to the people. Such practice is sufficient to the State's duties and consistent with the rule of law under section 56 paragraph two, paragraph three and paragraph four in conjunction with section 3 paragraph two of the Constitution.

Ladies and Gentlemen,

In a newly-digitalised world, the Constitutional Court of the Kingdom of Thailand has applied an electronic court system to ensure the people's convenient, prompt, and modern access to constitutional justice. Given that the applicants can file their application through the e-filing system, the Constitutional Court imposes its explicit time frame for adjudication. To illustrate, the Constitution provides that the Constitutional Court shall adjudicate the cases related to whether or not a Member of the House of Representatives, Senator, or member of a committee directly or indirectly is involved in expenditure estimates of the State within 15 days. According to the Constitution, the Constitutional Court shall also adjudicate the cases related to constitutionality of a draft of an amended constitution within 30 days, while the time frame imposed for general cases is set within 1 year.

Furthermore, the Constitutional Court of the Kingdom of Thailand takes into account its reasoning vis-à-vis research because such academic project can be a basic essence for the Court's reasoning. These are some of the research projects of the Thai Constitutional Court: The Scope of Duties and Powers of the Constitutional Court, The Balance of the Protection of the Right to Assembly, The Constitutional Court and the Protection of the Right to Individual Privacy in a Digital Society, Prominent Precedents on the Constitutional Adjudication, and The Constitutional Court in Democratic States in the 21st Century. In addition to many reasons that can be applied from the research projects, the Constitutional Court of the Kingdom of Thailand also takes into consideration universal principles such as the 1966 International Covenant on Civil and Political Rights (ICCPR) and the 1975 UN Declaration on the Rights of Disabled Persons.

Ladies and Gentlemen,

I would like to conclude my speech by confirming that over its past 25 years, the Constitutional Court of the Kingdom of Thailand has played its role and performed its duties to efficiently and obviously safeguard the constitution and protect the people's rights and liberties in line with intimate academic cooperation with all of the members of the Asian Association of Constitutional Courts and Equivalent Institutions (AACC) and the Permanent Secretariat for Research and development (SRD) as key mechanisms to drive us for sustainability and public trust in Asia.

Thank you for your kind attention.

Presentation 7

Constitutional Reform in Uzbekistan and the Development of Constitutional Control

Askarjon Gafurov
Deputy Chairman, Constitutional Court of Uzbekistan

Constitutional Reform in Uzbekistan and the Development of Constitutional Control

Askar Boyisovich Gafurov
Deputy Chairman of the Constitutional Court of the Republic of Uzbekistan

Dear Mr. Chairman!

Dear colleagues, ladies and gentlemen!

I am pleased to welcome you on behalf of the Constitutional Court of the Republic of Uzbekistan to today's symposium!

First of all, I would like to thank the representatives of the Constitutional Court of the Republic of Korea and personally Mr. Yoo Nam-seok, President of the Constitutional Court, for the invitation and for the opportunity to participate in this symposium.

The topic of the symposium is very interesting and important for the improvement of the effectiveness of constitutional justice. Undoubtedly, the symposium will allow us to share our experiences and discuss the most pressing issues of constitutional review.

In my speech I would like to briefly inform you about the constitutional reform conducted in our country.

A referendum on the new Constitution of Uzbekistan was held on April 30 this year, where the citizens of the country made their choice by a 90 percent majority in determining the future of the country, focused on deepening democratization of all spheres of public and state life and adopted a new version of the Constitution of the Republic of Uzbekistan.

The updated Constitution includes 155 articles compared to 128 in the previous constitution and the number of specific provisions on human rights and freedoms has more than tripled. Sixty-five percent of the constitution has been amended. Overall, these figures show that the document is not just an amended constitution, but essentially an updated one.

The main priority of the constitutional reform was to strengthen the guarantees of fundamental personal rights and freedoms of citizens. For the first time the constitution established that human rights and freedoms can be limited only in accordance with the law and only to the extent necessary to protect the constitutional order, health and morality of the people, the rights and freedoms of

others, in the interests of ensuring public safety and order.

This measure is aimed at strengthening the protection of human rights, that is, the rights of the individual, the protection of personal data, the right to housing, the right to work, access to health care, access to education, protection of freedom of religion and freedom of speech, the rights of low-income populations, protection, protection of the environment.

The Constitution serves a stabilizing function, designed to maintain stability not only in the legal, political and economic systems.

Constitutional amendments also aim to support fair competition, protect private property and develop a favorable investment and business climate. The government is responsible for ensuring sustainable economic growth, macroeconomic stability, the implementation of measures to create decent living conditions and food security.

The Constitution includes provisions for strengthening the immunity of judges and ensuring their safety, non-accountability of judges in specific cases, funding of courts from the state budget, contributing to a truly fair and independent judiciary and ensuring the impartiality of courts.

According to Article 132 of the Constitution, the judges of the Constitutional Court are elected for a ten-year term without the right to be re-elected. The updated Constitution contains very important guarantees for the independence of the Constitutional Court. Under the new Constitution, the judges of the Constitutional Court are elected for a term of ten years without the right to re-election. The Constitutional Court shall elect for a term of five years from among its members the President of the Constitutional Court of the Republic of Uzbekistan and his/her deputy.

The Constitution confers new powers on the Constitutional Court. From now on, the Constitutional Court shall determine the conformity of international treaties of the Republic of Uzbekistan with the Constitution - before the President of the country signs laws on their ratification, shall give an opinion on the conformity to the Constitution of the issues submitted to a referendum. In general, the new Constitution contributes to increasing the effectiveness of constitutional control, creates conditions for bringing the Constitutional Court to a new level of work to ensure the supremacy of the Constitution of the Republic of Uzbekistan.

The Legislative Chamber of the Oliy Majlis of the Republic of Uzbekistan addressed the Constitutional Court with the request to determine the constitutionality of the ruling on the draft Constitutional Law of the Republic of Uzbekistan "On the Referendum of the Republic of Uzbekistan". The resolution submitted by the Legislative Chamber provided for the appointment

of a referendum on the Draft Constitutional Law of the Republic of Uzbekistan "On the Constitution of the Republic of Uzbekistan".

The Constitutional Court considered this issue at its session. For the purpose of full and comprehensive examination of the submitted appeal on its contents, it considered appropriate to clarify the following issues

the observance by the Legislative Chamber of the Parliament of the procedure of adopting the Draft Constitutional Law "On the Constitution of the Republic of Uzbekistan";

Observance by the Legislative Chamber of the Oliy Majlis of the procedure for calling a referendum;

availability in the Draft Constitutional Law "On the Constitution of the Republic of Uzbekistan" submitted for referendum of the issues which may not be the subject of the referendum.

Having studied the submitted materials, having analyzed the mentioned issues, having listened to the parties, the Constitutional Court concluded that the Legislative Chamber of the Parliament observed the procedure of adopting the Draft Constitutional Law "On the Constitution of the Republic of Uzbekistan" and the procedure of appointing a referendum by the Parliament was not violated.

The Constitutional Court, taking into account the scope and significance of the amendments and additions to the Constitution of the Republic of Uzbekistan, considered the adoption of the new version of the Constitution justified.

Proceeding from the above circumstances, the Constitutional Court concluded that the Legislative Chamber of the Parliament observed the procedure of adopting the Draft Constitutional Law "On the Constitution of the Republic of Uzbekistan" established by law.

According to the Constitution, decision-making on holding a referendum and setting the date of holding it falls within the joint competence of the Chambers of the Parliament. Issues falling within the joint competence of the chambers of the Oliy Majlis are considered in the Legislative Chamber, and then in the Senate. Based on these constitutional norms, the Constitutional Court indicated that the issue of fixing the date of the referendum is subject to implementation after approval by the relevant resolution of the Senate.

The Constitutional Court in its decision noted that the submission of the draft of the updated Constitution to referendum is a manifestation of direct democracy, a constitutional-legal form and realization of the power of the people.

In particular, the Constitutional Court, taking into account the practice of adopting the Constitution through referendum for the first time in the country's history, the fact that referendum

is the direct expression of people's will, the supreme legal force of the decisions adopted through referendum, believes that referring the adoption of the Constitution by the Legislative Chamber of Oliy Majlis to the expression of will of people, serves the realization of constitutional principle of democracy.

Here I would like to conclude my speech. I wish the organizers and all participants of the conference productive work, constructive dialogue and effective interaction!

Thank you for your attention!

Гафуров Аскар Бойисович, Заместитель председателя Конституционного суда Республики Узбекистан

ДОКЛАД
на тему “Конституционная реформа в Узбекистане и развитие конституционного контроля”

Уважаемый г-н Председатель!

Уважаемые коллеги! Дамы и господа!

Я рад приветствовать Вас от имени Конституционного суда Республики Узбекистан на сегодняшнем симпозиуме!

Прежде всего хочу поблагодарить представителей Конституционного суда Республики Кореи и лично председателя Конституционного суда господина Ю Нам Суук (Yoo Nam-seok), за приглашение и за возможность принять участие в данном симпозиуме.

Тема симпозиума очень интересна и имеет важное значение в повышение эффективности конституционного правосудия. Без всякого сомнения можно утверждать, что симпозиум позволит поделиться опытом и обсудить наиболее актуальные вопросы обеспечения конституционного контроля.

В своем выступление хотел вкратце проинформировать Вас о конституционной реформе, проведенной в нашей стране.

30 апреля этого года состоялся референдум по новой Конституции Узбекистана, где, граждане страны 90 % большинством голосов сделали свой выбор в определении будущего страны, ориентированного на углубление демократизации всех сфер общественной и государственной жизни, приняв новую редакцию Конституции Республики Узбекистан.

Обновленная Конституция содержит 155 статей по сравнению со 128 в прежнем Основном законе, а количество конкретных положений о правах и свободах человека увеличилось более чем в три раза. В 65% конституции были внесены изменения. В целом, эти цифры свидетельствуют о том, что документ является не просто измененной, а по сути обновленной конституцией.

Основным приоритетом конституционной реформы стало усиление гарантий основных личных прав и свобод граждан. Впервые в Конституции установлено, что права и свободы человека могут быть ограничены только в соответствии с законом и только в той мере, в какой это необходимо в целях защиты конституционного строя, здоровья и нравственности народа, прав и свобод других лиц, в интересах обеспечения общественной безопасности и порядка.

Данная мера направлена на усиление защиты прав человека, то есть прав личности, защиты персональных данных, права на жилище, права на труд, доступа к медицинскому обслуживанию, доступа к образованию, защиты свободы вероисповедания и свобода слова, права малообеспеченных слоев населения, защита, охрана окружающей среды.

Конституция выполняет стабилизирующую функцию, призвана поддерживать стабильность не только правовой, политической и экономической систем.

Конституционные поправки также направлены на поддержку честной конкуренции, защиту частной собственности и развитие благоприятного инвестиционного и делового климата. Правительство отвечает за обеспечение устойчивого экономического роста, макроэкономической стабильности, реализацию мер по созданию достойных условий жизни и обеспечению продовольственной безопасности.

В Конституцию включены нормы об усилении неприкосновенности судей и обеспечении их безопасности, не подотчётности судей по конкретным делам, финансировании деятельности судов из государственного бюджета, способствующие формированию действительно справедливой и независимой судебной системы и обеспечению беспристрастности судов.

В соответствии со статьей 132 Конституции судьи Конституционного суда избираются на десятилетний срок без права на переизбрание. Обновленная Конституция содержит весьма важные гарантии самостоятельности Конституционного суда. Согласно новой Конституции судьи Конституционного суда избираются на десятилетний срок без права на переизбрание. Конституционный суд избирает на пятилетний срок из своего состава председателя Конституционного суда Республики Узбекистан и его заместителя.

Конституция возлагает новые полномочия на Конституционный суд. Отныне Конституционный суд Республики Узбекистан определяет соответствие Конституции международных договоров Республики Узбекистан — до подписания Президентом страны законов об их ратификации, дает заключение о соответствии Конституции Республики Узбекистан вопросов, выносимых на референдум. В целом новая Конституция

способствует повышению эффективности конституционного контроля, создает условия для выведения на новый уровень работы Конституционного суда по обеспечению верховенства Конституции Республики Узбекистан.

Законодательная палата Олий Мажлиса Республики Узбекистан обратилась в Конституционный суд с запросом об определении соответствия Конституции Республики Узбекистан постановления «О проведении референдума Республики Узбекистан» по проекту Конституционного закона Республики Узбекистан «О Конституции Республики Узбекистан». Представленное Законодательной палатой постановление предусматривал назначении референдума по проекту Конституционного закона Республики Узбекистан «О Конституции Республики Узбекистан».

Конституционный суд рассмотрел данный вопрос на своем заседание. В целях полного и всестороннего изучения внесенного обращения по содержанию, счел целесообразным выяснение следующих вопросов:

соблюдение Законодательной палатой парламента порядка принятия проекта Конституционного закона «О Конституции Республики Узбекистан»;

соблюдение Законодательной палатой Олий Мажлиса порядка назначения референдума;

наличие в выносимом на референдум проекте Конституционного закона «О Конституции Республики Узбекистан» вопросов, которые не могут быть предметом референдума.

Изучив представленные материалы, проанализировав указанные вопросы, выслушив сторон Конституционный суд пришел к заключению, что Законодательной палатой парламента соблюден порядок принятия проекта Конституционного закона «О Конституции Республики Узбекистан» и процедура назначения референдума парламентом не нарушена.

Конституционный суд, принимая во внимание объем и значительность, вносимых в Конституцию Республики Узбекистан изменений и дополнений, счел обоснованным принятие Конституции в новой редакции.

Исходя из вышеизложенных обстоятельств Конституционный суд пришел к заключению о соблюдении Законодательной палатой парламента установленного законом порядка принятия проекта Конституционного закона «О Конституции Республики Узбекистан».

В соответствии с Конституцией принятие решения о проведении референдума и назначении даты его проведения относится к совместному ведению палат парламента. Вопросы, относящиеся к совместному ведению палат Олий Мажлиса рассматриваются

в Законодательной палате, а затем – в Сенате. Опираясь данные конституционные нормы, Конституционный суд указал, что вопрос, назаначении даты проведения референдума подлежит реализации после утверждения соответствующим постановлением Сената.

Конституционный суд в своем постановление отметил, что вынесение проекта обновленной Конституции на референдум является проявлением непосредственной демократии, конституционно-правовой формой и реализацией народовластия.

В частности, Конституционный суд, учитывая применение практики принятия Конституции Республики Узбекистан путем проведения референдума практикуется впервые в истории страны, что референдум является непосредственным выражением воли народа, обладание решений, принятых на референдуме, высшей юридической силой, считает, что отнесение Законодательной палатой Олий Мажлиса принятия Конституции к волеизъявлению народа служит реализации конституционного принципа народовластия.

На этом, хочу завершить свое выступление. Желаю организаторам и всем участникам конференции плодотворной работы, конструктивного диалога и эффективного взаимодействия!

Благодарю за внимание!