

# Constitutional Rights and AACC Members























**AACC SRD**  
AACC Secretariat for Research and Development



**Constitutional Court  
of Korea**



## AACC Member Institutions

<b>Afghanistan</b>		Independent Commission for Overseeing the Implementation of the Constitution
<b>Azerbaijan</b>		Constitutional Court
<b>Bangladesh</b>		Supreme Court
<b>India</b>		Supreme Court
<b>Indonesia</b>		Constitutional Court
<b>Jordan</b>		Constitutional Court
<b>Kazakhstan</b>		Constitutional Council
<b>Korea, Rep.</b>		Constitutional Court
<b>Kyrgyz Rep.</b>		Constitutional Court
<b>Malaysia</b>		Federal Court
<b>Maldives</b>		Supreme Court
<b>Mongolia</b>		Constitutional Court
<b>Myanmar</b>		Constitutional Tribunal of the Union
<b>Pakistan</b>		Supreme Court
<b>Philippines</b>		Supreme Court
<b>Russia</b>		Constitutional Court
<b>Tajikistan</b>		Constitutional Court
<b>Thailand</b>		Constitutional Court
<b>Turkey</b>		Constitutional Court
<b>Uzbekistan</b>		Constitutional Court

(as of December 2021)

# Constitutional Rights and AACC Members

# Preface

This book marks the fourth research publication of the Secretariat for Research and Development (SRD) of the Association of Asian Constitutional Courts and Equivalent Institutions (AACC). With regular participation by AACC members every year, the AACC SRD has been publishing annual book projects since 2018. I sincerely thank AACC member institutions for their valuable contributions to this year's volume, entitled "Constitutional Rights and AACC Members."

The purpose of this year's book is to provide an overview of constitutional rights protection in the countries of AACC members. The focus is on rights which are constitutionally protected either explicitly or implicitly in the respective constitutions, their categorization, and aspects of their interpretation and protection.

Especially Part III of each of the chapters in this book deal with important considerations for the adjudication of constitutional rights. These include the impact of historical and cultural contexts, the role of international legal norms, and current issues and challenges in rights adjudication. These three topics also respectively formed the thematic basis of the three conference sessions at the AACC SRD's 3<sup>rd</sup> International Symposium (held online, on 10 and 11 November 2021).

In 2020 the AACC SRD published a volume entitled "Freedom of Expression: Experience of AACC Members." In contrast, this year's book on "Constitutional Rights and AACC Members" therefore takes a broader perspective by adopting a bird's-eye view on the topic of constitutional rights. By providing such a perspective covering 17 Asian countries, this 2021 book will facilitate the AACC SRD in publishing future volumes on various topics of interest in comparative constitutional law.

The introductory chapter of this book discusses the background, methods and key contents of this year's research project. This is followed by comparative tables which present to the reader a quick comparative overview of selected themes across the 17 chapters provided by the respective AACC member institutions. The main part of the book consists of these chapters, each structured in a similar way. Unlike in previous volumes, this year the chapters do not include an Annex containing case summaries. Instead, the AACC SRD has asked AACC members to submit relevant case summaries via a separate process. These summaries will be available in the AACC SRD's online database (<http://www.aaccsrd.org/en/dbLst.do>).

As the AACC SRD makes further progress in realizing the exchange of information among AACC members, I look forward to the strengthening of relations between constitutional adjudicatory bodies in Asia. Once again I would like to express my profound gratitude to AACC member institutions for their enthusiastic engagement and support during the 2021 book project of the AACC SRD.

**Jongmun Park**  
Secretary General  
AACC SRD / Constitutional Court of Korea

# Congratulatory Message

I extend my sincere congratulations to the Secretariat for Research and Development (SRD) of the Association of Asian Constitutional Courts and Equivalent Institutions (AACC) for publishing its fourth research publication. I find it meaningful that the SRD was able to publish its research publication despite many obstacles encountered in the process of overcoming the deep impacts of the COVID-19 pandemic that began last year. In this regard, I express my deep appreciation for the active contribution made by AACC member institutions and the hard work and dedication of the staff of the AACC SRD.

This year, the AACC SRD has conducted research on the topic of “Constitutional Rights and AACC Members.” In this era where people around the world are inevitably experiencing restrictions on their freedoms and rights as a consequence of unexpected changes such as the COVID-19 pandemic, it is particularly timely and highly relevant for AACC member institutions to begin discussing on protection and limitations of fundamental rights.

The 3<sup>rd</sup> International Symposium of the AACC SRD held online this November provided a forum for AACC member institutions to share their own experiences on various issues including the protection of constitutional rights within a diverse Asian context, new challenges faced by constitutional review bodies as the guardian of fundamental rights, and the application of international human rights norms in constitutional adjudication and the universality of constitutional rights.

This book not only reflects the discussions at the Symposium but also provides an overview of constitutional rights provisions, classifications and the substance of constitutional rights, as well as findings in comparative constitutional studies within the AACC context. This year’s publication adds greater value in that it will provide a systematic and comprehensive insight into constitutional rights in AACC member countries, thereby laying the foundation for deeper future studies on individual specific rights.

I hope this book will be of great use and value since it contains the efforts of all AACC member institutions in safeguarding fundamental rights, based on the common understanding of the universality of fundamental rights within the context of historical, cultural, and religious diversity in Asia. I would like to conclude by reiterating my gratitude and congratulations for this year's research publication of the AACC SRD.

**Namseok Yoo**  
President  
Constitutional Court of Korea

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Part A.

Introduction

# **Introduction**

## ***Outline***

1. Background
2. Rights provisions in the constitution
3. Unenumerated constitutional rights
4. International human rights
5. Diversity in Asia: Rights in context
6. Current issues and challenges
7. Conclusion

## **1. Background**

This publication is the fourth volume of the AACC SRD<sup>1</sup> in its series of annual research books.<sup>2</sup> This growing series of annual publications serves as a primary comparative resource for AACC members themselves and the global research community. Entitled *Constitutional Rights and AACC Members*, this year's book provides an overview of constitutional rights protection in Asia through the perspective of AACC member institutions. The key reason for this choice of topic is the importance to first gain an overview of available constitutional rights within the AACC context before the AACC SRD continues with further publications focusing on particular constitutional rights.

Just like in previous years, this book mainly consists of “Fact Files” drafted by AACC members.<sup>3</sup> The process of conceptualizing, drafting, gathering, and editing these “Fact Files” takes place across the whole year. The AACC SRD coordinates closely with each AACC member during the course of the project. As conceptualized by the AACC SRD, each of the Fact Files this year is structured as follows. First, there should be a description of the rights that are available in the respective constitutional texts, as well as some references to any especially relevant historical background (Part I). Second, these available rights are to be analysed in greater detail, such as regarding their classification; discussion

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1 Secretariat for Research and Development (SRD) of the Association of Asian Constitutional Courts and Equivalent Institutions (AACC). The AACC SRD is based in Seoul, the Republic of Korea. For further information about the AACC SRD, please visit <http://www.aaccsrd.org/en/main.do>.

2 Previous volumes are *Jurisdictions and Organization of AACC Members* (2018), *Constitutional Review at AACC Members* (2019), and *Freedom of Expression: Experience of AACC Members* (2020).

3 This year 17 AACC member institutions have contributed to the publication.

should also encompass the possibility of recognizing unenumerated rights and the existence of provisions specifying the protection and legitimate limitation of rights (Part II). Lastly, each Fact File is to elaborate on examples of particularly relevant issues impacting the current interpretation of constitutional rights. These should include any especially notable cultural or historical contexts, the role of international human rights law, and significant current issues and new challenges (Part III). Each Fact File should also, if relevant, contain an Annex detailing cited legal provisions and cited cases. Unlike in previous years, this year's book project no longer contains collections of case summaries in each of the Fact Files. Instead, AACC members directly submit relevant case summaries to the AACC SRD, which will then be uploaded to the "Decisions" section of the online database.<sup>4</sup>

During the annual conference, organized under the same theme as the annual book project, AACC members are invited to further discuss certain topics that are included in their respective Fact Files. This year's conference, held online from 10 to 11 November 2021, was organized around three main sessions: 1) common values and diverse aspects of constitutional rights in Asia, 2) new challenges to constitutional rights, and 3) constitutional adjudication and the universality of human rights. These sessions reflected the design of sub-parts of the Fact Files in this book. The conference materials are available in the online database of the AACC SRD, to be found in the "Archive" section.<sup>5</sup>

Even though the book consists mainly of materials provided by AACC members, the AACC SRD contributes additional materials such as this introductory chapter (Part A.) and a selection of comparative tables on the research topic (Part B.). The comparative tables are designed to, at a glance, familiarize readers with a selection of key issues that are part of the annual research topic.<sup>6</sup> Following on from the comparative tables are the AACC members' Fact Files (Part C.). The remainder of this introduction provides some highlights from this year's book, clustered around five themes:

- Rights provisions in the constitution
- Unenumerated constitutional rights
- International human rights
- Rights in the diverse Asian context
- Current issues and challenges

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<sup>4</sup> <http://www.aaccsrd.org/en/dbLst.do>

<sup>5</sup> Ibid.

<sup>6</sup> Entries in the comparative tables have been reviewed by AACC members.

The following observations cover countries of the 17 AACC members that have contributed to this year's book: Azerbaijan, India, Indonesia, Kazakhstan, the Republic of Korea (hereafter "Korea"), the Kyrgyz Rep., Malaysia, the Maldives, Mongolia, Myanmar, Pakistan, the Philippines, Russia, Tajikistan, Thailand, Turkey, and Uzbekistan.

## 2. Rights provisions in the constitution

Constitutions usually contain a specific "Chapter", "Part" or "Section", etc. devoted to an enumerated list of rights. As demonstrated in Tables 1 and 2 of Part B. of this book, all of the constitutions surveyed in this volume contain such a list. The vast majority of these are found in either the second or third chapter (or part or section, etc.) of the constitutional text. The key exceptions are the respective constitutional texts of Indonesia and Myanmar, where the respective main list of constitutional rights is found in the second half of the constitutional text.<sup>7</sup>

As part of this book project, the AACC SRD has asked contributing AACC members to describe the categorization of constitutional rights in their respective countries' constitutions. Some of the surveyed constitutions provide explicit categorizations via official headings in the constitutional text itself. One clear example of such explicit categorization is Part III ("Fundamental Rights") of the Constitution of India, which contains headings such as: *Right to Equality*, *Right to Freedom*, *Right against Exploitation*, *Right to Freedom of Religion, Cultural and Educational Rights*, and *Right to Constitutional Remedies*. Other constitutions may not have explicit headings, but the order of the listed rights follows particular categorization. One example is the Constitution of Korea, where the listed rights can be grouped under the following six implicit headings: Human dignity and worth, and the right to pursue happiness (Article 10); right to equality (Article 11); liberty rights (Articles 12-23); rights to political participation (Articles 24-25); claim rights (Articles 26-30); and social rights (Articles 31-36).

In contrast to the above, some constitutions neither explicitly group constitutional rights via category headings nor make a particular order implicitly discernible in the list of rights. Under such circumstances, the concept of "generations of human rights" can provide a useful tool to categorize the available rights. One example is the Constitution of Indonesia. According to the Fact File provided by the Constitutional Court of Indonesia, "rights are spread over several articles and

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<sup>7</sup> See Tables 1 and 2 of Part B. of this book.

there is no definite order. However, we can still classify existing human rights arrangements according to the classification of human rights generations.” The Indonesian Fact File in this book therefore proceeds to group the constitutional rights into civil and political rights; economic, social and cultural rights; and solidarity rights.<sup>8</sup> For further details on how rights in the respectively surveyed constitutions are or can be categorized, see Table 3 of Part B. of this book and Part II.A. of the respective Fact Files provided by the AACC members. It is also important to note that constitutional rights are not necessarily only contained in the explicitly stipulated “rights” chapter of a constitution. Some rights found elsewhere in the constitution can also be interpreted as having the status of a constitutional right, and therefore must be taken into account when categorizing different groups of constitutional rights.<sup>9</sup>

Only very rarely is a constitutional right considered as absolute. Therefore the constitutional text has to stipulate how constitutional rights can be legitimately restricted and when such restrictions in turn may reach their own constitutional limits. Such matters can be regulated either via a general limitation clause applicable to all or most rights, or they can be regulated via restrictions that apply to a particular right, the latter being found in the particular relevant rights provision itself. Out of the seventeen surveyed constitutions in this book, six do not contain a general limitation clause. With the exception of the Turkish Constitution,<sup>10</sup> all of these are from either common law countries<sup>11</sup> or from a country operating a mixed legal system.<sup>12</sup> Instead of a general limitation clause, these countries usually specify rights restrictions in specific individual rights provisions.<sup>13</sup> The remaining eleven constitutions all contain general limitation clauses. With the exception of the Constitution of the Maldives, all of these are from civil law countries. This group can itself again be divided in terms of where the general limitation clause is found. Out of these eleven constitutions, six of them place the general limitation clause at the end of the list of rights;<sup>14</sup> the other five place it at the beginning of their constitutional rights chapter (part or section,

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<sup>8</sup> See Part II.A.1. of the Fact File of the Constitutional Court of Indonesia.

<sup>9</sup> Information on constitutional rights found elsewhere in the constitutional text are discussed in Part I.B. of the respective Fact Files.

<sup>10</sup> For further details regarding the nature of Article 13 of the Turkish Constitution and why it is not understood as a general limitation clause, see Part II.C.2. of the Fact File of the Constitutional Court of Turkey and the relevant footnote in Table 4 of Part B. of this book.

<sup>11</sup> India, Malaysia, Myanmar and Pakistan.

<sup>12</sup> The Philippines.

<sup>13</sup> For example, a table listing restrictions specific to the freedom of expression can be found on pp. 21-22 of the AACC SRD's publication *Freedom of Expression: Experience of AACC Members* (2020).

<sup>14</sup> Azerbaijan (Article 71 II), Indonesia (Article 28J(2)), Kazakhstan (Article 39), Korea (Article 37(2)), Mongolia (Article 19.3), and Russia (Article 55(3)).

etc.), thus preceding the enumerated list of rights.<sup>15</sup>

### 3. Unenumerated constitutional rights

Very few of the surveyed constitutions contain an explicit provision on unenumerated rights. Such provisions are found in the constitutional text of Korea (Article 37(1)), the Kyrgyz Rep. (Article 62.2), the Maldives (Article 62), and Thailand (Section 25, paragraph 1). Despite such a provision in the Constitution of the Kyrgyz Rep., no relevant cases currently exist, potentially because the Constitution only very recently came into force.<sup>16</sup> The other three countries with explicit provisions on unenumerated rights have all had experiences with judicial recognition of such rights.<sup>17</sup> However, it must be noted that despite the existence of such explicit provisions, unenumerated rights can also find their source in other constitutional provisions. For example, although Korea's Article 37(1) is the explicit constitutional provision on unenumerated rights, in practice the provision on human dignity and the pursuit of happiness (Article 10) also plays an important role in the recognition of unenumerated rights.<sup>18</sup>

It is therefore not too surprising that constitutions without explicit provisions on unenumerated rights may also be very familiar with this type of rights. Some key examples of such situations found in this book are those of India and Pakistan. The Fact Files provided by their respective supreme courts extensively discuss the existence of unenumerated rights despite the absence of an explicit constitutional provision on unenumerated rights. In its Fact File, the Indian Supreme Court lists up to twenty unenumerated rights that have been recognized<sup>19</sup> and notes that this list is not exhaustive.<sup>20</sup> Instead of an explicit constitutional provision on unenumerated rights, some of the most relevant constitutional provisions are those

15 The Kyrgyz Rep. (Article 23(2)), the Maldives (Article 16), Tajikistan (Article 14), Thailand (Article 26), and Uzbekistan (Article 19).

16 The new Constitution of the Kyrgyz Rep. was adopted on 11 April 2021 via referendum, entering into force on 5 May 2021.

17 For examples, see Table 5 of Part B. of this book. The relevant experience of the Maldives with significant adjudication on unenumerated rights was very recent, namely through a landmark judgement rendered in August 2021. For further details, see Part II.B. of the Fact File of the Supreme Court of the Maldives.

18 See Parts II.B.2. and Part II.B.3. of the Fact File of the Constitutional Court of Korea.

19 The following list is provided in Part II.B. of the Fact File of the Supreme Court of India: Right to sleep, right to locus standi, rights against arbitrariness, right to remain silent, right to privacy, right to passive euthanasia, right to non-discrimination on the ground of disability, right of women to make reproductive choices, right to receive information, rights against handcuffing, right against solitary confinement, right to free legal aid, right against the use of bar fetters, right against custodial violence, right to clean environment, right to internet, right to food, right to clothing and shelter, right to human dignity, right to inter-caste marriage, etc.

20 See Part II.B. of the Fact File of the Supreme Court of India.



specifying the Indian Supreme Court's power of constitutional interpretation.<sup>21</sup> Similarly, the Supreme Court of Pakistan has also recognized a variety of unenumerated rights through constitutional interpretation. Examples of such rights include those concerned with the environment, health, livelihood and political rights. Many of these have been recognized as being part of already explicitly enumerated rights, such as being part of the right to life (Article 9) or the freedom of association (Article 17).<sup>22</sup>

Overall, out of the seventeen surveyed constitutional courts or equivalent institutions in this book, nine provide examples of having recognized unenumerated constitutional rights, and are from the following countries: Azerbaijan, India, Indonesia, Korea, Malaysia, the Maldives, Pakistan, Thailand, and Turkey.<sup>23</sup> This list is relatively balanced in terms of legal culture, consisting of five civil law and four common law countries.

In terms of the other eight institutions, reasons for not having yet recognized any unenumerated rights vary. There may be no particular urgency to recognize unenumerated rights. For example, the materials provided by the Constitutional Court of Mongolia mentioned one reason for the absence of unenumerated rights being “due to the fact that the 18 rights and freedoms enumerated in Article 16 of the Constitution of Mongolia have a complex content that can be explained in detail.”<sup>24</sup> Others prefer not to use the terminology “unenumerated rights” as such. For example, as noted in the materials provided by the Constitutional Court of Russia, “the Constitution affords the constitutional supervisory authority discretion upon disclosing on the basis of its plain text the principles or rules that can be somewhat conventionally described as ‘unenumerated rights’. At that, in such cases the Constitutional Court does not ‘invent’ new rights, but adapts to concrete situations the constitutional text in force. Thus, it would be unsubstantiated to state the existence of ‘unenumerated rights’ in a strict sense.”<sup>25</sup>

More fundamentally, the lack of jurisprudence on unenumerated rights may be to do with whether the recognition of unenumerated rights is at all possible under one's particular constitutional framework. For example, materials provided by the Philippine Supreme Court mentioned that a separate opinion in a recent judgement “noted that the Declaration of Principles and State Policies in Article

21 Articles 141, 142, 132 and 145(3) of the Indian Constitution.

22 For further details, see Part II.B. of the Fact File of the Supreme Court of Pakistan.

23 For an overview, see Table 5 of Part B. of this book.

24 See Part II.B. of the Fact File of the Constitutional Court of Mongolia. However, international human rights treaties can play an important role within this context (for some relevant discussion, see Part I.B.3. and Part III.B. of the Fact File).

25 See Part II.B.2. of the Fact File of the Constitutional Court of Russia.

II as well as the Bill of Rights in Article III of the 1987 Constitution contain no such ‘unenumerated rights’ provision and opined that neither does Article VIII nor all the other articles in the Constitution have the effect of giving the Judiciary the power to ‘determine’ any right which may have been ‘implied’ in the Constitution.”<sup>26</sup> In light of all of the examples cited above, it is clear that among AACC members there is a wide spectrum of approaches regarding the recognition or non-recognition of unenumerated constitutional rights.

#### 4. International human rights

In terms of the nine core UN human rights treaties, they have the following number of states parties from among the seventeen surveyed countries: Convention on the Elimination of All Forms of Discrimination against Women (17), Convention on the Rights of the Child (17), International Covenant on Economic, Social and Cultural Rights (16), International Convention on the Elimination of All Forms of Racial Discrimination (15), International Covenant on Civil and Political Rights (15), Convention on the Rights of Persons with Disabilities (15), Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (14), International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (6) and International Convention for the Protection of All Persons from Enforced Disappearance (2). For further details on the ratification of these treaties, see Table 6 of Part B. of this book.

One very important issue related to the ratification of international human rights treaties is the status accorded to international law within the respective constitutional systems. For example, Article 6(1) of the Constitution of Korea states that “[t]reaties duly concluded and promulgated under the Constitution and the generally recognized rules of international law shall have the same effects as the domestic laws of the Republic of Korea.” However, this provision does not further elaborate on what is meant by the phrase “the same effects as the domestic laws.” For further information regarding the interpretation of Article 6(1), see Part III.B. of the Fact File of the Constitutional Court of Korea in this publication. Other contributing AACC members have also been asked to discuss the impact of international human rights law on constitutional rights interpretation.<sup>27</sup>

<sup>26</sup> This case from 2020 was *In the Matter of the Urgent Petition for the Release of Prisoners on Humanitarian Grounds in the midst of the Covid-19 Pandemic*. See Part II.B. of the Fact File of the Supreme Court of the Philippines for further details.

<sup>27</sup> See Part III.B. of the respective Fact Files in this book.

It could be the case that rights listed in a constitution actually largely overlap with some of the most important international human rights instruments. For example, materials provided by the Supreme Court of the Maldives has noted that “[m]ost economic, social, cultural, and political rights recognized in international and regional human rights instruments are enumerated in the 2008 Constitution of the Republic of Maldives.”<sup>28</sup> An especially important impact of international human rights law would in such circumstances be the ratification of optional protocols to such treaties. One prominent example of such optional protocols are those establishing an individual complaint mechanism to the relevant treaty body. Both of the two main international human rights covenants, the ICCPR and the ICESCR, have such optional protocols. At the time of the publication of this book, from the seventeen surveyed countries, eleven are states parties to the ICCPR-OP1<sup>29</sup> and two are states parties to the ICESCR-OP.<sup>30</sup> For further information on the states parties (ratification/accession) for all the optional protocols to the core UN human rights treaties within the AACC context, see Table 7 of Part B. of this book.

Even though Asia does not have a regional human rights protection system covering the whole continent, three AACC members are located in countries which are states parties to the European Convention on Human Rights (ECHR): Azerbaijan, Russia, and Turkey. These countries are therefore also under the jurisdiction of the European Court of Human Rights (ECtHR). The Fact File of the Constitutional Court of Azerbaijan discusses the impact of the ECHR in judgements on the right to liberty, the principle of legal certainty, and rights protection through administrative remedies.<sup>31</sup> The Fact File of the Constitutional Court of Russia specifically elaborates on the relationship between the Constitutional Court and the ECtHR, including their “mutual influence of case-law.”<sup>32</sup> For Turkey, one very significant issue within the ECHR context is the individual application system that was introduced to the Constitutional Court of Turkey in 2010. According to the newly added Article 148 of the Turkish Constitution, “[e]veryone may apply to the Constitutional Court on the grounds that one of the fundamental rights and freedoms within the scope of the European Convention on Human Rights which are guaranteed by the Constitution has been violated by public authorities. In order to make an application, ordinary legal remedies must be exhausted.”<sup>33</sup>

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28 See Part II.A.1. of the Fact File of the Supreme Court of the Maldives.

29 Azerbaijan, Kazakhstan, Korea, Kyrgyz Rep., the Maldives, Mongolia, the Philippines, Russia, Tajikistan, Turkey, and Uzbekistan.

30 The Maldives and Mongolia.

31 See Part III.B. of the Fact File of the Constitutional Court of Azerbaijan.

32 See Part III.B.4. of the Fact File of the Constitutional Court of Russia.

33 See Part III.B.3. of the Fact File of the Constitutional Court of Turkey.

## 5. Diversity in Asia: Rights in context

AACC members are spread across the entire vast Asian continent and are found in all sub-regions of Asia: East Asia, Southeast Asia, South Asia, Central Asia, and West Asia. AACC members therefore come from a very diverse range of countries, each with their distinct history and cultural contexts. Certain nationally unique or sub-regionally distinctive contexts may be reflected in the constitutional text and in constitutional interpretation. Examples could be a multi-ethnic population, the importance of a particular religion, or other aspects of the country or sub-region's history, traditions, and culture.

Full and comprehensive research on the diversity of approaches to constitutional rights adjudication in Asia resulting from distinct or shared historical and cultural experiences is beyond the scope of this book. Instead, the aim of Part III.A. of each of the Fact Files contained in this book is just to provide a taste of these issues, encouraging further research. It should therefore be noted that the information highlighted by the respective AACC members in Part III.A. of their respective Fact Files are by no means exhaustive. Particularly in light of the inevitable page limit set by the AACC SRD for each Fact File, the presented issues are only a selection of examples. These are summarised in Table 8 of Part B. of this book. For the purposes of this introduction, only a few examples will be mentioned. These include issues on religion, national security, and a particular example of cultural heritage.

Malaysia demonstrates the context of a multi-ethnic state but which also has one official religion. Article 3(1) of the Constitution states that “Islam is the religion of the Federation; but other religions may be practised in peace and harmony in any part of the Federation.” According to the materials provided by the Federal Court of Malaysia, “[t]he issue of freedom of religion has also been the subject of contentions before the Malaysian Court of law.” Key issues include the jurisdiction of the civil court and Syariah court, as well as religious conversion and its impact on the civil marriage, and the custody and religion of the children. Therefore, “[a]s a multi-racial country that practices civil and Syariah law, this delicate issue has to be treated carefully within the bounds permissible by the Constitution, the applicable laws on the matter in question and the sensitivity that the issue may entail.”<sup>34</sup> Other surveyed states in this book which have Islam as the official religion are the Maldives and Pakistan. In contrast, some AACC members are located in states where the principle of secularism plays a central

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34 For further details, see Part III.A. of the Fact File of the Federal Court of Malaysia.

constitutional role.<sup>35</sup> Another category on this spectrum is Indonesia, which is “a religious state which guarantees freedom of religion” within the context of a set of officially “acknowledged religions.”<sup>36</sup>

A particular national security context for rights adjudication can be found in the Republic of Korea, namely the current division of the Korean Peninsula. This situation has had an impact on certain aspects of rights adjudication, such as cases on conscientious objectors to compulsory military service. According to the materials provided by the Constitutional Court of Korea, in a judgement in 2018 “the Constitutional Court reasoned that as long as the introduction of the alternative service system does not have significant influence on national defense and it does not reduce the effectiveness of the military system, refusing or delaying the introduction of the alternative service system for reasons of the unique security situation of the nation cannot be justified. Accordingly, it found that the Categories of Military Service Provision which failed to stipulate the alternative service program for conscientious objectors infringes on objectors’ freedom of conscience by violating the principle against excessive restriction and it does not conform to the Constitution.” This 2018 judgement overturned two previous judgements on conscientious objectors (from 2004 and 2011).<sup>37</sup>

One example of rights in cultural context is mentioned in the materials provided by the Constitutional Court of Mongolia. The relevant context is the Mongolian National Festival (Naadam), which includes events such as horse racing involving child jockeys. The materials provided by the Mongolian Constitutional Court in this book notes that such horse racing “is part of Mongolian long-lived culture and is protected by the Constitution. Thus, preservation of this cultural heritage is essential and should be inherited with thoughtful national programs that can protect children’s rights from potential violation.” The materials also mention that “some improvements were made, such as the adoption of the National Program to Eliminate the Worst Forms of Child Labor, the establishment of a national registration system for child jockeys, the adoption of the lists of hazardous works that prohibits employment of children, including child jockeys in race competitions from 1st of November to 1st of May, the establishment of national standards garments for child jockeys, and legal improvements such as requirement for child jockeys to be covered by accident insurance.”<sup>38</sup>

35 One example is Turkey. For further details, see Part III.A. of the Fact File of the Constitutional Court of Turkey. Discussion on the freedom of religion in the respective Part III.A. of the Fact Files can also be found in various materials provided by AACC members, such as those provided by the Supreme Court of India and the Supreme Court of the Philippines.

36 For further details, see Part III.A.2. of the Fact File of the Constitutional Court of Indonesia.

37 For further details, see Part III.A.2. of the Fact File of the Constitutional Court of Korea.

38 See Part III.A.3. of the Fact File of the Constitutional Court of Mongolia.

## 6. Current issues and challenges

The respective Part III.C. of the Fact Files highlight some current issues in rights adjudication. Similar to Part III.A., this section of the Fact Files also aims to provide just a limited selection of issues to the reader, encouraging further research. The examples presented by AACC members regarding especially relevant current issues in rights adjudication are summarized in Table 9 of Part B. of this book. From a brief comparative overview, one can identify mentions of three major global challenges as well as a range of other issues. The three identified global challenges are the current ongoing Covid-19 pandemic, digitalization, and environmental protection (including climate change).

In terms of Covid-19, the Constitutional Council of Kazakhstan's materials have highlighted that "measures to counter this threat caused by its global scale have actualized the need for a deep understanding of the international and national legal framework in terms of their compliance with the requirements of new challenges in crisis situations, ensuring a reasonable balance of public, state and private interests."<sup>39</sup> From the Malaysian perspective, the Covid-19 pandemic became a current issue for rights interpretation especially within the context of Movement Control Orders, the proclamation of emergency, and the use of remote communication technology in court proceedings.<sup>40</sup> Materials provided by the Supreme Court of the Philippines presents information on a recent Special Civil Action (petition) for mandamus, where "petitioners sought to compel the government, through the Department of Health (DOH) and any and all agencies involved in addressing the COVID-19 pandemic, to conduct positive mass testing, efficient contact tracing and isolation, and effective treatment of positive cases."<sup>41</sup> The Russian Constitutional Court has also dealt with a case concerning Covid-19, the background to which was when in March 2020 the Governor of the Moscow region "obliged citizens not to leave their places of residence or otherwise face administrative sanctions (certain exceptions were, of course, foreseen)."<sup>42</sup> In its Fact File for this book, the Constitutional Court of Tajikistan mentions one example of current government measures in response to the socio-economic impact of Covid-19.<sup>43</sup>

Regarding developments in information technology and digitalization, the Constitutional Court of Indonesia has specifically adjudicated on the issue

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39 See Part III.C. of the Fact File of the Constitutional Council of Kazakhstan.

40 See Part III.C. of the Fact File of the Federal Court of Malaysia.

41 See Part III.C. of the Fact File of the Supreme Court of the Philippines.

42 For further details regarding this case, see Part III.C. of the Fact File of the Constitutional Court of Russia.

43 See Part III.C. of the Fact File of the Constitutional Court of Tajikistan.

of the utilization of GPS when driving.<sup>44</sup> Also, the Constitutional Council of Kazakhstan's materials generally point out that "rapid development of the IT industry and the infrastructure of 'electronic government', the deepening of the use of digital technologies in the provision of public services and the administration of certain types of government activities (electronic government bodies, online receptions, e-health, criminal prosecution, justice and others) directly affect the degree of implementation of a number of constitutional human rights and requires the creation of an adequate legal framework. The current and adopted legal acts in this area must be coordinated in terms of content and terminology. They must guarantee the protection of personal data of citizens, state secrets, expand electronic forms of public participation in the exercise of rights and freedoms and the implementation of state functions."<sup>45</sup> In the Republic of Korea, the Constitutional Court "has been working to protect the freedom of expression on the Internet by rendering a series of relevant decisions including the unconstitutionality decision on the provision that requires information and communications service users to have their identity verified to use online bulletin boards and the decision of conditional unconstitutionality on the provision which bans campaigning through internet media outlets. Also, the Court has been actively responding to new and emerging human rights issues stemming from the development of information and communications technologies. For example, the Constitutional Court held in a 2005 decision that the right to informational self-determination is guaranteed as a constitutional right."<sup>46</sup>

Environmental issues, including the impact of climate change, is the third global challenge that has featured in a number of the AACC members' Fact Files. Materials provided by the Supreme Court of India has noted that "in the process of adjudication on the environmental matters, the Supreme Court of India has actually showcased a new pattern of '*judge-driven implementation*' of environmental justice and administration in India. The Court has played a pivotal role in interpreting those laws and has successfully isolated specific environmental law principles upon the interpretation of Indian statutes and the Constitution. This approach has been adopted for ensuring social justice and the protection of human rights. The orders and directions of the Supreme Court of India cover a wide range of domains, be it air, water, solid waste or hazardous waste."<sup>47</sup> Environmental impacts as current issues in rights adjudication are also mentioned in the Constitutional Court of Mongolia's Fact File. It highlights two key issues, namely the right to safe drinking water and sanitation, and the

44 For further details, see Part III.C. of the Fact File of the Constitutional Court of Indonesia.

45 See Part III.C. of the Fact File of the Constitutional Council of Kazakhstan.

46 For further details of relevant cases, see Part III.C. of the Fact File of the Constitutional Court of Korea.

47 See Part III.C. of the Fact File of the Supreme Court of India.



right to know about environmental impacts.<sup>48</sup> In the Philippines, the Supreme Court has “ordered concerned government agencies to coordinate the cleanup, restoration, and preservation of the water quality of Manila Bay in line with the country’s development objective of attaining economic growth consistent with the protection, preservation, and revival of marine waters. It held that the State, through petitioners, has to take the lead in the preservation and protection of Manila Bay.”<sup>49</sup>

Having already previously adjudicated issues concerning the right to a healthy and pleasant environment, the Constitutional Court of Korea “is currently reviewing a constitutional complaint which argues that the State has set up a highly insufficient greenhouse gas emission reduction target in response to climate change and therefore infringed the complainant’s right to a healthy and pleasant environment and the rights to health, life and personal safety.”<sup>50</sup> Some of the most detailed examples on the challenge of climate change are found in the materials provided by the Supreme Court of Pakistan. It mentions a case from the Lahore High Court which observed that “Climate Justice links human rights and development to achieve a human-centred approach, safeguarding the rights of the most vulnerable people and sharing the burdens and benefits of climate change and its impacts equitably and fairly.” In the same case, the High Court further observed that “Water Justice” is a sub-concept of “Climate Justice.” In a Supreme Court judgement, the concept of “climate democracy” was discussed: “Robust democracies need to be climate democracies in order to save the world and our further generations from being colonized at the hands of climate change. The preambular constitutional value of democracy under our Constitution is in effect climate democracy, if we wish to actualize our Constitution and the fundamental rights guaranteed under the Constitution for ourselves and our future generations. . . Sustainable development means development that meets the needs of the present generation without compromising the ability of future generations to meet their needs and it is in step with our constitutional values of social and economic justice.”<sup>51</sup>

Apart from the three major global challenges discussed above, a number of other current issues and challenges are noted in the respective Fact Files of the AACC members. Examples include the scope of constitutional review,<sup>52</sup> the right to fair trial within a reasonable time,<sup>53</sup> the implementation and interpretation of the

48 See Part III.C. of the Fact File of the Constitutional Court of Mongolia.

49 See Part III.C. of the Fact File of the Supreme Court of the Philippines.

50 See Part III.C. of the Fact File of the Constitutional Court of Korea.

51 See Part III.C. of the Fact File of the Supreme Court of Pakistan.

52 See the respective Part III.C. of the Fact Files of the Constitutional Courts of Indonesia and Russia.

53 See the respective Part III.C. of the Fact Files of the Supreme Courts of the Maldives and of the Philippines.



judgements of international courts,<sup>54</sup> elections dispute,<sup>55</sup> biomedical engineering,<sup>56</sup> the rights of the dead,<sup>57</sup> public health and abortion,<sup>58</sup> and the absolute nature of a citizen's right to enter and remain in their own country.<sup>59</sup>

## 7. Conclusion

This introduction has attempted to fulfil two aims. First, the highlights provided in this introduction have hopefully demonstrated the diversity, but also some commonalities, of constitutional rights protection in Asia. Despite the inevitable limited scope of this book, the AACC SRD hopes that its contents will contribute to spurring on future research in the various constitutional issues that have been mentioned in the AACC members' respective Fact Files. Second, by providing these highlights, this introduction aimed to introduce the work of the AACC SRD in a concrete manner. Since its establishment in January 2017, the AACC SRD continues its mandate of fostering the exchange of experiences between AACC members, as well as providing information for the wider interested research community. The annual book series, which this volume is a part of, is currently the main vehicle in driving this work forward. The related annual conference and the growing online information available on the AACC SRD's website are also essential parts of this endeavour. With every annual book it publishes, the AACC SRD strives to improve the project cycle and book contents, learning from the experience of previous years. The AACC SRD looks forward to working together with all AACC members and further engaging with the global research community in the years to come.

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54 See Part III.C. of the Fact File of the Constitutional Court of Russia.

55 See Part III.C.1. of the Fact File of the Constitutional Court of Indonesia.

56 See Part III.C. of the Fact File of the Constitutional Court of Korea.

57 See Part III.C. of the Fact File of the Supreme Court of Pakistan.

58 See Part III.C. of the Fact File of the Constitutional Court of Thailand.

59 Ibid.



Part B.

Comparative tables

## **Comparative tables**

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**Table 1. Basic overview**

Country <sup>60</sup>	Type of legal system	Highest organ to adjudicate on constitutional rights	Key constitutional rights provisions in the Constitution	9 core UN human rights treaties: Ratification/accession	
				Core treaties <sup>61</sup>	Optional protocols <sup>62</sup>
Azerbaijan	Civil law	Constitutional Court	Chapter III (Art. 24-71)	8	7
India	Common law	Supreme Court	Part III (Art. 12-35)	6	2
Indonesia	Civil law	Constitutional Court	Chapter XA (Art. 28-28J)	8	2
Kazakhstan	Civil law	Constitutional Council	Section II (Art. 10-39)	8	6
Korea, Rep.	Civil law	Constitutional Court	Chapter II (Art. 10-39)	7	4
Kyrgyz Rep.	Civil law	Constitutional Court	Part Two (Art. 23-65)	8	6
Malaysia	Common law	Federal Court	Part II (Art. 5-13)	3	2
Maldives	Common law	Supreme Court	Chapter II (Art. 16-69)	7	7
Mongolia	Civil law	Constitutional Court	Chapter 2 (Art. 14-19 <sup>1</sup> ) <sup>63</sup>	8	9
Myanmar	Common law	Supreme Court <sup>64</sup>	Chapter VIII (Sec. 345-390)	4	2
Pakistan	Common law	Supreme Court	Part II, Chapter 1 (Art. 8-28)	7	2
Philippines	Mixed <sup>65</sup>	Supreme Court	Article III (Sec. 1-22)	8	6
Russia	Civil law	Constitutional Court	Chapter 2 (Art. 17-64)	7	4
Tajikistan	Civil law	Constitutional Court	Chapter 2 (Art. 14-47)	7	4
Thailand	Civil law	Constitutional Court	Chapter III (Sec. 25-49)	7	5
Turkey	Civil law	Constitutional Court	Part 2 (Art. 12-74)	8	8
Uzbekistan	Civil law	Constitutional Court	Part 2 (Art. 18-52)	6	4

60 Only the countries of AACC members contributing to this publication (17) are included in the comparative tables. Three of these countries are subject to a fully functioning regional human rights court, the European Court of Human Rights: Azerbaijan, Russia, and Turkey.

61 For further details, see Table 6.

62 For further details, see Table 7.

63 Article 16 of the Constitution contains the main list of rights and freedoms, ranging from Article 16.1 to Article 16.18.

64 According to the Constitution of Myanmar, constitutional rights are mainly protected through human rights writs issued by the Supreme Court. The Constitutional Tribunal of the Union (CTU) of Myanmar does not grant direct access to individuals. The CTU can only deal with rights if called upon by another state institution. For further details, see Parts II.C. and III.A. of the Fact File of the Constitutional Tribunal of the Union of Myanmar in this publication.

65 The legal system of the Philippines can be classified as a combination of common law and civil law.

**Table 2. Main constitutional text devoted to constitutional rights**

Country <sup>66</sup>	Title of the constitutional text's main chapter/part/section specifically devoted to constitutional rights	Location in the constitutional text
Azerbaijan	<i>Fundamental Rights and Freedoms of Man and Citizen</i>	Chapter III (Art. 24-71)
India	<i>Fundamental Rights</i>	Part III (Art. 12-35)
Indonesia	<i>Human Rights</i>	Chapter XA (Art. 28-28J)
Kazakhstan	<i>The Individual and the Citizen</i>	Section II (Art. 10-39)
Korea, Rep.	<i>Rights and Duties of Citizens</i>	Chapter II (Art. 10-39)
Kyrgyz Rep.	<i>Rights, Freedoms and Duties of a Human and a Citizen</i>	Part Two (Art. 23-65)
Malaysia	<i>Fundamental Liberties</i>	Part II (Art. 5-13)
Maldives	<i>Fundamental Rights and Freedoms</i>	Chapter II (Art. 16-69)
Mongolia	<i>Human Rights and Freedoms</i>	Chapter 2 (Art. 14-19 <sup>1</sup> ) <sup>67</sup>
Myanmar	<i>Citizen, Fundamental Rights and Duties of the Citizens</i>	Chapter VIII (Sec. 345-390)
Pakistan	<i>Fundamental Rights</i>	Part II, Chapter 1 (Art. 8-28)
Philippines	<i>Bill of Rights</i>	Article III (Sec. 1-22)
Russia	<i>Human and Civil Rights and Freedoms</i>	Chapter 2 (Art. 17-64)
Tajikistan	<i>Rights, Liberties, Basic Duties of Individuals and Citizens</i>	Chapter 2 (Art. 14-47)
Thailand	<i>Rights and Liberties of the Thai People</i>	Chapter III (Sec. 25-49)
Turkey	<i>Fundamental Rights and Duties</i>	Part 2 (Art. 12-74)
Uzbekistan	<i>Basic Human and Civil Rights, Freedoms and Duties</i>	Part 2 (Art. 18-52)

<sup>66</sup> Only AACC members contributing to this publication (17) are included in the comparative tables.

<sup>67</sup> Article 16 of the Constitution contains the main list of rights and freedoms, ranging from Article 16.1 to Article 16.18.

**Table 3. Categories of constitutional rights**

Country <sup>68</sup>	Categorizations of rights (either as described in the Fact Files found in this publication or as officially categorized in the respective constitutional texts)	Further details can found in the relevant part of the respective Fact Files
Azerbaijan	<ul style="list-style-type: none"> <li>• Personal rights</li> <li>• Political rights and freedoms</li> <li>• Socio-economic rights</li> <li>• Cultural rights</li> <li>• Procedural rights</li> </ul>	See Part II.A. of the Fact File
India	<ul style="list-style-type: none"> <li>• Right to equality</li> <li>• Right to freedom</li> <li>• Right against exploitation</li> <li>• Right to freedom of religion</li> <li>• Cultural and educational rights</li> <li>• Right to constitutional remedies</li> </ul>	See Part II.A. of the Fact File
Indonesia	<ul style="list-style-type: none"> <li>• Civil and political rights</li> <li>• Economic, social and cultural rights</li> <li>• Solidarity rights</li> </ul>	See Part II.A.1. of the Fact File
Kazakhstan	<ul style="list-style-type: none"> <li>• Personal rights</li> <li>• Political rights</li> <li>• Socio-economic rights</li> </ul>	See Part II.A. of the Fact File
Korea, Rep.	<ul style="list-style-type: none"> <li>• Human dignity and worth, right to pursue happiness</li> <li>• Right to equality</li> <li>• Liberty rights</li> <li>• Rights to political participation</li> <li>• Claim rights</li> <li>• Social rights</li> </ul>	See Part II.A.3. of the Fact File
Kyrgyz Rep.	<ul style="list-style-type: none"> <li>• Personal rights and freedoms</li> <li>• Political rights</li> <li>• Socio-economic rights</li> </ul>	See Part II.A. of the Fact File
Malaysia	<ul style="list-style-type: none"> <li>• Liberty of the person</li> <li>• Protection against slavery</li> <li>• Protection against retrospective criminal laws and repeated trial</li> <li>• Equality</li> <li>• Prohibition of banishment and freedom of movement</li> <li>• Freedom of speech, assembly and association</li> <li>• Freedom of religion</li> <li>• Rights to education</li> <li>• Right to property</li> </ul>	See Part II.A. of the Fact File
Maldives	<ul style="list-style-type: none"> <li>• Economic rights</li> <li>• Social rights</li> <li>• Cultural rights</li> <li>• Political rights</li> </ul>	See Part II.A.1. of the Fact File

68 Only AACC members contributing to this publication (17) are included in the comparative tables.

Mongolia	<ul style="list-style-type: none"> <li>• Civil rights</li> <li>• Political rights</li> <li>• Social rights</li> <li>• Economic rights</li> </ul>	See Part II.A. of the Fact File
Myanmar	<ul style="list-style-type: none"> <li>• Right to equality</li> <li>• Right to freedoms</li> <li>• Right against exploitation</li> <li>• Rights relating to religion</li> <li>• Cultural, educational and health rights</li> <li>• Right to elect and right to be elected</li> <li>• Economic rights</li> <li>• Right to constitutional remedies</li> </ul>	See Part II.A.1. of the Fact File
Pakistan	<ul style="list-style-type: none"> <li>• Security of person</li> <li>• Freedom of association, assembly and profession</li> <li>• Freedom of speech and right to information</li> <li>• Freedom of religion</li> <li>• Property rights</li> <li>• Equality of citizens</li> <li>• Right to education</li> <li>• Access to public places</li> <li>• Discrimination in services</li> <li>• Language, script and culture</li> </ul>	See Part II.A. of the Fact File
Philippines	<ul style="list-style-type: none"> <li>• Political rights</li> <li>• Civil rights</li> <li>• Social and economic rights</li> <li>• Rights of the accused</li> </ul>	See Part II.A. of the Fact File
Russia	<ul style="list-style-type: none"> <li>• Personal and civil rights</li> <li>• Political rights</li> <li>• Socio-economic rights</li> <li>• Cultural rights</li> <li>• Rights of legal protection</li> </ul>	See Part II.A.1. of the Fact File
Tajikistan	<ul style="list-style-type: none"> <li>• Personal rights</li> <li>• Political rights</li> <li>• Economic rights</li> <li>• Social rights</li> <li>• Cultural rights</li> </ul>	See Part II.A. of the Fact File
Thailand	<ul style="list-style-type: none"> <li>• Rights that shall be recognized fully without any condition</li> <li>• Rights capable of being limited under the stated condition</li> <li>• Rights capable of limitation</li> </ul>	See Part II.A.1. of the Fact File
Turkey	<ul style="list-style-type: none"> <li>• Core individual's rights and freedoms</li> <li>• Social and economic rights</li> <li>• Political rights</li> </ul>	See Part II.A.1. of the Fact File
Uzbekistan	<ul style="list-style-type: none"> <li>• Personal rights and freedoms</li> <li>• Political rights</li> <li>• Economic and social rights</li> </ul>	See Part II.A. of the Fact File



## Table 4. General limitation clauses on constitutional rights

*Note:* These provisions stipulate the general grounds and conditions for the restriction of rights and freedoms. This table is a slightly modified version of the table found on pp. 23-25 of the AACC SRD's 2020 publication "Freedom of Expression: Experience of AACC Members." Constitutions which do not contain general limitation clauses may contain individual restrictions for particular constitutional rights.

Country	Constitutional provision	Full text of the provision
Azerbaijan	Art. 71 II	No one may restrict exercise of rights and freedoms of a man and citizen. Everyone's rights and freedoms shall be restricted on the grounds provided for in the present Constitution and laws, as well as by the rights and freedoms of others. Restriction of rights and liberties shall be proportional to the result expected by the state.
India <sup>69</sup>	N/A	N/A
Indonesia	Art. 28J(2)	In exercising his/her rights and freedoms, every person shall have the duty to accept the restrictions established by law for the sole purposes of guaranteeing the recognition and respect of the rights and freedoms of others and of satisfying just demands based upon considerations of morality, religious values, security and public order in a democratic society.
Kazakhstan	Art. 39	1. Rights and freedoms of an individual and citizen may be limited only by law and only to the extent necessary for the protection of the constitutional system, defense of public order, human rights and freedoms, and the health and morality of the population. 2. Any acts capable of violating inter-ethnic and inter-religious harmony shall be recognized as unconstitutional. 3. Restriction of the rights and freedoms of citizens for political reasons shall not be allowed in any form. The rights and freedoms provided for by articles 11, 13–15, paragraph 1 of article 16, article 17, article 19, article 22, paragraph 2 of article 26 of the Constitution, are not subject to limitation in any case.
Korea, Rep.	Art. 37(2)	The freedoms and rights of citizens may be restricted by Act only when necessary for national security, the maintenance of law and order or for public welfare. Even when such restriction is imposed, no essential aspect of the freedom or right shall be violated.

<sup>69</sup> Firstly, under the Indian Constitution, Fundamental rights enlisted under Part III of the Constitution are enforceable only against the "State" which has been defined under Article 12 of the Constitution. Secondly, in the Indian Constitution, reasonable restrictions for the exercise of various freedoms and rights have been provided expressly either in the form of separate provision within the same Article or in the form of exceptions or proviso to the express fundamental right. For instance, Article 19 clauses (2), (3), (4), (5), (6) clearly provide reasonable restrictions for the exercise of various freedoms enshrined in Article 19 clause (1). This is an example of separate constitutional provision prescribing restrictions on certain rights. Examples of restrictions contained within the same provision in the form of exceptions or proviso clauses are Article 21, Article 22, Article 25 etc.

Kyrgyz Rep.	Art. 23(2)	Human and civil rights and freedoms may be limited by the Constitution and laws for the purposes of protecting national security, public order, health and morale of the population as well as rights and freedoms of other persons. Such limitations can be also introduced in view of specific modalities of military or other civil service. The introduced limitations should be commensurate to the declared objectives.
Malaysia	N/A	N/A
Maldives	Art. 16	<p>a. This Constitution guarantees to all persons, in a manner that is not contrary to any tenet of Islam, the rights and freedoms contained within this Chapter, subject only to such reasonable limits prescribed by a law enacted by the People's Majlis in a manner that is not contrary to this Constitution. Any such law enacted by the People's Majlis can limit the rights and freedoms to any extent only if demonstrably justified in a free and democratic society.</p> <p>b. The limitation of a right or freedom specified in this Chapter by a law enacted by the People's Majlis as provided for in this Constitution, and in order to protect and maintain the tenets of Islam, shall not be contrary to article (a).</p> <p>c. In deciding whether a right or freedom in this Chapter, has been limited in accordance with article (a) and (b), a court must be fully cognisant of and make reference to all the facts, including:</p> <ol style="list-style-type: none"> <li>1. the nature and character of the right or freedom;</li> <li>2. the purpose and importance of limiting the right or freedom;</li> <li>3. the extent and manner of limiting the right or freedom;</li> <li>4. the relationship between the limitation of the right or freedom and the importance of the right or freedom;</li> <li>5. the extent to which the objective for which the right or freedom has been limited could have been achieved by limiting the right or freedom to a lesser degree;</li> <li>6. the extent to which the right or freedom must be limited in order to protect the tenets of Islam, where the right or freedom has been limited pursuant to article (b).</li> </ol> <p>d. The onus of establishing that the limitation to any extent, of a right or freedom included in this Chapter is within the reasonable limitations prescribed in this Constitution is on the State or the person asserting the limitation of the right or freedom.</p>
Mongolia	Art. 19.3	In exercising his/her rights and freedoms, a person shall not breach national security, the rights and freedoms of others, or violate public order.
Myanmar	N/A	N/A
Pakistan	N/A	N/A
Philippines	N/A	N/A
Russia	Art. 55(3)	Human and civil rights and freedoms may be limited by federal law only to the extent necessary for the protection of the basis of the constitutional order, morality, health, rights and lawful interests of other people, and for ensuring the defence of the country and the security of the State.

Tajikistan	Art. 14	<p>The rights and freedoms of individual and citizen are regulated and protected by the Constitution, laws of the Republic, and international legal acts recognized by Tajikistan.</p> <p>The rights and freedoms of individual and citizen are exercised directly. They determine the goals, content and application of laws, the activity of legislative, executive and local agencies of state power and self-government and are secured by judicial power.</p> <p>Limitations of rights and freedoms of citizens are permitted only for the purpose of securing the rights and freedoms of other citizens, public order, and protection of the constitutional system and the territorial integrity of the Republic.</p>
Thailand	Art. 26 <sup>70</sup>	<p>The enactment of a law resulting in the restriction of rights or liberties of a person shall be in accordance with the conditions provided by the Constitution. In the case where the Constitution does not provide the conditions thereon, such law shall not be contrary to the rule of law, shall not unreasonably impose burden on or restrict the rights or liberties of a person and shall not affect the human dignity of a person, and the justification and necessity for the restriction of the rights or liberties shall also be specified.</p> <p>The law under paragraph one shall be of general application, and shall not be intended to apply to any particular case or person.</p>
Turkey <sup>71</sup>	N/A	N/A
Uzbekistan	Art. 19 <sup>72</sup>	<p>A citizen of the Republic of Uzbekistan and the state shall be bound by mutual rights and mutual responsibility. Citizens' rights and freedoms, established by the Constitution and laws, shall be inalienable. No one shall have the right to deprive or limit them without a court.</p>

<sup>70</sup> Section 26 is preceded by Section 25, the latter being the first provision of "Chapter III. Rights and Liberties of the Thai People." One part of Section 25 stipulates conditions in which rights and liberties shall be exercised: "As regards the rights and liberties of the Thai people, in addition to the rights and liberties as guaranteed specifically by the provisions of the Constitution, a person shall enjoy the rights and liberties to perform any act which is not prohibited or restricted by the Constitution or other laws, and shall be protected by the Constitution, insofar as the exercise of such rights or liberties does not affect or endanger the security of the State or public order or good morals, and does not violate the rights or liberties of other persons."

<sup>71</sup> Article 13 of the Turkish Constitution, as amended on 3 October 2001 by Law no. 4709, enabling the restriction of fundamental rights and freedoms can be read as follows: "Fundamental rights and freedoms may be restricted only by law and in conformity with the reasons mentioned in the relevant articles of the Constitution without infringing upon their essence. These restrictions shall not be contrary to the letter and spirit of the Constitution and the requirements of the democratic order of the society and the secular republic and the principle of proportionality." As it can be inferred from this article, there are specific limitation provisions which are listed under each of the rights and freedoms enshrined in the Constitution, if any. However, even though no reason for restriction is included in the article regulating a given right, such rights may be restricted relying on the rules covered under other articles of the Constitution (CC, E.2010/83, K.2012/169, 1/11/2012).

<sup>72</sup> Article 19 is followed by Article 20, the latter stipulates conditions in which rights and freedoms shall be exercised: "The exercising of rights and freedoms by a citizen must not encroach on the lawful interests, rights and freedoms of other persons, the state and society."

**Table 5. Examples of recognized unenumerated constitutional rights**

*Note:* Further details on this issue, relevant jurisprudence, and discussion of potentially implicit sources for unenumerated rights can be found in Part II.B. (“Unenumerated rights”) of the respective Fact Files. The following table only presents examples of unenumerated rights as recognized by a decision of a constitutional adjudicatory body and explicit constitutional provisions on unenumerated rights, if any. If no specific unenumerated rights have so far been recognized or there is no explicit constitutional provision on unenumerated rights, there may still be noteworthy relevant perspectives to mention. These are indicated below via relevant footnotes, and includes references to relevant parts of the Fact Files in this publication.

Country <sup>73</sup>	Examples of unenumerated rights as recognized through a decision of the relevant constitutional adjudicatory body	Explicit constitutional provision on unenumerated rights
Azerbaijan <sup>74</sup>	<ul style="list-style-type: none"> <li>• Rights on education, free movement, and extraterritoriality</li> </ul>	N/A
India	<ul style="list-style-type: none"> <li>• Right to travel abroad</li> <li>• Right to consult a legal advisor of choice</li> <li>• Right to sleep</li> <li>• Right to locus standi</li> <li>• Rights against arbitrariness</li> <li>• Right to remain silent</li> <li>• Right to privacy</li> <li>• Right to passive euthanasia</li> <li>• Right to non-discrimination on the ground of disability</li> <li>• Right of women to make reproductive choices</li> <li>• Right to receive information</li> <li>• Rights against handcuffing</li> <li>• Right against solitary confinement</li> <li>• Right to free legal aid</li> <li>• Right against the use of bar fetters</li> <li>• Right against custodial violence</li> <li>• Right to clean environment</li> <li>• Right to internet</li> <li>• Right to food</li> <li>• Right to clothing and shelter</li> <li>• Right to human dignity</li> <li>• Right to inter-caste marriage</li> </ul>	N/A
Indonesia	<ul style="list-style-type: none"> <li>• Right to water</li> <li>• Right to vote and right to be a candidate</li> <li>• Right to presumption of innocence</li> </ul>	N/A

<sup>73</sup> Only AACC members contributing to this publication (17) are included in the comparative tables.

<sup>74</sup> As noted in Part II.B. of the Fact File of the Constitutional Court of Azerbaijan, “rights and freedoms of man and citizen listed in the present Constitution are applied in accordance with international treaties to which the Republic of Azerbaijan is a party” and the “Constitutional Court of the Republic of Azerbaijan in its well-developed practice has repeatedly relied on the norms and provisions of international law as an additional argument in favour of the norms of domestic law when substantiating the violations of human rights established by it, or vice versa to justify the protection of such rights.”

Kazakhstan <sup>75</sup>	N/A	N/A
Korea, Rep.	<ul style="list-style-type: none"> <li>• Right to life</li> <li>• Right to self-determination</li> <li>• Parents' right to educate children</li> <li>• Right to informational self-determination</li> </ul>	Article 37(1) <sup>76</sup>
Kyrgyz Rep. <sup>77</sup>	N/A	Article 62.2
Malaysia	<ul style="list-style-type: none"> <li>• Right to travel abroad</li> <li>• Right to privacy</li> <li>• Right to expeditious trial</li> <li>• Right to livelihood</li> </ul>	N/A
Maldives	<ul style="list-style-type: none"> <li>• Right to compensation for the loss of consortium</li> </ul>	Article 62
Mongolia <sup>78</sup>	N/A	N/A
Myanmar <sup>79</sup>	N/A	N/A
Pakistan <sup>80</sup>	<ul style="list-style-type: none"> <li>• Right to pure and unpolluted water</li> <li>• Right to basic health care</li> <li>• Right to a clean, safe and health-friendly environment</li> <li>• Right to be protected against adverse effects of electromagnetic fields</li> <li>• Right to livelihood</li> <li>• Right to provision of electricity and gas</li> <li>• Right of access to justice</li> <li>• Right to operate as a political party</li> <li>• Right to participate in and contest an election</li> <li>• Right to form the government after successful election</li> <li>• Right to "political justice"</li> </ul>	N/A

75 As stated by the Constitutional Council of Kazakhstan in a normative resolution, "Based on the analysis of the listed norms of the Highest Law in their unity and systemic integrity, in relation to the subject of the considered appeal, it means that everyone has the right to freely dispose of his/her own life and health (including in such a form as causing harm to himself/herself), if this is not connected with the evasion of the fulfilment of constitutional and other obligations established by law, does not violate the rights and freedoms of others and does not encroach on the constitutional order and public morality." See Part II.B. of the Fact File of the Constitutional Council of Kazakhstan for further details.

76 As discussed in Part II.B. of the Fact File of the Constitutional Court of Korea, Article 10 (human dignity and worth, right to pursue happiness) also plays an important role in the jurisprudence on unenumerated rights. Please see the Korean Fact File for further examples of recognized unenumerated rights.

77 At the time of publication of this book, there are currently no relevant court decisions recognizing particular unenumerated rights since the entry into force of the new Constitution of the Kyrgyz Republic on May 5, 2021.

78 According to Part II.B. of the Fact File of the Constitutional Court of Mongolia: "In the 29 years since the adoption of the fourth Constitution, Mongolia has not had unenumerated constitutional rights in its history. This is also due to the fact that the 18 rights and freedoms enumerated in Article 16 of the Constitution of Mongolia have a complex content that can be explained in detail."

79 According to a case discussed in Part II.B. of the Fact File of the Constitutional Tribunal of the Union of Myanmar, "the authority to issue writs by the Supreme Court of the Union is not restricted to only issuing writs for rights contained in Chapter VIII ("Citizen, Fundamental Rights and Duties of the Citizens") of the Constitution."

80 Many of the unenumerated rights listed in this table for Pakistan have been recognized as being part of explicitly enumerated rights, such as the right to life (Article 9) or the freedom of association (Article 17). Also, the Supreme Court of Pakistan in *Benazir Bhutto v Federation of Pakistan* held that "Articles 3, 37 and 38 of the Constitution juxtapose to advance the cause of socio-economic principles and should be given a place of priority to mark the onward progress of democracy. These provisions become in an indirect sense enforceable by law and thus, bring about a phenomenal change in the idea of co-relation of Fundamental Rights and directive principles of State Policy." For further details, see Part II.B. of the Fact File of the Supreme Court of Pakistan.

Philippines <sup>81</sup>	N/A	N/A
Russia <sup>82</sup>	N/A	N/A
Tajikistan <sup>83</sup>	N/A	N/A
Thailand	<ul style="list-style-type: none"> <li>• Rights regarding the power to establish a Constitution and the constitutional amendment to the entire body of the Constitution belonging to the people as the holders of the sovereign power <sup>84</sup></li> </ul>	Section 25, paragraph 1
Turkey	<ul style="list-style-type: none"> <li>• Right to review of a judgment</li> <li>• Principle of not to be tried or punished twice for the same offence (<i>ne bis in idem</i>)</li> </ul>	N/A
Uzbekistan <sup>85</sup>	N/A	N/A

81 According to a separate opinion in a judgement delivered in 2020, “the Declaration of Principles and State Policies in Article II as well as the Bill of Rights in Article III of the 1987 Constitution contain no such ‘unenumerated rights’ provision and opined that neither does Article VIII nor all the other articles in the Constitution have the effect of giving the Judiciary the power to ‘determine’ any right which may have been ‘implied’ in the Constitution.” See Part II.B. of the Fact File of the Supreme Court of the Philippines for further details.

82 As noted in Part II.B.2. of the Fact File of the Constitutional Court of Russia, “the Constitution affords the constitutional supervisory authority discretion upon disclosing on the basis of its plain text the principles or rules that can be somewhat conventionally described as ‘unenumerated rights’. At that, in such cases the Constitutional Court does not ‘invent’ new rights, but adapts to concrete situations the constitutional text in force. Thus, it would be unsubstantiated to state the existence of ‘unenumerated rights’ in a strict sense.”

83 As noted in Part II.B.2. of the Fact File of the Constitutional Court of Tajikistan, “all human and civil rights and freedoms are enshrined in the Constitution and normative legal acts” and that even though there “are some rights in the Republic of Tajikistan that are not enshrined in the Constitution, but their regulation refers to other laws.”

84 Section 3, paragraph 1 of the Thai Constitution is of particular relevance here: “Section 3. Sovereign power belongs to the Thai people. The King as Head of State shall exercise such power through the National Assembly, the Council of Ministers and the Courts in accordance with the provisions of the Constitution.”

85 As noted in Part II.B. of the Fact File of the Constitutional Court of Uzbekistan, although Article 45 merely stipulates that the rights of minors must be protected and does not enumerate relevant rights, the Law “On Guarantees of the Rights of the Child” (January 7, 2008) provides a list of rights of the child.

**Table 6. The core UN human rights treaties**

Ratification/accession regarding the nine core international human rights treaties of the United Nations (UN).

Country	9 core UN human rights treaties:	ICERD	ICCPR	ICESCR	CEDAW	CAT	CRC	ICMW	CPED	CRPD
Azerbaijan	8	Yes	Yes	Yes	Yes	Yes	Yes	Yes		Yes
India	6	Yes	Yes	Yes	Yes		Yes			Yes
Indonesia	8	Yes	Yes	Yes	Yes	Yes	Yes	Yes		Yes
Kazakhstan	8	Yes	Yes	Yes	Yes	Yes	Yes		Yes	Yes
Korea, Rep.	7	Yes	Yes	Yes	Yes	Yes	Yes			Yes
Kyrgyz Rep.	8	Yes	Yes	Yes	Yes	Yes	Yes	Yes		Yes
Malaysia	3				Yes		Yes			Yes
Maldives	7	Yes	Yes	Yes	Yes	Yes	Yes			Yes
Mongolia	8	Yes	Yes	Yes	Yes	Yes	Yes		Yes	Yes
Myanmar	4			Yes	Yes		Yes			Yes
Pakistan	7	Yes	Yes	Yes	Yes	Yes	Yes			Yes
Philippines	8	Yes	Yes	Yes	Yes	Yes	Yes	Yes		Yes
Russia	7	Yes	Yes	Yes	Yes	Yes	Yes			Yes
Tajikistan	7	Yes	Yes	Yes	Yes	Yes	Yes	Yes		
Thailand	7	Yes	Yes	Yes	Yes	Yes	Yes			Yes
Turkey	8	Yes	Yes	Yes	Yes	Yes	Yes	Yes		Yes
Uzbekistan	6	Yes	Yes	Yes	Yes	Yes	Yes			
17 AACC countries: <sup>86</sup>		15	15	16	17	14	17	6	2	15

<sup>86</sup> Only AACC members contributing to this publication (17) are included in the comparative tables.

The nine core international human rights treaties of the UN:

1965	ICERD	<i>International Convention on the Elimination of All Forms of Racial Discrimination</i>
1966	ICCPR	<i>International Covenant on Civil and Political Rights</i>
1966	ICESCR	<i>International Covenant on Economic, Social and Cultural Rights</i>
1979	CEDAW	<i>Convention on the Elimination of All Forms of Discrimination against Women</i>
1984	CAT	<i>Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment</i>
1989	CRC	<i>Convention on the Rights of the Child</i>
1990	ICMW	<i>International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families</i>
2006	CPED	<i>International Convention for the Protection of All Persons from Enforced Disappearance</i>
2006	CRPD	<i>Convention on the Rights of Persons with Disabilities</i>

Sources: <https://www.ohchr.org/en/professionalinterest/pages/coreinstruments.aspx> and <https://indicators.ohchr.org/>.



# **Table 7. Optional protocols to the core UN human rights treaties**

Ratification/accession regarding optional protocols to the nine core international human rights treaties of the UN.

Country	9 optional protocols to the core UN human rights treaties	ICCPR-OP1	ICCPR-OP2	OP-CEDAW	OP-CRC-AC	OP-CRC-SC	OP-CAT	OP-CRPD	ICESCR-OP	OP-CRC-IC
Azerbaijan	7	Yes	Yes	Yes	Yes	Yes	Yes	Yes		
India	2				Yes	Yes				
Indonesia	2				Yes	Yes				
Kazakhstan	6	Yes	Yes <sup>87</sup>	Yes	Yes	Yes	Yes			
Korea, Rep.	4	Yes		Yes	Yes	Yes				
Kyrgyz Rep.	6	Yes	Yes	Yes	Yes	Yes	Yes			
Malaysia	2				Yes	Yes				
Maldives	7	Yes		Yes	Yes	Yes	Yes		Yes	Yes
Mongolia	9	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Myanmar	2				Yes	Yes				
Pakistan	2				Yes	Yes				
Philippines	6	Yes	Yes	Yes	Yes	Yes	Yes			
Russia	4	Yes		Yes	Yes	Yes				
Tajikistan	4	Yes		Yes	Yes	Yes				
Thailand	5			Yes	Yes	Yes		Yes		Yes
Turkey	8	Yes	Yes	Yes	Yes	Yes	Yes	Yes		Yes
Uzbekistan	4	Yes	Yes		Yes	Yes				
17 AACC countries: <sup>88</sup>		11	7	11	17	17	7	4	2	4

<sup>87</sup> On 2 January 2021 the President of the Republic of Kazakhstan signed the Law “On the Ratification of the Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death Penalty.”

<sup>88</sup> Only AACC members contributing to this publication (17) are included in the comparative tables.

Optional protocols to the core international human rights treaties of the UN:

1966	ICCPR-OP1	<i>Optional Protocol to the International Covenant on Civil and Political Rights</i>	Establishes an individual communications mechanism.
1989	ICCPR-OP2	<i>Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty</i>	Aims at the abolition of the death penalty.
1999	OP-CEDAW	<i>Optional Protocol to the Convention on the Elimination of Discrimination against Women</i>	Establishes communications and inquiry mechanisms.
2000	OP-CRC-AC	<i>Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict</i>	Prohibits the military conscription of children.
2000	OP-CRC-SC	<i>Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography</i>	Prohibits the sale of children, child prostitution and child pornography.
2002	OP-CAT	<i>Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment</i>	Establishes an inspection system.
2006	OP-CRPD	<i>Optional Protocol to the Convention on the Rights of Persons with Disabilities</i>	Establishes an individual communications mechanism.
2008	ICESCR-OP	<i>Optional Protocol to the Covenant on Economic, Social and Cultural Rights</i>	Establishes an individual communications mechanism.
2011	OP-CRC-IC	<i>Optional Protocol to the Convention on the Rights of the Child on a communications procedure</i>	Establishes an individual communications mechanism.

Sources: <https://www.ohchr.org/en/professionalinterest/pages/coreinstruments.aspx> and <https://indicators.ohchr.org/>.

## Table 8. Diversity of contexts and constitutional rights

*Note:* Part III.A. of the Fact Files reference historical and cultural experiences, factors, issues, etc., which may impact the interpretation of constitutional rights. The following table summarizes examples of these experiences, factors, issues, related rights, etc. For further details, please refer to Part III.A. of each of the Fact Files in this publication. The presented content in the Fact Files are not necessarily exhaustive.

Country	Key issues mentioned in Part III.A. of the respective AACC Fact Files in this publication
Azerbaijan	<ul style="list-style-type: none"> <li>• Independence, sovereignty and territorial integrity of Azerbaijan</li> <li>• Democratic system within the framework of the Constitution</li> <li>• Establishment of civil society</li> <li>• A constitutional and secular state that guarantees the supremacy of law as an expression of the will of the people</li> <li>• Provision of a proper standard of living in conformity with a just economic and social order</li> <li>• Adherence to universal values</li> </ul>
India	<ul style="list-style-type: none"> <li>• Prohibition of discrimination</li> <li>• Equality of opportunity in public employment</li> <li>• Abolition of untouchability</li> <li>• Prohibition of traffic in human beings and forced labour</li> <li>• Prohibition of employment of children in factories, etc.</li> <li>• Freedom of conscience and free profession, practice and propagation of religion</li> <li>• Freedom to manage religious affairs</li> <li>• Freedom as to payment of taxes or promotion of any particular religion</li> <li>• Freedom as to attendance at religious instruction or religious worship in certain educational institutions; protection of interests of minorities</li> <li>• Rights of minorities to establish and administer educational institutions</li> </ul>
Indonesia	<ul style="list-style-type: none"> <li>• Presidential powers</li> <li>• Establishment of the Constitutional Court</li> <li>• Freedom of religion</li> </ul>
Kazakhstan	<ul style="list-style-type: none"> <li>• Languages in the Republic of Kazakhstan</li> <li>• The death penalty</li> </ul>
Korea, Rep.	<ul style="list-style-type: none"> <li>• Peaceful reunification</li> <li>• Conscientious objectors to compulsory military service</li> </ul>
Kyrgyz Rep.	<ul style="list-style-type: none"> <li>• Sovereignty of the people</li> <li>• Forms of government, such as parliamentary, presidential, or mixed</li> <li>• Secular state and the freedom of conscience and belief</li> <li>• Folk customs and traditions</li> <li>• Elements of customary law, such as the people's kurultai and the courts of elders</li> </ul>
Malaysia	<ul style="list-style-type: none"> <li>• Multi-ethnic population, the main three groups being the Malays, Chinese and Indians</li> <li>• Islam as the religion of the Federation, but other religions may be practiced in peace and harmony</li> <li>• Constitutional provisions on the special position of the Malays</li> </ul>

Maldives	<ul style="list-style-type: none"> <li>• Freedom of expression</li> <li>• Multi-party elections and the right to vote</li> <li>• Constitutional provisions on Islam as the official religion</li> <li>• Gender equality and the right to political participation</li> </ul>
Mongolia	<ul style="list-style-type: none"> <li>• Transition from monarchical theocracy to revolutionary socialism and to constitutional democracy</li> <li>• Non-discrimination</li> <li>• National Festival of Mongolia (Naadam) and the rights of child jockeys</li> </ul>
Myanmar	<ul style="list-style-type: none"> <li>• Transitions of the state as reflected in the three constitutions so far (1947, 1974, 2008)</li> <li>• Multi-ethnic state: Eight major national ethnic races and ca. 135 ethnic groups</li> <li>• Constitutional provisions on freedom of religion, custom, literature, language, and art</li> <li>• Roles of the Supreme Court and the Constitutional Tribunal in constitutional rights protection</li> </ul>
Pakistan	<ul style="list-style-type: none"> <li>• Islam as the state religion of Pakistan</li> <li>• Establishment of a federal parliamentary form of government</li> <li>• Role of particular parts of the Constitution in the interpretation of rights, such as the Objectives Resolution, the Preamble, and the Principles of Policy</li> <li>• Conflict situation in the province of Balochistan</li> </ul>
Philippines	<ul style="list-style-type: none"> <li>• Freedom of religion</li> <li>• Right to a balanced and healthful ecology</li> <li>• The human rights writ of <i>amparo</i></li> <li>• Right to a speedy trial</li> </ul>
Russia	<ul style="list-style-type: none"> <li>• Democratization in the late 1980s and early 1990s</li> <li>• Impossibility to deport a Russian citizen abroad</li> <li>• Legislation on the rehabilitation of victims of political repressions</li> </ul>
Tajikistan	<ul style="list-style-type: none"> <li>• Declaration of Cyrus the Great (539 B.C.)</li> <li>• Freedom of religion</li> </ul>
Thailand	<ul style="list-style-type: none"> <li>• The relation of the King of Thailand to the Thai history, the Thai people, and the nation</li> <li>• Freedom of religion</li> </ul>
Turkey	<ul style="list-style-type: none"> <li>• Principle of the state of law</li> <li>• Principle of secularism</li> </ul>
Uzbekistan	<ul style="list-style-type: none"> <li>• Ideological diversity in the post-Soviet era</li> </ul>

## Table 9. Current issues in constitutional rights adjudication

*Note:* Part III.C. of the Fact Files (entitled “Current issues”) in this publication reference current issues in constitutional rights adjudication. The following table summarizes examples of these issues. For further details, please refer to Part III.C. of each of the Fact Files in this publication. The presented content in the Fact Files are not necessarily exhaustive. Fact Files which do not contain such a particular section are not included in this table.

Country	Key issues mentioned in Part III.C. of the respective AACC Fact Files in this publication
India	<ul style="list-style-type: none"> <li>• Environment</li> <li>• Information technology</li> <li>• Public health</li> </ul>
Indonesia	<ul style="list-style-type: none"> <li>• Elections dispute</li> <li>• Constitutional review of Perppu</li> <li>• Utilization of GPS when driving</li> </ul>
Kazakhstan	<ul style="list-style-type: none"> <li>• Rapid development of the IT industry and the infrastructure of “electronic government”</li> <li>• Impact of the Covid-19 pandemic, including in its international context</li> </ul>
Korea, Rep.	<ul style="list-style-type: none"> <li>• Information and communications technology</li> <li>• Biomedical engineering</li> <li>• Right to a healthy and pleasant environment</li> <li>• Climate change</li> </ul>
Malaysia	<ul style="list-style-type: none"> <li>• Impact of the Covid-19 pandemic, especially within the context of Movement Control Orders, the proclamation of emergency, and the use of remote communication technology in court proceedings</li> </ul>
Maldives	<ul style="list-style-type: none"> <li>• Right to a fair and public hearing within a reasonable time</li> </ul>
Mongolia	<ul style="list-style-type: none"> <li>• Right to safe drinking water and sanitation</li> <li>• Right to know about environmental impacts</li> </ul>
Pakistan	<ul style="list-style-type: none"> <li>• Climate change, climate justice and water justice</li> <li>• Sustainable development</li> <li>• Rights of the dead</li> </ul>
Philippines	<ul style="list-style-type: none"> <li>• Responses to the Covid-19 pandemic</li> </ul>
Russia	<ul style="list-style-type: none"> <li>• Implementation and interpretation of the judgements of international courts</li> <li>• Emergence of a new generation of rights and related problems of their regulation</li> <li>• Expansion of constitutional review to spheres previously deemed to be outside its reach</li> <li>• Challenges posed by the Covid-19 pandemic</li> </ul>
Tajikistan	<ul style="list-style-type: none"> <li>• Socio-economic impact of the Covid-19 pandemic</li> </ul>
Thailand	<ul style="list-style-type: none"> <li>• Public health and abortion</li> <li>• The absolute nature of the right of a Thai citizen regarding habitation in and entry into the Kingdom, and also the prohibition on expulsion from the Kingdom</li> </ul>



Part C.

Fact Files from  
AACCC Members:  
Constitutional Rights

# 1. Azerbaijan

## Constitutional Court

### *Overview*

Chapter III of Section II contains 48 Articles devoted to human rights and freedoms. The manner in which a number of rights, provided for in the Constitution of the Republic of Azerbaijan, shall be implemented is being regulated through separate laws. At the same time, the Constitutional Law of the Republic of Azerbaijan On Regulation of the Exercise of Human Rights and Freedoms in the Republic of Azerbaijan prescribes the conditions for lawful interference with the exercise of certain rights and freedoms listed in the Constitution. The rights and freedoms provided for in the Constitution can be classified under the following categories: personal rights, political rights and freedoms, socio-economic rights, cultural rights, and procedural rights. Paragraph II of Article 12 of the Constitution of the Republic of Azerbaijan provides that individual and citizen's rights and freedoms listed in the Constitution shall be implemented in line with international treaties to which the Republic of Azerbaijan is a party. In addition to the European Convention on Human Rights, Azerbaijan has ratified eight of the nine core UN human rights treaties. In terms of unenumerated rights, the case-law of the Constitutional Court also include examples concerning the rights on education, free movement, and extraterritoriality. It has to be also noted that the preamble of the Constitution serves as basis for identification of historical and cultural factors relevant to constitutional rights adjudication.

### *Outline*

#### **I. Rights in the Constitution**

- A. Constitutional bill of rights
- B. Rights elsewhere in the Constitution
- C. Concretization of constitutional rights
- D. Historical background and development

#### **II. Classification and content**

- A. Enumerated constitutional rights
- B. Unenumerated constitutional rights
- C. Protection and limitation

#### **III. Interpretation and current issues**

- A. Rights in diverse contexts
- B. Impact of international norms

#### **Annex 1: List of cited legal provisions**

#### **Annex 2: List of cited cases**



## **I. Rights in the Constitution**

### **A. Constitutional bill of rights**

Constitutional rights are listed in Section II of the Constitution of the Republic of Azerbaijan, entitled “Fundamental Rights, Freedoms and Duties”.

Chapter III of Section II contains 48 Articles devoted to human rights and freedoms.

The relevant overarching constitutional context is found in the preamble to the Constitution, which states as follows:

“The people of Azerbaijan, continuing their centuries-long statehood traditions, guided by the principles laid down in the Constitutional Act on the State Independence of the Republic of Azerbaijan, desiring to ensure welfare of the whole society and every individual, wishing to establish justice, freedom and security, acknowledging their responsibility before past, present and future generations, and exercising their sovereign right, hereby solemnly declare the following intentions:

- To protect the independence, sovereignty and territorial integrity of the Republic of Azerbaijan;
- To provide a democratic system within the frames of the Constitution;
- To achieve the establishment of a civil society;
- To build a law-based, secular state to provide the command of law as an expression of the will of the nation;
- To provide a worthy life level for everybody in conformity with just economic and social order;
- To remain faithful to universal human values, to live in peace and freedom with all the nations of the world and cooperate with them for this purpose.”

Having in mind the above-enumerated sincere intentions, the present Constitution was adopted through the general poll of the population via referendum.

Chapter III of Section II of the Constitution covers provisions concerning human rights and freedoms. This Chapter, entitled “Fundamental Rights and Freedoms of Man and Citizen”, reflects civil, political, economic, social and cultural rights, which include universally recognized international standards of human rights and

freedoms.

A legislative framework has been created in the Republic of Azerbaijan aimed at ensuring human rights and freedoms, as well as national mechanisms to ensure the implementation of these laws.

According to the Constitution, the main principle of rights and freedoms of man and citizen is that everyone, as from the moment of birth, enjoys inviolable and inalienable rights and freedoms. Rights and freedoms shall also include the responsibilities and duties of everyone to the society and to other persons.

Fundamental rights and freedoms of man and citizen are listed in Chapter III (Articles 24-71) of the Constitution of the Republic of Azerbaijan. These rights and freedoms are set out as part of Section II (Articles 24-80) of the Constitution immediately following Section I (Articles 1-23), which sets out general provisions. The list of rights and freedoms at the beginning of the Constitution reflects the special attention paid by the Azerbaijani state to the protection of human and civil rights and freedoms. Chapter III lists 58 human and civil rights and freedoms.

The title of Chapter III (“Fundamental Rights and Freedoms of Man and Citizen”) combines the titles of the 1789 Declaration of the Rights of Man and the Citizen, the Universal Declaration of Human Rights and the Convention for the Protection of Human Rights and Fundamental Freedoms.

Articles 72 to 80 of Chapter IV, entitled “Fundamental Duties of Citizens” of Section II of the Constitution covers constitutional duties. Article 72 of the Constitution states that everyone has duties to the state and society that derive directly from his/her rights and freedoms.

## **B. Rights elsewhere in the Constitution**

Human and civil rights are also enshrined in other articles of the Constitution.

According to Article 85 of the Constitution every citizen of the Republic of Azerbaijan enabled with the right to participation in election may be elected, as prescribed by law, as a deputy of the Milli Majlis (Parliament) of the Republic of Azerbaijan.

According to Article 100 of the Constitution any citizen of the Republic of

Azerbaijan, who has resided permanently on the territory of the Republic of Azerbaijan for longer than 10 years, has the right to participate in elections, and who has not been previously convicted for a serious crime, has no obligations to other states, has higher education, and who has no dual citizenship may be elected the President of the Republic of Azerbaijan.

Article 127 of the Constitution states that Court proceedings shall be conducted on the basis of the adversarial principle (Paragraph VII), everyone's right to defense shall be guaranteed at any stage of court proceedings (Paragraph VIII), and justice shall be based on the presumption of innocence (Paragraph IX).

Although other chapters of the Constitution contain provisions reflecting human rights, they are intended to clarify the rights listed in Chapter III ("Fundamental Rights and Freedoms of Man and Citizen"). For example, Article 56, which is contained in Chapter III of Section II of the Constitution states that citizens of the Republic of Azerbaijan have the right to elect and be elected to state bodies and to participate in referendum. Further specifications are then provided in the above-mentioned Articles 85 and 100, which are to be found under Chapter V ("Legislative Power") of the Constitution. These provisions relate to the election of a deputy of the Milli Majlis (Parliament) of the Republic of Azerbaijan and the election of the President of the Republic of Azerbaijan.

Paragraph V of Article 130 of the Constitution states that everyone shall have the right to lodge, as prescribed by law, complaints with the Constitutional Court of the Republic of Azerbaijan against normative acts of the legislature and the executive, acts of municipalities, and judicial acts infringing upon his/her rights and freedoms, for resolving by the Constitutional Court of the Republic of Azerbaijan the issues referred to in items 1-7 of Paragraph III of the present Article, for the purpose of restoration of his/her violated rights and freedoms. This right is reflected in the article dedicated to authorities of the Constitutional Court of the Republic of Azerbaijan.

### **C. Concretization of constitutional rights**

The procedure for execution of a number of rights provided for by the Constitution of the Republic of Azerbaijan is regulated by separate laws.

For example, the below mentioned laws set out the rules for exercising the relevant rights:

1. Law of the Republic of Azerbaijan On the Constitutional Court of the Republic of Azerbaijan
2. Law of the Republic of Azerbaijan On Freedom of Religion
3. Law of the Republic of Azerbaijan On Freedom of Assembly
4. Law of the Republic of Azerbaijan On the Commissioner for Human Rights (Ombudsman) of the Republic of Azerbaijan
5. Law of the Republic of Azerbaijan On Courts and Judges
6. Civil Procedure Code
7. Criminal Procedure Code
8. Economic Procedure Code
9. Election Code

At the same time, the Constitutional Law of the Republic of Azerbaijan On Regulation of the Exercise of Human Rights and Freedoms in the Republic of Azerbaijan establishes the procedure for limiting a number of rights and freedoms listed in the Constitution.

## **D. Historical background and development**

The Constitution of the Republic of Azerbaijan was adopted through the referendum on 12 November 1995.

Article 19 of the Constitutional Act on the State Independence of the Republic of Azerbaijan of 18 October 1991 provides that all the citizens of the Republic of Azerbaijan are equal before the law. The Republic of Azerbaijan, while adhering to the Universal Declaration of Human Rights, the Final Act of the Helsinki Conference and the other universally recognized international legal instruments, shall secure the respect to and unhindered exercise of all rights and freedoms provided therein, without distinction of gender, race or national origin, religion, social origin, political belief or other grounds.

By the Resolution of the Milli Majlis (Parliament) of the Republic of Azerbaijan dated 6 December 1993 “On Preparation of the draft of the First National Constitution of the Republic of Azerbaijan”, a commission was established under the chairmanship of the President of the Republic of Azerbaijan in order to draft the first national constitution.

The draft was based on human rights and freedoms listed in the Universal Declaration of Human Rights, the Helsinki Final Act and other universally recognized international documents.

It should be noted that Chapter III of Section II of the Constitution of the Republic of Azerbaijan was amended by the referendums held on August 24, 2002, March 18, 2009 and September 26, 2016.

## **II. Classification and content**

### **A. Enumerated constitutional rights**

One third of the Constitution of the Republic of Azerbaijan is devoted to human rights and freedoms and its guaranties.

According to Article 26 of the Constitution, everyone has the right to protect his/her rights and freedoms using ways and means not prohibited by law. The state shall guarantee the protection of rights and freedoms of everyone.

This obligation, without exception, applies to all branches of government and includes the obligation to respect, protect, support and exercise rights and freedoms of man and citizen.

According to Paragraph I of Article 12, the highest objective of the state is to ensure rights and liberties of man and a citizen and a proper standard of living for the citizens of the Republic of Azerbaijan. Rights and liberties of man and a citizen listed in the present Constitution are applied in accordance with international treaties to which the Republic of Azerbaijan is a party.

Chapter III (Articles 24-71) of the Constitution of the Republic of Azerbaijan outlines the fundamental rights and freedoms of man and citizen. The rights and freedoms of man and citizen provided for in the Constitution can be classified in relative order:

*Personal rights* – Included are Articles 24 (Main principle of rights and freedoms of man and citizen), 25 (Right to equality), 26 (Protection of rights and freedoms of a man and a citizen), 27 (Right to life), 28 (Right to liberty), 29 (Right to property), 30 (Right to intellectual property), 31 (Right to live in safety), 32 (Right to inviolability of private life), 33 (Right to inviolability of home), 34 (Right to marriage), 46 (Right to protect honour and dignity), 47 (Freedom of thought and speech), 48 (Freedom of conscience), 52 (Right to citizenship) and 63 (Presumption of innocence).

*Political rights and freedoms* – Included are Articles 25 (Right to equality), 36 (Right to strike), 47 (Freedom of thought and speech), 48 (Freedom of conscience), 49 (Freedom of assembly), 55 (Right to participate in administration of the state), 57 (Right to appeal) and 58 (Right to association).

*Socio-economic rights* – Included are Articles 29 (Right to property), 34 (Right to marriage), 35 (Right to work), 37 (Right to rest), 38 (Right to social security) and 41 (Right to protection of health).

*Cultural rights* – Included are Articles 40 (Right to culture), 42 (Right to education) and 45 (Right to use native language).

*Procedural rights* – Included are Articles 60 (Administrative and judicial guarantee of rights and freedoms), 61 (Right to legal assistance), 62 (Inadmissibility of change of court jurisdiction), 63 (Presumption of innocence), 64 (Inadmissibility of double jeopardy), 65 (Right for repeated appeal to the law court), 66 (Inadmissibility of testifying against relatives), 67 (Rights of persons detained, arrested, accused in crime), 68 (The right to protection from arbitrariness and conscientious treatment), 69 (Rights of foreigners and stateless persons), 70 (Right to political asylum) and 71 (Guarantees for rights and freedoms of man and citizen).

Article 24 of the Constitution of the Republic of Azerbaijan outlines the main principle of rights and freedoms of man and citizen. Everyone, as from the moment of birth, enjoys inviolable and inalienable rights and freedoms. Human dignity is protected and respected. Rights and freedoms shall also include the responsibilities and duties of everyone to the society and to other persons.

For the purposes of Article 25 of the Constitution of the Republic of Azerbaijan the term “right to equality” is understood as:

- Every person is equal before the law and the courts.
- Men and women possess equal rights and freedoms.
- The state shall guarantee the equality of rights and freedoms to everyone, irrespective of race, ethnicity, religion, language, sex, origin, property status, occupation, beliefs or affiliation with political parties, trade union organisations or other public associations.
- Restrictions of rights and freedoms on the grounds of race, ethnicity, religion, language, sex, origin, beliefs, or political or social affiliation are prohibited.

Article 71 of the Constitution of the Republic of Azerbaijan is dedicated to

guarantees for rights and freedoms of man and citizen. According to this Article, the legislature, executive and judiciary shall have the duty to observe and to protect the rights and freedoms of man and citizen set forth in the Constitution. No one may restrict the exercise of rights and freedoms of a man and citizen. Everyone's rights and freedoms shall be restricted on the grounds provided for in the present Constitution and laws, as well as by the rights and freedoms of others.

Restriction of rights and liberties shall be proportional to the result expected by the state. Rights and freedoms of man and citizen may be partially and temporarily restricted in time of war, martial law and state of emergency, as well as mobilization, subject to the international obligations of the Republic of Azerbaijan. The population shall be notified in advance about restrictions as regards their rights and liberties. Under no circumstances may a person be forced to proclaim his religion, thoughts and beliefs, and persecuted for them. No provision of the present Constitution may be interpreted as aiming at the abolition of rights and freedoms of man and citizen. Rights and freedoms of man and citizen shall have direct effect on the territory of the Republic of Azerbaijan. Disputes concerning the violation of rights and freedoms of man and citizen shall be resolved by courts of law. No one shall be liable for an act which did not constitute an offence at the time when it was committed. If, after the commission of an offence, a new law abolishes or diminishes liability for such an offence, the new law shall be applied.

Everyone may perform actions not prohibited by law and no one may be forced to perform actions not prescribed by law. State bodies may function only on the basis of the present Constitution, in the manner and within the boundaries prescribed by law.

One of the greatest advantages and distinguishing features of the Constitution is the reflection of all possible rights, freedoms and duties granted (granting of which is a necessity) to men and women by the state and society, which they trust and which are trustable. Such rights, freedoms and duties are reflected as a whole and a unity. Their fundamental value and quality is that they reflect the will of the nation, establish the form of nation building and the legal grounds for it.

The Constitution reflects the principles of state administration and relationship between people and state. It also provides a whole framework for building a democratic, secular state of law.

In its essence, the Constitution defines the ultimate sovereignty, territorial integrity of the country and the inviolability of the rights of Azerbaijani people, of every

citizen of the Republic of Azerbaijan.

The Constitution of the Republic of Azerbaijan considers rights and freedoms of man and citizen to be the highest value and defines their respect and protection of human rights and freedoms as an obligation of the legislative, executive and judicial authorities.

One of the most important principles of law and state administration is the establishment of a broad range of natural, inalienable and democratic rights of people through legislation, ensuring their viability through material, moral and other means, and their protection against any kind of infringement. This principle is wholly reflected by the Constitution.

The Constitution of the Republic of Azerbaijan has the highest legal authority within the Republic of Azerbaijan. The Constitution has direct effect. The Constitution is the foundation of the legislative system of the Republic of Azerbaijan (Article 147 of the Constitution).

The Constitution establishes the grounds for the legal status of man and citizen, the essence of the process of the exercise of the rights and freedoms, and the fundamental ideas defining the features of the society, economy, politics and social sphere. It also defines the limits for and the character of the state regulation.

Declaring the supremacy of rights and freedoms of man and citizen, their direct force on the territory of the country and proclaiming their provision as the supreme goal of Azerbaijani state, the Constitution of the Republic of Azerbaijan determines that the state guarantees the protection of the rights and freedoms of everyone.

In this context, Paragraphs II, III and IX of Article 71 clearly establish the following:

- No one may restrict exercise of rights and freedoms of a man and citizen. Everyone's rights and freedoms shall be restricted on the grounds provided for in the present Constitution and laws, as well as by the rights and freedoms of others.
- Rights and freedoms of man and citizen may be partially and temporarily restricted in time of war, martial law and state of emergency, as well as mobilization, subject to the international obligations of the Republic of Azerbaijan. The population shall be notified in advance about restrictions as regards their rights and liberties.



- Everyone may perform actions not prohibited by law and no one may be forced to perform actions not prescribed by law.

## **B. Unenumerated constitutional rights**

According to Paragraph II of Article 12 of the Constitution of the Republic of Azerbaijan, rights and freedoms of man and citizen listed in the present Constitution are applied in accordance with international treaties to which the Republic of Azerbaijan is a party.

The analysis of the Constitution of the Republic of Azerbaijan reveals that the Republic of Azerbaijan recognizes human and civil rights and freedoms provided for by international law. Accordingly, the Constitution incorporates the vast majority of the provisions of the Universal Declaration of Human Rights (1948), the International Covenant on Economic, Social and Cultural Rights (1966), and the International Covenant on Civil and Political Rights (1966) into the national legal system, which are the main international sources of human and civil rights and freedoms.

It should also be noted that the Constitution lays down the guarantees for the protection of constitutional human rights and freedoms, establishing the limits of permissible restrictions on certain rights and freedoms of a citizen, and creating a legal framework for courts to resolve the conflicts between statutory enactments, as well as the issues concerning their compliance with the Constitution (jurisdiction of the Constitutional Court of the Republic of Azerbaijan).

The Constitutional Court of the Republic of Azerbaijan in its well-developed practice has repeatedly relied on the norms and provisions of international law as an additional argument in favour of the norms of domestic law when substantiating the violations of human rights established by it, or vice versa to justify the protection of such rights.

What follows are some examples of key cases, from the Constitutional Court of the Republic of Azerbaijan, relevant to unenumerated rights.

### **1. Education**

Case title: *Verification of conformity of some provisions of the Law of the Republic of Azerbaijan on Social Security of Children who have lost their Parents and were Deprived of Parental Care with Article 25.1 of the Constitution on the complaint*

*of Mr. Javidan Gafarov (constitutional complaint, 25.01.2017)*

a) Case headnotes

No person shall be denied the right to education. According to the legal position formed by the Plenum of the Constitutional Court, mainly to Article 42 of the Constitution, every citizen has the right for education. The state guarantees free obligatory secondary education. Furthermore, with reference to the requirements of Article 25.1 of the Constitution, in case, if persons studying on a paid basis at a state higher education institution loses parental support after the age of 18 years for the reasons specified in Paragraph 12 of Article 1 of the *Law of the Republic of Azerbaijan on Social Security of Children who have lost their Parents and were Deprived of Parental Care*, tuition payment for education (up to 23 years' age) has to be provided according to Article 38.3 of the Law of the Republic of Azerbaijan on Education.

b) Case summary

Mr. Javidan Gafarov having applied to the Constitutional Court asks for verification of conformity of some provisions of the *Law of the Republic of Azerbaijan on Social Security of Children who have lost their Parents and were Deprived of Parental Care* with the Constitution of the Republic of Azerbaijan.

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

In the response letter to Mr. Gafarov it has been explained that, being the state higher educational institution, the Medical University is not authorised to exempt students from payment of education fee without legal justification. At the same

time in the letter it has been noted that with the purpose to clarify this matter, the address to the Ministry of Education was provided.

In turn, the Ministry of Education has specified in its letter that according to the law, children who lost their parents and were deprived of parental care or persons equated to them (one parent is deceased, and another one is a disabled person of the 1<sup>st</sup> group (person with serious disorders of one or more body systems) and the 2<sup>nd</sup> groups (person who has serious functional disorders as a result of a previous illness, injury or birth defect)) are understood as children aged up to 18 years. From this point of view, the guarantees for education specified in Article 5 of the law do not extend to persons who lost both parents and were deprived of parental care during having higher education (students of the II-VI courses at the age of 19-23 years).

However, the content of Articles 1 and 5 of the present law read that also the persons that are not considered any more as children could use such privileges. This includes only persons under 18 years old who have lost both parents, as well as persons under 23 years old, deprived of care of both parents, studying full-time in higher and secondary specialized educational institutions and at the magistracy level of a scientific organization established by the relevant executive authority.

However, these persons receive these privileges in case of loss of parents and deprivation of parental care if such loss or deprivation occurred during the time period up to the age of 18 years.

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

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

These rights have also found the reflection in a number of international legal documents on human rights.

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

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

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

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

and economic rights.

Taking into account the legal positions mentioned in the Plenum of the Constitutional Court, non-covering by a concept of the 12th Paragraph of Article 1 of the Law of the Republic of Azerbaijan on Social Security of Children who have lost their Parents and were Deprived of Parental Care, of persons deprived of maintenance of parents after 18 years who study at state higher educational institutions does not correspond with Article 25.1 of the Constitution and in this connection it is necessary to recommend to the Milli Majlis (Parliament) of the Republic of Azerbaijan to coordinate this norm with the legal position reflected in the descriptive and motivation part of this Decision. Until the resolution in a legislative order of the issue specified in Point 1 of a resolute part of the present Decision, based on the requirement of Article 25.1 of the Constitution in case the persons studying full-time education in state higher educational institutions on a paid basis lose parental support after 18 years for the reasons specified in the 12th Paragraph of Article 1 of the *Law of the Republic of Azerbaijan on Social Security of Children who have lost their Parents and were Deprived of Parental Care*, payment of education fee (up to 23 years age) has to be provided according to Article 38.3 of the Law on Education.

## 2. Free movement

Case title: *Verification of conformity of some regulatory legal acts on the appeal of Mr. Clark Gordon Morris with the Constitution* (constitutional complaint, 26.05.2017)

### a) Case headnotes

Everyone lawfully within the territory of a state shall, within that territory, have the right to liberty of movement and freedom to choose his residence. No restrictions shall be placed on the exercise of these rights other than such as are in accordance with law and are necessary in a democratic society in the interests of national security or public safety, or for the protection of the rights and freedom of others.

### b) Case summary

The citizen of the United Kingdom of Great Britain and Northern Ireland Mr. Clark Gordon Morris appealed to the Constitutional Court and requested to verify the upholding of the judicial act temporarily restricting the right to leave the country and the measure of the restriction of the right to leave the country, as well

as the conformity of the relevant regulatory legal acts with the Constitution and the provisions of Protocol 4 of the European Convention on Human Rights.

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

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

In his appeal to the Constitutional Court, the applicant stated that the above-mentioned decision of the Baku City Nasimi District Court and the fact of upholding of the measure of temporary restriction of his right to leave the country by the executive officer do not comply with the requirements of Articles 28.3 and 71.2 of the Constitution and Article 2.3 and 2.4 of Protocol 4 to the European Convention on Human Rights.

The Plenum of the Constitutional Court, in connection with the appeal, noted that according to Article 28.3 of the Constitution, everyone legally being on the territory of the Republic of Azerbaijan may travel without restrictions, choose the place of residence and go beyond the territory of the Republic of Azerbaijan.

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

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

In accordance with Article 12 of the International Covenant on Civil and Political Rights:

- Everyone lawfully within the territory of a state shall, within that territory, have the right to liberty of movement and freedom to choose his residence;

- Everyone shall be free to leave any country, including his own;
- The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order, public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant;
- No one shall be arbitrarily deprived of the right to enter his own country.

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

It was also noted in the Decision that the General Records adopted by the UN Human Rights Committee no. 27, dated 2 November 1999 on Article 12 of the International Covenant, states that restrictions imposed on the rights provided for in that article should not undermine the principle of freedom of movement. To consider these restrictions to be reasonable, they should be envisaged by the law and should be necessary to achieve the objectives mentioned in Article 12.3 of the Covenant in the democratic society and should comply with all other rights set out in the Covenant. States should always be guided by the principle that these restrictions do not address the essence of the law under consideration when adopting laws that contain restrictions permitted by Article 12.3 of the Covenant. The restrictive measures should comply with the principle of proportionality; they should be suitable for the performance of defense functions; among all means which may lead to the desired results, they should be the least restrictive and should be proportionate to protected interests. The principle of proportionality should be followed not only in the legislation in which the relevant restriction is envisaged, but also in the administrative and judicial authorities within the framework of the application of that law.

Some of the decisions of the European Court of Human Rights have shown that any measure restricting the right of freedom of movement should be consistent with the law and should pursue one of the legitimate aims outlined in Article 2.3 of Protocol 4 to the European Convention on Human Rights, should be compulsory in a democratic society, that is, to meet the criteria of proportionality (*Battista v. Italy*, 2 December 2014, § 37; *Stamose v. Bulgaria*, 27 November



2012, § 30; *Bartik v. Russia*, 21 December 2006, § 46).

Taking into consideration the above-mentioned legal positions, the Plenum of the Constitutional Court decided that the grounds for causing the temporary restriction of the right of the debtor to leave the country as provided for in Article 84-1 of the *Law of the Republic of Azerbaijan on Execution [of judgements]* and in Paragraph 2 of the “Instruction on the rules for applying by the executive of the temporary restriction of the right to leave the country” approved by the Decree of the Collegium of the Ministry of Justice dated 22 April 2013 shall be considered to be corresponding to Articles 28.3 and 71.2 of the Constitution, as it meets, constitutional principles of legal certainty and proportionality.

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

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

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

### **3. Extraterritoriality**

Case title: *Verification of conformity of the Decision of the Civil Board of the Supreme Court of the Republic of Azerbaijan with the Constitution and laws of the Republic of Azerbaijan in connection with the complaint of Mr. Davud Bagirov* (constitutional complaint, 25.07.2018)

#### a) Case headnotes

In some cases, the decisions made by the courts of a foreign state may be equally valid on the territory of another state, together with the court’s judgment. In the event that the proceedings are carried out in a foreign country and its implementation is envisaged in the Republic of Azerbaijan, the same proceedings shall be carried out in accordance with the fundamental principles of the Constitution on fair trial, along with the international verification of obligations of the state.



### b) Case summary

Mr. Davud Bagirov was married to Mrs. Merim Beyshekeyeva, a Kyrgyz citizen in Dubai (The United Arab Emirates), in 2011, and within this marriage is a daughter named Jeyla who was born in the United States in New York City in 2012.

Mrs. Beyshekeyeva appealed to the court in Dubai in 2015 and filed for divorce against Mr. Davud Bagirov. Due to the Decision of the First Instance Court of Dubai of June 6, 2016, the marriage was annulled, child custody was given to the father, the lump sum payment for the claimant was put on the defendant.

The Dubai Court of Appeals of the United Arab Emirates annulled the Decision of the Court of First Instance of November 17, 2016, and decided to return the child to the claimant as well the reimbursement of alimony payments, custody costs, housing and marriage expenses and etc.

The Dubai Supreme Court of the United Arab Emirates, by a decision of February 14, 2017, made partial changes to the decision of the court of appeal, ordered the withholding of alimony, the execution of the provision of housing costs to the guardian from the moment the child was handed over to the mother, the withholding of expenses on marriage matters after the final decision on divorce or the moment of the actual transfer of the child to the mother, the parties are obliged to jointly pay the fees of the courts of two instances.

The applicant having submitted a petition through her representative to the Civil Board of the Supreme Court of the Republic of Azerbaijan, requested recognition and enforcement in the territory of the Republic of Azerbaijan of the decision of the Dubai Supreme Court of the United Arab Emirates dated February 14, 2017.

By the Supreme Court's Decision of October 5, 2017 the Decision of the Dubai Supreme Court of February 14, 2017 was recognized compulsory for the execution in Azerbaijan.

In response, Mr. Davud Bagirov appealed to the Constitutional Court with the request to consider the Supreme Court's Decision of October 5, 2017 as incompatible with the Constitution and laws.

The applicant considers that the Civil Board of the Supreme Court during the examination of the case has not properly implemented Articles 462, 467 and 471 of the Civil Procedure Code and by that, his rights provided for in Articles 25, 26

and Article 60.1 of the Constitution have been violated.

The applicant also noted in his complaint that the decision of the Dubai Supreme Court of February 14, 2017, which was submitted to the United Arab Emirates, was not timely presented to him, and he could not challenge the court's translation flaws.

Under Article 60.1 of the Constitution, everyone has a guaranteed protection of his/her rights and freedoms through the administrative remedies and in court.

In international law, the impartial and fair protection of human rights and freedoms by a court is defined as the human's inalienable right.

The European Court of Human Rights also considered the execution of the judgment issued by any court as an integral part of the proceedings under Article 6 of the European Convention on Human Rights.

In some cases, the decisions made by the courts of a foreign state may be equally valid on the territory of the other state, together with the court's judgment. In the event that the proceedings are carried out in a foreign country and its implementation is envisaged in the Republic of Azerbaijan, the same proceedings shall be carried out in accordance with the fundamental principles of the Constitution on fair trial, along with the international obligations of the state.

According to the legislation the marriage of a citizen of Azerbaijan residing outside the Republic of Azerbaijan, which he/she has with a husband or wife living outside Azerbaijan, may be dissolved in the courts of Azerbaijan irrespective of his/her place of residence. If the annulment of the marriage in the relevant executive authority is permitted by the legislation of Azerbaijan, that marriage may be annulled in diplomatic representations or consular offices of Azerbaijan.

The scope of the right of the former husband (wife) to receive alimony is limited and clearly defined in the legislation. The factor consolidating the basis listed in Article 85.1 of the Family Code is that the former husband (wife) is not required or limited to work for certain reasons and that the former husband (wife) is required to pay alimony.

As regards Article 85.1.1 of the Family Code, it should be noted that, in contrast to the grounds provided for in Articles 85.1.2-85.1.4 of the Code, the establishment of the right of the former husband (wife) to receive alimony does not depend

on whether he / she needs financial assistance. However, as for Article 85.1.1 of the Family Code, the payment of alimony as defined in this article is limited to reaching the age of three years.

According to Article 86 of the Family Code, the amount of alimony to be paid by the husband (wife) or the former husband (husband) in the court, if the agreement on the payment of alimony is not between the spouse or the former spouse, the financial position is determined in the form of a fixed amount of money payable each month taking into account the other significant interests of the parties.

The Plenum of the Constitutional Court considered that when the Civil Board of the Supreme Court recognized the Decision of the Dubai Supreme Court of February 14, 2017 it did not take into consideration that the payment of alimony and custody costs by Mrs. M. Beyshekeyeva was in contradiction with the laws of Azerbaijan. This is the basis for refusing the recognition of the judgment under Paragraph d of Article 21 of the Treaty and Articles 462 and 465.1.5 of the Civil Procedure Code.

The Plenum of the Constitutional Court considered that the provisions of Article 134 of the Civil Procedure Code should be interpreted in terms of the requirements of the above mentioned constitutional principles. The Supreme Court, when examining applications for compulsory enforcement and recognition of resolutions by foreign courts and arbitration, shall officially transmit the official copy of the court decision and the recognition thereof to the persons presenting at the case.

The Plenum of the Constitutional Court considered that the judgment of February 14, 2017 of the Dubai Supreme Court of the United Arab Emirates, which was recognized by the Supreme Court's Civil Board, did not consider the payment of alimony and custody costs to Mrs. M. Beyshekeyeva contrary to the domestic legislation of Azerbaijan, Paragraph 4 of Article 21 of the Civil Procedure Code, which is incompatible with Articles 462 and 465.1.5. However, the Civil Board of the Supreme Court, despite the requirements of the Constitution and the procedural legislation, did not submit a translated copy of the court decision presented for recognition, thus violating the principles of fair trial and equality of parties.

The Plenum of the Constitutional Court decided that the Decision of the Civil Board of the Supreme Court of October 5, 2017 on the recognition and compulsory execution of the Decision of the Dubai Supreme Court of February 14, 2017 in Azerbaijan shall be recognized as null and void due to its discrepancy

with Article 60.1 of the Constitution and Articles 462 and 472 of the Civil Procedure Code. The case should be reconsidered according to this Decision of the Constitutional Court in the order and terms established by the civil procedural legislation of the Republic of Azerbaijan.

Due to the inconsistency of the determination of the Civil Collegium of the Supreme Court of the Republic of Azerbaijan dated October 5, 2017 on the compulsory execution and recognition in the Republic of Azerbaijan of the decision of the Dubai Supreme Court of the United Arab Emirates dated February 14, 2017, Part I of Article 60 of the Constitution and Articles 462 and 472 of the Civil Procedure Code Of the Republic of Azerbaijan to consider it invalid. Review the case in accordance with this resolution in the manner and terms established by the civil procedural legislation of the Republic of Azerbaijan.

### **C. Protection and limitation**

The Constitution is based on such progressive ideas allowing for nation and civil society building as recognizing the nation as the sole source of the power, strict compliance with the principle of separation of powers, declaring human rights and freedoms as the supreme objective of the state, and superiority of international law over national legislation. The constitutional law defines the belonging of the supreme power to the nation as a prerequisite for inevitable progression of Azerbaijan on the path of democracy.

Another important feature characterizing the Constitution of the Republic of Azerbaijan is a rather comprehensive establishment of human and civil rights, and declaration of recognition, protection and promotion of these rights as the primary objective of the state.

According to Paragraph I of Article 12, the highest objective of the state is to ensure rights and liberties of man and citizen and a proper standard of living for the citizens of the Republic of Azerbaijan. Numerous many-branched reforms undertaken after adoption of the Constitution indeed have been aiming to ensure an efficient exercise of human and civil rights and freedoms, while the role played by civil society organizations has been enhanced.

It should also be noted that according to Article 71, the legislature, executive and judiciary shall have the duty to observe and to protect the rights and freedoms of man and citizen set forth in the Constitution. No one may restrict exercise of rights and freedoms of a man and citizen. Everyone's rights and freedoms shall

be restricted on the grounds provided for in the present Constitution and laws, as well as by the rights and freedoms of others.

Restriction of rights and freedoms shall be proportional to the result expected by the state.

According to Article 2 of the Constitutional Law On Regulation of the Exercise of Human Rights and Freedoms in the Republic of Azerbaijan, the rights provided for in Article 27 (except for cases of death resulting from lawful conduct of war), Paragraph I of Article 28, Paragraph III of Article 46, Article 63, Article 64 and Paragraph VIII of Article 71 of the Constitution may not be restricted and no reservation might be made in their respect.

According to Article 3 of the present Constitutional Law, human rights and freedoms, provided for in the Constitution of the Republic of Azerbaijan and in the international agreements, acceded by the Republic of Azerbaijan shall be subject for restriction only by the law. The Law restricting human rights and freedoms shall directly quote the restricted right or freedom, as well as the relevant Article of the Constitution of the Republic of Azerbaijan. Restrictions on human rights and freedoms should not alter the essence of these rights and freedoms. Restrictions introduced in relation to human rights and freedoms should be aimed at the legitimate goal provided for by the Constitution of the Republic of Azerbaijan and this Constitutional Law and be proportionate to this goal.

Beside the grounds contained in Paragraph II of Article 71, Paragraph III of Article 71 of the Constitution of the Republic of Azerbaijan stipulates that rights and freedoms of man and citizen may be partially and temporarily restricted in time of war, martial law and state of emergency, as well as mobilization, subject to the international obligations of the Republic of Azerbaijan. The population shall be notified in advance about restrictions as regards their rights and liberties.

Along with other grounds specified in the Constitution of the Republic of Azerbaijan, the rights and freedoms specified in Paragraph III of Article 28, Articles 32, 33, 49, 50, 51, 58 of the Constitution and freedom of speech can be restricted in the interests of national security, protection of health and morals, rights and freedoms of others, for the purpose of crime prevention specified in Article 47 of the Constitution.

The rights and freedoms enshrined in Articles 32, 33, 49, 50 and 58 of the Constitution and the freedom of speech referred to in Article 47, can also be restricted for the prevention of riots.

The rights and freedoms specified in Paragraph III of Article 28, Articles 49, 50 and 58 of the Constitution, freedom of speech specified in Article 47 and the right to freely determine the individual's approach to religion, to profess individually or together with others any religion or to profess no religion, and to express and disseminate his/her beliefs concerning his approach to religion, can also be restricted for the protection of public safety.

The rights and freedoms set forth in Paragraph III of Article 28, Articles 32 and 33 of the Constitution, and the right to practice, express and disseminate one's beliefs in relation to religion, as specified in Article 48, Part II, can also be restricted to ensure public order.

The rights and freedoms set forth in Articles 32 and 33 of the Constitution can also be restricted in the interests of the country's economic well-being.

Freedom of speech under Article 47 and freedom of information under Article 50 of the Constitution, can also be restricted in the interests of protection of the territorial integrity of the State, for the protection of reputation or rights of others, prevention of disclosure of confidential information or securing the authority and impartiality of the court.

The right to practice, express and disseminate one's beliefs in relation to any religion specified in Paragraph II of Article 48 of the Constitution may be restricted for the purpose of protection health and morals or the rights and freedoms of others.

### **III. Interpretation and current issues**

#### **A. Rights in diverse contexts**

The preamble of the Constitution of the Republic of Azerbaijan states that the people of Azerbaijan, continuing their centuries-long statehood traditions, guided by the principles laid down in the Constitutional Act on the State Independence of the Republic of Azerbaijan, desiring to ensure welfare of the whole society and every individual, wishing to establish justice, freedom and security, acknowledging their responsibility before past, present and future generations, and exercising their sovereign right, hereby solemnly declare the following intentions:

- to protect the independence, sovereignty and territorial integrity of the Republic of Azerbaijan;
- to guarantee a democratic system within the framework of the Constitution;
- to achieve the establishment of a civil society;
- to build constitutional and secular state that guarantees the supremacy of law as an expression of the will of the people;
- to provide a proper standard of living for everybody in conformity with just economic and social order;
- to remain faithful to universal human values, to live in friendship, peace and safety with all the nations of the world and co-operate with them for this purpose.

Paragraph II of Article 8 of the Constitution of the Republic of Azerbaijan states that the President of the Republic of Azerbaijan embodies unity of the Azerbaijani people and ensures continuity of the Azerbaijani statehood.

The preamble speaks of the continuation of the centuries-long statehood traditions of the Azerbaijani people. The preamble states of the desire of the Azerbaijani people to provide prosperity and welfare of the whole society and each individual. This means that the Azerbaijani people are interested in creating a prosperous life for members of society and for everyone in general.

The ideology of the state is based on the moral values of the people, as well as on customs and traditions, taking into account universal values.

The President ensures legal succession of the Azerbaijani statehood on the basis of the aforementioned principles and assumes the duties and responsibilities arising from this succession.

## **B. Impact of international norms**

The Republic of Azerbaijan has joined the Convention for the Protection of Human Rights and Fundamental Freedoms of 1950, the Convention on the Political Rights of Women of 1953, International Covenant on Economic, Social and Cultural Rights 1966, the International Covenant on Civil and Political Rights of 1966, the Council of Europe Convention on Action against Trafficking in Human Beings of 2005, the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse of 2007, the Convention on the Rights of Persons with Disabilities of 2007. These are examples of the general international agreements establishing all or most of the fundamental rights

at the international level.

Paragraph II of Article 12 of the Constitution of the Republic of Azerbaijan states that rights and liberties of a person and a citizen listed in the present Constitution are applied in accordance with international treaties to which the Republic of Azerbaijan is a party.

Paragraph II of Article 148 of the Constitution of the Republic of Azerbaijan states that international treaties to which the Republic of Azerbaijan is a party shall be an integral part of the legislative system of the Republic of Azerbaijan.

Article 151 of the Constitution of the Republic of Azerbaijan states that if a conflict arises between normative legal acts of the legislative system of the Republic of Azerbaijan (with the exception of the Constitution of the Republic of Azerbaijan and acts adopted by referendum) and inter-state treaties to which the Republic of Azerbaijan is a party, the international treaties shall apply.

The articles of the European Convention on Human Rights were the basis to the final part of 3 (three) decisions adopted by the Constitutional Court, along with the constitutional norm. These are summarized below.

## **1. Right to liberty**

Case title: *Interpretation of some provisions of Article 158.3, Articles 158.4 and 290.3 of the Criminal Procedure Code of the Republic of Azerbaijan* (constitutional request of the Court of Appeal of Shirvan district, 10.10.2011)

### a) Case headnotes

According to Article 28 of the Constitution, everyone has the right to liberty. The right to liberty can be limited only in the order provided by the law by detention, arrest or imprisonment.

### b) Case summary

The decision stated that under Article 28 of the Constitution everyone has the right to liberty. The right to liberty can only be restricted by law, arrest or imprisonment.

The recognition of human dignity as a social value by the state ensures impermissibility of arbitrary interference with the right to freedom of everyone



and creates conditions for the full development of the individual and the democratic organization of society.

Article 1 of the Universal Declaration of Human Rights provides that all are born free and equal in dignity and rights. The right of every person to freedom and inviolability is the fundamental natural right that belongs to him upon his birth. The limitation of these rights, without any legal basis or necessity, is unacceptable.

According to Article 5 § 1 (c) of the Convention, the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so.

Article 9 of the International Covenant on Civil and Political Rights and Article 5 of the Convention intend the “right to trial within a reasonable time”. According to Article 6 § 1 of the Convention, everyone is entitled to a fair and public hearing within a reasonable time, in the determination of civil rights and obligations or of any criminal charge against him.

The Constitutional Court decided that Article 158.4 of the Criminal Procedure Code as well as provision “the time necessary for the accused and his defence counsel to take familiarization of the case file shall not be included in the period of the investigation” of Article 218.4 of this Code shall be considered as null and void from 01 March 2012 in the view of discrepancy to Article 28 of the Constitution and Article 5 of the Convention for the Protection of Human Rights and Fundamental Freedoms.

## **2. Principle of legal certainty**

Case title: *Verification of conformity of decision of the Civil Board of the Supreme Court of the Republic of Azerbaijan as of 8 June 2011 to the Constitution and laws of the Republic of Azerbaijan in connection with the claim of R. Jafarov* (constitutional complaint, 18.05.2012)

### **a) Case headnotes**

The constitutional law doctrine recognizes a principle of legal certainty as one of basic elements of rule of the law, found its reflection in a preamble of the Constitution of the Republic of Azerbaijan.

b) Case summary

The decision states that the doctrine of the constitutional law recognizes the principle of legal certainty as one of the key elements of the law, which is reflected in the Constitution's preamble.

The principle of legal certainty provides, among other requirements, clarity and certainty regarding the current legal situation (Decision of the Constitutional Court "On Article 228.5 of the Civil Code of the Republic of Azerbaijan", dated May 27, 2008).

The inevitable inaccuracies or ambiguities of legal norms are often overcome by judicial practice. From the point of view of Article 19 of the European Convention on Human Rights and the legal position expressed in the judgment of the European Court of Human Rights (ECtHR) in *Scordino v. Italy*, (no. 1), the purpose of the ECHR is to verify whether the interpretation and application of domestic law is consistent with the principles of the Convention. The Plenum of the Constitutional Court stated that the interpretation and application of domestic law by the Court of Cassation of Azerbaijan should be consistent with the provisions of the Constitution and the law. Thus, the judicial practice in any case must be consistent with the purpose and essence of the applicable legal norm, its meaning should not be distorted, and the practice of application in such a way that it does not violate the human rights and freedoms enshrined in the Constitution.

The Constitutional Court came to conclusion that it should be recommended to the Milli Majlis (Parliament) of the Republic of Azerbaijan to improve the provisions of the legislation concerning the social security of prosecutors, as well as judges from the point of view of the Chapter VII of the Constitution, as well as Article 14 of the Convention. The decision of the Civil Chamber of the Supreme Court of June 8, 2011 in the civil case in the claim of Mr. R. Jafarov should be found to be inconsistent with Article 60 of the Constitution, as well as Article 32.5 of the Law "On Service in the Prosecutor's Office" and Article 9.4.1 of the Law "On Labour Pensions" and the case must be reconsidered according to the present decision, according to the order and the terms established by the civil procedure legislation of the Republic of Azerbaijan.

### **3. Protection of rights and liberties through administrative remedies**

Case title: *Interpretation of Article 28 of the Administrative Procedure Code of the Republic of Azerbaijan* (constitutional request of the Baku Court of Appeal, 12.04.2017)

a) Case headnotes

Paragraph I of Article 60 of the Constitution guarantees that everyone is guaranteed protection of his/her rights and liberties through the administrative remedies and in court.

b) Case summary

The decision states that it is necessary to analyze the principle of stability of judicial decisions, which is an integral part of legal certainty with the right to appeal to the court arising from Article 60 of the Constitution of the Republic of Azerbaijan.

Paragraph I of Article 60 of the Constitution guarantees that everyone is guaranteed protection of his/her rights and liberties through the administrative remedies and in court. According to paragraphs VI and VII of Article 71 of the Constitution, human and citizens' rights and freedoms shall have direct effect on the territory of the Republic of Azerbaijan. Disputes related to violation of human and citizens' rights and freedoms shall be resolved by courts of law.

Paragraph I of Article 125 of the Constitution provides that judicial power in the Republic of Azerbaijan shall be exercised by the courts of law, through the administration of justice. The Court decided to recommend to the Milli Majlis (Parliament) of the Republic of Azerbaijan to regulate the right of a person who has not been involved in administrative proceedings, whose interests are affected by a court decision that has entered into legal force, to apply to court, arising from part 1 of Article 60 of the Constitution of the Republic of Azerbaijan and Article 6 of the Convention "On the Protection of Human Rights and Fundamental Freedoms".

To ensure the right of access to court provided in paragraph I of Article 60 of the Constitution of the Republic of Azerbaijan and Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms, until the matter is resolved in the law, in cases of gross violations of rights and lawful interests of an individual who has not been involved in the administrative proceedings but whose interests have been affected by the relevant final judicial act, he may be invited to join the administrative proceedings as a third party. Such liability should be in accordance with Article 28.1 of the Code of Administrative Procedure of the Republic of Azerbaijan, with due regard to the legal views expressed in the descriptive and reasoning part of this Decision.

## **Annex 1: List of cited legal provisions**

### **1) Constitutional provisions**

Constitution of the Republic of Azerbaijan (last amended 26 Sep. 2016)

- Preamble
- Articles 8 (II), 11 (II), 12 (I, II), 19, 24 to 38, 41, 42, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 80, 85, 100, 101, 127 (VII, VIII, IX), 130 (V), 147, 148 (II), 151.

### **2) Constitutional laws**

Constitutional Law On Regulation of the Exercise of Human Rights and Freedoms in the Republic of Azerbaijan

### **3) Laws**

Law of the Republic of Azerbaijan on the Commissioner for Human Rights (Ombudsman) of the Republic of Azerbaijan

Law of the Republic of Azerbaijan on the Constitutional Court of the Republic of Azerbaijan

Law of the Republic of Azerbaijan on Courts and Judges

Law of the Republic of Azerbaijan on Education

Law of the Republic of Azerbaijan on Freedom of Assembly

Law of the Republic of Azerbaijan on Freedom of Religion

Law of the Republic of Azerbaijan on Labour Pensions

Law of the Republic of Azerbaijan on Service in the Prosecutor's Office

Law of the Republic of Azerbaijan on Social Security of Children who have lost their Parents and were Deprived of Parental Care

#### **4) Resolutions of Parliament**

The Resolution of the Milli Majlis (Parliament) of the Republic of Azerbaijan dated 6 December 1993 “On Preparation of the draft of the First National Constitution of the Republic of Azerbaijan”

#### **5) Legal codes**

Civil Procedure Code

Criminal Procedure Code

Economic Procedure Code

Election Code

#### **6) International provisions**

Universal Declaration of Human Rights (1948)

The Convention for the Protection of Human Rights and Fundamental Freedoms (1950)

Convention on the Political Rights of Women (1953)

International Covenant on Economic, Social and Political Rights (1966)

International Covenant on Civil and Political Rights (1966)

Final Act of the Helsinki Conference (1975)

The Council of Europe Convention on Action against Trafficking in Human Beings (2005)

Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (2007)

The Convention on the Rights of Persons with Disabilities (2007)

## **Annex 2: List of cited cases**

### **1) Constitutional Court of the Republic of Azerbaijan**

On Article 228.5 of the Civil Code of the Republic of Azerbaijan, 27.05.2008

On Interpretation of some provisions of Article 158.3, Articles 158.4 and 290.3 of the Criminal Procedure Code of the Republic of Azerbaijan, 10.10.2011

On Verification of conformity of the Decision of the Civil Board of the Supreme Court of the Republic of Azerbaijan as of 8 June 2011 to the Constitution and laws of the Republic of Azerbaijan in connection with the claim of Mr. R. Jafarov, 18.05.2012

On Verification of conformity of some provisions of the Law on Social Security of Children who have lost their Parents and were deprived of Parental Care with Article 25.1 of the Constitution of the Republic of Azerbaijan on the complaint of Mr. Javidan Gafarov, 25.01.2017

On Interpretation of Article 28 of the Administrative Procedure Code of the Republic of Azerbaijan, 12.04.2017

On Verification of conformity of some regulatory legal acts on the appeal of Mr. Clark Gordon Morris with the Constitution of the Republic of Azerbaijan, 26.05.2017

On Verification of conformity of the Decision of the Civil Board of the Supreme Court of the Republic of Azerbaijan with the Constitution of the Republic of Azerbaijan and laws of the Republic of Azerbaijan in connection with the complaint of Mr. Davud Bagirov, 25.07.2018

### **2) European Court of Human Rights**

Battista v. Italy, no. 43978/09, 02.12.2014

Ponomaryovi v. Bulgaria, no.5335/05, 21.06.2011

Scordino v. Italy, no. 36813/97, 29.03.2006

## 2. India

### Supreme Court

#### *Overview*

Part III of the Constitution is entitled “Fundamental Rights”. The rights it contains are grouped under the following seven headings: General, Right to Equality, Right to Freedom, Right against Exploitation, Right to Freedom of Religion, Cultural and Educational Rights, and Right to Constitutional Remedies. The judiciary in India through various pronouncements have interpreted fundamental rights as dynamic concepts and courts expand them in changing contexts. Expansive meaning given to fundamental rights is equally enforceable and cannot be ignored on the ground of being derivative rights. The Constitution of India allows for the recognition of unenumerated constitutional rights. The Indian judiciary has the power to interpret the constitutional provisions and in doing so, it creates unenumerated constitutional rights. International human rights norms can also play a role in this process. India has ratified six of the nine core UN human rights treaties. In terms of rights explicitly enumerated in Part III of the Constitution, several of these have been carved out of some significant historical or cultural experiences. These historical and cultural experiences have also played a role in the interpretation of such constitutional rights. Such experiences include those related to religion, non-discrimination, employment and labour. Currently, some key issues relevant to constitutional rights adjudication include the environment, information technology, and public health.

#### *Outline*

##### **I. Rights in the Constitution**

- A. Constitutional bill of rights
- B. Rights elsewhere in the Constitution
- C. Historical background and development

##### **II. Classification and content**

- A. Enumerated constitutional rights
- B. Unenumerated constitutional rights
- C. Protection and limitation

##### **III. Interpretation and current issues**

- A. Rights in diverse contexts
- B. Impact of international norms
- C. Current issues

##### **Annex 1: List of cited legal provisions**

##### **Annex 2: List of cited cases**

## **I. Rights in the Constitution**

### **A. Constitutional bill of rights**

The Fundamental Rights in the Indian Constitution have been grouped under seven heads as follows:

#### **“PART III FUNDAMENTAL RIGHTS”**

##### **General**

Article 12. Definition of State.

Article 13. Laws inconsistent with or in derogation of the fundamental rights to be void.

##### **Right to Equality**

Article 14. Equality before law and equal protection of laws.

Article 15. Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth and equal access to shops, hotels, wells, tanks, roads, etc.

Article 16. Equality of opportunity in matters of public employment.

Article 17. Abolition of Untouchability.

Article 18. Abolition of titles.

##### **Right to Freedom**

Article 19. Protection of certain rights regarding freedom of speech and expression; assemble peacefully; form associations/unions; move freely throughout the territory of India; reside and settle in any part of India; practise any profession, or to carry on any occupation, trade or business.

Article 20. Protection in respect of conviction for offences.

Article 21. Protection of life and personal liberty.

Article 21A. Right to education.

Article 22. Protection against arrest and detention in certain cases.

##### **Right against Exploitation**

Article 23. Prohibition of traffic in human beings and forced labour.

Article 24. Prohibition of employment of children in factories, etc.

##### **Right to Freedom of Religion**

Article 25. Freedom of conscience and free profession, practice and propagation of religion.

Article 26. Freedom to manage religious affairs.



Article 27. Freedom as to payment of taxes for promotion of any particular religion.

Article 28. Freedom as to attendance at religious instruction or religious worship in certain educational institutions.

### Cultural and Educational Rights

Article 29. Protection of interests of minorities.

Article 30. Right of minorities to establish and administer educational institutions.

### Right to Constitutional Remedies

Article 32. Remedies for enforcement of rights conferred by this Part i.e., the Right to move the courts to issue directions/orders/writs for enforcement of rights.

A special feature of the Fundamental Rights under the Indian Constitution is that not only the rights themselves, but the constitutional remedy to move to the Supreme Court for their enforcement is also guaranteed as a fundamental right (Article 32).

These rights are regarded as fundamental because they are of utmost importance for attainment of dignified and fulfilling life for its citizens. The declaration of these rights as fundamental also serves as a reminder to the government in power that these rights are to be respected. The fundamental rights are inherent and cannot be extinguished by any constitutional or statutory provision. Any law which abridges or abrogates such rights would be violative of the basic structure of the Constitution and hence be struck down. Part III of the Constitution is termed “Fundamental Rights” for four primary reasons. Firstly, these rights are superior to ordinary laws in the sense that whereas ordinary rights or rights created by the Legislature may be changed by the Legislature in its ordinary process of legislation, a “Fundamental Right”, being guaranteed by the *Constitution*, cannot be altered except by amending the *Constitution* itself. Secondly, the validity of ordinary laws can be tested with reference to the fundamental law. Thirdly, there is an authority (i.e., the Judiciary) to declare unconstitutional an ordinary law which is thus found to be inconsistent with the provisions of this Part III of the Constitution of India. And lastly, these rights cannot be suspended or abridged except in the manner laid down in the Constitution itself.

The fundamental duties were added to the Constitution of India by the Constitution (Forty-Second Amendment) Act 1976. Part IVA consisting of Article 51A was added to the Constitution. The fundamental duties are as follows:

**51A. Fundamental duties.**—*It shall be the duty of every citizen of India—*

- (a) to abide by the Constitution and respect its ideals and institutions, the National Flag and the National Anthem;*
- (b) to cherish and follow the noble ideals which inspired our national struggle for freedom;*
- (c) to uphold and protect the sovereignty, unity and integrity of India;*
- (d) to defend the country and render national service when called upon to do so;*
- (e) to promote harmony and the spirit of common brotherhood amongst all the people of India transcending religious, linguistic and regional or sectional diversities; to renounce practices derogatory to the dignity of women;*
- (f) to value and preserve the rich heritage of our composite culture;*
- (g) to protect and improve the natural environment including forests, lakes, rivers and wild life, and to have compassion for living creatures;*
- (h) to develop the scientific temper, humanism and the spirit of inquiry and reform;*
- (i) to safeguard public property and to abjure violence;*
- (j) to strive towards excellence in all spheres of individual and collective activity so that the nation constantly rises to higher levels of endeavour and achievement;*
- (k) who is a parent or guardian to provide opportunities for education to his child or, as the case may be, ward between the age of six and fourteen years.<sup>89</sup>*

The idea behind enunciating duties in the Constitution is that these precepts should become a part and parcel of every Indian's thoughts and actions.

## **B. Rights elsewhere in the Constitution**

Other Constitutional Rights of the Constitution are as follows:

### Rights in Part IV of the Constitution:

1. Right to adequate means of livelihood [Art. 39(a)].
2. Right of both sexes to equal pay for equal work [Art. 39(d)].
3. Right against economic exploitation [Art. 39(e)-(f)].
4. Right of children and the young to be protected against exploitation and to opportunities for healthy development, consonant with freedom and dignity [Art. 39A].
5. Right to equal opportunity for justice and free legal aid [Art. 39A].
6. Right to work [Art. 41].
7. Right to public assistance in case of unemployment, old age, sickness and other cases of undeserved want [Art. 41].

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<sup>89</sup> Article 51A-k was introduced as a fundamental duty in 2002 along with Article 21A as a fundamental right.

8. Right to humane conditions of work and maternity relief [Art. 42].
9. Right to a living wage and conditions of work ensuring decent standard of life for workers [Art. 43].
10. Right to workers to participate in management of industries [Art. 43A].
11. Right of children to free and compulsory education [Art. 45].

Other Constitutional Rights:

1. Right to vote guaranteed by Article 326 based on Universal Adult Suffrage.
2. Right to property. (Article 300A)
3. Taxes not to be imposed save by authority of law.—No tax shall be levied or collected except by authority of law. (Article 265)
4. Freedom of trade, commerce and intercourse.—Subject to the other provisions of this Part, trade, commerce and intercourse throughout the territory of India shall be free. (Article 301)

Constitutional rights also create justiciable rights and the individual aggrieved may enforce them in a court of law, with this difference that, not being a fundamental right, a right derived from any provision outside Part III, cannot be enforced by a petition under Article 32 before the Supreme Court; the remedy is a suit or even a petition under Article 226 before a High Court. The Courts while dealing with unenumerated fundamental rights take the approach that whenever an appeal is made by a litigant to a right which is not enumerated expressly in the several provisions of Part III of the Constitution of India, he may still contend that the right relied upon by him follows from any of those rights which are expressively provided in the text of the Constitution, and it will be the duty of the Court to determine whether the right claimed may be derived by a proper interpretation, from any of the enumerated rights. It is held by the Supreme Court that in order to treat a right as a fundamental right, it is not necessary that it should be expressly stated as one in Part III of the Constitution. It was held that provisions of Part III and Part IV are supplementary and complementary to each other.<sup>90</sup>

In the Indian Constitutional scheme there is a common thread that runs through Parts III, IV & IVA of the *Constitution*. One part enumerates the fundamental rights, the second fundamental principles of governance and the third lays down fundamental duties of citizens. While interpreting any of these provisions, it is important to examine the scope and impact of such interpretation on all the three constitutional aspects emerging from these Parts. The right to any freedom or liberty comes with reasonable restriction, in the same way the right is coupled

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<sup>90</sup> *Peoples Union of Civil Liberties v. Union of India*, AIR 2003 SC 2363.

with a duty. These duties are in a direct consequence of a fair assertion of the right. Rights, restrictions and duties co-exist. These rights are basic in nature and are recognized and guaranteed as natural rights, inherent in the status of a citizen of a free country; but are not absolute in nature and uncontrolled in operation. Each one of these rights is to be controlled, balanced and regulated to a certain extent by laws made by the Parliament or the State legislature. When there exists freedom of rights which are subject to a reasonable restriction, there are contemporaneous duties cast upon the citizens too. The duty to maintain law and order lies on the authority concerned and thus, there is nothing unreasonable in making it the initial judge of the emergency. All this is coupled with a fundamental duty upon the citizen to obey such lawful orders as well as to extend their full co-operation in maintaining public order and tranquillity.

The true source of right is duty. So, Article 38 was introduced in the Constitution as an obligation upon the State to maintain social order for promotion of the welfare of the people. By the Constitution (Forty-Second Amendment) Act 1976, Article 51A was added to comprehensively state the fundamental duties of the citizens to complement the obligation of the State. All the duties enumerated henceforth are of great constitutional significance. On the point of enforcement of the Fundamental Rights, the Hon'ble Supreme Court in the case of *Union of India v. Naveen Jindal*,<sup>91</sup> held that fundamental duties are implicit in the concept of fundamental rights, the former providing certain restrictions on the exercise of the latter. The question of enforceability of fundamental duties thus takes a "back seat".<sup>92</sup> In the *Ramlila Maidan* case,<sup>93</sup> the Court considered the scope of meaning of the expression "fundamental". The word "fundamental" has been used in the expression "fundamental" in the governance of the State to describe the directive principles which have not been made legally enforceable. Thus, the word "fundamental" has been used in two different senses under the Constitution. The essential character of fundamental rights is secured by limiting legislative power and by providing that any transgression of the limitation would render the offending law void. The word "fundamental" in Article 37 also means basic or essential, but it is used in the normative sense of setting before the State, goals which it should try to achieve. The significance of the fundamental principle stated in the directive principles has attained greater significance through judicial pronouncements.

91 (2004) 2 SCC 510.

92 Also, in the case of *Ashoka Kumar Thakur v. Union of India* ((2008) 6 SCC 1) by Bhandari, J explaining the scope of Article 51A said that "State is all the citizens placed together and hence though Article 51-A does not expressly cast any fundamental duty on the State, the fact remains that the duty of every citizen of India is the collective duty of the State."

93 *Ramlila Maidan Incident, Re.*, (2012) 5 SCC 1: 2012 (4) SCR 971.

## C. Historical background and development

The Judiciary in India through various pronouncements have interpreted Fundamental rights as dynamic concepts having no fixed contents and Courts expand them in the changing context so as to make them vibrant and lively. Expansive meaning given to fundamental rights is equally enforceable and cannot be ignored on the ground of being derivative rights. For instance, Right to information was held as part of Article 19(1)(a). In *Peoples Union of Civil Liberties v UOI*,<sup>94</sup> It was held by the Supreme Court that, in order to treat a right as a fundamental right, it is not necessary that it should be expressly stated as one in Part III of the Constitution. It was held that provisions of Part III and Part IV are supplementary and complementary to each other.

Right to education originally was not expressly stated as a fundamental right, but was held to be implicit and flowing from the Right to Life guaranteed under Article 21. The right to education was treated as one of transcendental importance and of fundamental significance to the life of an individual and the nation. Without education being provided to the citizens, the objectives set in the Preamble cannot be achieved. The mere fact that the State is not taking away the right does not mean that right of education is not included within the right to life. It was held that the content to right to life is not to be determined on the basis of existence or absence of threat of deprivation. The State cannot deprive the citizens of his right to education except in accordance with procedures prescribed by law. The right to education flows directly from right to life.<sup>95</sup> This is a case for expansion of enumerated fundamental rights.

### *Changes in Some Original Constitutional Provisions*

#### Right to property

The Forty-Fourth Amendment changed the right to property from the category of Fundamental Rights to a Constitutional Right. Article 19(1)(j) and Article 31 were repealed and a new Article 300A was inserted. The “Right to Property” in Part XII of the Constitution provides that “no person shall be deprived of his property save by authority of law.”

#### Right to education

The Constitution (Eighty-Sixth Amendment) Act 2002 inserted a new Article 21A (right to education) for providing free and compulsory education to all children

<sup>94</sup> AIR 2003 SC 2363.

<sup>95</sup> *Unnikrishnan v. State of AP*, AIR 1993 SC 2178.

of the age of six years to fourteen years in such a way as the State may by law determine. In addition to this, a new provision in the form of Article 45 was also inserted providing for early childhood care and education for all children until they complete the age of six years.

### Free Legal Aid

The Constitution (Forty-Second Amendment) Act 1976 inserted Article 39A “right to free legal aid” in the Constitution of India. It enjoins the State to secure that the operation of the legal system promotes justice on the basis of equal opportunity, and shall, in particular provide free legal aid.

## II. Classification and content

### **A. Enumerated constitutional rights**

Article 12-35 of the Constitution of India deal with the enumerated fundamental rights. These can be classified as below on the basis of their nature:

Serial No.	Broad Category of Rights	Articles of the Constitution of India
1	Right to Equality	Articles 14-18
2	Right to Freedom	Articles 19-22
3	Rights against Exploitation	Articles 23-24
4	Right to Freedom of Religion	Articles 25-28
5	Cultural and Educational Rights	Articles 29-30
6	Right to Constitutional Remedies	Articles 32-35

Apart from these fundamental rights contained in Part III of the Constitution of India, other constitutional rights in the nature of socio-economic rights are enumerated in Part IV of the Constitution in the form of the Directive Principles of State Policy which are as follows:

Serial No.	Socio-Economic Rights	Articles of the Constitution of India
1	Right to adequate means of livelihood	Article 39(a)
2	Right of both sexes to equal pay for equal work	Article 39(d)
3	Right against economic exploitation	Article 39(e)
4	Right of children and the young to be protected against exploitation and to opportunities for healthy development, consonant with freedom and dignity	Article 39(f)
5	Right to equal opportunity for justice and free legal aid	Article 39A
6	Right to work	Article 41
7	Right to public assistance in case of unemployment, old age, sickness and other cases of undeserved want	Article 41
8	Right to humane conditions of work and maternity relief	Article 42
9	Right to a living wage and conditions of work ensuring decent standard of life for workers	Article 43
10	Right to workers to participate in management of industries	Article 43A
11	Right of children to early childhood care and education	Article 45

Apart from the above mentioned socio-economic rights, right to property has been listed as a Constitutional right under Article 300A of the Constitution of India. As far the listing of various Constitutional rights in the Constitution of India is concerned, there does not seem to be any strict logic in the order of the listing. However, a few observations can be made as follows.

Firstly, the Constitution defines the term “State” in Article 12. Fundamental rights contained in Part III are only enforceable against the State. As such these are mostly clubbed as “negative rights”. This provision gives the reader an idea as to the enforcement of rights contained in Part III.

Second, from Article 14 onwards, various fundamental rights have been listed with the classification highlighted in the beginning part of this section. The last category of fundamental rights i.e. the Right to Constitutional Remedies has been listed as the last of all fundamental rights. From this, it follows that, remedy for violation of fundamental rights have also been given as another “Fundamental Right” after listing all the fundamental rights.

Third, this also signifies the difference in the nature of fundamental rights contained in Part III and socio-economic rights contained in Part IV (Directive Principles of State Policy) of the Constitution. The fact that the rights to

constitutional remedies have been listed only in Part III implies that Part IV rights are not enforceable against the State.<sup>96</sup>

Fourth, the constitutional right of right to property has been listed in Part XII, Chapter IV because Part XII largely concerns itself with Finance, Property, Contracts and Suits.

### 1. Holders of constitutional rights in the Constitution of India

The following table enlists various constitutional rights available to citizens and non-citizens:

Serial No.	The Constitutional Right	Holder	Concerned Article(s)
1	Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth	Only citizens and not foreigners	Article 15
2	Equality of opportunity in matters of public employment	Only citizens and not foreigners	Article 16
3	Six basic freedoms subject to reasonable restrictions	Only citizens and not foreigners	Article 19
4	Protection of language, script and culture of minorities	Only citizens and not foreigners	Article 29
5	Right of minorities to establish and administer educational institutions	Only citizens and not foreigners	Article 30
6	Equality before law and equal protection of laws	To both citizens and foreigners except enemy aliens	Article 14
7	Protection in respect of conviction for offences	To both citizens and foreigners except enemy aliens	Article 20
8	Protection of life and personal liberty	To both citizens and foreigners except enemy aliens	Article 21
9	Right to elementary education	To both citizens and foreigners except enemy aliens	Article 21A
10	Protection against arrest and detention in certain cases	To both citizens and foreigners except enemy aliens	Article 22

<sup>96</sup> Also, see Article 37 of the Constitution of India.



11	Prohibition of traffic in human beings and forced labour	To both citizens and foreigners except enemy aliens	Article 23
12	Prohibition of employment of children in factories etc.	To both citizens and foreigners except enemy aliens	Article 24
13	Freedom of conscience and free profession, practice and propagation of religion	To both citizens and foreigners except enemy aliens	Article 25
14	Freedom to manage religious affairs	To both citizens and foreigners except enemy aliens	Article 26
15	Freedom from payment of taxes for promotion of any religion	To both citizens and foreigners except enemy aliens	Article 27
16	Freedom from attending religious instruction or worship in certain educational institutions	To both citizens and foreigners except enemy aliens	Article 28

In relation to legal persons including incorporated juristic legal entities etc., it must be stated that, the makers of the Constitution deliberately made the clear distinction between fundamental rights available to “any person” and those guaranteed to “all citizens”. In other words “all citizens” are persons but all persons are not citizens under the Constitution.<sup>97</sup> The legal significance of “all citizens” has been explained by the Hon’ble Supreme Court of India in its judgment in *State Trading Corporation of India Ltd. v. Commercial Tax Officer and Ors.*,<sup>98</sup> with reference to the provisions of Article 5 to Article 11 of the Constitution of India read with the Citizenship Act 1955. It is thus settled that an incorporated legal juristic entity cannot claim fundamental rights which are guaranteed by the Constitution in favour of citizens only. Articles 14, 20, 21, 22 and 27 are rights which are guaranteed in favour of a person, and so may include natural as well as juristic persons, while rights guaranteed under Articles 19, 26, 29 and 30 are rights which are available to citizens only, who are necessarily natural persons and therefore said rights are not available to a juristic legal person.<sup>99</sup>

<sup>97</sup> *Dr. Naresh Agarwal v. Union Of India And Ors*, 2005 (4) AWC 3745.

<sup>98</sup> AIR 1963 SC 1811.

<sup>99</sup> *Supra*, note 2; also see, *Tata Engineering and Locomotive Co. Ltd. v. State of Bihar and Ors* 1964 SCR (6) 885.

## 2. Structure of the individual rights provisions

In the Constitution of India, various constitutional rights have been enumerated in various provisions. On an observational analysis of each of those provisions, it can be said that, the structure of these provisions is not uniform. Some of the provisions are briefly worded leaving the possibilities of further interpretation. Some provisions are detailed and grounds for limiting that particular right have also been enlisted. Following are the examples:

### a) Instance of briefly drafted constitutional rights provision

**21. Protection of life and personal liberty.**—*No person shall be deprived of his life or personal liberty except according to procedure established by law.*

### b) Instance of a detailed constitutional rights provision

**19. Protection of certain rights regarding freedom of speech, etc.**—*(1) All citizens shall have the right—*

*(a) to freedom of speech and expression;*

*(b) to assemble peaceably and without arms;*

*(c) to form associations or unions [or co-operative societies];*

*(d) to move freely throughout the territory of India;*

*(e) to reside and settle in any part of the territory of India; [and]*

*(g) to practice any profession, or to carry on any occupation, trade or business.*

*[ (2) Nothing in sub-clause (a) of clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause in the interests of [the sovereignty and integrity of India,] the security of the State, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence.]*

*(3) Nothing in sub-clause (b) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of [the sovereignty and integrity of India or] public order, reasonable restrictions on the exercise of the right conferred by the said sub-clause.*

*(4) Nothing in sub-clause (c) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of the sovereignty and integrity of India or public order or morality, reasonable restrictions on the exercise of the right conferred by the said sub-clause.*

*(5) Nothing in [sub-clauses (d) and (e)] of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, reasonable restrictions on the exercise of any of the rights conferred by the said sub-clauses either in the interests of the general public or for the protection of the interests of any Scheduled Tribe.*

*(6) Nothing in sub-clause (g) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of the general public, reasonable restrictions on the exercise of the right conferred by the said sub-clause, and, in particular, nothing in the said sub-clause shall affect the operation of any existing law in so far as it relates to, or prevent the State from making any law relating to,—*

*(i) the professional or technical qualifications necessary for practicing any profession or carrying on any occupation, trade or business, or*

*(ii) the carrying on by the State, or by a corporation owned or controlled by the State, of any trade, business, industry or service, whether to the exclusion, complete or partial, of citizens or otherwise.*

## **B. Unenumerated constitutional rights**

The Constitution of India also allows for the recognition of unenumerated constitutional rights. In the Indian context, it is the Indian Judiciary, specifically the Supreme Court of India, which has the power to interpret the constitutional provisions and in doing so, it creates unenumerated constitutional rights. Some of the provisions of the Constitution of India which reflect the power of the Supreme Court of India to interpret the Constitution have been reproduced below:

***141. Law declared by Supreme Court to be binding on all courts.***—*The law declared by the Supreme Court shall be binding on all courts within the territory of India.*

***142. Enforcement of decrees and orders of Supreme Court and orders as to discovery, etc.***—*(1) The Supreme Court in the exercise of its jurisdiction may pass such decree or make such order as is necessary for doing complete justice in any cause or matter pending before it, and any decree so passed or order so made shall be enforceable throughout the territory of India in such manner as may be prescribed by or under any law made by Parliament and, until provision in that behalf is so made, in such manner as the President may by order prescribe.*

*(2) Subject to the provisions of any law made in this behalf by Parliament, the Supreme Court shall, as respects the whole of the territory of India, have all and every power to make any order for the purpose of securing the attendance of any*

*person, the discovery or production of any documents, or the investigation or punishment of any contempt of itself.*

**132. Appellate jurisdiction of Supreme Court in appeals from High Courts in certain cases.**—(1) *An appeal shall lie to the Supreme Court from any judgment, decree or final order of a High Court in the territory of India, whether in a civil, criminal or other proceeding, [if the High Court certifies under article 134A] that the case involves a substantial question of law as to the interpretation of this Constitution...*

**145. ... (3)** *The minimum number of Judges who are to sit for the purpose of deciding any case involving a substantial question of law as to the interpretation of this Constitution or for the purpose of hearing any reference under article 143 shall be five...*

The potential sources for recognizing various unenumerated constitutional rights can be found within the Constitution of India, i.e. Directive Principles of State Policy (Part IV) and the Preamble to the Constitution of India. The Supreme Court of India has recognized many unenumerated constitutional rights so far. Some of them<sup>100</sup> are:

1. Right to sleep
2. Right to locus standi
3. Rights against arbitrariness
4. Right to remain silent
5. Right to privacy
6. Right to passive euthanasia
7. Right to non-discrimination on the ground of disability
8. Right of women to make reproductive choices
9. Right to receive information
10. Rights against handcuffing
11. Right against solitary confinement
12. Right to free legal aid
13. Right against the use of bar fetters
14. Right against custodial violence
15. Right to clean environment
16. Right to internet
17. Right to food
18. Right to clothing and shelter

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<sup>100</sup> The list is not exhaustive.

19. Right to human dignity
20. Right to inter-caste marriage etc.

There is no constitutional provision stating specific conditions which hinder or help in the recognition of unenumerated constitutional rights in India. As the power of interpreting the Constitution rests with the Supreme Court of India (Indian judiciary), the Court creates unenumerated constitutional rights within the scope, realm and limitations of the particular provision being interpreted. For instance, “Freedom of Press” has been held by the Supreme Court to be part of Article 19(1)(a) of the Constitution of India. Hence the limitations on the enjoyment of this unenumerated right as given under Article 19(2) will also be applicable on the freedom of press. Some of the key landmark judgements of the Supreme Court of India regarding unenumerated rights are showcased below:

Serial No.	Name of the Decision	The Unenumerated Constitutional Right involved/evolved
1	Justice K. S. Puttaswamy v. Union of India <sup>101</sup>	Right to privacy is guaranteed under Article 21 of the Constitution of India.
2	Satwant Singh Sawhney v. D. Ramarathnam <sup>102</sup>	Right to travel abroad is included within the expression “personal liberty” under Article 21.
3	Francis Coralie Mullin v. Administrator <sup>103</sup>	Right of a detenu to consult a legal advisor of his choice is included within the ambit of Article 21 of the Constitution of India.
4	People’s Union for Civil Liberties and another v. State of Maharashtra and others <sup>104</sup>	Right to life under Article 21 includes right to live with dignity.
5	M. H. Hoskot v. State of Maharashtra <sup>105</sup>	Right to life under Article 21 includes right to free legal aid.

## C. Protection and limitation

Under the Indian Constitution, Fundamental Rights enlisted in Part III of the Constitution are enforceable only against the “State” under Article 12. Article 12 of the Constitution states:

<sup>101</sup> Writ Petition (Civil) No. 494 of 2012.

<sup>102</sup> 1967 SCR (2) 525.

<sup>103</sup> 1981 SCR (2) 516.

<sup>104</sup> CRIMINAL APPEAL NO.1255 OF 1999.

<sup>105</sup> AIR 1978 SC 1548.

**12. Definition.**—*In this Part, unless the context otherwise requires, —the “State” includes the Government and Parliament of India and the Government and the Legislature of each of the States and all local or other authorities within the territory of India or under the control of the Government of India.*

For the purposes of enforcing the fundamental rights given under Part III of the Constitution, individuals have right to move to the Supreme Court of India under Article 32 of the Constitution. Article 32 states:

**32. Remedies for enforcement of rights conferred by this Part.**—*(1) The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this Part is guaranteed.*

*(2) The Supreme Court shall have power to issue directions or orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, whichever may be appropriate, for the enforcement of any of the rights conferred by this Part. (3) Without prejudice to the powers conferred on the Supreme Court by clauses (1) and (2), Parliament may by law empower any other court to exercise within the local limits of its jurisdiction all or any of the powers exercisable by the Supreme Court under clause (2).*

*(4) The right guaranteed by this article shall not be suspended except as otherwise provided for by this Constitution.*

Apart from the right of enforcement of fundamental rights under Article 32, Article 226 also gives power to High Courts in India to issue writs for enforcing rights conferred under Part III and other constitutional rights. Article 226 states:

**226. Power of High Courts to issue certain writs.**—*(1) Notwithstanding anything in article 324, every High Court shall have power, throughout the territories in relation to which it exercises jurisdiction, to issue to any person or authority, including in appropriate cases, any Government, within those territories directions, orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, or any of them, for the enforcement of any of the rights conferred by Part III and for any other purpose.*

*(2) The power conferred by clause (1) to issue directions, orders or writs to any Government, authority or person may also be exercised by any High Court exercising jurisdiction in relation to the territories within which the cause of action, wholly or in part, arises for the exercise of such power, notwithstanding that the seat of such Government or authority or the residence of such person is not within those territories.*

*(3) Where any party against whom an interim order, whether by way of injunction or stay or in any other manner, is made on, or in any proceedings relating to, a*

*petition under clause (1), without— (a) furnishing to such party copies of such petition and all documents in support of the plea for such interim order; and (b) giving such party an opportunity of being heard, makes an application to the High Court for the vacation of such order and furnishes a copy of such application to the party in whose favour such order has been made or the counsel of such party, the High Court shall dispose of the application within a period of two weeks from the date on which it is received or from the date on which the copy of such application is so furnished, whichever is later, or where the High Court is closed on the last day of that period, before the expiry of the next day afterwards on which the High Court is open; and if the application is not so disposed of, the interim order shall, on the expiry of that period, or, as the case may be, the expiry of the said next day, stand vacated.*

*(4) The power conferred on a High Court by this article shall not be in derogation of the power conferred on the Supreme Court by clause (2) of article 32.*

### **III. Interpretation and current issues**

#### **A. Rights in diverse contexts**

Part III of the Constitution of India enlists several constitutional rights which have been carved out of some significant historical or cultural experiences. Such historical and cultural experiences have also played a role in the interpretation of such constitutional rights. These rights have been enumerated and discussed as below:

Serial No.	Name of the Constitutional Rights with Historical/Cultural Context(s)	Provision of the Indian Constitution
1	Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth	Article 15
2	Equality of opportunity in matters of public employment	Article 16
3	Abolition of Untouchability	Article 17
4	Prohibition of traffic in human beings and forced labour	Article 23
5	Prohibition of employment of children in factories etc.	Article 24
6	Freedom of conscience and free profession, practice and propagation of religion	Article 25
7	Freedom to manage religious affairs	Article 26



8	Freedom as to payment of taxes or promotion of any particular religion	Article 27
9	Freedom as to attendance at religious instruction or religious worship in certain educational institutions	Article 28
10	Protection of interests of minorities	Article 29
11	Rights of minorities to establish and administer educational institutions	Article 30

All the above mentioned rights have been subjected to judicial interpretations, which also have significantly contributed to the understanding of these constitutional rights in India. Some of the important judicial constructions on the mentioned articles have been highlighted below:

### ***On Articles 15 and 16***

The jurisprudence of Article 15 and 16 of the Constitution of India cannot be understood without understanding Article 14. The three articles together form part of the same constitutional code of guarantee of equality and supplement each other.<sup>106</sup> The first ever Constitutional Amendment to the Indian Constitution was brought in Article 15 by adding clause (4) to it, the purpose of which was to make it constitutional for the State to reserve seats for backward classes of citizens, Scheduled Castes and Tribes in public educational institutions as well as to make other special provisions as might be necessary for their advancement.<sup>107</sup> Articles 15(4) and 16(4) profess to bring the socially and educationally backward people to the forefront. Only for the purpose of invoking the equality clause, the makers of the Indian Constitution thoroughly protected discrimination and affirmative action.<sup>108</sup> It was laid down by the Hon'ble Supreme Court of India in the *Indira Sawhney* case that, equality contemplated by Article 14 and the cognate Articles 15 and 16 are secured not only when equals are treated equally but also when unequals are treated unequally.<sup>109</sup> With respect to Article 16, it must be stated that the equality contemplated under this provision should not be confused with "absolute equality". The Article only speaks of the equality of opportunity and not opportunity to achieve equality and is different from equality of results.<sup>110</sup> The Supreme Court of India has very categorically pointed out that mala fide exercise of power and arbitrariness are different lethal variations emanating from the same

<sup>106</sup> See *Govt Branch Press v. D. B. Belliapa* (1979 1 SCC 477); *C. A Rajendran v. Union of India* (AIR 1968 SC 507).

<sup>107</sup> See Durga Das Basu, *Commentary On the Constitution of India*, Vol 2, 8<sup>th</sup> Edition, Wadhwa and Company, at 1752.

<sup>108</sup> Id., at 1753.

<sup>109</sup> *Indira Sawhney v. Union of India*, 1992 Supp (3) SCC 215.

<sup>110</sup> See *State of Kerala v. N. M. Thomas*, AIR 1976 SC 490.



vice, in fact the latter comprehends the former and both are inhibited by Article 16.<sup>111</sup>

### ***On Article 17***

The complete abolition of untouchability was one of the visions of Mahatma Gandhi in his “*Ramrajya*”.<sup>112</sup> Article 17 adopts this Gandhian ideal without any qualification.<sup>113</sup> Article 17 is self-operating and if read with Article 39(a)(ii), it would follow that untouchability has been abolished and its practice in any form is forbidden.<sup>114</sup>

### ***On Article 23***

Clause (1) of Article 23 prohibits not only forced labour but also “traffic in human beings” which is evidently a very wide expression. It would include not only the prohibition of slavery but also of traffic in women for immoral or other purposes.<sup>115</sup> Clause (2) of the Article is an exception to the bar imposed by Clause (1) on the ground of public purposes. Under this clause, the State will be free to require compulsory service for public purposes. The expression “public purposes” includes any purpose in which even a fraction of the community may be interested or benefitted.<sup>116</sup>

### ***On Article 24***

In *Bandhua Mukti Morcha Case*,<sup>117</sup> the Court took note of employment of children in carpet weaving centres in Bihar and observed that basic cause of child labour being poverty, it should be banned progressively in a planned manner starting from most hazardous and intolerable activities. It directed that primary education to children, in particular, to the child from poor, weaker sections, Dalits and tribes and minorities is made mandatory. The basic education and employment oriented vocational education should be imparted so as to empower the children within those segments of the society to retrieve them from poverty and thus develop basic abilities, skills and capabilities to live a meaningful life for economic and social empowerment.

111 *E. P. Royappa v. State of Tamil Nadu*, AIR 1974 SC 555.

112 The ideal “*Ramrajya*” according to Mahatma Gandhi, may be described as “Divine Raj”, “the Kingdom of God”, where true democracy exists and the meanest citizen could be sure of swift justice without an elaborately costly procedure. “*Ramrajya*” is a state of righteousness in its true sense.

113 See Durga Das Basu, *Commentary On the Constitution of India*, Vol 2, 8<sup>th</sup> Edition, Wadhwa and Company, at 2066.

114 *Jai Singh v. Union of India*, AIR 1993 Raj 177.

115 See *Raj Bahadur v. Legal Remembrancer; Govt of West Bengal*, AIR Cal 522; *Shama Bai v. State of Uttar Pradesh*, AIR 1959 All 57.

116 *Somawanti v. State of Punjab*, AIR 1963 SC 151.

117 See *Bandhua Mukti Morcha v. Union of India*, AIR 1997 SC 2218; also see, *M. C. Mehta (Child labour matter) v. State of Tamil Nadu*, 1996 6 SCC 756.

***On Articles 25, 26, 27 and 28***

Since no fundamental right can be absolute in a modern state, the freedom of religion cannot be absolute.<sup>118</sup> The Hon'ble Supreme Court of India in the *Full Gospel Case* said that, "Undisputedly no religion prescribes that prayers should be performed by disturbing the peace of others nor does it preach that they should be through voice-amplifiers or beating of drums. In our view, in a civilized society in the name of religion, activities which disturb old or infirm persons, students or children having their sleep in the early hours or during day-time or other persons carrying on other activities cannot be permitted. It should not be forgotten that young babies in the neighbourhood are also entitled to enjoy their natural right of sleeping in a peaceful atmosphere. A student preparing for his examination is entitled to concentrate on his studies without there being any unnecessary disturbance by the neighbours. Similarly, old and infirm are entitled to enjoy reasonable quietness during their leisure hours without there being any nuisance of noise pollution. Aged, sick, people afflicted with psychic disturbances as well as children up to 6 years of age are considered to be very sensible to noise. Their rights are also required to be honoured."<sup>119</sup>

Articles 25 and 26 strike a balance between rigidity of right to religious belief and faith and their intrinsic restrictions in matters of religion, religious beliefs and religious practices and the guaranteed freedom of conscience to commune with his Cosmos, Creator and realise his spiritual self.<sup>120</sup> The Court has also noted that while Article 25 extends to all persons, Article 26 is confined to religious denominations. Hence, there is no anomaly in the fact that while the rights under both Articles 25-26 are subject to "public order, morality and health", Article 25 is also subject to "other provisions" of Part III of the Indian Constitution, but Article 26 is not.<sup>121</sup>

With respect to Article 27, the Supreme Court of India has noted that, the manner in which Article 27 has been framed does not prohibit the State from enacting a law to incur expenses for the promotion or maintenance of any particular religion or religious denomination, but specifies that by that law, no person shall be compelled to pay any tax, the proceeds of which are to be utilized. In other words, if there is a tax for the promotion or maintenance of any particular religion or religious denomination, no person can be compelled to pay any such tax.<sup>122</sup>

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118 *Govindlalji v. State of Rajasthan*, AIR 1963 SC 1638.

119 *Church of God (Full Gospel) in India v. KKR Majestic Colony Welfare Association*, AIR 2000 SC 2773: (2000) 7 SCC 282.

120 See *A. S. Narayana Deekshitulu v. State of Andhra Pradesh*, AIR 1996 SC 1765.

121 *Narendra v. State of Gujarat*, AIR 1974 SC 2098.

122 See *T. M. A. Pai Foundation v. State of Karnataka*, AIR 2003 SC 355.

The Supreme Court of India while interpreting Article 28 of the Constitution of India said that the expression “religious instruction” used in Article 28(1) has a restricted meaning. It conveys that teachings of custom, ways of worship, practices and rituals cannot be allowed in educational institutions wholly maintained out of state funds.<sup>123</sup> In this connection, the Court has also held that the academic study of the teaching and philosophy of any great saint of India (Guru Nanak or Mahabir) and its impact on the Indian and world civilizations cannot be considered as religious instructions.<sup>124</sup>

### ***On Articles 29 and 30 (Cultural and Educational Rights)***

There is an overlap between Articles 29(1) and 30(1). While Article 29(1) applies to any section of citizens having a distinct language, Article 30(1) protects a minority “based on language”.<sup>125</sup> From this point of view, the usage of the word “minorities” in the marginal note of Article 29(1) is somewhat misleading because that might suggest that it is confined to a section of citizens who constitute a numerical minority in the state in relation to a state law. But the text of Article 29(1) says that it would refer to any section of citizens who may have a distinct language, script or culture, even though they may not belong to a “minority” community in the sense of Article 30(1). This was made clear in the 2<sup>nd</sup> *D. A. V. College* case.<sup>126</sup> It was held that “...Article 29(1) is wider than Article 30(1), in that, while any section of citizens including the minorities, can invoke the rights guaranteed under Article 29(1), the rights guaranteed under Article 30(1) are only available to the minorities based on religion or language...the two articles are not interlined nor does it permit of their being always read together...”<sup>127</sup>

## **B. Impact of international norms**

The table below enlists various international or regional human rights treaties/conventions/instruments which India has ratified/acceded/signed, with the following details.<sup>128</sup>

<sup>123</sup> See *Aruna Roy v. Union of India*, AIR 2002 SC 3176.

<sup>124</sup> See *D.A.V. College v. State of Punjab (II)*, AIR 1971 SC 1737 and *Suresh v. Union of India*, AIR 1975 Del 168 (para 11).

<sup>125</sup> See, Durga Das Basu, *Commentary On the Constitution of India*, Vol 2, 8<sup>th</sup> Edition, Wadhwa and Company, at 3562.

<sup>126</sup> Cf. *D. A. V. College v. State of Punjab (II)*, AIR 1971 SC 1737.

<sup>127</sup> Id., also see *Rev. Father v. State of Bihar*, AIR 1969 SC 465.

<sup>128</sup> These facts and figures have been taken from United Nations Treaty Database of India, available at [https://tbinternet.ohchr.org/\\_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=79&Lang=EN](https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=79&Lang=EN); Human Rights Library, University of Minnesota, available at <http://hrlibrary.umn.edu/research/ratification-india.html>

Serial No.	Name of the Treaty	Signed	Ratification	Accession
1	International Covenant on Economic, Social and Cultural Rights	-	-	10 Apr 1979
2	International Covenant on Civil and Political Rights	-	-	10 Apr 1979
3	International Convention on the Elimination of All Forms of Racial Discrimination	2 Mar 1967	3 Dec 1968	-
4	Convention on the Elimination of All Forms of Discrimination against Women	30 Jul 1980	9 Jul 1993	-
5	United Nations Convention against Transnational Organized Crime	12 Dec 2002	5 May 2011	-
6	Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime Preamble, supplementing the United Nations Convention against Transnational Organized Crime	12 Dec 2002	5 May 2011	-
7	Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime	12 Dec 2002	5 May 2011	-
8	Slavery Convention	-	18 Jun 1927	-
9	Protocol amending the Slavery Convention	-	12 Mar 1954 (definitive signature)	-
10	Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others	9 May 1950	9 Jan 1953	-
11	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment	14 Oct 1997	-	-
12	Convention on the Rights of Child	-	-	11 Dec 1992
13	Convention concerning Forced or Compulsory Labour	-	30 Nov 1954	-
14	Equal Remuneration Convention	-	25 Sep 1958	-
15	Abolition of Forced Labour Convention	-	18 May 2000	-

16	Discrimination (Employment and Occupation) Convention	-	3 Jun 1960	-
17	International Convention Against the Taking of Hostages	-	-	7 Sep 1994
18	International Convention on the Prevention and Punishment of Crimes Against International Protected Persons	-	-	11 Apr 1978
19	Convention for the Protection of All Persons from Enforced Disappearance	6 Feb 2007	-	-
20	Convention on the Rights of Persons with Disabilities	30 Mar 2007	1 Oct 2007	-
21	United Nations Universal Declaration of Human Rights	1 Jan 1942	-	-

## 1. Legal status of international treaties/conventions in India

The legal status of international conventions/treaties or declarations in a country depends upon how that country perceives international norms of law vis-à-vis the domestic norms. In this context, it must be mentioned that India follows the model of dualism wherein international law and domestic law are considered as two different legal systems, as opposed to monism.<sup>129</sup> Hence in India, the international treaties do not directly become part of the domestic legal system of India. However, the Constitution of India does provide for a Directive Principle of State Policy which obligates a State to endeavour to “...foster respect for international law and treaty obligations in the dealings of organized peoples with one another...”<sup>130</sup>

In connection to the treaty making process in India, it should be stated that implementation of international law obligations depends upon the role played by each of the organs of the government, i.e. the Executive, Legislature and the Judiciary.<sup>131</sup> The treaty-making in India is, by and large, an executive act. A joint reading of Articles 73, 246, 253 and Entry 14 of List I of the Seventh Schedule of the Indian Constitution results in the position that the executive power of the Union government is co-extensive with the legislative power in the matter of

<sup>129</sup> The theory of monism recognizes that the international law norms and domestic legal norms essentially form part of the same legal system.

<sup>130</sup> See Article 51(c) of the Constitution of India.

<sup>131</sup> The next section discusses how the Indian Judiciary has taken the support of international legal norms in order to arrive at a decision in a case.

entering into and implementation of treaties.<sup>132</sup>

Article 73 of the Constitution of India states:

***Extent of executive power of the Union.***—(1) *Subject to the provisions of this Constitution, the executive power of the Union shall extend— (a) to the matters with respect to which Parliament has power to make laws...*

Article 53 of the Constitution of India states:

***Executive power of the Union.***—(1) *The executive power of the Union shall be vested in the President and shall be exercised by him either directly or through officers subordinate to him in accordance with this Constitution...*

And Article 253 of the Constitution of India reads:

***Legislation for giving effect to international agreements.***—*Notwithstanding anything in the foregoing provisions of this Chapter, Parliament has power to make any law for the whole or any part of the territory of India for implementing any treaty, agreement or convention with any other country or countries or any decision made at any international conference, association or other body.*

Reading all the above mentioned provisions conjointly, it can be stated that in India, international law does not directly become part of the domestic legal system unless there is either a legislation to its effect by the Parliament of India or through an executive action by the President.

## **2. Constitutional rights cases which have made significant use of international human rights norms**

Following is the list of cases with relevant description:<sup>133</sup>

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132 Narendra Kadoliya, A Paradigm Shift in the Role of Domestic Courts in Implementing International Treaty Provisions: An Indian Perspective, <https://www.manupatrafast.com/articles/articleSearch.aspx>

133 The list is not exhaustive. The mentioned cases in the table are some of the popular judicial decisions of the Supreme Court of India.

Serial No.	Name of the Case	Brief Description
1	Vishaka v. State of Rajasthan <sup>134</sup>	It was a case relating to sexual harassment of women at the workplace wherein the Court expressed that while construing the domestic law norms, regard must be paid also to the international law norms. The Court referred to the Convention on the Elimination of All Forms of Discrimination against Women and laid down guidelines for workplaces.
2	National Legal Services Authority v. Union of India <sup>135</sup>	This was a landmark judgement of the Hon'ble Supreme Court of India in which the Court recognized the transgenders as "third gender". The Court in this case referred to the Universal Declaration of Human Rights, 1948; International Covenant on Civil and Political Rights, 1966 (ICCPR); Yogyakarta Principles on the application of International Human Rights Law in relation to Sexual Orientation and Gender Identity; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1987, etc., in arriving at its decision.
3	Smt. Nilabati Behera v. State of Orissa <sup>136</sup>	In this case, the Supreme Court of India relied upon the International Covenant on Civil and Political Rights, 1966 while granting compensation to a victim due to custodial death.
4	The Chairman, Railway Board & Ors vs Mrs. Chandrima Das & Ors. <sup>137</sup>	In this case, the Court utilized the principles of the Universal Declaration of Human Rights, 1948 while widening Article 21 of the Constitution's scope by providing security to rape victims who are foreign nationals.
5	Justice K. S. Puttaswamy and Anr. v. Union of India and Ors. <sup>138</sup>	In this historic verdict, the Supreme Court of India held that "right to privacy" is a fundamental right under the Constitution of India. In its judgement, the nine judge bench referred to the European Convention on Human Rights; Universal Declaration of Human Rights; International Covenant on Civil and Political Rights, etc. to arrive at its decision.

134 *Vishaka and Ors. v. State of Rajasthan & Ors*, 1997 3 LRC 361.

135 Writ Petition (Civil) No 400 of 2012.

136 1993 SCR (2) 581.

137 (2000) 2 SCC 465.

138 Writ Petition (Civil) No 494 of 2012.

### 3. International human rights norms and unenumerated constitutional rights

The Supreme Court of India while interpreting constitutional rights and creating the unenumerated constitutional rights has used international human rights norms as basis for recognizing them and in arriving at a decision in many cases. The following table highlights the names of the cases<sup>139</sup> along with the unenumerated constitutional rights discussed and the international human rights norms referred:

Serial No.	Name of the Decision	The Unenumerated Constitutional Right involved / evolved	The International Human Rights Norm concerned
1	Justice K. S. Puttaswamy v. Union of India <sup>140</sup>	Right to privacy is guaranteed under Article 21 of the Constitution of India.	European Convention on Human Rights; Universal Declaration of Human Rights; International Covenant on Civil and Political Rights
2	Satwant Singh Sawhney v. D. Ramarathnam <sup>141</sup>	Right to travel abroad is included within the expression “personal liberty” under Article 21.	Universal Declaration of Human Rights
3	Francis Coralie Mullin v. Administrator <sup>142</sup>	Right of a detenu to consult a legal advisor of his choice is included within the ambit of Article 21 of the Constitution of India.	Universal Declaration of Human Rights; International Covenant on Civil and Political Rights.
4	People’s Union for Civil Liberties and another v. State of Maharashtra and others <sup>143</sup>	Right to life under Article 21 includes right to live with dignity.	Universal Declaration of Human Rights
5	M. H. Hoskot v. State of Maharashtra <sup>144</sup>	Right to life under Article 21 includes right to free legal aid.	Universal Declaration of Human Rights; International Covenant on Civil and Political Rights.

139 The list is not exhaustive. The table highlights a few of the many landmark cases delivered by the Supreme Court of India in which the Hon’ble Court brought to life some unenumerated constitutional rights with the support of international human rights norms.

140 Writ Petition (Civil) No 494 of 2012.

141 1967 SCR (2) 525.

142 1981 SCR (2) 516.

143 CRIMINAL APPEAL NO.1255 OF 1999.

144 AIR 1978 SC 1548.



## C. Current issues

There are some alarming current issues which have led to some of the path-breaking innovations and perspectives in terms of the interpretation of enumerated constitutional rights leading to the creation of numerous unenumerated constitutional rights. This has indeed impacted the adjudication of constitutional rights. For instance, factors like environmental concerns, impact of information technology and public health related issues etc., have heralded the further understanding of constitutional rights in India. To elaborate it further, in the process of adjudication on the environmental matters, the Supreme Court of India has actually showcased a new pattern of “*judge-driven implementation*” of environmental justice and administration in India. The Court has played a pivotal role in interpreting those laws and has successfully isolated specific environmental law principles upon the interpretation of Indian statutes and the Constitution. This approach has been adopted for ensuring social justice and the protection of human rights. The orders and directions of the Supreme Court of India cover a wide range of domains, be it air, water, solid waste or hazardous waste. The Supreme Court has passed orders for closure of polluting industries and environmentally harmful aqua-farms, mandated cleaner fuel for vehicles, stopped illegal mining activity, and protected forests and architectural treasures like the Taj Mahal.<sup>145</sup> For instance, in the landmark case of *M. C. Mehta v. Kamal Nath*,<sup>146</sup> wherein, for the purposes of enhancing the facilities in a motel, an attempt was made to divert the flow of a river, the Supreme Court of India by laying down the “Public Trust Doctrine” held that the State under Article 12 of the Constitution of India has the duty to protect and preserve natural resources and the natural resources belong to the public.

## Annex 1: List of cited legal provisions

### Constitution of India

- Article 12
- Article 13
- Article 14
- Article 15

<sup>145</sup> Vijay K. Sondhi et al., India: Climate Change-Indian Law and Judiciary, June 2020, available at <https://www.mondaq.com/india/clean-air-pollution/945304/climate-change--indian-law-and-judiciary>

<sup>146</sup> 1996 1 SCC 38.

- Article 16
- Article 17
- Article 18
- Article 19
- Article 20
- Article 21
- Article 21A
- Article 22
- Article 23
- Article 24
- Article 25
- Article 26
- Article 27
- Article 28
- Article 29
- Article 30
- Article 32
- Article 39(a), (d), (e), (f)
- Article 39A
- Article 41
- Article 42
- Article 43
- Article 43A
- Article 45
- Article 51A
- Article 132
- Article 141
- Article 142
- Article 145(3)
- Article 226
- Article 265
- Article 300A
- Article 301
- Article 326

## **Annex 2: List of cited cases**

- *Aruna Roy v. Union of India* AIR 2002 SC 3176
- *Ashoka Kumar Thakur v. Union of India* ((2008) 6 SCC 1)
- *Bandhua Mukti Morcha v. Union of India* AIR 1997 SC 2218
- *C. A Rajendran v. Union of India* (AIR 1968 SC 507)
- *Church of God (Full Gospel) in India v. KKR Majestic Colony Welfare Association* AIR 2000 SC 2773
- *D. A. V. College v. State of Punjab (II)* AIR 1971 SC 1737
- *Dr. Naresh Agarwal vs Union Of India And Ors*, 2005 (4) AWC 3745
- *E. P. Royappa v. State of Tamil Nadu* AIR 1974 SC 555
- *Francis Coralie Mullin v. Administrator* 1981 SCR (2) 516
- *Govindlalji v. State of Rajasthan* AIR 1963 SC 1638
- *Govt Branch Press v. D. B. Belliapa* (1979 1 SCC 477)
- *Indira Sawhney v. Union of India*, 1992 Supp (3) SCC 215
- *Jai Singh v. Union of India*, AIR 1993 Raj 177
- *Justice K. S. Puttaswamy v. Union of India* Writ Petition (Civil) No 494 of 2012
- *M. C. Mehta (Child labour matter) v. State of Tamil Nadu* 1996 6 SCC 756
- *M. H. Hoskot v. State of Maharashtra* AIR 1978 SC 1548
- *National Legal Services Authority v. Union of India* Writ Petition (Civil) No 400 of 2012
- *Narendra v. State of Gujarat* AIR 1974 SC 2098
- *Peoples Union of Civil Liberties v Union of India*, AIR 2003 SC 2363
- *People's Union for Civil Liberties and another v. State of Maharashtra and Others* CRIMINAL APPEAL NO.1255 OF 1999
- *Raj Bahadur v. Legal Remembrancer, Govt of West Bengal*, AIR Cal 522
- *Ramlila Maidan Incident, Re.*, (2012) 5 SCC 1
- *Rev. Father v. State of Bihar* AIR 1969 SC 465
- *Satwant Singh Sawhney v. D. Ramarathnam* 1967 SCR (2) 525
- *State Trading Corporation of India Ltd. v. Commercial Tax Officer and Ors.* AIR 1963 SC 1811
- *State of Kerala v. N. M. Thomas*, AIR 1976 SC 490
- *Shama Bai v. State of Uttar Pradesh* AIR 1959 All 57
- *Somawanti v. State of Punjab* AIR 1963 SC 151
- *S. Narayana Deekshitulu v. State of Andhra Pradesh* AIR 1996 SC 1765
- *Smt. Nilabati Behera v. State of Orissa* 1993 SCR (2) 581
- *Suresh v. Union of India* AIR 1975 Del 168
- *T. M. A. Pai Foundation v. State of Karnataka* AIR 2003 SC 355

- *Tata Engineering and Locomotive Co. Ltd. v. State of Bihar and Ors* 1964 SCR (6) 885
- *The Chairman, Railway Board & Ors vs Mrs. Chandrima Das & Ors* (2000) 2 SCC 465
- *Union of India v. Naveen Jindal* (2004) 2 SCC 510
- *Unnikrishnan v State of AP*, AIR 1993 SC 2178
- *Vishaka v. State of Rajasthan* 1997 3 LRC 361

## 3. Indonesia

# Constitutional Court

### *Overview*

The list of constitutional rights is found under the title “Human Rights” in Chapter XA. The Indonesian Constitution does not literally have a particular categorisation of human rights based on the human rights generations, but most of the human rights in each of the “three generations” have been substantially acknowledged and guaranteed in the 1945 Constitution. Therefore, apart from civil and political rights, the Constitution also contains social, economic and cultural rights, as well as solidarity rights. Although the Constitution does not have a stipulation that explicitly recognises unenumerated rights, constitutional interpretation opens the possibility to recognise unenumerated constitutional rights. The potential sources for unenumerated rights could be the preamble of the Constitution, the Five Precepts of the Nation (Pancasila), and also international legal instruments or general principles of law. In terms of international human rights law, Indonesia has ratified eight of the nine core UN human rights treaties. Regarding constitutional rights in particular historical or cultural contexts, religion has been a major theme. Key cases concern the recognition of religious faiths on identity cards and also the issue of blasphemy. Examples of current issues in constitutional rights adjudication include election disputes, the range of legal norms subject to constitutional review, and the impact of technology.

### *Outline*

#### **I. Rights in the Constitution**

- A. Constitutional bill of rights
- B. Rights elsewhere in the Constitution
- C. Concretization of constitutional rights
- D. Historical background and development

#### **II. Classification and content**

- A. Enumerated constitutional rights
- B. Unenumerated constitutional rights
- C. Protection and limitation

#### **III. Interpretation and current issues**

- A. Rights in diverse contexts
- B. Impact of international norms
- C. Current issues

#### **Annex 1: List of cited legal provisions**

#### **Annex 2: List of cited cases**

## **I. Rights in the Constitution**

### **A. Constitutional bill of rights**

#### **1. Constitutional rights in the Constitution**

Indonesia has a written constitution, namely the 1945 Constitution of the Republic of Indonesia (the 1945 Constitution). It consists of a Preamble and Articles. The Preamble consists of 4 (four) paragraphs which elaborates on the principles, basis, and goal for the nation, while the Articles contain an explicit list of constitutional rights. The Articles consist of 4 Chapters, 73 Articles, 170 Paragraphs, and another 3 Articles on Transitional Provisions and 2 Articles on Additional Provisions.

#### **2. List of constitutional rights**

The list of constitutional rights is under the title “Human Rights” in Chapter XA (Article 28 – Article 28J), with a total of 70 rights. The title was the result of the 2<sup>nd</sup> amendment of the Constitution, which took place in 2000.

Before the 2<sup>nd</sup> amendment, there was no ‘special’ chapter that listed constitutional rights. In the original text of the Constitution, there was one explicit provision on human rights, which was Article 28: “The freedom to associate and to assemble, to express written and oral opinions, etc., shall be regulated by law.” Even though this article still prevails, the differentiation is the placement of this article currently under Chapter X: Citizens and Residents. The forming of the “Human Rights” chapter demonstrates Indonesia’s effort to guarantee enforcement of human rights in the life of the nation.

Despite most of the constitutional rights already listed in Chapter XA, there are some constitutional rights that are spread throughout the others; such as Chapter X: Citizens and Residents (Article 27(1), (2), (3), three rights); Chapter XI: Religion (Article 29(2), one right); Chapter XII: State Defence and Security (Article 30(1), one right); Chapter XIII: Education (Article 31(1), one right). The total of explicit constitutional rights are 76 rights, while the other rights can be interpreted implicitly.

#### **3. Constitutional duties**

This list of constitutional rights also contains the constitutional duties of individuals as stipulated in Article 28J(2) “In exercising his/her rights and

freedoms, every person shall have the duty to accept the restrictions established by law for the sole purposes of guaranteeing the recognition and respect of the rights and freedoms of others and of satisfying just demands based upon considerations of morality, religious values, security and public order in a democratic society.” Constitutional duties have equal status with constitutional rights. Every right and duty in the Constitution has the same position because their relationship should be balanced.

## **B. Rights elsewhere in the Constitution**

### **1. Rights elsewhere in the constitutional text**

Every right stipulated in the 1945 Constitution is considered contextually as a constitutional right be it clearly classified under Chapter XA: Human Rights, or implicitly treated as a constitutional right under another chapter. These ‘other rights’ differ from the constitutional rights under the ‘Human Rights’ chapter in the view that the former are specifically regulated within the context of their own respective core chapters. As for the rights in the ‘Human Rights’ chapter, it is very clear that they are to be treated as constitutional rights.

### **2. Nature and characteristics of the “other” rights**

As mentioned, there are other rights listed in constitutional text apart from Chapter XA: Human Rights. Some of them are: right to work, a reasonable standard of living (Article 27), freedom of religion (Article 29(2)), right to obtain education (Article 31(1)), right to culture (Article 32), and so on. Even though these rights are not listed under the “Human Rights” chapter, it has the same level of status. The differentiation in terms of ‘categorization’ or ‘placement’ in the Constitution does not lead to different treatment in fulfilling the rights. After all, all of them are still to be considered constitutional rights, which should be respected, protected, enforced, and promoted in the future. There is no special or separate categorization to differentiate the chapter that consists of constitutional rights and duties.

## **C. Concretization of constitutional rights**

This section considers further rights-specific legislation. The 1945 Constitution stipulates clearly in Article 28I paragraph (5), “To uphold and protect human rights in accordance with the principles of the democratic constitutional state, then

the implementation of human rights is guaranteed, regulated, and stipulated in further regulations.”

Every constitutional right needs another kind of implementing regulations due to the right’s nature as an ideal norm. As to how it is being implemented can be elaborated by consulting the hierarchy of regulations in Indonesia. The hierarchy of regulations is set to concretize and guarantee constitutional rights in the level of implementation in society. Indonesia has a hierarchy of regulations as stipulated in Article 7(1) Law Number 12 Year 2011 concerning Formation of Regulations, such as (top to bottom): a. The 1945 Constitution; b. MPR Decree; c. Law/Government Regulation in Lieu of Law; d. Government Regulation; e. Presidential Regulations; f. Provincial Regulation; and g. City Regulation.

The legal strength of the above statutory regulations is in accordance with the hierarchy and the lower statutory regulations should be in line (i.e. must not conflict) with higher laws and regulations. It means that every regulation below the 1945 Constitution should be in accordance with the 1945 Constitution as the highest regulation. The 1945 Constitution and Laws consist of norms that should be executed by regulations below it. For an illustration, on the level of Law, there are Law 39/1999 on Human Rights; Law 26/2000 on Human Rights Court; Law 40/2008 on Elimination of Race and Ethnic Discrimination; Law 7/2012 on Handling Social Conflict; and so on.

## **D. Historical background and development**

### **1. Historical background regarding rights provisions**

The Indonesian Constitution began with the proclamation of independence on August 17, 1945, which led to the formation of the 1945 Constitution on August 18, 1945. Next, on December 27, 1949, the Indonesian Constitution was changed to the Constitution of the United States of Indonesia (RIS Constitution). It happened when people’s sovereignty shifted from the Netherlands to Indonesia. After that, the Constitution changed to The Temporary Constitution 1950 (Undang-Undang Dasar Sementara 1950/ UUDS 1950) in August 14, 1950. Finally, it was back to the 1945 Constitution after the Presidential Decree on July 5, 1959.

The background of the several amendments to the 1945 Constitution include the President having so much power without checks and balances so that the system became executive heavy; there are so many attributions and delegation



of authorities to the President to make law on important things with an act or government's regulation; some of the constitutional articles are ambiguous or have many interpretations, but the interpretation that should be accepted is by the President only; and the provisions prioritize more the state administrator rather than its system.

The 1945 Constitution has been amended 4 (four) times, in The People's Consultative Assembly (Majelis Permusyawaratan Rakyat/MPR), which are: First Amendment in MPR's General Assembly 14<sup>th</sup> – 21<sup>st</sup> October 1999; Second Amendment in MPR's Yearly Assembly 7<sup>th</sup> – 18<sup>th</sup> August 2000; Third Amendment in MPR's Yearly Assembly 1<sup>st</sup> – 9<sup>th</sup> November 2001; and Fourth Amendment in MPR's Yearly Assembly 1<sup>st</sup> – 11<sup>th</sup> August 2002.

## **2. Amendment of the Constitution**

Each amendment has its focus on how the government works in the future. The 1<sup>st</sup> Amendment shifted law-making power from President to The People's Representative Council (DPR), this was designed to limit the President's power that excessive (executive heavy). One example of the changes is the restriction on the President's tenure. The 2<sup>nd</sup> Amendment increased the authority and position of the regional government, the roles and functions of the DPR, and regulations regarding human rights. The 3<sup>rd</sup> Amendment dealt with the form and sovereignty of the state, impeachment of the president, the establishment of various institutions such as the Regional Representative Council, the Judicial Commission, and the Constitutional Court. Besides that, the election of President and Vice President are conducted directly and are no longer carried out by the MPR. Finally, in the 4<sup>th</sup> Amendment, there were changes in education and economy, transitional and additional provisions. There is no particular order on how the constitutional rights have been listed or classified into some chapters, especially in Chapter XA-Human Rights.

## **II. Classification and content**

### **A. Enumerated constitutional rights**

#### **1. Classification of constitutional rights**

In terms of quantity, total articles stipulating human rights norms in the 1945

Constitution are 16 articles with 35 paragraphs. Based on the Constitution, there is no explicit classification of human rights based on the categorisation of the “generation” of human rights. These rights are spread over several articles and there is no definite order. However, we can still classify existing human rights arrangements according to the classification of human rights generations.

First Generation Rights (Civil and Political Rights) are guaranteed in: Article 28 A: Right to life; Article 27(1) and Article 28D(1): Right to legal certainty and equality before the law; Article 28 D: Right to citizenship status; Article 28E(2): Right to belief and right of thought; Article 28G(2) Right to political asylum; Article 28I(1) Non-derogable Rights: Right to life; right not to be tortured, right to freedom of thought, right to religion, right not to be enslaved, the right to recognition, and right not to be prosecuted by retroactive law; Article 28I(2): Right to non-discrimination.

Second Generation Rights (Economic, Social and Cultural Rights) are stipulated in: Article 27(2): Right to live a decent life; Article 28H(1): Right to prosperous life; Article 28B(1): Right to family and descendants; Article 27(2) and Article 28D(2): Right to work; Article 28D(2) Right to wages; Article 28C(1) and Article 31(1): Right to education; Article 28H(1): Right to health; Article 28H(3): Rights of social security; Article 28I(3): Rights of cultural identity and traditional community.

Third Generation (Solidarity Rights) are regulated in: Article 18B: Recognition of indigenous peoples and traditional rights; and Article 34: Rights of poor and neglected children are maintained by the State.

Although the Indonesian Constitution does not literally have a categorisation of human rights based on the human rights generations, most of the human rights in each generation have been substantially acknowledged and guaranteed in the 1945 Constitution.

## **2. Holders of constitutional rights**

According to the 1945 Constitution, almost all human rights holders are individual natural persons. At least this legal subject can be found in 35 paragraphs that guarantee human rights. Of the total paragraphs, 22 paragraphs use the subject “every person”, meaning that it includes all people living in Indonesia and Indonesian citizens abroad. Meanwhile, 6 paragraphs do not explicitly mention the subject of constitutional rights holders or emphasise the state’s responsibility to fulfil these human rights.

Apart from that, seven paragraphs clearly regulate that the holder of constitutional rights is a “citizen”, which means specifically for Indonesian citizens, for example in Article 27(1): Right to equal position in law and government; Article 27(2): Right to work and decent living; Article 27(3): Right to participate in defending the state; Article 28D(3): Right to equal opportunity in government; Article 31(1): Right to participate in national defence and security efforts; Articles 31(1) and (2): Right to education.

Persons as a group may enjoy certain constitutional rights as regulated in: Article 18B: Recognition of indigenous peoples and traditional rights; Article 34: Rights of poor and neglected children are maintained by the State. Even though no provisions specifically regulate constitutional rights enforcement for non-citizens (refugees, asylum seekers or stateless persons), Article 28D paragraph (4) of the Indonesian Constitution strongly stipulates that “Every person shall have the right to citizenship status.” This means the Indonesian Constitution encourages that all persons should not be stateless persons.

So, the range of possible holders of constitutional rights in the Indonesian Constitution is individual natural persons (every person or every citizen) and persons as a group (indigenous peoples, impoverished persons, and abandoned children).

### **3. Structure of constitutional rights**

In the 1945 Constitution, the stipulation of human rights are written explicitly in Chapter XA regarding “Human Rights”, from Article 28A to Article 28J. However, human rights norms are also to be found in Articles 27 to Article 34, besides the Human Rights Chapter. This structure happened because the human rights arrangement in Chapter IX is a new stipulation formed in the second amendment of the Constitution through an addendum in 2000. Meanwhile, several regulations related to human rights outside of the Human Rights Chapter are original arrangements since the Constitution was formed in 1945.

According to original intent of the 1945 Constitution, the structure of human rights norms in the Human Rights Chapter are based on derivation of human rights values that live in society and are a response to the various human rights violations that have occurred. The human rights in the 1945 Constitution are not very detailed and only regulates the most fundamental human rights, which are obligatorily guaranteed in the Indonesian Constitution. There are at least 35 paragraphs that contain human rights norms: (1) civil and political rights; (2) economic, social and cultural rights; and (3) solidarity rights.

Another essential point in the Human Rights Chapter structure is that human rights arrangements in Article 28A to Article 28I are bound with an article regarding human rights restrictions, which is regulated in Article 28J(2). This last article in the Human Rights Chapter is a fundamental consideration for the interpretation and protection of constitutional rights in Indonesia.

## **B. Unenumerated constitutional rights**

### **1. Recognition of unenumerated constitutional rights**

Basically, the 1945 Constitution does not have a stipulation that explicitly recognises unenumerated rights. However, constitutional interpretation open the possibility to recognise unenumerated constitutional rights outside the 1945 Constitution. The potential source for unenumerated rights could be the preamble of the Constitution, which contains Indonesia's goals: (1) Protect all the people of Indonesia; (2) Improve public welfare; (3) Educate the people; and (4) Participate to establish world order. Another possible source for unenumerated rights based on the preamble of the Constitution is the Five Precepts of the Nation (Pancasila): (1) Belief in the One and Only God; (2) Fair and civilised humanity; (3) Unity of Indonesia; (4) Democracy which is led by the wisdom of thoughts in deliberation amongst representatives of the people; (5) Achieving social justice for all the people of Indonesia. In addition, based on practice in the Indonesian Constitutional Court, the source of unenumerated constitutional rights may also refer to international legal instruments or the general principle of law.

For instance, there are three rights (the right to water, the right to vote, and the right to presumption of innocence) which are not mentioned explicitly in the 1945 Constitution, but which are still recognised as constitutional rights by the Constitutional Court's interpretation.

### **2. Condition to recognise unenumerated constitutional rights**

According to the 1945 Constitution, there is no explicit constitutional provision authorising the recognition of unenumerated rights. Unfortunately, other possible sources for recognising unenumerated rights in the 1945 Constitution preamble, international legal instruments, or the general principle of law also implicitly do not regulate certain conditions for recognition.

### 3. Landmark cases regarding unenumerated rights

#### a) Decision 058-059-060-063/PUU-II/2004 and 008/PUU-III/2005 (Right to Water)

This decision reviews Law Number 7 Year 2004 on Water Resources Law, and is about the interpretation of the right to water. The Constitutional Court decided to reject the petition. Even though the right to water is not a right that is explicitly regulated in the 1945 Constitution, the Constitutional Court stated the constitutional basis of water regulation as being Article 33 Paragraph (3) and Article 28H 1945 Constitution, which provide the basis for the recognition of the right to water as part of the right to live a prosperous and spiritual life, which is part of the content of human rights.

The Constitutional Court provides an interpretation that the right to water is a part of the citizens' constitutional rights set forth in Article 28H, the right to live prosperously, physically and mentally. The Constitutional Court also considered Article 12(1) of the ICESCR, which states that "The States Parties to the present Covenant recognises the right of all to the enjoyment of the highest attainable standard of physical and mental health." Furthermore, the UN General Comment on the article illustrates that the right to health includes the right to health care and factors that determine good health, including access to safe drinking water.

#### b) Decision 011-017/PUU-I/2003 (Right to Vote and Right to be a Candidate)

This decision reviews Law Number 12 Year 2003 on General Election to Member of House of Representatives, Regional Representative Council, and Regional People's Representative Council. This decision is about the interpretation of the right to vote and the right to be a candidate. The Constitutional Court decided to grant the petition. Although, the right to vote and to be a candidate are not rights that are explicitly regulated in the 1945 Constitution, but the Constitutional Court concluded that citizens' constitutional right to vote and be a candidate are rights guaranteed by the Constitution.

In consideration, the Constitutional Court's interpretation stated the right to vote is categorised as a constitutional right, referring to international law such as: Article 21 UDHR "Everyone has the right to take part in the government of his country, directly or through freely chosen representatives." Also, Article 25 of the ICCPR states that "Every citizen shall have the right and the opportunity, without any of the distinctions [...] and without unreasonable restrictions: [...] (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the

will of the electors; [...]"

c) Decision 133/PUU-VII/2009 (Right to Presumption of Innocence)

The decision reviews Law No. 30 of 2002 on Corruption Eradication Commission. This decision is about the interpretation of the right to presumption of innocence. The Constitutional Court decided to grant the petition. Even though the right to presumption of innocence is not a right that is explicitly regulated in the 1945 Constitution, the Constitutional Court stated that the presumption of innocence is a central principle of a democratic constitutional state. The principle is therefore recognised as a fundamental human right that must be protected. Implicitly, these rights are recognised and can be constructed as part of human rights and constitutional rights guaranteed and protected by the 1945 Constitution.

The Constitutional Court's consideration also refers to international legal references, such as Article 11(1) UDHR: "Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence." Also, Article 14(2) ICCPR stipulates that "Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence."

## **C. Protection and limitation**

### **1. State's obligations in the protection of rights**

According to Article 28I paragraph (4) 1945 Constitution, the State has explicitly stipulated obligations: "The protection, advancement, upholding and fulfilment of human rights are the responsibility of the state, especially the government."

This obligation means all state institutions are directly bound by the responsibility to fulfil every human rights guaranteed in the Constitution. Even though the 1945 Constitution does not regulate the judicial process to resolve a violation of human rights, the Indonesian legal system, especially in Law No. 39 Year 1999 on Human Rights, has stipulated judicial mechanisms to prosecute human rights violations.

### **2. Limitation to constitutional rights**

Article 28J paragraph (2) 1945 Constitution clearly states that "In exercising his/her rights and freedoms, every person shall have the duty to accept the restrictions

established by law for the sole purposes of guaranteeing the recognition and respect of the rights and freedoms of others and of satisfying just demands based upon considerations of morality, religious values, security and public order in a democratic society.”

This norm opens the possibility for limitation to every human rights in the 1945 Constitution based on consideration of morality, religious values, security, and public order. However, this stipulation is under the requirement that the restriction of constitutional rights must be regulated at the level of Law through the legislation process.

### **III. Interpretation and current issues**

#### **A. Rights in diverse contexts**

##### **1. Constitutional provisions which reflect historical or cultural context**

<b>Article</b>	<b>Provisions</b>
1(2)	: Sovereignty is in the hands of the people and is implemented according to this Constitution
6A(1)	: The President and Vice-President shall be elected as a single ticket directly by the people
7	: The President and Vice President shall hold office for a term of five years and may subsequently be re-elected to the same office for one further term only.
7A	: The President and/or the Vice-President may be dismissed from his/her position during his/her term of office by the MPR on the proposal of the House of Representatives (Dewan Perwakilan Rakyat or DPR), both if it is proven that he/she has violated the law through an act of treason, corruption, bribery, or other act of a grave criminal nature, or through moral turpitude, and/or that the President and/or Vice-President no longer meets the qualifications to serve as President and/or Vice-President.
7C	: The President may not freeze and/or dissolve the DPR.

Based on the list above, these provisions illustrate there are dynamics in society that require fundamental changes in the life of the nation and state, namely in the form of amendments to the 1945 Constitution. As previously mentioned, there

are some historical or cultural events that generated this amendment, such as a reformation movement that demanded a reform in the state administration system and government system. This movement arose as President Suharto has served too long, for 32 years. In the original constitution, the highest power was held by the MPR, albeit sovereignty is in the hands of the people. There had been no constitutional amendment since the enactment of the 1945 Constitution under the leadership of Soekarno, and also during the New Order era under the leadership of President Soeharto.

Later, a reformation movement followed the fall of President Suharto. It marked massive changes in Indonesia's government system that were reflected in the amendment of the constitution as mentioned before. Limitation of the President's tenure meant that the President can only be elected for a second time. This was an improvement in the government system, which before the reforms had previously perpetuated the dictatorial government in Indonesia.

Article	Provisions
24C(1) :	The Constitutional Court shall possess the authority to try a case at the first and final level and shall have the final power of decision in reviewing laws against the Constitution, determining disputes over the authorities of state institutions whose powers are given by this Constitution, deciding over the dissolution of a political party, and deciding disputes over the results of general elections.

Another provision that impacted on the interpretation of constitutional rights is Article 24C on the Constitutional Court. The presence of the Constitutional Court since 2003 in the Indonesian constitutional system had a major influence in interpreting, understanding and enforcing laws based on the Constitution in Indonesia.

## **2. Landmark decisions**

One of the key decisions, which relates to the stipulation that Indonesia is based upon the belief in the One and Only God, is illustrated in constitutional provision on the freedom of religion, Article 29(2): "The State guarantees all persons the freedom of worship, each according to his/her own religion or belief." This provision on religious rights played an important role in the religious life of everyone in Indonesia. Reflecting Indonesia as a religious state which guarantees freedom of religion, relevant Constitutional Court's Decisions are listed below:



a) Decision 97/PUU-XIV/2016 (Recognition to all Faith in Family Card and Identity Card)

This was a judicial review on Law 23/2006 concerning Population Administration as amended with Law 24/2013. The Court granted the application of the petitioner, and held that the phrase ‘Religion’ in Article 61(1) and Article 64(1) is contrary to the 1945 Constitution and is not legally binding as long as it does not include “trust”. Furthermore, Article 61(2) and Article 64(5) are contrary to the 1945 Constitution and have no legal binding force.

The Court considered that freedom of religion is inherent in everyone because this right is derived from natural rights, and is not granted by the state. However, the adherents’ belief has received different treatment when compared to the acknowledged religions. In this context, when citizens want to obtain a Family Card and Identity Card, they should register in one of the acknowledged religions even though they may be of the adherents’ belief. This stipulation contradicts the values and norms of the 1945 Constitution.

As the requirements of the limitation of rights as stipulated in Article 28J(2) of the 1945 Constitution are not fulfilled, the restrictions on the basis of beliefs that affect the emergence of different treatment between citizens is a discriminatory act. Thus, in order to realize the neat population administration, and considering the number of believers in Indonesia’s society is very large and diverse, the inclusion of data elements regarding the population in terms of the religion of believers should be only by registering the person concerned as a “believer” without detailing the beliefs held in the family card and e-identity card. This should apply also to followers of other religions.

b) Decision 56/PUU-XV/2017 (Blasphemy of Religion)

This was a judicial review on Law 1/PNPS/1965 concerning Prevention of Religious Abuse and/or Blasphemy and Law 5/1969 concerning Statement of Various Presidential Decrees and Presidential Regulations as Laws. The Court rejected the application on Article 1, Article 2, and Article 3.

If there is a problem or constitutional rights loss by citizens as a result of the enactment of the joint decision of minister or regional regulations based on Law 1/PNPS/1965, then this does not necessarily mean that the a quo Law is contrary to the 1945 Constitution. The norm of Law 1/PNPS/1965 is absolutely not to eliminate the right of everyone to interpret the teachings of their respective religions. The interpretation of religious teachings cannot be carried out freely on the basis of individual rights and freedoms to practice religion and belief.

Because, when freedom of interpretation of religion is exercised or given freely to each individual, then the chaos will occur.

Referring to Decision 140/PUU-VII/2009, although there is freedom to interpret the teachings of a religion, but this freedom should consider the main teachings of a religion and even then can only be carried out according to a methodology that has been recognized and accepted in internal forum of adherents of the religion concerned. This is important so that it does not threaten security and public order which in the end has the potential to threaten the life of the nation and state.

## **B. Impact of international norms**

### **1. Acknowledgement to international and regional human rights treaties**

Indonesia recognises the Universal Declaration of Human Rights as stated in consideration point d of Law No. 39 Year 1999 on Human Rights. As a member of the United Nations, Indonesia has moral and legal responsibilities to uphold and implement the Universal Declaration of Human Rights as international instruments established by the United Nations. Indonesia has also ratified the International Covenant on Civil and Political Rights (ICCPR) through Law No. 12 Year 2005 and the International Covenant on Economic, Social and Cultural Rights (ICESCR) through Law No. 12 Year 2005. Then, Indonesia has ratified human rights treaties specific to a particular subject: the Convention on the Elimination of All Forms of Racial Discrimination (ICERD) by Law No. 29 Year 1999 and the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) by Law No. 5 Year 1998. However, the Convention for the Protection of All Persons from Enforced Disappearance (CPED) is an ongoing process for ratification.

International treaties for the particular category of persons also have been ratified by Indonesia, such as the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) by Law No. 7 Year 1984; the Convention on the Rights of the Child (CRC) by Presidential Decree No. 36 Year 1990, the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICMRW) by Law No. 6 Year 2012, and the Convention on the Rights of Persons with Disabilities (CRPD) by Law No. 19 Year 2011.

Indonesia, as one of Member States of the Association of Southeast Asian Nations (ASEAN), initiated and adopted the ASEAN Human Rights Declaration (AHRD).

This Declaration will help establish a framework for human rights cooperation in the region and contribute to the ASEAN community-building process.

## **2. Legal status of ratified treaties or adopted declarations**

The legal status of ratified treaties can refer to the hierarchical law and regulation in Indonesia. Based on Article 7 Paragraph (1) Law No. 12 Year 2011 on Establishment of Law and Regulations, states from the highest to the lowest level the following types and hierarchy of regulations: (1) The Constitution; (2) People's Consultative Assembly Decision; (3) Law & Government Regulation in Lieu of Law (Perppu); (4) Government Regulation; (5) Presidential Decision & Presidential Regulation; (6) Provincial Regulation; (7) City Regulation.

Treaties' or adopted declarations' legal status depends on ratification by which type and level of regulations. Article 10 Law No. 24 Year 2000 on International Treaties stipulates that "Ratification of international treaties is carried out by Law if they relate to: a. political issues, peace, defence and state security; b. changes to the territory or determination of the territorial boundaries of the Republic of Indonesia; c. sovereignty or sovereign rights of the state; d. human rights and the environment; e. the establishment of a new legal rule; f. foreign loans and/or grants" For instance, the International Covenant on Civil and Political Rights (ICCPR) and International Covenant on Economic, Social and Cultural Rights (ICESCR) are ratified by Law. So these international human rights instruments have the same level as ordinary legislation.

In addition, Article 11 of the Law on International Treaties states that "Ratification to international treaties which the substance does not include the material referred to Article 10, is sufficient to be carried out by Presidential Decree." For example, the Convention on the Rights of the Child (CRC) was ratified by Presidential Decree No. 36 Year 1990. Therefore the status of these international treaties are the same level as Presidential Decrees.

## **3. Constitutional Court's cases referring to ratified international treaties**

### **a) Decision 013/PUU-I/2003 (Retroactive Principle)**

The decision reviews the constitutionality of the retroactive implementation principle as regulated in Law Number 16 Year 2002 on Eradication of Terrorist Crime. The Constitutional Court decided to reject the petition. The Constitutional Court states enforcement of the Eradication of Terrorist Crime Act retroactively in regard to the Bali Bombing Case 2002 does not contradict the 1945 Constitution,

because it is implemented in a limited manner and upholds a sense of justice in a particular situation.

In consideration, the Constitutional Court acknowledged that most of the international legal instruments emphasise that non-retroactive principles should not be violated, including Article 11(2) of UDHR; Article 7 European Convention for the Protection of Human Rights and Fundamental Freedoms; Article 4 of the ICCPR; Article 9 of the American Convention on Human Rights; and Articles 22 and 23 of the Rome Statute of the International Criminal Court. However, the Constitutional Court stated that non-retroactive principle can be set aside as long as it is limited in a particular situation.

b) Decision No. 2-3/PUU-V/2007 (Death Penalty)

The decision reviews the constitutionality of the death penalty as regulated in Law Number 22 Year 1997 on Narcotics. The Constitutional Court decided to reject the petition. The legal reasoning was based on the interpretation of Article 28J Paragraph (2) 1945 Constitution, and the Constitutional Court concluded that the imposition of the death penalty or limitation against the right to life was justified as long as it fulfils the specified requirements or limitations.

As an additional consideration, the Constitutional Court also referred to international instruments which show the possibility to limit the right to life, whether in the form of provisions that allow the imposition of the death penalty with specific limitations or provisions concerning the lawful loss of life. It can be found in several international legal instruments. The Constitutional Court referred to Article 6 Paragraph (2) of the International Covenant on Civil and Political Rights (ICCPR) which has been ratified in Law No. 12 Year 2005. The Constitutional Court said that the ICCPR still allows states parties to impose the death penalty in their national laws, so Indonesia does not violate an international obligation that arises from the treaty. The Constitutional Court stated that qualification of crimes in the articles of the Narcotics Law can be equated to the term “the most serious crimes” that is referred to in Article 6 of the ICCPR.

Other international instruments mentioned in this decision are as follows: Additional Protocol I to the 1949 Conventions and Relating to the Protection of Victims of International Armed Conflict, Additional Protocol II to the 1949 Conventions and Relating to the Protection of Victims of Non-International Armed Conflict, the Rome Statute of the International Criminal Court, the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights), the American Convention on Human

Rights, and Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms Concerning the Abolition of the Death Penalty.

c) Decision 55/PUU-XIV/2016 (Discriminatory Treatment)

This decision reviewed the constitutionality of discriminatory treatment as regulated in Law Number 10 Year 2016 on Local Election. The Constitutional Court decided to reject the petition. The Constitutional Court interpreted discriminatory treatment based on Article 28I(2) of the 1945 Constitution, which stipulates that “Every person shall have the right to be free from discriminatory treatment on any basis and has the right get protection against such discriminatory treatment”.

The Constitutional Court’s consideration refers to Article 2 of the ICCPR. The provisions of the Convention provide that discrimination means different treatment on the grounds “...race, colour, sex, language, religion, political or another opinion, national or social origin, property, birth or another status.” The Constitutional Court concludes that there is no discriminatory treatment in Article 7 paragraph (2) letter p and Article 70 paragraph (3) because it treats differently different things. According to the Constitutional Court, the definition of discrimination is also in line with the notion of discrimination in the International Covenant on Civil and Political Rights (ICCPR). The use of the ICCPR argument in the Constitutional Court’s decision is merely as a supporting argument for the definition of discriminatory treatment.

For cases on unenumerated constitutional rights being recognised on the basis of international treaties, please refer to Part II.B.3. of this chapter.

## **C. Current issues**

### **1. Decision 135/PHP.BUP-XIX/2021 (Elections Dispute of Sabu Raijua Regency)**

The Court granted application partly, declaring the disqualification of Candidate Number 2 (Orient Patriot Riwu Kore and Thobias Uly) from participation in the Regent and Deputy Regent Election of Sabu Raijua Regency in 2020. The Court decision cancelled the Decision of the General Election Commission on the Sabu Raijua Regency.

Passport is a document which proves someone’s nationality. Orient has a US passport, so he is a US citizen. Referring to Article 23 h of Law 12/2006, this

results in Orient should be automatically losing his status as an Indonesian citizen without having to go through the mechanism of administrative waiver of citizenship. Thus, Orient failed to meet the candidate requirement for regent. Even though the Deputy Regent qualified, but because both of them are in pairs as stipulated in the Decision of the General Election Commission on the Sabu Raijua District, the Deputy Regent candidate also was automatically disqualified as a Candidate Pair of the Election Contestants. Finally, the election result regarding Candidate Number 2 in the Election of Regent and Deputy Regent of Sabu Raijua Regency in 2020 should be declared null and void.

## **2. Decision 138/PUU-VII/2009 (Additional Constitutional Court Authority to Review Lieu of Law)**

Albeit the Court rejected the application, this Decision marks the addition of the Constitutional Court's authority to examine Government Regulation in Lieu of Law (Perppu). This addition shows the expansion of the object of the constitutional court's authority, outside what was written in the 1945 Constitution.

Because Perppu has binding force which is the same as the Law, so the Court can examine whether the norms in the Perppu are materially contradictory to the 1945 Constitution. Thus, the Court has the authority to review the Perppu against the 1945 Constitution before and after the approval of the DPR.

This Decision caused concurring (Moh. Mahfud MD) and dissenting (Mohammad Alim) opinions from the Judges. The concurring opinion was made because the need to interpret the contents of the 1945 Constitution does not only rely on original intent, historical, and grammatical interpretation but must emphasize sociological and teleological interpretation. Thus development of state administration is another reason for agreeing to judicial review of Perppu by the Constitutional Court. In the dissenting opinion, Judge Mohammad Alim argued that the 1945 Constitution only gives authorities judicial review of law against the 1945 Constitution. If the Court's authority is expanded to include judicial review on Perppu, it is not being implemented based on the 1945 Constitution and rather deviates from it.

## **3. Decision No. 23/ PUUXVI/2018 (Utilization GPS when Driving)**

This decision reviews Law Number 22 Year 2009 on Traffic and Road Transport. The main legal issue is utilization Global Positioning System (GPS) when driving road transport. The petitioner stated that the phrase "using the telephone" in Article 106 paragraph (1) and the phrase "other activities or being influenced

by a situation that results in impaired concentration while driving on the road” in Article 283 are contrary to the 1945 Constitution and do not have conditional binding legal force as long as it is not interpreted “except for the use of a satellite-based navigation system application commonly called the Global Positioning System (GPS) contained in a smartphone”.

Even though the Constitutional Court decided to reject the petition, in its consideration the Court emphasized that using a cellular phone with various features including navigation system/GPS while driving has the possibility to interfere with the driver’s concentration, which can have an impact on traffic accidents. In other words, the use of GPS can be justified as long as it does not interfere with the driver’s concentration in traffic. This means that not every driver who uses GPS can immediately be judged to interfere with driving concentration which endangers other road users, or cannot directly be judged to have violated the law. So, its application must be seen in a case-by-case manner.

## **Annex 1: List of cited legal provisions**

### **1) Constitutional provisions**

Constitution of Indonesia (last amended 2002)

- Article 1(2)
- Article 6A(1)
- Article 27
- Article 24C
- Article 28A - 28J
- Article 29
- Article 31
- Article 33

### **2) Legislative provisions**

Prevention of Religious Abuse and/or Blasphemy Act (last amended 27 January 1965)

Human Rights Act (last amended 23 September 1999)

Population Administration Act (last amended 29 December 2006)

Indonesian Republic Citizenship Act (last amended 1 August 2006)

Establishment of Law and Regulations Act (last amended 4 October 2019)

### **3) International provisions**

Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) ratified by Law No. 7 Year 1984

Convention on the Rights of the Child (CRC) ratified by Presidential Decree No. 36 Year 1990

Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) ratified by Law No. 5 Year 1998

Convention on the Elimination of All Forms of Racial Discrimination (ICERD) ratified by Law No. 29 Year 1999

International Covenant on Civil and Political Rights (ICCPR) ratified by Law No. 12 Year 2005

International Covenant on Economic, Social and Cultural Rights (ICESCR) ratified by Law No. 12 Year 2005

Convention on the Rights of Persons with Disabilities (CRPD) ratified by Law No. 19 Year 2011

International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICMRW) ratified by Law No. 6 Year 2012



## **Annex 2: List of cited cases**

*Retroactive Principle* [013/PUU-I/2003, 23 July 2004]

*Right to Vote and Right to be Candidate* [011-017/PUU-I/2003, 24 February 2004]

*Right to Water* [058-059-060-063/PUU-II/2004 and 008/PUU-III/2005, 19 July 2005]

*Death Penalty* [2-3/PUU-V/2007, 30 October 2007]

*Right to Presumption of Innocence* [133/PUU-VII/2009, 25 November 2009]

*Corruption Eradication Commission* [138/PUU-VII/2009, 8 February 2010]

*Discriminatory Treatment* [55/PUU-XIV/2016, 28 February 2017]

*Recognition to all Faith in Family Card and Identity Card* [97/PUU-XIV/2016, 7 November 2017]

*Blasphemy of Religion* [56/PUU-XV/2017, 23 July 2018]

*Elections Dispute of Sabu Raijua Regency 2020* [135/PHP.BUP-XIX/2021, 15 April 2021]

## 4. Kazakhstan

### Constitutional Council

#### *Overview*

Section II (“The Individual and Citizen”) of the Constitution consists of Articles 10 to 39, and is devoted to the basics of the legal status of the individual, the rights and freedoms of a person, as well as the foundations of the institution of citizenship. This section defines the fundamental rights and freedoms of individual and citizen, but it also includes duties. The rights in Section II include personal, political, and socio-economic rights. In terms of international human rights law, the Republic of Kazakhstan has ratified eight of the nine core UN human rights treaties. Regarding constitutional rights and distinct historical or cultural contexts, two key decisions of the Constitutional Council should be cited. One concerns the languages in the Republic of Kazakhstan, while the other considers the regulation of the application of the death penalty. In terms of current issues facing constitutional rights adjudication, two major areas can be discussed. The first concerns the rapid development of the IT industry and the infrastructure of “electronic government.” This involves the deepening use of digital technologies in the provision of public services and the administration of certain types of government activities, which directly affect the degree of implementation of a number of constitutional human rights. Second, the impact of the Covid-19 pandemic has actualized the need for a deep understanding of the international and national legal frameworks in terms of their compliance with the requirements of new challenges in crisis situations, ensuring a reasonable balance of public, state and private interests.

#### *Outline*

##### **I. Rights in the Constitution**

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- C. Concretization of constitutional rights
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##### **II. Classification and content**

- A. Enumerated constitutional rights

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- C. Current issues

##### **Annex 1: List of cited legal provisions**

##### **Annex 2: List of cited cases**

## **I. Rights in the Constitution**

### **A. Constitutional bill of rights**

The Constitution of the Republic of Kazakhstan is the Highest Law of Kazakhstan. The current Constitution was approved by referendum on 30 August 1995.

The Constitution consists of a preamble and 9 sections.

Section II (“The Individual and Citizen”) consists of Articles 10 to 39, and is devoted to the basics of the legal status of the individual, the rights and freedoms of a person, as well as the foundations of the institution of citizenship. This section defines the fundamental rights and freedoms of individual and citizen, but it also includes duties.

Duties are usually listed after human rights. In particular, these include the following:

- According to paragraph 3 of Article 12 of the Constitution, a citizen of the Republic shall have rights and bear responsibilities owing to his citizenship. Paragraph 4 of Article 12 of the Constitution provides, “Foreigners and stateless people in the Republic shall enjoy rights and freedoms as well as bear responsibilities, established for the citizens unless otherwise stipulated by the Constitution, laws and international agreements.”
- Paragraph 2 of Article 23 of the Constitution determines that military servants, employees of national security agencies, law enforcement agencies and judges shall not be members of parties, trade unions, or speak in support of any political party.
- Paragraph 2 of Article 27 of the Constitution defines, “Care and upbringing of children shall be a natural right and responsibility of parents,” whereas the paragraph 3 states that “Adult, able-bodied children must take care of their disabled parents.”
- According to Article 34 of the Constitution, “Everyone must observe the Constitution, legislation of the Republic of Kazakhstan and respect the rights, freedoms, honor, and dignity of other people” (paragraph 1), and “Everyone must respect the state symbols of the Republic” (paragraph 2).
- According to Article 35 of the Constitution, “Payment of legally established taxes, fees, and other obligatory payments shall be a duty and

responsibility of everyone.”

- Article 36 of the Constitution defines, “Defense of the Republic of Kazakhstan shall be a sacred duty and responsibility of its every citizen” (paragraph 1).
- According to Article 37 of the Constitution, “Citizens of the Republic of Kazakhstan must care for the protection of historical and cultural heritage, and preserve monuments of history and culture.”
- According to Article 38 of the Constitution, “Citizens of the Republic of Kazakhstan must preserve nature and protect natural resources.”

## **B. Rights elsewhere in the Constitution**

In addition to the fundamental human and civil rights specified in Section II (“The Individual and Citizen”), the Constitution includes other sections in which other rights can also be found.

For example, in Section VII (“Court and Justice”) a number of principles are enshrined, from the content of which the rights of the individual follow. In particular, in accordance with paragraph 3 of Article 77 of the Constitution, when applying the law, the judge shall be guided by the following principles:

- 1) a person is considered to be innocent of committing a crime until his guilt is recognized by the court judgment that has entered into legal force;
- 2) no one may be subjected to repeated criminal or administrative liability for the same offense;
- 3) no one’s court jurisdiction, provided for him by law, can be changed without his consent;
- 4) everyone has the right to be heard in court;
- 5) laws that establish or strengthen liability, impose new duties on citizens or worsen their situation, do not have retroactive effect. If, after committing the offense, the responsibility for it is cancelled or mitigated by law, the new law shall be applied;
- 6) the accused is not obliged to prove his innocence;
- 7) no one is obliged to testify against himself, or his spouse (-s) and close relatives, whose circle is determined by law. Priests are not obliged to testify against those who confided in them at confession;
- 8) any doubts about the guilt of the person shall be interpreted in favor of the accused;
- 9) evidence obtained in an unlawful manner is not legally binding. No one can be convicted solely on the basis of his own confession;

10) the application of criminal law by analogy is not allowed.

The above-mentioned sections of the Highest Law of Kazakhstan determine the political and legal status of one of the most important state institutions of the Republic of Kazakhstan.

In theory, it is controversial to classify human rights, indirectly enshrined in other sections, as constitutional human rights. Nevertheless, in the current laws, a number of them are enshrined as human rights.

Other sections of the Constitution do not provide the duties/responsibilities of citizens.

### **C. Concretization of constitutional rights**

According to paragraph 2 of Article 12, “Human rights and liberties shall belong to everyone by virtue of birth, be recognized as absolute and inalienable, and define the contents and implementation of laws and other regulatory and legal acts.”

According to paragraph 1 of Article 10, citizenship of the Republic of Kazakhstan shall be acquired and terminated, as prescribed by Law and shall be indivisible and equal regardless of the grounds of its acquisition. On December 20, 1991 the Law of the Republic of Kazakhstan “On Citizenship of the Republic of Kazakhstan” was adopted for the purpose of regulating the issues regarding the citizenship.

In paragraph 3 of Article 13 of the Constitution it is stated, “Everyone shall have the right to take qualified legal assistance. In cases stipulated by law, legal assistance shall be provided free of charge.” The Law of the Republic of Kazakhstan “On Advocacy and Legal Assistance” of July 5, 2018 defines the grounds and procedures for providing individuals and legal entities with state-guaranteed legal assistance.

According to paragraph 1 of Article 23 of the Constitution, “Citizens of the Republic of Kazakhstan shall have the right to freedom of forming associations. The activities of public associations shall be regulated by law.”

The Law of the Republic of Kazakhstan “On Public Associations” of May 31, 1996 regulates relations of a public legal nature arising due to the exercise by

citizens of the Republic of Kazakhstan of the right to freedom of association, as well as the creation, activity, reorganization and liquidation of public associations.

In accordance with Article 32 of the Constitution, “Citizens of the Republic of Kazakhstan shall have the right to assemble peacefully and without weapons, hold meetings, campaigns and demonstrations, street processions and pickets. The use of this right may be restricted by law in the interests of state security, public order, and protection of health, rights, and the freedom of other persons.”

In order to realize the constitutional rights of citizens to assemble peacefully and without weapons, hold meetings, rallies and demonstrations, processions and picketing, the Law of the Republic of Kazakhstan "On the Procedure for Organizing and Holding Peaceful Assemblies in the Republic of Kazakhstan" was developed, and it was adopted on May 25, 2020.

## **D. Historical background and development**

The current Constitution was adopted by referendum on August 30, 1995. The adoption of the Highest Law of the country was preceded by a broad discussion of the draft Constitution by the population of the country.

Since the adoption of the current Constitution, amendments and additions to it have been made five times: in 1998, 2007, 2011, 2017, 2019.

The content of Section II (“The Individual and Citizen”) remained unchanged, with the exception of amendments and additions to the following articles as a result of the constitutional reforms of 1998, 2007 and 2017:

- The Law of the Republic of Kazakhstan of October 7, 1998 No. 284-I “On Amendments and Additions to the Constitution of the Republic of Kazakhstan” introduced changes in the age of a civil servant.
  - Thus, in the paragraph 4 of Article 33, the words “The age of a civil servant must not exceed sixty years, and in exceptional cases, sixty-five years” were removed.
- The Law of the Republic of Kazakhstan of May 21, 2007 No. 254-III “On Amendments and Additions to the Constitution of the Republic of Kazakhstan”, paragraphs 2 of Articles 15 and 16 are set forth in a new edition.
  - Paragraph 2 of Article 15: “No one shall have the right to deprive life of a person arbitrarily. The death penalty is established by law as

an exceptional punishment for terrorist offenses involving the death of people, as well as for particularly serious crimes committed in wartime, with giving the sentenced person the right to seek pardon.”

- Paragraph 2 of Article 16: “Arrest and detention shall be allowed only in cases stipulated by law and only with the authorization of the court with the right of appeal. Without the authorization of the court, a person shall be detained for a period of not more than seventy-two hours.”
- Paragraph 3 of Article 1 of the Law of March 10, 2017 No. 51-IV “On Amendments and Additions to the Constitution of the Republic of Kazakhstan” introduced a new version of paragraph 2 of Article 10 of the Constitution: “A citizen of the Republic shall not be deprived of citizenship, the right to change such citizenship, and also may not be expelled from Kazakhstan. Deprivation of citizenship is allowed only by a court decision for the commission of terrorist crimes, as well as for causing other grave harm to the vital interests of the Republic of Kazakhstan,” thereby the reference to Article 10 has been excluded from paragraph 3 of Article 39 of the Constitution.

## **II. Classification and content**

### **A. Enumerated constitutional rights**

Section II of the Constitution lists the fundamental human and civil rights and freedoms, which include personal, political and socio-economic rights.

The Constitution defines the fundamental rights and obligations of a person and a citizen, as well as foreign citizens and stateless persons.

In addition, it should be noticed that according to Article 12 of the Highest Law of Kazakhstan, “Human rights and freedoms in the Republic of Kazakhstan shall be recognized and guaranteed in accordance with this Constitution. Human rights and liberties shall belong to everyone by virtue of birth, be recognized as absolute and inalienable, and define the contents and implementation of laws and other regulatory and legal acts. Every citizen of the Republic shall have rights and bear responsibilities owing to his citizenship.”

Also according to Article 12 of the Constitution, “Foreigners and stateless people

in the Republic shall enjoy rights and freedoms as well as bear responsibilities, established for the citizens unless otherwise stipulated by the Constitution, laws and international agreements.”

According to the Constitution, everyone is equal before the law and the courts (Article 14); everyone has the right to life (Article 15), personal freedom (Article 16), free choice of a place of residence (Article 21), freedom of conscience (Article 22), freedom of association (Article 23); freedom of labour (Article 24), private property (Article 26), health protection (Article 29), education (Article 30). Human honor and dignity are inviolable.

Section II also contains provisions on the conscientious performance of duties (Article 18, Article 27, Article 34, Article 37, Article 38).

## **B. Unenumerated constitutional rights**

Paragraph 1 of Article 12 of Section II of the Constitution states, “Human rights and freedoms in the Republic of Kazakhstan shall be recognized and guaranteed in accordance with this Constitution.”

In its normative resolution of October 28, 1996, No. 6/2, the Constitutional Council indicated,

“In accordance with the paragraph 1 of Article 12 of the Constitution, human rights and freedoms in the Republic of Kazakhstan shall be recognized and guaranteed in accordance with this Constitution. It means that the list of human rights and freedoms is guaranteed by the state within the limits established by the norms of the Constitution of the Republic and other normative legal acts corresponding to it.

Recognition of the mentioned human rights and freedoms as absolute means their extension to every person in the territory of the Republic of Kazakhstan, regardless of his or her belonging to the citizenship of the Republic. The inalienability of rights and freedoms means that a person cannot be deprived of the rights and freedoms established by the Constitution by anyone, including the state, except for the cases provided by the Constitution and laws adopted on its basis. The human rights and freedoms, in accordance with the paragraph 2 of Article 12 of the Constitution of the Republic of Kazakhstan, determine the content and application of laws and other regulatory legal acts.



Along with that, human rights and freedoms can be limited by the state in the manner prescribed by law, in cases provided by the Constitution (paragraph 5 of Article 12 and paragraphs 1, 2 of Article 39). At the same time, in accordance with the paragraph 3 of Article 39 of the Constitution, “Restriction of the rights and freedoms of citizens for political reasons shall not be allowed in any form. The rights and freedoms provided for by Articles 11, 13–15, paragraph 1 of Article 16, Article 17, Article 19, Article 22, paragraph 2 of Article 26 of the Constitution, are not subject to limitation in any case.”

In addition, the Constitutional Council in its normative resolution of February 27, 2008, No. 2 stated,

“The Republic of Kazakhstan proclaims itself as a democratic, secular, legal and social state whose highest values are a person, his life, rights, and freedoms,” (paragraph 1 of Article 1 of the Constitution), which indicates the priority for the state of universal human values (resolutions of the Constitutional Council dated December 21, 2001 No. 18/2 and dated July 13, 2006 No. 4) and it means that the state “...does not have a more important task than caring for a person...” (Resolution of the Constitutional Council of May 28, 2007 No. 5).

In accordance with paragraphs 1 and 2 of Article 12 of the Highest Law “Human rights and freedoms in the Republic of Kazakhstan shall be recognized and guaranteed in accordance with this Constitution,” and “Human rights and liberties shall belong to everyone by virtue of birth, be recognized as absolute and inalienable, and define the contents and implementation of laws and other regulatory and legal acts.” It follows from the content of these norms that human rights and freedoms are guaranteed by the state within the limits established by the Constitution and the normative legal acts corresponding to it, and are fundamental in the development and adoption of laws and other regulatory legal acts that establish the conditions and procedure for the exercise of these rights and freedoms (resolutions of the Constitutional Council of October 28, 1996 No. 6/2 and of April 18, 2007 No. 4).

Provisions proclaimed by the Constitution, related to the attitude of the state to a person, serve as a prerequisite for solving all aspects of legal regulation of the status of a person and a citizen in the Republic. The recognition by the Highest Law of a person, his rights and freedoms as the highest value is a fundamental principle of the constitutional system, which forms the basis of a constitutionally organized society and provides everyone with a legally

recognized and protected state, and the opportunity to choose options for their own behaviour within the framework of the law.

By guaranteeing a person the right to recognition of legal personality, the Constitution gives him the opportunity to protect his/her rights and freedoms by all means not contradicting the law (paragraph 1 of Article 13).

The fundamental human and civil rights and freedoms enshrined in Section II (“The Individual and Citizen”) of the Constitution of the Republic, including the right to recognition of legal personality (paragraph 1 of Article 13), the right to life (paragraph 1 of Article 15), the right to personal freedom (paragraph 1 of Article 16), the right to inviolability of dignity (paragraph 1 of Article 17), freedom of speech (paragraphs 1 and 2 of Article 20) and others, are innate, recognized as absolute and inalienable (paragraph 2 of Article 12), and the rights and freedoms provided in paragraph 1 of Article 13, paragraph 1 of Article 15, paragraph 1 of Article 16 and paragraph 1 of Article 17, in addition, are not subject to limitation in any cases (paragraph 3 of article 39 of the Constitution). They are based on the recognition of free will and the resulting autonomy of the individual’s behaviour. Accordingly, a person and a citizen who has these rights and freedoms due to their natural origin can exercise them at his/her own discretion.

Based on the analysis of the listed norms of the Highest Law in their unity and systemic integrity, in relation to the subject of the considered appeal, it means that everyone has the right to freely dispose of his/her own life and health (including in such a form as causing harm to himself/herself), if this is not connected with the evasion of the fulfilment of constitutional and other obligations established by law, does not violate the rights and freedoms of others and does not encroach on the constitutional order and public morality (paragraph 5 of Article 12, paragraph 1 of Article 34, Article 36 of the Constitution).”

## **C. Protection and limitation**

In accordance with the paragraph 2 of Article 11 of the Constitution, “The Republic shall guarantee protection and patronage to its citizens outside its boundaries.”

According to Article 1 of the Constitution, “The Republic of Kazakhstan proclaims itself as a democratic, secular, legal and social state whose highest

values are a person, his life, rights, and freedoms.”

According to paragraph 1 of Article 83 of the Constitution, “The Prosecutor’s Office, on behalf of the state and in the limits and forms established by law, supervises the observance of legality on the territory of the Republic of Kazakhstan, represents the interests of the state in court, and carries out criminal prosecutions on behalf of the state.”

The final decisions of the Constitutional Council emphasized that the raising of a specific type of rights or freedoms to the constitutional level and the announcement in the Constitution of its guarantee means that the state undertakes to ensure the implementation of these rights and freedoms (normative resolutions of March 12, 1999 No. 3/2, dated April 20, 2004 No. 3, dated April 29, 2005 No. 3).

According to Article 39 of the Constitution, “Rights and freedoms of an individual and citizen may be limited only by law and only to the extent necessary for the protection of the constitutional system, defence of public order, human rights and freedoms, and the health and morality of the population. Any acts capable of violating inter-ethnic and inter-religious harmony shall be recognized as unconstitutional.”

At the same time, it should be noticed that paragraph 3 of Article 39 of the Highest Law provides that restriction of the rights and freedoms of citizens for political reasons shall not be allowed in any form. The rights and freedoms provided for by Articles 11 (extradition of a citizen to a foreign state), 13–15 (judicial protection of rights and freedoms and obtaining qualified legal assistance, equality before the law and court, discrimination, as well as the right to life and deprivation of life, the death penalty is established by law as an exceptional punishment), paragraph 1 of Article 16 (right to personal freedom), Article 17 (right to inviolability of dignity, inadmissibility of torture), Article 19 (the right to national, party and religious affiliation and use of the native language, culture and freedom to choose the language of communication, education, training and creativity), Article 22 (everyone has the right to freedom of conscience), paragraph 1 of Article 26 (citizens of the Republic of Kazakhstan shall privately own any legally acquired property) of the Constitution, are not subject to limitation in any case.

### **III. Interpretation and current issues**

#### **A. Rights in diverse contexts**

First of all, it should be noted that the preamble of the Constitution of the Republic of Kazakhstan begins with the words, “We, the people of Kazakhstan, united by a common historic fate, creating a state on the indigenous Kazakh land, considering ourselves a peace-loving and civil society, dedicated to the ideals of freedom, equality and concord, wishing to take a worthy place in the world community, realizing our high responsibility before the present and future generations, proceeding from our sovereign right, accept this Constitution.”

The introductory part of the Constitution, which fully considers the mentality and legal traditions of the people of Kazakhstan, plays an important political and ideological role and is essential for understanding the meaning of the text of the Highest Law, determines the general logic of the Constitution and, accordingly, all legislation.

The preamble establishes that the basis of the state of the Republic of Kazakhstan, its sovereignty, independence and constitutional order is the people of Kazakhstan.

The Constitution put a person and a citizen with his inalienable rights at the forefront, guaranteed him real freedom of speech and conscience, and confirmed universally recognized democratic values in its provisions.

Regarding constitutional rights and distinct historical or cultural contexts, two key decisions of the Constitutional Council should be cited.

#### **1. Languages**

On February 23, 2007, the Constitutional Council considered the appeal of a group of deputies of the Parliament of the Republic of Kazakhstan on the interpretation of the resolution of the Constitutional Council of the Republic of Kazakhstan of May 8, 1997 No. 10/2 “On the Appeal of the President of the Republic of Kazakhstan on the Compliance of the Constitution of the Republic of Kazakhstan with the Law “On languages in the Republic of Kazakhstan” submitted for Signature to the President of the Republic of Kazakhstan adopted by the Parliament of the Republic of Kazakhstan on March 12, 1997” (Additional Normative Resolution of the Constitutional Council of the Republic of Kazakhstan dated February 23, 2007 No. 3).

In the petition, the subjects of the appeal were asked to answer the following questions:

- Does the state language have priority over the officially used language “not in state organizations”, but in state and socially significant events, receptions, assemblies, congresses, conferences, round tables?”
- “Does the concept (term) “on equal grounds”, used in paragraph 2 of the Constitution of the Republic, apply to such events?”
- Should we understand the constitutional norm, “Russian language shall be officially used on equal grounds along with the Kazakh language in state institutions and local self-administrative bodies” (paragraph 2 of Article 7 of the Constitution), in such a way that Russian is the second state language?

The Constitutional Council in this normative resolution clarified that the equality in the use of Kazakh state language and officially used Russian language in state organizations and local governments does not mean that the latter is endowed with the status of a second state language.

The supremacy of the status of the state language means that it is enshrined in the Constitution and the possibility of establishing by laws the exclusiveness or priority of its use in the public law sphere.

The Constitution of the Republic of Kazakhstan does not establish equality in the use of the Kazakh and Russian languages outside state organizations and local authorities, in particular, when holding socially significant events (at receptions, assemblies, congresses, conferences, round tables), but the term “on equal grounds” used in paragraph 2 of Article 7 of the Constitution does not apply to such events. The Constitution of the Republic gives everyone the right to choose the language of communication at their own discretion. At the same time, the state should take care of the state language and stimulate its development, dissemination and application not only in the field of state legal regulation, but also in all other spheres of social relations.

Legislation and law enforcement practice shall consider the requirement of the Constitution, according to which no one can be subjected to any discrimination, including on the basis of language, as well as constitutional provisions that enshrine the right of everyone to use their native language and culture, to freely choose the language of communication, education, learning and creativity.

## 2. Death penalty

In the normative resolution of the Constitutional Council of June 4, 2021, No. 1, at the request of the President of the Republic of Kazakhstan, the Constitutional Council gave an official interpretation of the provisions of the Constitution of the Republic which regulate the application of the death penalty.

The appeal of the Head of State was conditioned by the forthcoming ratification by Kazakhstan of the Second Optional Protocol to the International Covenant on Civil and Political Rights, aimed at abolishing the death penalty (hereinafter referred to as the Optional Protocol). The appeal deals with the correlation between the provisions of the Constitution of the Republic and the norms of the Optional Protocol that regulate the application of the exceptional measure of punishment.

The Constitutional Council decided that there was no need to amend the Highest Law for the ratification of the Optional Protocol.

At the same time, the Council noted that according to the Constitution and universally recognized international acts, the right to life is the main value of a democratic society and the state is obliged to guarantee the exercise of this right for all people.

As an equal member of the world community, from the very beginning, in the criminal legislation, Kazakhstan considers the tendency to abolish the death penalty, and over the years, a stable legal regime for the non-use of capital punishment has been formed in the country.

The next stage in the consistent implementation of this course was marked by the signing of the specified Optional Protocol by the Republic of Kazakhstan on September 23, 2020.

Considering that the Constitution of Kazakhstan allows the establishment of the death penalty for terrorist crimes involving the death of people, as well as for especially grave crimes committed during wartime, the Council indicated that the ratification of the international treaty on the abolition of the death penalty is within the competence of the Parliament of the Republic. At the same time, the Highest Law leaves the issue of establishing or refusing the death penalty in the criminal law for these crimes, narrowing their circle to the discretion of the Parliament. The legislator can abolish the death penalty not only by introducing appropriate amendments to national legislation, but also by ratifying an international treaty

providing for the abolition or limitation of the number of crimes for which this type of punishment may be imposed. In its decision, the Council stressed that the Constitution does not prevent the ratification of the Optional Protocol. After its ratification, the Criminal Code of the Republic of Kazakhstan must be brought in line with its requirements.

## **B. Impact of international norms**

Since the declaration of independence, the Republic of Kazakhstan has ratified a number of UN international documents in the field of human rights.

In particular:

- Geneva Conventions for the Protection of War Victims of 1949 and Additional Protocols I and II of 1977 (the Republic of Kazakhstan joined the Convention by the resolution of the Supreme Council of the Republic of Kazakhstan of March 31, 1993 No. 2060-XII).
- Convention on the Rights of the Child of November 20, 1989, New York (ratified by the Resolution of the Supreme Council of the Republic of Kazakhstan on June 8, 1994 No. 77-XIII).
- Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment of December 10, 1984, New York (the Republic of Kazakhstan joined the Convention by the Law of the Republic of Kazakhstan of June 29, 1998 No. 247).
- Convention on the Prevention and Punishment of the Crime of Genocide of December 9, 1948, New York (RK joined by the Law of the Republic of Kazakhstan dated June 29, 1998 No. 244).
- The Convention on the Elimination of All Forms of Discrimination against Women of December 18, 1979, New York (the Republic of Kazakhstan joined by the Law of the Republic of Kazakhstan of June 29, 1998, No. 248).
- International Convention on the Elimination of All Forms of Racial Discrimination of March 7, 1966, New York (RK joined by the Law of the Republic of Kazakhstan of June 29, 1998 No. 245).
- Convention relating to the Status of Refugees on July 28, 1951 (Geneva) and the Protocol Relating to the Status of Refugees dated January 31, 1967 (the Republic of Kazakhstan joined by the Law of the Republic of Kazakhstan of December 15, 1998 No. 317-I).
- 1958 Convention on Discrimination in the Field of Labor and Occupation (ratified by the Law of the Republic of Kazakhstan of July 20, 1999 No. 444-I).



- 1948 Convention on Freedom of Association and Protection of the Right to Organize (ratified by the Law of the Republic of Kazakhstan of December 30, 1999 No. 29-II).
- Convention on the Political Rights of Women of March 31, 1953, New York (RK joined by the Law of the Republic of Kazakhstan of December 30, 1999 No. 18-II).
- Convention on Recovery Abroad of Maintenance, adopted within the framework of the United Nations on June 20, 1956 (RK joined by the Law of the Republic of Kazakhstan of December 30, 1999 No. 33-II).
- Convention on the Nationality of Married Women (RK joined by the Law of the Republic of Kazakhstan of December 30, 1999 No. 19-II).
- Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women of December 18, 1979, New York (ratified by the Law of the Republic of Kazakhstan of July 4, 2001, No. 220).
- 2000 Optional Protocols to the Convention on the Rights of the Child of November 20, 1989, New York concerning the involvement of children in armed conflict and concerning the sale of children, child prostitution and child pornography (ratified by the Law of the Republic of Kazakhstan on July 4, 2001 No. 219).
- Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women of September 6, 1999, New York (ratified by the Law of the Republic of Kazakhstan of July 4, 2001, No. 220).
- International Covenant on Economic, Social and Cultural Rights of December 16, 1966, New York (ratified by the Law of the Republic of Kazakhstan of November 21, 2005 No. 87).
- International Covenant on Civil and Political Rights of December 16, 1966 (ratified by the Law of the Republic of Kazakhstan dated November 28, 2005 No. 91).
- The Slavery Convention of September 25, 1926 and the Protocol amending the Slavery Convention of December 7, 1953 and the Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery of September 7, 1956 (ratified by the Law of the Republic of Kazakhstan of 5 February 2008 No. 19-IV).
- Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of September 25, 2007, New York (ratified by the Law of the Republic of Kazakhstan of June 26, 2008 No. 48-IV).
- International Convention for the Protection of All Persons from Enforced Disappearance of December 20, 2006, New York (ratified by the Law of



- the Republic of Kazakhstan of December 15, 2008 No. 104-IV).
- Optional Protocol to the International Covenant on Civil and Political Rights of December 16, 1966, New York (ratified by the Law of the Republic of Kazakhstan of February 11, 2009 No. 130-IV).
  - The Convention on the International Recovery of Child Support and Other Forms of Family Maintenance and the Protocol on the Law Applicable to Alimony Obligations (ratified by the Law of the Republic of Kazakhstan of April 9, 2016 No. 492-V 3PK).
  - The Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty (hereinafter referred to as the Second Optional Protocol), created in New York on December 15, 1989, with the following reservation:
    - “The Republic of Kazakhstan, in accordance with article 2 of the Second Optional Protocol, reserves the right to use the death penalty in wartime after being found guilty of committing especially grave crimes of a military nature committed in wartime.” (ratified by the Law of the Republic of Kazakhstan of January 2, 2021 No. 404-VI).

In accordance with Article 4 of the Constitution, “The provisions of the Constitution, the laws corresponding to it, other regulatory and legal acts, international agreements and other commitments of the Republic, as well as normative resolutions of the Constitutional Council and the Supreme Court of the Republic, shall be the functioning law in the Republic of Kazakhstan. The Constitution shall have the highest juridical force and direct effect on the entire territory of the Republic. International agreements ratified by the Republic have primacy over its laws. The legislation of the Republic determines the procedure and conditions of operation of international agreements in the territory of the Republic of Kazakhstan to which Kazakhstan is a party.”

According to Article 8 of the Constitution, “The Republic of Kazakhstan shall respect principles and norms of international law, shape policy of cooperation and good-neighbourly relations between states, their equality and non-interference in each other’s domestic affairs, peaceful settlement of international disputes and renounce the [first] use of military force.”

In this constitutional norm, Kazakhstan confirmed its adherence to the principles of international law, which are enshrined in the UN Charter (1945), the Declaration on the Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the UN Charter (1970), the Final Act of the Conference on Security and Co-operation in Europe (1975) and other international treaties to which Kazakhstan is a party.

The normative resolution of the Constitutional Council of October 11, 2000 No. 18/2 explains that paragraph 3 of Article 4 of the Constitution should be understood in a way that international agreements ratified by the Republic in accordance with the Constitution, in accordance with the procedure established by law, and ratified by the Parliament of the Republic have primacy over its laws. International treaties that did not consider ratifications as conditions for entry into force, concluded before the adoption of the 1995 Constitution, are in force and retain priority over the legislation of the Republic, if such priority for these international treaties is directly foreseen by the laws of the Republic that regulate the relevant spheres of legal relations.

It should be noticed that the Constitutional Council has introduced into constant practice when making its decisions to refer to the norms of international law. References to international legal agreements, such as the UDHR, ICCPR, ICESCR, the Vienna Convention on the Law of Treaties (VCLT) and others are given in a number of decisions of the Constitutional Council.

### **C. Current issues**

The Constitutional Council, in its annual messages on constitutional legality in the state, always reflects especially significant historical events that have occurred during the year, analyzes the considered appeals from subjects, and also notes legal positions on the most important issues of a constitutional and legal nature.

In this regard, in the previous year's message, the Constitutional Council drew attention to the fact that legislation should keep pace with the rapidly changing realities of state and public life, avoiding gaps and doubts about the validity of decisions taken on pressing issues. In the conditions of a unitary state, it is important to ensure uniform law-making and law enforcement practice.

The rapid development of the IT industry and the infrastructure of "electronic government", the deepening of the use of digital technologies in the provision of public services and the administration of certain types of government activities (electronic government bodies, online receptions, e-health, criminal prosecution, justice and others) directly affect the degree of implementation of a number of constitutional human rights and requires the creation of an adequate legal framework. The current and adopted legal acts in this area must be coordinated in terms of content and terminology. They must guarantee the protection of personal data of citizens, state secrets, expand electronic forms of public participation in the exercise of rights and freedoms and the implementation of state functions.

The COVID-19 coronavirus pandemic announced by the World Health Organization and the measures to counter this threat caused by its global scale have actualized the need for a deep understanding of the international and national legal framework in terms of their compliance with the requirements of new challenges in crisis situations, ensuring a reasonable balance of public, state and private interests. Additional measures of legal regulation should create a reliable basis for effective multilateral cooperation of states, improve the mechanism for ensuring the rights and implementation of the duties of citizens in such situations, including the transfer of these legal relations into digital format. In general, they should be aimed at identifying and preventing threats to constitutional security and creating safe conditions for the life of the society of Kazakhstan.

## **Annex 1: List of cited legal provisions**

### **1) Constitutional provisions**

The Constitution of the Republic of Kazakhstan

- The Preamble
- Article 4
- Article 5
- Article 11
- Article 12(1)
- Article 13
- Article 14
- Article 15
- Article 16(1)
- Article 17
- Article 18
- Article 19
- Article 20
- Article 22
- Article 26
- Article 39

### **2) Legislative provisions**

Law of the Republic of Kazakhstan “On Citizenship of the Republic of Kazakhstan” (December 20, 1991)

Civil Code of the Republic of Kazakhstan (December 27, 1994 No. 268-XIII)

- Article 143
- Article 144

Law of the Republic of Kazakhstan “On Public Associations” (May 31, 1996)

Law of the Republic of Kazakhstan “On the Mass Media” (July 23, 1999 No. 451-I)

- Article 1
- Article 2(1)
- Article 5
- Article 13
- Article 18
- Article 19

Criminal Code of the Republic of Kazakhstan (July 3, 2014 No. 226-V Law of the Republic of Kazakhstan)

- Article 131
- Article 161
- Article 174
- Article 179
- Article 180
- Article 256
- Article 274

Code of the Republic of Kazakhstan on Administrative Offenses (July 5, 2014 No. 235-V Law of the Republic of Kazakhstan)

- Article 453
- Article 455

Ethical Code of Civil Servants of the Republic of Kazakhstan (Rules of Official Ethics of Civil Servants) (December 29, 2015 No. 153)

- Article 12

Law of the Republic of Kazakhstan “On Advocacy and Legal Assistance” (July 5, 2018)

Law of the Republic of Kazakhstan “On the Procedure for Organizing and Holding Peaceful Assemblies in the Republic of Kazakhstan” (May 25, 2020)

### 3) International provisions

The Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty (hereinafter referred to as the Second Optional Protocol), created in New York on December 15, 1989, with the following reservation:

- “The Republic of Kazakhstan, in accordance with article 2 of the Second Optional Protocol, reserves the right to use the death penalty in wartime after being found guilty of committing especially grave crimes of a military nature committed in wartime.” (ratified by the Law of the Republic of Kazakhstan of January 2, 2021 No. 404-VI).

Law of the Republic of Kazakhstan “On the Accession of the Republic of Kazakhstan to the International Convention on the Elimination of All Forms of Racial Discrimination” (June 29, 1998 No. 245)

Law of the Republic of Kazakhstan “On the Ratification of the International Covenant on Civil and Political Rights, adopted by resolution 2200A (XXI) of the United Nations General Assembly of December 16, 1966” (November 28, 2005 No. 91-III)

## **Annex 2: List of cited cases**

Normative resolutions of the Constitutional Council of the Republic of Kazakhstan:

*“On the Official Interpretation of Paragraph 1 of Article 4 and Paragraph 2 of Article 12 of the Constitution of the Republic of Kazakhstan”* [October 28, 1996 No. 6/2]

*“On the Official Interpretation of Paragraph 3 of Article 4 of the Constitution of the Republic of Kazakhstan”* [October 11, 2000 No. 18/2]

*“On the Submission of the Kyzylorda Regional Court on the Recognition of Unconstitutional Part of the Second Paragraph 6.12 of Article 6 of the Lease Agreement for the Baikonur complex, Articles 5 and 11 of the Agreement on the Cooperation of Law Enforcement Agencies in Ensuring Law and Order on the Territory of the Baikonur Complex”* [As amended on April 17, 2017; May 7, 2001]

No. 6/2]

*“On the Interpretation of the Resolution of the Constitutional Council of the Republic of Kazakhstan of May 8, 1997 No. 10/2 “On the Appeal of the President of the Republic of Kazakhstan on the Compliance of the Constitution of the Republic of Kazakhstan with the Law of the Republic of Kazakhstan “On languages in the Republic of Kazakhstan” submitted for signature to the President of the Republic of Kazakhstan, adopted by the Parliament of the Republic of Kazakhstan on March 12, 1997” [February 23, 2007 No. 3]*

*“On Verification of the Constitutionality of Parts One and Four of Article 361 of the Criminal Code of the Republic of Kazakhstan upon the Appeal of the Kapshagai City Court of Almaty Region” [February 27, 2008 No. 2]*

*“On Verification of the Law of the Republic of Kazakhstan “On Amendments and Additions to the Constitution of the Republic of Kazakhstan” for Compliance with the Constitution of the Republic of Kazakhstan” [March 9, 2017 No. 1]*

*“On the Verification of the Constitutionality of Subparagraph 8) of Article 107 of the Law of the Republic of Kazakhstan “On Housing Relations” on the Submission of the Alatau District Court of the city of Almaty” [January 21, 2020 No. 1]*

*“On Giving an Official Interpretation of Paragraph 2 of Article 15 of the Constitution of the Republic of Kazakhstan.” [June 04, 2021 No. 1]*

# 5. Republic of Korea

## Constitutional Court

### *Overview*

Constitutional rights are found in Chapter 2 of the Constitution which is entitled “Rights and Duties of Citizens.” In Chapter 2, the freedoms and rights of citizens are specified in the following order: human dignity and worth and the right to pursue happiness (Article 10), the right to equality (Article 11), liberty rights (Articles 12 to 23), rights to political participation (Articles 24 and 25), claim rights (Articles 26 to 30), and social rights (Articles 31 to 36). The Korean Constitution guarantees unenumerated constitutional rights as well as enumerated constitutional rights. Article 37(1) of the Constitution declares that “Freedoms and rights of citizens shall not be neglected on the grounds that they are not enumerated in the Constitution.” Regarding particular historical and cultural contexts relevant to rights adjudication, these include issues of peaceful unification and conscientious objectors to military service within the context of the reality of national division of the Korean Peninsula. In terms of international human rights law, the Republic of Korea has ratified seven of the nine core UN human rights treaties. Current issues in constitutional rights adjudication include the emerging human rights issues from the development of information and communications technologies (e.g. right to informational self-determination), biomedical engineering, the right to a healthy and pleasant environment and climate change.

### *Outline*

#### **I. Rights in the Constitution**

- A. Constitutional bill of rights
- B. Rights elsewhere in the Constitution
- C. Concretization of constitutional rights
- D. Historical background and development

#### **II. Classification and content**

- A. Enumerated constitutional rights
- B. Unenumerated constitutional rights
- C. Protection and limitation

#### **III. Interpretation and current issues**

- A. Diversity in Asia and fundamental rights
- B. Accession to international human rights treaties and protection of constitutional rights
- C. Current issues

#### **Annex 1: List of cited legal provisions**

#### **Annex 2: List of cited cases**

## I. Rights in the Constitution

### A. Constitutional bill of rights

The Constitution of the Republic of Korea consists of a **Preamble, 10 Chapters with 130 Articles of the main body and 6 Articles of the Addenda**. The main body of the Constitution consists of Chapter 1 General Provisions (Articles 1 to 9); **Chapter 2 Rights and Duties of Citizens** (Articles 10 to 39); Chapter 3 The National Assembly (Articles 40 to 65); Chapter 4 The Executive (Articles 66 to 100); Chapter 5 The Courts (Articles 101 to 110); Chapter 6 The Constitutional Court (Articles 111 to 113); Chapter 7 Election Management (Articles 114 to 116); Chapter 8 Local Autonomy (Articles 117 to 118); Chapter 9 The Economy (Articles 119 to 127); and Chapter 10 Amendments to the Constitution (Articles 128 to 130).

The Bill of Rights is stipulated in **Chapter 2, which is located between General Provisions and Governmental Structure** in the constitutional text. The rights and freedoms of the people are provided for in Articles 10 through 37 under the heading of “**Rights and Duties of Citizens**” in Chapter 2.

The constitutional rights listed in Chapter 2 are as follows:

The right to human dignity and worth and the right to pursue happiness (Article 10); the right to equality before the law (Article 11); the right to personal liberty (Article 12); the principle of *nulla poena sine lege* (Article 13); freedom of residence and the right to move at will (Article 14); freedom of occupation (Article 15); freedom of residence (Article 16); the right to privacy (Article 17); the right to privacy of correspondence (Article 18); freedom of conscience (Article 19); freedom of religion (Article 20); freedom of speech and the press and freedom of assembly and association (Article 21); freedom of learning and the arts (Article 22); the right to property (Article 23); the right to vote (Article 24); the right to hold public office (Article 25); the right to petition (Article 26); the right to a court trial (Article 27); the right to claim for criminal compensation (Article 28); the right to claim for state compensation (Article 29); the right to receive aid from the State (Article 30); the right to an education (Article 31); the right to work (Article 32); the right to independent association, collective bargaining and collective action (Article 33); the right to a life worthy of human beings (Article 34); the right to a healthy and pleasant environment (Article 35); and the right to marriage and family life and the right to health (Article 36).



Also, Article 37 of the Constitution prescribes respect for the freedoms and rights of citizens unenumerated in the Constitution (Section 1) and the general statutory reservation and the principle of rights restrictions (Section 2).

Aside from the freedoms and rights of citizens, Chapter 2 also covers duties of citizens including the duty to pay taxes (Article 38), the duty of national defense (Article 39), the duty to provide education for one's children (Article 31(2)), the duty to work (Article 32(2)), and the duty to protect the environment (Article 35(1)).

## **B. Rights elsewhere in the Constitution**

Constitutional rights are not only covered by the provisions in Chapter 2, but there are other rights provisions outside of the Chapter.

### **1. The freedom to establish political parties (Article 8(1))**

Article 8(1) of the Constitution, which reads “The establishment of political parties shall be free, and the plural party system shall be guaranteed.” ensures all citizens the right to establish political parties free from state intervention, in principle, as a fundamental right. The Constitutional Court of Korea held that although the freedom to establish political parties is enshrined in Article 8(1) of the Constitution, it is a ‘fundamental right’ afforded to individuals, political parties and even political parties as unincorporated associations whose registrations are cancelled (*2012Hun-Ma431, etc.*, January 28, 2014). Also, the Court opined that Article 8(1) of the Constitution is a provision that guarantees all citizens not only the right to establish political parties without state intervention in principle, but also the general freedom of a political party, which encompasses freedom of political organization and activities, as a fundamental right (*2004Hun-Ma456*, December 16, 2004; *2012Hun-Ma431, etc.*, January 28, 2014; *2014Hun-Ma7*, February 27, 2014).

### **2. The right to vote in elections for National Assembly members, President and local council members (Article 41(1), Article 67(1) and Article 118(2))**

Article 24 of the Constitution stipulates the right to vote as a constitutional right, and Article 41(1) and Article 67(1) prescribe that members of the National Assembly and the President shall be elected by universal, equal, direct and secret ballot by citizens. Also, Article 118(2) proclaims that members of local councils shall be elected and specific matters pertaining to the election shall be determined

by Act. Given the above, the right to vote in the elections for members of the National Assembly, the President, and local council members can be seen as a constitutional right guaranteed by the Constitution.

### **3. The right to referendum (Article 72 and Article 130(2))**

Article 72 of the Constitution stipulates that “The President may submit important policies relating to diplomacy, national defense, unification and other matters relating to the national destiny to a national referendum if he deems it necessary.” and Article 130(2) prescribes that “The proposed amendments to the Constitution shall be submitted to a national referendum not later than thirty days after passage by the National Assembly, and shall be determined by more than one half of all votes cast by more than one half of voters eligible to vote in elections for members of the National Assembly.” Accordingly, Article 72 and Article 130(2) of the Constitution are the provisions which ensure the people’s right to referendum for important policies regarding national destiny and the proposed amendments to the Constitution as a political right protected under the Constitution.

### **4. Nature and legal status of rights listed elsewhere in the Constitution**

Article 37(1) provides that “Freedoms and rights of citizens shall not be neglected on the grounds that they are not enumerated in the Constitution.” It thereby declares that even freedoms and rights not explicitly specified in the Constitution are guaranteed as unenumerated constitutional rights if it is deemed necessary for human dignity and worth as prescribed in Article 10 of the Constitution and if the Constitutional Court finds that it meets certain requirements for unenumerated constitutional rights. Thus, all constitutional rights are protected regardless of their locations in the Constitution and the existence of express provisions thereof.

## **C. Concretization of constitutional rights**

### **1. Concretization of constitutional rights by the legislature**

Liberty rights essentially entail ‘the right against state interference’. This can be ensured by the state respecting, and not infringing upon, the realm of individual freedom. On the other hand, the right to political participation, claim rights, and social rights, etc. specifically require elaboration by specific legislation for their implementation.

The Constitution uses the expressions “under the conditions as prescribed by

Act” for the right to political participation and “as prescribed by Act” or “in conformity with the Act” for claim rights, which means that those rights need to be elaborated by the legislature unlike freedom rights. Therefore, as to the right to political participation, the issue mainly concerns whether the legislators respected the constitutional principles of election and democracy in concretizing the right to vote. Also, the key issue regarding claim rights is whether citizens can demand certain state actions based on their constitutional rights of claim and whether the legislators exercised their legislative power accordingly.

A social right needs to be constructed and elaborated through legislation and is heavily dependent upon the formation of legislation in alignment with the national financial capability and policies, etc. Social rights are enshrined in Articles 31 to 36 of the Constitution.

In particular, Article 34(1) of the Constitution explicitly stipulates all citizen’s “right to lead a life worthy of human beings.” The Constitutional Court commented that “in certain circumstances, concrete rights can be directly derived from the right to lead a life worthy of human beings by which individuals can demand certain entitlements necessary to meet ‘the minimum material needs’ for a life worthy of human beings.” The Court viewed that “where the issue of judicial review concerns whether the state has fulfilled its constitutional obligations to guarantee its citizens a life worthy of human beings, it can be declared unconstitutional only when the State has done nothing to legislate for ensuring the basic minimum conditions of life or the legislation is significantly unreasonable to the extent that it deviates manifestly from the constitutionally permissible limits of executive discretion” (2002Hun-Ma328, October 28, 2004; 2009Hun-Ma338, May 27, 2010).

Whereas the right to property is classified as freedom rights, Article 23 of the Constitution stipulates that “The right of property of all citizens shall be guaranteed. The contents and limitations thereof shall be determined by Act.” according to which the legislators are granted broad legislative discretion in determining the content of property rights and their limitations.

## **2. Cases of recognizing concrete rights as statutory rights**

The Constitutional Court held that whereas the right to demand entitlements necessary to maintain ‘the minimum material needs of life’ is a constitutional right, the claim for specific entitlements that ‘goes beyond’ the minimum material conditions need to be elaborated by legislation, and such concrete rights are the statutory right that can only be recognized when they are concretized through

legislation enacted in consideration of various circumstances including national financial conditions (*97Hun-Ka10, etc.*, February 27, 1998).

The Constitutional Court held that as opposed to the constitutional rights to political participation such as the right to vote, the right to hold public office, and the right to referendum, the right to local referendum which is exercised by residents of local governments under the relevant Act cannot be recognized as a fundamental right, and declared it a mere statutory right (*2000Hun-Ma735*, June 28, 2001; *2004Hun-Ma643*, June 28, 2007).

## **D. Historical background and development**

The Constitution of the Republic of Korea was amended nine times since its foundation in 1948, and the current Constitution is the outcome of the ninth amendment. Major changes in the fundamental rights provisions resulting from the constitutional amendments are described as below.

### **1. The founding Constitution (1948)**

The 1948 Constitution consisted of a preamble, 10 Chapters with 103 Articles, and the rights and duties of citizens were enshrined in Chapter 2. This Chapter provided for rights to equality and personal liberty, and other classic rights, while setting out specific statutory reservations that apply to the exercise of each of those rights. Also, it prescribed social rights such as the three basic labor rights, as well as worker's right to equal share in the profits of private enterprises, protection of people without economic ability, and protection of family health, thereby stipulating the fundamental rights in a relatively specific and detailed manner.

### **2. The 1960 Constitution**

Specific statutory reservations in the founding Constitution were removed and provisions were created to prohibit the violation of essential elements of the people's fundamental rights. Also, provisions were introduced to ban censorship and prior restraints on the freedom of expression.

### **3. The 1962 Constitution**

Human dignity and value and the right to lead a life worthy of human beings were clearly specified and new provisions were introduced to ban torture and to impose restrictions on the admission of a confession as evidence of guilt. Also,

the provision providing for workers' right to equal share in the profits of private enterprises which existed since the founding Constitution was repealed.

#### **4. The 1972 Constitution (the so-called *Yushin Constitution*)**

The part that prohibited the violation of the essential elements of the people's freedoms and rights was deleted from the rights provisions, and the Constitution abolished the provision on judicial review of detention and eliminated the provision that limited the probative value of forced confessions and confessions without corroborating evidence. Also, the provisions on freedoms such as freedom of movement and residence and freedom of occupational choice, and the workers' rights to independent association, collective bargaining and collective action became subject to statutory reservation.

#### **5. The 1980 Constitution**

The amended Constitution deleted specific statutory reservations, and adopted general statutory reservation. It also provided for prohibition against infringing upon the essential aspect of fundamental rights. It particularly stipulated the inviolability of fundamental human rights and specified judicial review of the legality of detention, the presumption of innocence for defendants in criminal trials, the inviolability of privacy, the right to environment, the abolition of the system of guilt-by-association, and the protection of marriage and family life based on individual dignity and gender equality. Another noticeable feature is that it newly provided for the right to pursue happiness.

#### **6. The current Constitution (amended in 1987)**

It newly stipulated the defendant's right to claim for criminal compensation, the criminal victim's right to receive aid from the State, the right to welfare for the elderly, women, and the young, and the right to a healthy and pleasant environment. Furthermore, it enhanced personal liberty by introducing the principle of due process of law in case of penalty, arrest and detention, etc.; providing for the right to be informed of reasons for arrest and detention and of the right to the assistance of counsel; and expanding the scope of the claimant for a review of the legality of arrest and detention. As to the guarantee of freedom of expression, it prescribed the prohibition of licensing or censorship of speech and the press and the ban on licensing of assembly. The Constitution deleted the provision that provided for statutory reservation for the exercise of the right to collective action. To strengthen social rights, the current Constitution introduced the minimum wage system for workers, protection of women workers and the

State's duty of disaster prevention, etc. Compared to the previous Constitutions, the current one significantly reinforced the content of basic social and claim rights, as a result, contains a more extensive guarantee of the rights provisions.

## **II. Classification and content**

### **A. Enumerated constitutional rights**

#### **1. Structure of enumerated constitutional rights**

The Constitution of the Republic of Korea provides wide protection of individual freedoms and rights which include liberty rights and social rights by stipulating them in a relatively specific manner. Article 10 ensures human dignity and worth and the right to pursue happiness. Specific fundamental rights are enshrined in Articles 11 through 36. Article 37(1) proclaims that freedoms and rights of citizens unenumerated in the Constitution are also given equal protection to the constitutionally enumerated freedoms and rights. In addition, Section 2 of the same Article provides that the rights can only be restricted by Act and even when such restriction is imposed, no essential aspect of the rights shall be violated. By doing so, it seeks to ensure the full exercise of fundamental rights (*88Hun-Ka13*, December 22, 1989; *89Hun-Ka95*, September 3, 1990).

Specifically, Chapter 2 of the Constitution sets out the freedoms and rights of citizens in the following order: human dignity and worth and the right to pursue happiness; the right to equality; liberty rights; rights to political participation (basic political rights); claim rights; and social rights.

#### **2. Rights holders**

##### **a) Natural persons**

**All Koreans** with Korean nationality enjoy fundamental rights enshrined in the Constitution. These rights are guaranteed in Articles 10 through 39 under Chapter 2, entitled "Rights and Duties of Citizens." This Bill of Rights chapter makes it clear that all citizens are entitled to constitutional rights by stipulating that "all citizens shall enjoy freedom..." or "all citizens shall have the right to..."

In principle, fundamental rights of **foreigners** are recognized within the scope

of ‘human rights,’ not ‘the rights of citizens’ (2004Hun-Ma670, August 30, 2007). Human dignity and worth and the right to pursue happiness are generally recognized as ‘human rights,’ to which foreigners are also entitled. Personal liberty, freedom of residence, the right to legal counsel, and the right to a court trial fall under the scope of human rights given their nature. Therefore, foreigners are acknowledged to enjoy the above-mentioned fundamental rights (99Hun-Ma494, November 29, 2001; 2008Hun-Ma430, August 23, 2012). However, the right to political participation and the freedom of entry to the country are the rights of citizens. Thus, foreigners are not entitled to these fundamental rights (2011Hun-Ma502, June 26, 2014). While the right to equality can be granted to foreigners as a human right, it may come with certain restrictions, given the nature of political rights, etc. and the principle of reciprocity (99Hun-Ma494, November 29, 2001; 2014Hun-Ma367, March 31, 2016).

#### b) Legal persons

While the Constitution does not have an express provision that recognizes the ability of a legal person to enjoy fundamental rights, among the fundamental rights applicable to natural persons, there are rights also applicable to legal persons considering their nature, including freedom of speech and the press and the right to property (90Hun-Ma56, June 3, 1991). However, the right to vote and the right to national referendum can only be granted to Korean nationals, who are natural persons of Korean nationality, and in light of their nature, legal persons or organizations cannot be granted these political rights (2009Hun-Ma256, *etc.*, July 24, 2014).

An incorporated association/foundation or a for-profit/non-profit corporation can enjoy constitutional rights within the aforementioned limit, and even an unincorporated association or foundation can also enjoy fundamental rights which, in light of their nature, are applicable thereto if it has a designated representative and operates as an independent social entity. However, a public corporation cannot be entitled to fundamental rights, in principle, as the addressee of these rights.

### **3. Content of enumerated constitutional rights**

#### a) Human dignity and worth and the right to pursue happiness (Article 10)

Article 10 of the Constitution stipulates that “All citizens shall be assured of human dignity and worth and have the right to pursue happiness. It shall be the duty of the State to confirm and guarantee the fundamental and inviolable human rights of individuals,” and thereby ensure the right to personality and the right to

pursue happiness which protect the very essence and the unique value of human beings as the ultimate goal (the basic philosophy) of guaranteeing all fundamental rights.

Human dignity and worth enshrined in Article 10 is the supreme principle of the Constitution and the core of constitutionalism. In this vein, the provision declares the basic principle of the Constitution that the State shall not only guarantee individual fundamental rights enumerated in the Constitution, but also freedoms and rights not enumerated in the Constitution, through which it shall respect and ensure the dignity and worth of all citizens as human beings. Therefore, although the guarantee of fundamental rights is realized primarily through individual rights provisions in the Constitution, if the restriction of fundamental rights is in breach of human dignity and worth, or if the elaboration of fundamental rights fails to provide the minimum safeguard and consequently infringes upon human dignity and worth, it contravenes human dignity and worth as prescribed in Article 10 of the Constitution.

In this context, the Constitutional Court considered that with regard to the exercise of the state's authority to punish crime, human dignity and worth prohibits treating people as a mere object of state action or imposing inhumane, cruel punishment, and in the case of criminal administration, prohibits confining people in facilities that lack the basic requirements necessary for human survival. Although it may be inevitable to restrict the fundamental rights of a convicted prisoner to the minimum extent necessary to achieve the purpose of confinement, under no circumstances can the State harm the human dignity and worth of a convicted prisoner. Thereupon, the Court held that the prison overcrowding infringes upon human dignity and worth, and thus violates the Constitution (*2013Hun-Ma142*, December 29, 2016).

The right to pursue happiness is a general right to freedom under which the people can do things necessary for the pursuit of happiness without state interference. It includes the general freedom of action and the right to free development of personality. The Constitutional Court viewed the general freedom of action derived from Article 10 of the Constitution as a general fundamental right, and various freedoms and rights have been extracted from this right (*93Hun-Ka14*, July 21, 1995; *89Hun-Ma204*, June 3, 1991).

#### b) The right to equality (Article 11)

Article 11(1) stipulates that all citizens shall be equal before the law, and there shall be no discrimination in political, economic, social or cultural life on account



of sex, religion or social status. This principle of equality does not mean absolute equality which denies any forms of discriminatory treatments. It is the principle followed by the State in exercising its powers of legislation, interpretation and execution of laws and is the people's right not to be treated unfairly without reasonable grounds and to demand equal treatment.

Article 11(2) prescribes the prohibition of privileged cast, and Article 11(3) mandates the awarding of decorations or distinctions of honors only to recipients.<sup>147</sup> There are also other provisions which ensure specific rights of equality, such as Article 32(4) (the ban on unjust discrimination against working women) and Article 36(1) (gender equality in marriage and family life).

### c) Liberty rights (Articles 12 to 23)

Articles 12 through 23 of the Constitution provide for liberty rights. Specifically, they prescribe the right to personal liberty (Article 12); the principle of *nulla poena sine lege* (Article 13); freedom of residence and the right to move at will (Article 14); freedom of occupation (Article 15); freedom from intrusion into one's place of residence (Article 16); the right to privacy (Article 17); the right to privacy of correspondence (Article 18); freedom of conscience (Article 19); freedom of religion (Article 20); freedom of speech and the press and freedom of assembly and association (Article 21); freedom of learning and the arts (Article 22); and the right to property (Article 23).

Article 12(1) of the Constitution guarantees **personal liberty** by prescribing that "All citizens shall enjoy personal liberty." Also, the second sentence of Article 12(1) through (7) and Article 13 lay down the detailed regulations to ensure personal liberty (the principle of due process of law, ban on torture, the right to refuse to make a statement, the principle of arrest by warrant, the right to assistance of legal counsel, the right to request the court to review the legality of arrest or detention, the principle of *nulla poena sine lege*, the principle of non-retroactivity of punishment, the principle against double jeopardy, the prohibition of retroactive legislation and the ban on the system of guilt-by-association).

**Freedom of residence and the right to move at will** enshrined in Article 14 of the Constitution is the freedom to choose one's place of residence and sojourn without state interference. Freedom of residence and the right to move at will include not only the freedom to choose their place of residence and sojourn inside

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<sup>147</sup> Article 11(3) is designed to prevent the inheritance of decorations or distinctions of honors with a view to preventing the creation of a privileged class (2008Hun-Ba111, March 31, 2011).

the country, but also the freedom to travel and relocate abroad as well as the freedom to change nationality which allows the people to renounce the nationality of the Republic of Korea (2003Hun-Ka18, October 28, 2004).

**Freedom of occupation** prescribed in Article 15 of the Constitution is the freedom to choose a particular occupation or type of occupation and the freedom to freely practice any profession of their choice. The Constitutional Court commented that “the freedom of occupation as prescribed by Article 15 of the Constitution encompasses freedom of occupation in a narrow sense where the people can choose any occupation of their choice, and the freedom to practice any occupation of their choice to their liking” (97Hun-Ma194, March 26, 1998). However, it also mentioned that “the restriction on freedom to choose an occupation in a narrow sense generally violates the development of personality more than the restriction on freedom to practice any occupation, and thus the restriction on the former is under greater scrutiny than that on the latter” (2008Hun-Ba110, May 27, 2010; 2013Hun-Ma585, etc., March 31, 2016).

The Constitution provides for freedom from intrusion into one’s place of residence (Article 16), the right to privacy (Article 17) and freedom from the disclosure of correspondence against one’s will (Article 18) to protect **the freedom in the realm of private life**. The right to secrecy of private life is a fundamental right which protects individuals against state intrusion into their private lives, while the freedom of private life means protection against state obstruction or prohibition of the free formation of private life (2014Hun-Ba401, November 24, 2016).

Freedom of conscience (Article 19), freedom of religion (Article 20) and freedom of learning and the arts (Article 22) are **the freedom in the realm of spirituality**. The ‘conscience’ protected by the Constitution is a strong and earnest voice of one’s mind without acting according to which one’s existential value would collapse. The Constitutional Court of Korea opined that the ‘conscience’ protected under ‘freedom of conscience’ is not synonymous with the thoughts and values of the democratic majority; rather, it is extremely subjective as an individual phenomenon. Whether decisions based on conscience are reasonable and rational, or appropriate, or aligned with the legal order, social norm or ethical rules may not serve as the standard that judges the existence of conscience and thus all decisions based on conscience shall be protected by freedom of conscience (2007Hun-Ka12, etc., August 30, 2011; 2008Hun-Ka22, etc., August 30, 2011; 2011Hun-Ba379, etc., June 28, 2018).

Article 20 of the Constitution prescribes freedom of religion (Section 1), the prohibition of state religion, and the separation of religion and state (Section 2).

Freedom of religion generally consists of three elements of freedom: freedoms of belief, religious activities, and religious association and assembly (*2000Hun-Ma159*, September 27, 2001). Unlike freedom of belief, freedom of religious activities is not an absolute freedom. Therefore, it may be restricted for the maintenance of law and order or for public welfare (*2000Hun-Ma159*, September 27, 2001).

Article 21 of the Constitution guarantees **freedom of speech and the press, and freedom of assembly and association**. Traditionally, freedom of expression refers to the freedom to express and disseminate thoughts or opinions. It is indispensable for individuals to maintain human dignity and worth and pursue happiness as well as for the nation to realize popular sovereignty. It is the freedom to express externally the spiritual freedom such as freedom of religion, freedom of conscience and freedom of learning and the arts. This provision also stipulates the ban on licensing or censorship of speech and the press and licensing of assembly and association, and establishes the conditions for restricting the freedom of speech and the press (the honor or rights of other persons, public morals, or social ethics). (For more details, see the 2020 AACC SRD Research Publication, entitled *Freedom of Expression: Experience of AACC Members* (pp. 203-259)).

Article 23(1) of the Constitution ensures the private property system and individual's **property rights** while granting the legislature the authority to enact specific rules by providing that "the right of property of all citizens shall be guaranteed. The contents and limitations thereof shall be determined by Act." Also, Article 23(2) stipulates social obligation in the exercise of property rights by stating that the exercise of property rights shall conform to the public welfare. Article 23(3) prescribes the expropriation, use or restriction of private property from public necessity and compensation therefor (it shall be governed by Act: *Provided that* in such a case, just compensation shall be paid).

The Constitutional Court understood the legislative objective of Article 23 of the Constitution that "it basically ensures all citizens freely to use, profit from, and dispose of specific property under the private property system while permitting expropriation, use or restriction of property rights for public necessity only when constitutional requirements are fulfilled." It found that even if the expropriation process has been completed in line with the requirements on land expropriation for public use, where the expropriated land becomes useless due to the cancellation of original public projects or the land is not used in practice, "the expropriated can recover the ownership of the land etc., i.e. the right to repurchase is derived from the constitutional right of private property ownership, and thus falls under the constitutionally guaranteed property right" (*93Hun-Ba29*, February

23, 1995; *2008Hun-Ba18, etc.*, May 28, 2009).

d) Rights to political participation (Articles 24 and 25)

Article 24 and Article 25 of the Constitution provide for the right to vote and the right to hold public office. The right to elect the President, the members of the National Assembly and the members of local councils are derived from Article 67(1), Article 41(1) and Article 118(2), respectively. The Constitutional Court considers the right to elect the heads of local governments also as a fundamental right protected by Article 24 of the Constitution.

The Constitution clearly states that the right to vote and the right to hold public office are rights enshrined in the Constitution and applies the principle of statutory reservation in their concretization by providing that (all citizens shall) "... have the right ... under the conditions as prescribed by Act." The Constitutional Court ruled that though Article 24 of the Constitution takes on the form of statutory reservation, this is to realize and ensure the right to vote and not to restrict it. Hence, the legislature should enact laws that guarantee the right to vote to its fullest. The Court further held that a strict scrutiny should be employed to review the constitutionality of the law restricting the right to vote, and its constitutionality shall be reviewed by the principle against excessive restriction under Article 37(2) of the Constitution (*2012Hun-Ma815, etc.*, July 25, 2013; *2012Hun-Ma409, etc.*, January 18, 2014; *2015Hun-Ma821, etc.*, January 25, 2018).

Meanwhile, the right to referendum (Articles 72 and 130 of the Constitution), a direct political right, is placed in Chapter 4 (The Executive) and Chapter 10 (Amendments to the Constitution), outside of the Bill of Rights chapter (Chapter 2).

e) Claim rights (Articles 26 to 30)

Articles 26 to 30 of the Constitution stipulate claim rights and consist of the right to petition (Article 26), the right to trial (Article 27), the right to criminal compensation (Article 28), the right to claim for state compensation (Article 29) and the right to receive aid from the State (Article 30).

With regard to the right to trial, the Constitution contains express provisions to ensure the right to trial in conformity with law by judges qualified under law; the right to a speedy trial; the accused's right to a public trial without delay unless there are justifiable reasons; criminal victim's right to make a statement during the proceedings of the trial; and the right to be presumed innocent.

In connection with the right to claim for state compensation, the Constitutional Court held that “the constitutional provision regarding the right to claim for state compensation guarantees this right as a fundamental claim right, and individual citizens who meet the requirements for its invocation are entitled to claim monetary compensation as their property right” (*94Hun-Ba20*, June 13, 1996; *96Hun-Ba24*, February 20, 1997; *2013Hun-Ba395*, April 30, 2015). Given the above, the right to seek state compensation also has the nature as the property right.

In the case of claim rights which require state action or assistance, specific legislative formation is necessary. The Constitution makes this point clear by using the expressions such as “as prescribed by Act,” or “in conformity with the Act.”

#### f) Social rights (Articles 31 to 36)

Articles 31 to 36 of the Constitution stipulate social rights including the right to receive an education corresponding to their abilities (Article 31), the right to work and the three basic labor rights (Articles 32 and 33), the right to lead a life worthy of human beings (Article 34), the right to a healthy and pleasant environment (Article 35), and the right to marriage and family life (Article 36).

Unlike liberty rights, social rights require specific elaboration by the legislature and the questions at issue concern whether legislative formative power was exercised in consideration of the fundamental spirit of social rights enshrined in the Constitution and whether the required minimum legislative action has been taken to realize them. The Constitutional Court of Korea applied the principle against arbitrariness when questioned about the right to lead a life worthy of human beings provided by Article 34 of the Constitution (*94Hun-Ma33*, May 29, 1997; *2000Hun-Ma342*, *etc.*, September 27, 2001).

Article 31 also provides for free compulsory education for children as well as ‘the right to receive an education corresponding to their abilities.’ Article 32 stipulates the enforcement of a minimum wage system, the determination of working conditions by law, and special protection for working women and children. Also, the Constitution guarantees the three basic labor rights, while specifying that these rights may be restricted for public officials or workers employed by important defense industries. The three basic labor rights (Articles 33) and the right to marriage and family life (Article 36) contain both the elements of social rights and liberty rights.

## **B. Unenumerated constitutional rights**

### **1. Recognition and content of unenumerated constitutional rights**

The fundamental rights protected by the Constitution include ‘unenumerated constitutional rights’ as well as ‘enumerated constitutional rights.’ Article 37(1) of the Constitution declares that even the freedoms and rights not expressly provided for in the Constitution shall be guaranteed when necessary for human dignity and worth by stipulating that “Freedoms and rights of citizens shall not be neglected on the grounds that they are not enumerated in the Constitution.”

The Constitutional Court has recognized various unenumerated fundamental rights through specific and individual cases. The Court has recognized the right to know (*88Hun-Ma22*, September 4, 1989), the right to sexual self-determination (*89Hun-Ma82*, September 10, 1990), the right to free development of personality (*89Hun-Ma204*, June 3, 1991), the general right to personality (*89Hun-Ma165*, September 16, 1991), the right to general freedom of action (*90Hun-Ba23*, April 14, 1992), the right to life (*95Hun-Ba1*, November 28, 1996), the right of consumers (*96Hun-Ka18*, December 26, 1996), the right to rest (*2000Hun-Ma159*, September 27, 2001), and the right to honor (*2001Hun-Ba43*, January 31, 2002) as unenumerated fundamental rights (*2005Hun-Ma19*, December 22, 2005). In addition, the Constitutional Court viewed the right to general freedom of action as a comprehensive right to freedom and acknowledged different rights and freedoms derived therefrom such as freedom of contract, freedom of transit, and the right of the detainee to meet and interact with others (*89Hun-Ma204*, June 3, 1991; *2002Hun-Ma193*, etc., November 27, 2003; *2011Hun-Ba51*, November 24, 2011).

Further, the Constitutional Court recognized the right to informational self-determination as an independent fundamental right not specified in the Constitution in the case on collecting and computerizing fingerprints and using them for investigation purposes (*99Hun-Ma513*, etc., May 26, 2005) and ‘parents’ right to educate children’ as a fundamental right in the case regarding the ban on extracurricular lessons (*98Hun-Ka16*, etc., April 27, 2000). Also, the ‘territorial right’ was drawn from Article 3 of the Constitution which provides that “The territory of the Republic of Korea shall consist of the Korean peninsula and its adjacent islands.” (*99Hun-Ma139*, etc., March 21, 2001)

### **2. Grounds and conditions for recognition of unenumerated constitutional rights**

The Constitutional Court has presented Article 10, Article 37(1) or specific fundamental rights provisions in the Constitution as grounds for recognizing

unenumerated constitutional rights. Specifically, unenumerated constitutional rights were derived from a) the former part of Article 10(1) (human dignity and worth); b) the latter part thereof (the right to pursue happiness); c) the entire provision as grounds for the recognition of fundamental rights not expressly provided in the Constitution; or d) other rights provisions enumerated in the Constitution with Article 10. Furthermore, the Court mentioned Article 37(1) of the Constitution as grounds for recognizing unenumerated constitutional rights.

Concerning grounds for the recognition of fundamental rights unenumerated in the Constitution, the Constitutional Court found that “in order to newly acknowledge a fundamental right unenumerated in the Constitution, we should find the special need for the right and the content of the right (the scope of protection afforded to the right) should be relatively clear, so that the right should be acknowledged as having concrete substance of a fundamental right. That is, the right should have the ability to demand from persons subject to the norm to ensure this right, and legal remedy should be sought through court proceedings in case of violation” and presented ‘the special need’ and ‘the substance as a concrete right’ as grounds for recognizing fundamental rights not enumerated in the Constitution (*2007Hun-Ma369*, May 28, 2009; *2008Hun-Ma477*, August 30, 2011; *2010Hun-Ba368*, December 29, 2011).

### 3. Unenumerated constitutional rights recognized through jurisprudence

#### a) The right to life

The Constitutional Court recognized that the right to life has the nature of a fundamental right by holding that “human life is noble and the source of the dignified human being that cannot be replaced by anything in the world. Such right to life, though not expressly provided in the Constitution, is a transcendental right granted by the law of nature based on the human instinct to survive and the purpose of human existence. It is thus considered as one of the most essential fundamental rights functioning as the prerequisite for all fundamental rights” (*95Hun-Ba1*, November 28, 1996).

With regard to capital punishment, the Constitutional Court ruled that capital punishment does not violate the Constitution based on the following reasoning: in light of the textual interpretation, the Constitution implicitly acknowledges capital punishment (Article 110(4))<sup>148</sup> and it does not explicitly recognize

<sup>148</sup> Article 110(4) of Constitution stipulates that “Military trials under an extraordinary martial law may not be appealed in case of crimes of soldiers and employees of the military; military espionage; and crimes as defined by Act in regard to sentinels, sentry post, supply of harmful foods and beverages, and prisoners of war, except in the case of a death sentence.”



absolute fundamental rights; and the right to life may have to be subject to the general statutory reservation under Article 37(2) of the Constitution. However, in a dissenting opinion, a justice argued that considering the background and the context of introducing the exception clause of Article 110(4) of the Constitution, since the provision was drafted to respect human rights by restricting the imposition of death penalty, it is hard to believe that the clause provides a constitutional ground to uphold capital punishment; and that capital punishment infringes on the essential aspect of the right to life and the personal liberty and thus it shall be repealed (*2008Hun-Ka23*, February 25, 2010).

#### b) The right to self-determination

The general right to personality is derived from human dignity protected by the first sentence of Article 10 of the Constitution (*89Hun-Ma160*, April 1, 1991; *2002Hun-Ka14*, June 26, 2003). The Constitutional Court recognized the right to self-determination as a basic constitutional right by commenting that the general right to personality comprehensively protects the basic conditions for free development of personality which has a close connection with human dignity, and the individual's right to self-determination is derived from the general right to personality; and that all citizens are entitled to the right to freely create their own private sphere of life based on their dignified right to personality (*95Hun-Ka14*, etc., March 27, 1997; *2010Hun-Ba402*, August 23, 2012; *2009Hun-Ba17*, etc., February 26, 2015; *2012Hun-Ma940*, November 26, 2015).

Also, the Constitutional Court has recently held that the Self-Abortion Provision in the Criminal Act infringes upon pregnant women's right to self-determination and therefore does not conform to the Constitution. The Court explained as follows: the right to self-determination includes women's right to freely create their own private sphere of life based on their dignified right to personality and this covers the right of a pregnant woman to determine whether to continue her pregnancy and give birth. With a few exceptions set forth in the *Mother and Child Health Act*, the Self-Abortion Provision imposes a complete and uniform ban on all abortions throughout pregnancy and provides criminal punishment for violations of this ban, thereby compelling a pregnant woman to continue her pregnancy and give birth (*2017Hun-Ba127*, April 11, 2019).

In another case, the Constitutional Court held that since the life sustaining treatment for the dying patient can be seen as artificially extending the final stage of the process of death which has already been started in natural condition, the decision and actual practice of withdrawing life sustaining treatment cannot be deemed a suicide, which is an arbitrary disposal of life; rather, this corresponds to



the human dignity and worth in that such practice is to leave one's life at the hand of nature, freeing the dying patient from non-natural intrusion on the body, and such decision should be protected as one of the aspects of the self-determination right guaranteed by the Constitution (*2008Hun-Ma385*, November 26, 2009).

c) Parents' right to educate children

The Constitutional Court recognized parents' right to educate children as a fundamental right by ruling that the right is an inviolable and inalienable human right that all humans should enjoy regardless of their nationality, and it is, though not enumerated in the Constitution, a crucial fundamental right arising out of Article 36(1) (protection of marriage and family life), Article 10 (the right to pursue happiness) and Article 37(1) of the Constitution (*98Hun-Ka16, etc.*, April 27, 2000).

d) The right to informational self-determination

The Constitution has express provisions for the right to privacy, the privacy of correspondence, and the right to pursue happiness, but not for the right to informational self-determination. However, the Constitutional Court acknowledged the right to control one's own personal information as an independent constitutional right in the 2005 case of the constitutional complaint regarding the fingerprinting system (*99Hun-Ma513, etc.*, May 26, 2005).

The Constitutional Court commented that a need has arisen to constitutionally approve the right to informational self-determination as an independent fundamental right since the rapid changes in information and communications technology has brought the new constitutional issue of privacy regarding the collection and processing of personal information to the fore of public attention. It also mentioned that approving the right to informational self-determination as a constitutional right protects personal information from the risk inherent in the development of information and communications technology, thereby serving as the minimum constitutional safeguard necessary to protect the individual's freedom of self-determination, and further to prevent the foundation of a free democracy from being generally disrupted.

Also, the Court held that in addition to the right to privacy under Article 17 of the Constitution and the general right to personality arising from human dignity and worth and the right to pursue happiness under the first sentence of Article 10 thereof, the provision regarding the free democratic basic order, the principle of popular sovereignty or the principle of democracy under the Constitution

can be considered as constitutional grounds of the right to informational self-determination. However, it is impossible to completely include what this right seeks to protect in some of the above-mentioned fundamental rights and constitutional principles. Hence, it is not desirable to select only one or two of the above as the constitutional grounds of this right; rather, it should be regarded as an independent fundamental right not specified in the Constitution but based on those rights and principles above.

## **C. Protection and limitation**

### **1. Constitutional provisions for protection of fundamental rights**

As noted above, the Constitution of the Republic of Korea provides for protection of the citizens' rights in Articles 10 through 36 of Chapter 2. The second sentence of Article 10 explicitly prescribes the State's obligation to protect fundamental rights by providing that "It shall be the duty of the State to confirm and guarantee the fundamental and inviolable human rights of individuals," and hence it declares that the State not only has a negative duty to refrain from violating fundamental rights of the people but also a positive duty to protect and realize them.

### **2. Constitutional provisions for restriction of fundamental rights**

Article 37(2) of the Constitution regulates possible restrictions of fundamental rights and their limitations by providing that "The freedoms and rights of citizens may be restricted by Act only when necessary for national security, the maintenance of law and order or for public welfare. Even when such restriction is imposed, no essential aspect of the freedom or right shall be violated." This provision sets out a series of important principles in restricting fundamental rights including the principle of statutory reservation, the principle against excessive restriction, and the prohibition of infringing upon the essential aspect of fundamental rights.

In addition to the general rights restriction provision mentioned above, there are provisions that guarantee specific fundamental rights while expressly specifying the grounds for their restrictions in the Constitution. These provisions include Article 8(4) (restrictions on the freedom of political organization and activity for protection and maintenance of the 'fundamental democratic order'), Article 21(4) (restrictions on freedom of speech and the press for protection of the honor or rights of other persons, public morals, and social ethics) and Article 23(3) (expropriation, use or restriction of private property for 'public necessity').

Besides, Article 76(1), Article 77(1) and Article 77(3) of the Constitution prescribe the restrictions of fundamental rights for the purpose of maintaining national security or public peace and order upon the issuance of a national emergency order.

### **III. Interpretation and current issues**

#### **A. Diversity in Asia and fundamental rights**

##### **1. Provisions relating to peaceful unification**

Article 3 of the Constitution of the Republic of Korea stipulates that “The territory of the Republic of Korea shall consist of the Korean peninsula and its adjacent islands.” However, the Korean peninsula is still divided since its national independence in 1948 and the armistice of the Korean War in 1953, and accordingly the Constitution has the distinct feature of containing provisions relating to peaceful unification.

The preamble of the Constitution states that “We, the people of Korea, ... having assumed the mission of ... peaceful unification of our homeland and having determined to consolidate national unity with justice, humanitarianism and brotherly love...” and Article 4 stipulates that “The Republic of Korea shall seek unification and shall formulate and carry out a policy of peaceful unification based on the principles of freedom and democracy.” Article 66(3) provides that “The President shall have the duty to pursue sincerely the peaceful unification of the homeland.”

These provisions indicate that unification is the task and mission of the people and nation in the reality of the national division and declare the principle of peaceful unification based on the principles of freedom and democracy.

Nevertheless, the Constitutional Court held that individual citizens’ fundamental right to unification, notably the right to request the State to take concrete actions regarding unification or the right to take certain actions in that regard cannot be understood as deriving from the above provisions (*98Hun-Ba63*, July 20, 2000).

## 2. Conscientious objector case

All citizens of the Republic of Korea shall have the duty of national defense under Article 39(1) of the Constitution. Every man of the Republic of Korea has the duty to perform military service under the *Military Service Act* and shall be subject to punishment if he evaded military service without justifiable grounds. In this connection, the question arose as to whether the provision in the *Military Service Act*, which imposed criminal punishment on persons refusing the duty to perform military service involving military training on the grounds that it was against their conscience according to their belief such as religion without introducing the alternative service system, was unconstitutional.

The Constitutional Court ruled the challenged provision constitutional in 2004 and 2011 on the main grounds of the decrease of available military service resources caused by introducing the alternative service system; the difficulties in determining whether a refusal of military service is based on genuine conscience; and the unique security situation where South and North Korea confront each other (2002Hun-Ka1, August 26, 2004; 2008Hun-Ka22, etc., August 30, 2011).

Nonetheless, the controversy over the imposition of criminal punishment on conscientious objectors continued thereafter. In 2018, the Constitutional Court reasoned that as long as the introduction of the alternative service system does not have significant influence on national defense and it does not reduce the effectiveness of the military system, refusing or delaying the introduction of the alternative service system for reasons of the unique security situation of the nation cannot be justified. Accordingly, it found that the Categories of Military Service Provision which failed to stipulate the alternative service program for conscientious objectors infringes on objectors' freedom of conscience by violating the principle against excessive restriction and it does not conform to the Constitution (2011Hun-Ba379, etc., June 28, 2018).

## B. Accession to international human rights treaties and protection of constitutional rights

The Republic of Korea is a state party to major human rights instruments such as the International Covenant on Civil and Political Rights and International Covenant on Economic, Social and Cultural Rights (acceded in 1990), International Convention on the Elimination of All Forms of Racial Discrimination (acceded in 1978), Convention on the Elimination of All Forms of Discrimination

Against Women (acceded in 1984), Convention on the Rights of the Child (acceded in 1991), Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (acceded in 1995) and Convention on the Rights of Persons with Disabilities (acceded in 2008).

Article 6(1) of the Constitution prescribes that “Treaties duly concluded and promulgated under the Constitution and the generally recognized rules of international law shall have the same effects as the domestic laws of the Republic of Korea.” The provision, however, does not further elaborate on the stipulation ‘the same effects as the domestic laws.’

In this context, the Constitutional Court ruled that the Constitution takes precedence over treaties, given the interpretation of Article 6(1) of the Constitution and Article 5 of the Addenda (acts, decrees, ordinances and treaties in force at the time this Constitution enters into force, shall remain valid unless they are contrary to this Constitution) and treaties concluded upon consent of the National Assembly hold the effect as statutes or equivalent thereto (*2012Hun-Ma166*, November 28, 2013; *99Hun-Ma139*, etc., March 21, 2001). However, with regard to the Universal Declaration of Human Rights, the Court viewed that it is not legally binding but only has a mere declaratory effect (*89Hun-Ka106*, July 22, 1991; *2005Hun-Ma971*, December 26, 2008).

According to the above interpretation, an international human rights treaty is not equivalent to the Constitution in terms of its effect, and thus it cannot serve as a norm of constitutional adjudication in principle. The violation of an international human rights treaty alone does not lead to unconstitutionality or infringement of fundamental rights in constitutional review of statutes or constitutional complaint.

However, the Constitutional Court has rendered decisions in respect and consideration of international laws by making reference to or taking into account international human rights instruments in the interpretation of the Constitution. For instance, the Court referred to the International Covenant on Civil and Political Rights to complement the justification for its interpretation in adjudicating whether the constitutional freedom of conscience was breached (*89Hun-Ma160*, April 1, 1991); used the Convention on the Elimination of All Forms of Discrimination Against Women as a supporting argument for acknowledging the unfairness of the practice of giving veterans extra points in civil service examinations (*98Hun-Ma363*, December 23, 1999); and mentioned when explaining the general principle of equality that the relevant provisions of the International Covenant on Economic, Social and Cultural Rights should be considered in interpreting our Constitution (*2004Hun-Ma670*, August 30, 2007).

## C. Current issues

While today's remarkable advancement of information and communications technology has enhanced the freedom of expression, and brought positive effects in achieving the principle of popular sovereignty and democracy, it also came with a higher risk of infringing upon fundamental rights including the right to personality, the secrecy of privacy, and freedom of correspondence, resulting from the collection, use, disclosure and monitoring of personal information. The issue of protecting such fundamental rights in the era of information and communications technologies has become an issue amid the COVID-19 pandemic, which began in early 2020.

In this connection, the Constitutional Court of the Republic of Korea has been working to protect the freedom of expression on the Internet by rendering a series of relevant decisions including the unconstitutionality decision on the provision that requires information and communications service users to have their identity verified to use online bulletin boards and the decision of conditional unconstitutionality on the provision which bans campaigning through internet media outlets.

Also, the Court has been actively responding to new and emerging human rights issues stemming from the development of information and communications technologies. For example, the Constitutional Court held in a 2005 decision that the right to informational self-determination is guaranteed as a constitutional right. In this regard, the Court decided several landmark cases. For example, the Constitutional Court found that the provisions of the *Protection of Communications Secrets Act*, which allow the interception (packet inspection) of telecommunications transmitted and received through internet lines while failing to provide a monitoring or control mechanism to prevent the abuse of power by investigative agencies, violate the secrecy and freedom of communications and privacy. Hence, the Court issued a decision of constitutional nonconformity regarding the provisions of the *Protection of Communications Secrets Act* (2016Hun-Ma263, August 30, 2018). It also rendered a decision of nonconformity to the Constitution on the provisions of the same Act which serve as grounds for investigative agencies to request a telecommunications business entity to provide the location tracing data of a telecommunication service subscriber and cell tower dumps. In its decision, it observed that since a procedural control mechanism is not in place to prevent investigative agencies from abusing their power in the handling of sensitive information and there are measures that do not interfere with investigation but are less intrusive, the above provisions violate the principle against excessive restriction and, therefore, infringe upon information subjects'

right to informational self-determination and freedom of communications (2012Hun-Ma191, *etc.*, June 28, 2018; 2012Hun-Ma538, June 28, 2018).

Also, as for the case related to biomedical engineering, the Constitutional Court held that the provisions under the *Act on Use and Protection of DNA Identification Information*, which failed to prescribe procedures for persons subject to collection of DNA samples to express their opinion or to appeal against a warrant issued, violate the principle against excessive restriction and thus infringe upon the right to trial of the persons subject to collection of DNA samples. Therefore, the Court delivered a decision of nonconformity to the Constitution regarding the challenged provisions (2016Hun-Ma344, *etc.*, August 30, 2018).

Concerning the right to a healthy and pleasant environment, the Constitutional Court recognized the State's positive duty to protect fundamental rights in the case of infringement of the people's right to a healthy and pleasant environment by the third private party under certain circumstances. The Court opined that it is within the remit of legislators to determine how to achieve the state's duty to protect fundamental rights, and thus, when examining whether the State fulfilled its duty to protect the people's right to a healthy and pleasant environment, the criterion for judgement shall be whether the State, at least, took the minimum protective measures in an adequate and efficient manner (the principle against excessive non-protection). However, it added that there is no general and uniform standard to determine in which case the principle against excessive non-protection is violated; rather, each case should be reviewed by balancing conflicting interests on a case-by-case basis (2018Hun-Ma730, December 27, 2019).

Meanwhile, the Constitutional Court is currently reviewing a constitutional complaint which argues that the State has set up a highly insufficient greenhouse gas emission reduction target in response to climate change and therefore infringed the complainant's right to a healthy and pleasant environment and the rights to health, life and personal safety.

## **Annex 1: List of cited legal provisions**

### **Constitution of the Republic of Korea (last amended 29 Oct. 1987)**

- Preamble, Article 3, 4, 6(1), 8(1)(4), 10-39, 41(1), 66(3), 67(1), 110(4), 118(2), 72, 76(1), 77(1)(3), 130, Article 5 of the Addenda



## **Annex 2: List of cited cases**

### **Constitutional Court**

- *88Hun-Ma22*, September 4, 1989
- *88Hun-Ka13*, December 22, 1989
- *89Hun-Ka95*, September 3, 1990
- *89Hun-Ma82*, September 10, 1990
- *89Hun-Ma160*, April 1, 1991
- *89Hun-Ma204*, June 3, 1991
- *90Hun-Ma56*, June 3, 1991
- *89Hun-Ka106*, July 22, 1991
- *89Hun-Ma165*, September 16, 1991
- *90Hun-Ba23*, April 14, 1992
- *93Hun-Ba29*, February 23, 1995
- *93Hun-Ka14*, July 21, 1995
- *94Hun-Ba20*, June 13, 1996
- *95Hun-Ba1*, November 28, 1996
- *96Hun-Ka18*, December 26, 1996
- *96Hun-Ba24*, February 20, 1997
- *95Hun-Ka14, etc.*, March 27, 1997
- *94Hun-Ma33*, May 29, 1997
- *97Hun-Ka10, etc.*, February 27, 1998
- *97Hun-Ma194*, March 26, 1998
- *98Hun-Ma363*, December 23, 1999
- *98Hun-Ka16, etc.*, April 27, 2000
- *98Hun-Ba63*, July 20, 2000
- *99Hun-Ma139, etc.*, March 21, 2001
- *2000Hun-Ma735*, June 28, 2001
- *2000Hun-Ma159*, September 27, 2001
- *2000Hun-Ma342, etc.*, September 27, 2001
- *99Hun-Ma494*, November 29, 2001
- *2001Hun-Ba43*, January 31, 2002
- *2002Hun-Ka14*, June 26, 2003
- *2002Hun-Ma193, etc.*, November 27, 2003
- *2002Hun-Ka1*, August 26, 2004
- *2002Hun-Ma328*, October 28, 2004
- *2003Hun-Ka18*, October 28, 2004
- *2004Hun-Ma456*, December 16, 2004
- *99Hun-Ma513, etc.*, May 26, 2005
- *2005Hun-Ma19*, December 22, 2005



- 2004Hun-Ma643, June 28, 2007
- 2004Hun-Ma670, August 30, 2007
- 2005Hun-Ma971, December 26, 2008
- 2007Hun-Ma369, May 28, 2009
- 2008Hun-Ba18, *etc.*, May 28, 2009
- 2008Hun-Ma385, November 26, 2009
- 2008Hun-Ka23, February 25, 2010
- 2008Hun-Ba110, May 27, 2010
- 2009Hun-Ma338, May 27, 2010
- 2007Hun-Ka12, *etc.*, August 30, 2011
- 2008Hun-Ka22, *etc.*, August 30, 2011
- 2008Hun-Ma477, August 30, 2011
- 2011Hun-Ba51, November 24, 2011
- 2010Hun-Ba368, December 29, 2011
- 2008Hun-Ma430, August 23, 2012
- 2010Hun-Ba402, August 23, 2012
- 2012Hun-Ma815, *etc.*, July 25, 2013
- 2012Hun-Ma166, November 28, 2013
- 2012Hun-Ma409, *etc.*, January 18, 2014
- 2012Hun-Ma431, *etc.*, January 28, 2014
- 2014Hun-Ma7, February 27, 2014
- 2011Hun-Ma502, June 26, 2014
- 2009Hun-Ma256, *etc.*, July 24, 2014
- 2009Hun-Ba17, *etc.*, February 26, 2015
- 2013Hun-Ba395, April 30, 2015
- 2012Hun-Ma940, November 26, 2015
- 2013Hun-Ma585, *etc.*, March 31, 2016
- 2014Hun-Ma367, March 31, 2016
- 2014Hun-Ba401, November 24, 2016
- 2013Hun-Ma142, December 29, 2016
- 2015Hun-Ma821, *etc.*, January 25, 2018
- 2011Hun-Ba379, *etc.*, June 28, 2018
- 2012Hun-Ma191, *etc.*, June 28, 2018
- 2012Hun-Ma538, June 28, 2018
- 2016Hun-Ma263, August 30, 2018
- 2016Hun-Ma344, *etc.*, August 30, 2018
- 2017Hun-Ba127, April 11, 2019
- 2018Hun-Ma730, December 27, 2019

## 6. Kyrgyz Republic

### Constitutional Court

#### *Overview*

The new Constitution of the Kyrgyz Republic was adopted on 11 April 2021 via referendum, entering into force on 5 May 2021. As part of this development, the Constitutional Chamber of the Supreme Court was reformed into the Constitutional Court of the Kyrgyz Republic. The new Constitution covers constitutional rights in Part Two, which consists of six chapters. Overall, the rights provisions found in Part Two of the Constitution can be consecutively categorized into three groups: personal rights and freedoms, political rights, and socio-economic rights. According to Article 62.2 of the Constitution, rights and freedoms established in the Constitution shall not be exhaustive and shall not be interpreted as denial or derogation of other universally recognized human and civil rights and freedoms. However, due to the new Constitution having only entered into force very recently, there are currently no relevant court decisions on the matter of unenumerated constitutional rights. Regarding historical and cultural contexts that are particularly relevant for the interpretation of constitutional rights, the following can be named as examples: sovereignty of the people, the form of government, the secular state, freedom of conscience and belief, folk customs and traditions, and elements of customary law. The Kyrgyz Republic has so far ratified eight of the nine core UN human rights treaties.

#### *Outline*

##### **I. Rights in the Constitution**

- A. Constitutional bill of rights
- B. Rights elsewhere in the Constitution
- C. Concretization of constitutional rights
- D. Historical background and development

##### **II. Classification and content**

- A. Enumerated constitutional rights
- B. Unenumerated constitutional rights
- C. Protection and limitation

##### **III. Interpretation and current issues**

- A. Rights in diverse contexts
- B. Impact of international norms

##### **Annex: List of cited legal provisions**

***Note: The Kyrgyz Republic adopted a new Constitution, which entered into force on May 5, 2021.***

*It should be noted that on April 11, 2021, the draft Law of the Kyrgyz Republic “On the Constitution of the Kyrgyz Republic” was submitted to a referendum (popular vote) for adoption by the citizens of the Kyrgyz Republic. According to the results of the referendum, the majority of the population who participated in the referendum voted for the adoption of the new Constitution of the Kyrgyz Republic. Thus, the new Constitution of the Kyrgyz Republic adopted, entered into force on May 5, 2021.*

*Due to the fact that the Constitutional Chamber of the Supreme Court of the Kyrgyz Republic was reformed into the Constitutional Court of the Kyrgyz Republic, further on throughout the following text, the new name of the constitutional control body will be used - the Constitutional Court of the Kyrgyz Republic.*

## **I. Rights in the Constitution**

### **A. Constitutional bill of rights**

The constitutional rights of human and a citizen, along with their freedom and duties, are enshrined in part two of the Constitution of the Kyrgyz Republic. This part of the Constitution consists of 6 chapters, including 43 Articles, in the normative provisions of which the following constitutional rights are enshrined:

#### *Chapter II. Human and civil rights and freedoms*

- Everyone shall have an inalienable right to life (Article 25.1);
- Everyone has the right to protect his/her life and health, the life and health of others from unlawful infringements within the limits of necessary defense (Article 25.2);
- Each child shall have the right to the level of life, necessary for his/her physical, mental, spiritual, moral and social development (Article 27.1);
- Everyone shall have the right to inviolability of one’s private life and protection of honor and dignity (Article 29.1);
- Everyone shall have the right to secrecy of correspondence, telephone and other conversations, postal, telegraphic, electronic and other communications (Article 29.3);

- Everyone shall be guaranteed protection, including judicial defense, from illegal collection, storage and dissemination of confidential information and information on private life of a person; the right for the compensation of material and moral damage caused by illegal action shall be guaranteed (Article 29.5);
- Everyone shall have the right of the inviolability of housing as well as other objects to which he/she has proprietary or other right (Article 30.1);
- Everyone shall have the right to liberty of movement, freedom to choose their destination and residence within territory of the Kyrgyz Republic (Article 31.1);
- A citizen of the Kyrgyz Republic shall have the right to travel freely outside the Kyrgyz Republic and return without hindrance (Article 31.2);
- Everyone shall have the right to freedom of thought and opinion (Article 32.1);
- Everyone shall have the right to free expression of opinion, freedom of speech and press (Article 32.2);
- Everyone shall have the right to freely seek, receive, keep and use information and disseminate it orally, in writing or otherwise (Article 33.1);
- Everyone shall have the right to acquaint with the information on himself/herself in state authorities, local self-governance bodies, institutions and organizations (Article 33.2);
- Everyone shall have the right to obtain information on the activity of state authorities, local self-governance bodies as well as officials thereof, legal entities with the participation of state authorities and local self-governance bodies as well as organizations financed from the republican and local budgets (Article 33.3);
- Everyone shall be guaranteed freedom of conscience and belief (Article 34.1);
- Everyone shall have the right to confess individually or jointly with other persons any religion or not to confess religion (Article 34.2);
- Everyone shall have the right to freely choose and have religions and other convictions (Article 34.3);
- Everyone shall have the right to compensation by the state for damage caused by illegal acts (inaction) of state authorities, local self-governance bodies or officials thereof in their official capacity (Article 35);
- Everyone shall have the right of freedom of association (Article 36).

### *Chapter III. Political rights*

- Citizens of the Kyrgyz Republic shall have the right to elect and to be elected to state authorities and local self-governance and also take part in referendum (Article 37.1);

- Citizens of the Kyrgyz Republic have the right to take part in the management of the affairs of society and the state both directly and through their representatives (Article 37.2);
- Citizens shall have equal rights and equal opportunities to take up posts in civil and municipal service as well as promotion in accordance with the regulations established in the law (Article 37.3);
- Citizens of the Kyrgyz Republic shall have the right to participate in the discussion and adoption of laws and decisions of republican and local significance (Article 37.4);
- Everyone shall have the right to appeal to state authorities, local self-governance bodies as well as officials thereof, these officials should provide a substantiated answer within the deadlines envisaged in the law (Article 37.5);
- Citizens shall have the right to participate in the formulation of the republican and local budgets as well as obtain information on actual spending of budgetary funds (Article 37.6);
- Everyone shall have the right to freedom of peaceful assembly (Article 39).

#### *Chapter IV. Socio-economic rights*

- Everyone shall have the right to possess, use and dispose of his/her property and results of activity (Article 40);
- Everyone shall have the right to economic freedom and free use of his/her abilities and property for any economic activity not prohibited by law (Article 41);
- Everyone shall have the right to freedom of labor, the use of his/her their abilities for work and choice of profession and occupation, labor protection and labor arrangements meeting safety and hygienic requirements as well as the right to remuneration for labor not less than minimum subsistence level (Article 42.1);
- Everyone shall have the right to leisure (Article 42.2);
- Everyone shall have the right to strike (Article 42.4);
- Everyone shall have the right to health protection and health insurance (Article 43.1);
- Citizens have the right to use the network of public health organizations free of charge (Article 43.3);
- Everyone shall have the right to housing (Article 45.1);
- Everyone shall have the right to education (Article 46.1);
- Everyone shall have the right to receive pre-school, general basic, secondary basic education and basic vocational education in state educational establishments free of charge (Article 46.3);
- Youth are guaranteed the right to spiritual, cultural, moral and physical development (Article 47.1);

- Everyone is guaranteed the freedom of scientific, technical, artistic and other types of creativity, teaching and learning. Everyone shall have the right to carry out creative activities in accordance with their interests and abilities (Article 48.1);
- Everyone shall have the right to participate in cultural life and access to cultural values (Article 48.2);
- Everyone shall have the right to environment favorable for life and health (Article 49.1);
- Everyone shall have the right to compensation of damage to health or property resulting from actions in the area of nature management (Article 49.2).

#### *Chapter V. Citizenship. Rights and duties of a citizen*

- Everyone who has proved their belonging to the people of Kyrgyzstan shall have the right to acquire citizenship of the Kyrgyz Republic in a simplified procedure. The Kyrgyz people living outside the Kyrgyz Republic shall have the right, regardless of their citizenship of another State, to acquire citizenship of the Kyrgyz Republic under a simplified procedure (Article 51.3);
- Foreign citizens or stateless persons who previously held citizenship of the Kyrgyz Republic have the right to obtain a residence permit in a simplified procedure (Article 51.7);
- Everyone shall have the right to perform any action and activity except for those prohibited by the Constitution and laws (Article 53.2).

#### *Chapter VI. Guarantees of human and civil rights and freedoms*

- Each person deprived of liberty shall have the right to humane treatment that does not degrade human dignity (Article 56.5);
- Everyone shall have the right to have their case examined by a court with the participation of jurors in cases stipulated by law (Article 58.1);
- Each convicted person shall have the right to seek a pardon or alleviation of punishment (Article 58.2);
- Each convicted person shall have the right to a consideration of his/her case by a higher court in accordance with the provisions of law (Article 58.4);
- Everyone shall have the right to apply in accordance with international treaties to international human rights bodies seeking protection of violated rights and freedoms in accordance with international treaties that have entered into force (Article 58.5);
- Everyone shall have the right to freedom and personal immunity (Article 59.1);
- Everyone shall be guaranteed judicial protection of his/her rights and

freedoms envisaged in the Constitution, laws, international treaties to which the Kyrgyz Republic is a party as well as universally recognized principles and norms of international law (Article 61.1);

- Everyone shall have the right to protect his/her rights and freedoms by all available means that are not prohibited by law (Article 61.2);
- Everyone shall have the right to be provided with qualified legal aid (Article 61.4).

However, rights and freedoms established in the Constitution shall not be exhaustive and shall not be interpreted as denial or derogation of other universally recognized human and civil rights and freedom (Article 62.2).

Constitutional provisions containing human and civil rights will also be substantively analyzed in the following issues in the specified configurations.

Part two of the Constitution of the Kyrgyz Republic consists of 6 interrelated chapters, the content of which together forms the heading of this part – “Rights, freedoms and duties of a human and a citizen”. The chapters that form the basis of part two of the Constitution are differentiated into general principles, personal rights and freedoms, political rights, and socio-economic rights, issues of citizenship and the rights and duties of a citizen, guarantees of human and civil rights and freedoms.

Part two of the Constitution, along with human and civil rights, also contains their constitutional duties, which are an integral part of the legal status of an individual. Thus, in accordance with the Constitution, the constitutional duties of a human and a citizen include:

- care for children and parents (Article 26.2);
- care for the environment, flora and fauna (Article 49.3);
- payment of taxes and fees (Article 50);
- compliance with the rules and norms of public behavior, respect for the interests of society (Article 53.1);
- compliance with the Constitution and laws, respect for the rights, freedoms, honor and dignity of others (Article 53.3);
- protection of Fatherland (Article 54).

Regarding the identification of duty bearers, the above-mentioned constitutional duties can be divided into two groups: general and private.

The first group includes the duties that apply to every person: protection and

respect for the natural environment and flora and fauna; compliance with the rules and norms of public behavior; respect for the interests of society; compliance with the Constitution and laws, respect for the rights, freedoms, honor and dignity of others.

The second group consists of duties that relate only to certain categories of the people: taking care of children and parents – able-bodied children and parents respectively; receiving basic general education – parents or persons replacing them; paying taxes and fees – taxpayers; protecting the Fatherland – persons liable for military service.

Thus, all the listed constitutional duties are covered only by part two of the Constitution of the Kyrgyz Republic, i.e. they are not additionally specified in other parts.

## **B. Rights elsewhere in the Constitution**

Elections and referendums all are conducted on the basis of universal, equal and direct suffrage by secret ballot. The right to vote shall be granted to the citizens of the Kyrgyz Republic having reached 18 years of age (Article 2.4). This constitutional right is enshrined in chapter I “Political foundations of the constitutional system” of part one “Foundations of the constitutional system” of the Constitution of the Kyrgyz Republic.

The mass media are guaranteed the right to receive information from state bodies and local self-government bodies, to disseminate it, and the right to freedom of expression (Article 10.1). This constitutional right is enshrined in chapter I of part one of the Constitution of the Kyrgyz Republic.

Representatives of all ethnic groups forming the people of the Kyrgyz Republic are guaranteed the right to create conditions for the preservation, study and development of their native language (Article 13.3). This constitutional right is enshrined in chapter I of part one of the Constitution of the Kyrgyz Republic.

Property shall be inviolable. No one can be arbitrarily deprived of his/her property (Article 15.2). The right of inheritance is guaranteed. This constitutional right is enshrined in chapter I of part one of the Constitution of the Kyrgyz Republic.

In cases and under the procedures envisaged in the law, the citizens of the Kyrgyz Republic shall have the right to participate in the administration of justice (Article



94.1). This constitutional right is enshrined in chapter IV “Judicial power of the Kyrgyz Republic” of part three “State authorities” of the Constitution of the Kyrgyz Republic.

Everyone shall have the right to challenge the constitutionality of a law or another regulatory legal act in case he/she believes that these acts violate rights and freedoms recognized in the Constitution (Article 97.3). This constitutional right is enshrined in chapter IV of part three of the Constitution of the Kyrgyz Republic.

Article 2.4 of the Constitution establishes the principles of electoral law, and the electoral qualification by age, while Article 37.1 differentiates the rights to active electoral rights and passive electoral rights. Thus, the constitutional rights located in two different parts are exclusively complementary in relation to each other and do not contain any differences in terms of the nature of their content and legal status.

Article 10.1 of the Constitution guarantees the mass media the right to receive information from state bodies and local self-government bodies, to disseminate it, and the right to freedom of expression. Article 10.1 is in direct connection with parts 1, 2 of Article 32 and Article 33.1 of the Constitution, since, in accordance with it, everyone shall have the right to freedom of thought and opinion. Everyone shall have the right to free expression of opinion, freedom of speech and press. Everyone shall have the right to freely seek, receive, keep and use information and disseminate it orally, in writing or otherwise. It should be noted that the right to organization of mass media belongs to physical persons and legal entities of the Kyrgyz Republic (Article 5 of the Law of the Kyrgyz Republic “On Mass Media”).

Representatives of all ethnic groups forming the people of the Kyrgyz Republic are guaranteed the right to create conditions for the preservation, study and development of their native language (Article 13.3). Since the state language is one of the integral attributes of the statehood of the Kyrgyz Republic, it is no coincidence that the issues of the state and official languages have found their place in part one of the Constitution and in particular in chapter I “Political foundations of the constitutional system”. The principle of the preservation, freely learning and developing the languages of all ethnic groups that make up the people of the Kyrgyz Republic promotes the use of other languages on the territory of the Kyrgyz Republic. In turn, the state, ensuring everyone’s right to education by making basic general education compulsory, creates conditions for teaching every citizen the state official and one of the foreign languages, starting from pre-school education institutions to secondary general education.

The principle of inviolability of property established by Article 15.2 of the Constitution is also reflected in Article 30.1, according to which everyone shall have the right of the inviolability of housing as well as other objects to which he/she has proprietary or other right. No one may penetrate housing or other objects against the will of a person who uses them. Regarding the implementation of the right of inheritance, it should be noted that it is already ensured by the establishment in the legislation of the Kyrgyz Republic of legal norms regulating the transfer of rights and obligations from the deceased to other persons. The main provisions governing inheritance relations are contained in part VI of the Civil Code of the Kyrgyz Republic.

The right of citizens to participate in the administration of justice (Article 94.1) is one of the components of another political right – the right to participate in the management of the affairs of society and the state both directly and through their representatives (Article 37.2). This right is exercised within the framework of constitutional, civil, criminal, administrative and other forms of legal proceedings in the manner prescribed by the legislation of the Kyrgyz Republic.

Everyone shall have the right to challenge the constitutionality of a law or another regulatory legal act in case he/she believes that these acts violate rights and freedoms recognized in the Constitution. The Constitutional Court, as the highest judicial authority, independently exercises constitutional control through constitutional legal proceedings in order to protect the foundations of the constitutional order, fundamental human and civil rights and freedoms, thereby ensuring the supremacy and direct operation of the Constitution (Article 97.1 and 97.3). This constitutional right is directly derived from part two of the Constitution, namely from parts 1 and 2 of Article 61, according to which everyone shall be guaranteed judicial protection of his/her rights and freedoms envisaged in the Constitution, laws, international treaties to which the Kyrgyz Republic is a party as well as universally recognized principles and norms of international law. Everyone shall have the right to protect his/her rights and freedoms by any means that are not prohibited by law.

Thus, the above-mentioned constitutional rights by their nature are more complementary/clarifying than establishing, since they are all confirmed to varying degrees in part two of the Constitution of the Kyrgyz Republic.

The constitutional duties of person and citizen are set out in part two of the Constitution.

### **C. Concretization of constitutional rights**

Article 6.1 of the Constitution of the Kyrgyz Republic defines that the Constitution shall have supreme legal force and direct application in the Kyrgyz Republic. The Constitution, being the Basic Law of the state, is at the top of the hierarchy of normative legal acts. It follows from the direct operation of the Constitution that certain provisions of the Constitution must be implemented regardless of the presence or absence of any normative legal acts that specify or detail these provisions.

Consequently, the normative provisions of the Constitution act directly, without the need for the adoption of normative legal acts. At the same time, the norms of the Constitution are quite general in nature, that if it is necessary to concretize them, constitutional laws, laws and other normative legal acts are adopted on the basis of the Constitution.

In any case, constitutional laws, laws and other normative legal acts adopted in the development of the norms of the Constitution should not contradict the Constitution.

### **D. Historical background and development**

First of all, it should be noted that on May 5, 2021, the new Constitution of the Kyrgyz Republic was adopted. The adoption of the Constitution was prompted by the need to implement the will of the people of Kyrgyzstan, expressed in two referendums held on January 10, 2021 and April 11, 2021. So, if on January 10, 2021, the people defined the form of government in the country as a presidential republic, then on April 11, 2021, they voted for the adoption of a new Constitution.

Consequently, the normative provisions on rights are listed in the second part of the Constitution and are structured according to blocks (personal, political, socio-economic and citizen's rights). For more information, see part I.A.1., above.

In the history of sovereign Kyrgyzstan, the Constitutions of May 5, 1993, and June 27, 2010 human and civil rights and freedoms were not codified and were allocated only in one separate block. However, the new version of the Constitution of May 5, 2021, classifies human rights and freedoms in part two into personal rights and freedoms (chapter II), political rights (chapter III), socio-economic rights (chapter IV), rights and duties of citizens (chapter V), guarantees of human

and civil rights and freedoms (chapter VI).

## **II. Classification and content**

### **A. Enumerated constitutional rights**

The human and civil rights and freedoms enshrined in part two of the Constitution of the Kyrgyz Republic can be divided into three fundamental groups:

#### *Group I*

Personal rights and freedoms (Articles 25-36)

#### *Group II*

Political rights (Articles 37-39)

#### *Group III*

Socio-economic rights (Articles 40-50)

At the same time, despite the sequence of the above-mentioned groups of rights and freedoms established by the Constitution, they are equal. The sequence of these groups, following each other, fully reflects the concept of “generations” of human rights and freedoms. Thus, while personal rights and freedoms and political rights together constitute the rights and freedoms of the first generation, socio-economic rights including cultural and environmental rights, constitute the rights and freedoms of the second generation.

#### *Rights and freedoms of the first generation*

Most of them belong to each person from birth and are inherent. In accordance with the Constitution of the Kyrgyz Republic, these include:

- the right to life (Article 25.1);
- the right to protect his/her life and health, the life and health of others from unlawful infringements within the limits of necessary defense (Article 25.2);
- the right of children to the level of life necessary for his/her physical, mental, spiritual, moral and social development (Article 27.1);
- the right to inviolability of one’s private life and protection of honor and dignity (Article 29.1);
- the right to secrecy of correspondence, telephone and other conversations, postal, telegraphic, electronic and other communications (Article 29.3);

- the right for the compensation of material and moral damage caused by illegal action (Article 29.5);
- the right of the inviolability of housing as well as other objects to which he/she has proprietary or other right (Article 30.1);
- the right to liberty of movement, freedom to choose their destination and residence in the Kyrgyz Republic (Article 31.1);
- the right of the citizen to travel freely outside the Kyrgyz Republic and return without hindrance (Article 31.2);
- the right to freedom of thought and opinion (Article 32.1);
- the right to free expression of opinion, freedom of speech and press (Article 32.2);
- the right to freely seek, receive, keep and use information and disseminate it orally, in writing or otherwise (Article 33.1);
- the right to acquaint with the information on himself/herself in state authorities, local self-governance bodies, institutions and organizations (Article 33.2);
- the right to obtain information on the activity of state authorities, local self-governance bodies as well as officials thereof, legal entities with the participation of state authorities and local self-governance bodies as well as organizations financed from the republican and local budgets (Article 33.3);
- freedom of conscience and belief (Article 34.1);
- the right to confess individually or jointly with other persons any religion or not to confess religion (Article 34.2);
- the right to freely choose and have religions and other convictions. Article 34.3);
- the right to compensation by the state for damage caused by illegal acts (inaction) of state authorities, local self-governance bodies or officials thereof in their official capacity (Article 35);
- the right of freedom of association (Article 36);
- the right of citizens to elect and to be elected to state authorities and local self-governance and take part in referendum (Article 37.1);
- the right of the citizens to take part in the management of the affairs of society and the state both directly and through their representatives (part 2 of Article 37);
- equal rights and equal opportunities of the citizens to take up posts in civil and municipal service as well as promotion in accordance with the regulations established in the law (Article 37.3);
- the right of the citizens to participate in the discussion and adoption of laws and decisions of republican and local significance (Article 37.4);
- the right to appeal to state authorities, local self-governance bodies as well as officials thereof, these officials should provide a substantiated answer within the deadlines envisaged in the law (Article 37.5);
- the right of the citizens to participate in the formulation of the republican and local budgets as well as obtain information on actual spending of budgetary funds (Article 37.6);

- the right to freedom of peaceful assembly (Article 39);
- the right to human treatment and respect of human dignity (Article 56.5);
- the right to have their case examined by a court with the participation of jurors in cases stipulated by law (Article 58.1);
- the right of the convicted person to seek a pardon or alleviation of punishment (Article 58.2);
- the right of the convicted person to a consideration of his/her case by a higher court in accordance with the provisions of law (article 58.4);
- the right to apply in accordance with international treaties to international human rights bodies seeking protection of violated rights and freedoms in accordance with international treaties that have entered into force in accordance with the procedure established by law (Article 58.5);
- the right to freedom and personal immunity (Article 59.1);
- judicial protection of his/her rights and freedoms envisaged in the Constitution, laws, international treaties to which the Kyrgyz Republic is a party as well as universally recognized principles and norms of international law (Article 61.1);
- the right to protect his/her rights and freedoms by all available means that are not prohibited by law (Article 61.2);
- the right to be provided with qualified legal aid (Article 61.4).

#### *Rights and freedoms of the second generation*

- the right to possess, use and dispose of his/her property and results of his/her activity (Article 40);
- the right to economic freedom and free use of his/her abilities and property for any economic activity not prohibited by law (Article 41);
- the right to freedom of labor, the use of his/her their abilities for work and choice of profession and occupation, labor protection and labor arrangements meeting safety and hygienic requirements as well as the right to remuneration for labor not less than minimum subsistence level (Article 42.1);
- the right to leisure (Article 42.2);
- the right to strike (Article 42.4);
- the right to health protection and health insurance (Article 43.1);
- the right to use the network of public health organizations free of charge (Article 43.3);
- the right to housing (Article 43.3);
- the right to education (Article 46.1);
- the right to receive pre-school, general basic, secondary basic education and basic vocational education in state educational establishments free of charge (Article 46.3);
- the right of youth to spiritual, cultural, moral and physical development (Article 47.1);
- the freedom of scientific, technical, artistic and other types of creativity, teaching

and learning; the right to carry out creative activities in accordance with their interests and abilities (Article 48.1);

- the right to participate in cultural life and access to cultural values (Article 48.2);
- the right to environment favorable for life and health (Article 49.1);
- the right to compensation of damage to health or property resulting from actions in the area of nature management (Article 49.2).

One of the most important principles of democracy in the Kyrgyz Republic is the protection of human and civil rights and freedoms. The Constitution of the Kyrgyz Republic usually considers human and civil rights together, but their content is not identical and as a rule, is differentiated.

In other words, in the Constitution of the Kyrgyz Republic, the distinction between human rights and civil rights is made directly in the wording of the relevant Articles, in which the terms “everyone”, “all”, “no one” are used to denote holders of constitutional human rights. In relation to the rights of a citizen, the Articles of the Constitution of the Kyrgyz Republic explicitly state: “citizens of the Kyrgyz Republic should have the right.”

The rights of a citizen include those rights that are assigned to a person only by virtue of his belonging to the state. Article 23 of the Constitution establishes, that the rights and freedoms of human and citizen are recognized and guaranteed in the Kyrgyz Republic in accordance with the generally recognized principles and norms of international law, as well as international treaties that have entered into force in accordance with the procedure established by law, to which the Kyrgyz Republic is a party.

Since, within the meaning of this question, a listing of specific constitutional rights in the context of their classification by holders is required, we provide you with the relevant information below. At the same time, it should be noted that in the Kyrgyz Republic foreign citizens and stateless persons have rights and duties on an equal basis with citizens of the Kyrgyz Republic, except for cases established by laws or international treaties that have entered into force in the manner established by law, to which the Kyrgyz Republic is a party (Article 52.1).

At the same time, the Kyrgyz Republic, in accordance with international commitments shall grant asylum to foreign citizens and stateless persons persecuted on political grounds as well as on the grounds of violation of human rights and freedoms. A person who has been granted political asylum cannot be extradited to another state.



Considering that everyone shall have the human rights — citizens of the Kyrgyz Republic, foreign citizens and stateless persons, refugees, etc., and these are listed in a number sections above (see parts I.A.1. and II.A.1.), we believe it is sufficient to clarify here only the constitutional rights of citizens:

- the right to freely leave the Kyrgyz Republic (Article 31.2);
- the right to elect and to be elected to state authorities and local self-governance and also take part in referendum (Article 37.1);
- the right of the citizens to take part in the management of the affairs of society and the state both directly and through their representatives (Article 37.2);
- equal rights and equal opportunities to take up posts in civil and municipal service and promotion (Article 37.3);
- the right of the citizens to participate in the discussion and adoption of laws and decisions of republican and local significance (Article 37.4);
- the right of the citizens to participate in the formulation of the republican and local budgets as well as obtain information on actual spending of budgetary funds (Article 37.6);
- the right to strike (Article 42.4);
- the right to use the network of public health organizations free of charge (Article 43.3).

The constitutional rights and freedoms of human and citizen are formulated in the Constitution in accordance with international documents – the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights.

The provisions on rights set out in the Constitution are internally consistent, logically constructed, quite concise and reflect their main content.

At the same time, the Constitution of the Kyrgyz Republic, while recognizing human rights and freedoms as the highest value, nevertheless allows for the possibility of their limitation, but only for strictly defined purposes. Thus, human and civil rights and freedoms may be limited by the Constitution and laws for the purposes of protecting national security, public order, health and morale of the population as well as rights and freedoms of other persons. Such restrictions may also be imposed taking into account the specifics of the military or other public service.

Thus, the part of the Constitution on human and civil rights and freedoms consists not only of rights and freedoms, but also contains an exclusive list of grounds for their limitation. For a more detailed structure of constitutional rights, see parts I.A.1. and II.A.1. above.



## **B. Unenumerated constitutional rights**

According to Article 62.2 of the Constitution of the Kyrgyz Republic, rights and freedoms established in the Constitution shall not be exhaustive and shall not be interpreted as denial or derogation of other universally recognized human and civil rights and freedoms.

At the same time, human rights are determined by the natural rights that he/she possesses from birth, while the rights of a citizen are determined by a person's belonging to the state and are positive in nature.

In accordance with Article 55 of the Constitution, human and civil rights and freedoms are recognized and guaranteed in the Kyrgyz Republic in accordance with generally recognized principles and norms of international law, as well as international treaties that have entered into force in the manner prescribed by law, to which the Kyrgyz Republic is a party.

Article 61 of the Constitution of the Kyrgyz Republic establishes that everyone shall be guaranteed judicial protection of his/her rights and freedoms envisaged in the Constitution, laws, international treaties to which the Kyrgyz Republic is a party as well as universally recognized principles and norms of international law.

According to Article 6.3 of the Constitution universally recognized principles and norms of international law, as well as international treaties that have entered into force under the established legal procedure shall be the constituent part of the legal system of the Kyrgyz Republic.

Generally, “universally recognized principles and norms of international law” refers to the principles and norms of general international law, i.e. the norms recognized by the majority of States. Universally recognized principles and norms of international law are enshrined in international covenants, conventions and other documents, such as the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the provisions of which are almost reproduced by the Constitution of the Kyrgyz Republic.

There are no relevant court decisions due to the entry into force of the new Constitution of the Kyrgyz Republic from May 5, 2021.

## C. Protection and limitation

The Constitution of the Kyrgyz Republic in its preamble, proclaiming the fundamental goals, the implementation of which is a priority task of the state, confirms its commitment to the protection and respect of human and civil rights and freedoms. This provision of the preamble has already been developed in Article 24.1 of the Constitution, according to which the Kyrgyz Republic ensures human rights and freedoms to all persons on its territory and under its jurisdiction.

Moreover, the Basic Law establishes that human rights and freedoms are of superior value, act directly and define the meaning and the content of the activity of legislative, executive power and local self-governance bodies and their officials.

The Constitution of the Kyrgyz Republic (parts 1-3 of Article 61), guaranteeing everyone judicial protection of his/her rights and freedoms obliges the State to ensure the development of extrajudicial and pre-trial methods, forms and means to protect human and civil rights and freedoms. Along with these everyone shall have the right to protect his/her rights and freedoms by any means that are not prohibited by law.

Thus, the Constitution of the Kyrgyz Republic contains a provision which explicitly stipulates the state's obligations in the protection of rights and freedoms of everyone.

In accordance with Article 23.1 of the Constitution, human rights and freedoms are inalienable and belong to everyone from birth. They are recognized as absolute, inalienable and protected by law and by the court from encroachments on the part of anyone.

The Constitution also stipulates that the human rights and freedoms established by the Constitution, as well as the guarantees of prohibition shall not be subject to any limitations (parts 5, 6 of Article 23).

The Constitution categorically prohibits the adoption of bylaw regulatory acts which limit human and civil rights and freedoms, and also enforces that law may not impose the limitation of rights and freedoms with other objectives and to a greater extent than it is envisaged in the Constitution (parts 3, 4 of Article 23).

Thus, the Basic Law, while guaranteeing the mass media the right to receive information from state bodies and local self-government bodies, their dissemination, and the right to freedom of expression, nevertheless establishes restriction by law,

activities that contradict the moral and ethical values and the public consciousness of the people of the Kyrgyz Republic (parts 1, 4 of Article 10).

Further, the Constitution, in Article 29.3, allows for the possibility of restricting the right to secrecy of correspondence, telephone and other conversations, postal, telegraphic, electronic and other communications but only in accordance with law and solely on the basis of a court order.

The next limitation, which is reflected in the norms of the Constitution, is the restriction of the right of a citizen to freely leave the Kyrgyz Republic, which is also allowed only on the basis of the law (Article 31.2).

The Constitution also explicitly states that citizens of the Kyrgyz Republic who have another citizenship may not assume political state posts and special government positions. At the same time, such limitation may be also established by the law for other public positions (Article 38).

The Basic Law provides that restrictions on the physical and moral integrity of a person are permissible only on the basis of the law, by a court decision as a punishment for a committed crime.

Summarizing this, it should be emphasized that at the same time, human and civil rights and freedoms may be limited by the Constitution and laws for the purposes of protecting national security, public order, health and morale of the population as well as rights and freedoms of other persons. The introduced limitations should be commensurate to the declared objectives. Such restrictions can also be introduced taking into account the specifics of military or other public service (Article 23.2).

### **III. Interpretation and current issues**

#### **A. Rights in diverse contexts**

According to parts 4 and 5 of Article 1 of the Constitution the people of the Kyrgyz Republic are the bearer of sovereignty and the sole source of state power; the people of Kyrgyzstan are citizens of all ethnic groups of the Kyrgyz Republic.

In the Kyrgyz Republic, democracy is based on the principles of the full authority of all power to the people, the protection of human and civil rights and freedoms, free and real access to the administration of the affairs of the state and society (Article 2.2).

At the same time, Article 2.1 of the Basic Law establishes that the independent determination of the foundations of the constitutional order is the sovereign right of the people of the Kyrgyz Republic. In this context, it should be noted that the appearance, for example, of this constitutional provision was preceded by a referendum on January 10, 2021, in which the people of Kyrgyzstan chose the presidential form of government. In turn, the holding of the referendum was caused by the change of power in the Kyrgyz Republic, which came after the riots in the country that took place on October 5-6, 2020.

As a result of the implementation of the will of the people, on April 11, 2021, the draft of the new Constitution of the Kyrgyz Republic was submitted to the national vote, as a result of which the Law of the Kyrgyz Republic “On the Constitution of the Kyrgyz Republic” was signed and put into force on May 5, 2021.

Of the constitutional novelties that deserve special attention, it is worth noting the transition from a parliamentary-presidential republic (mixed) to a presidential form of government, where the President is the head of state, the highest official and heads the executive power of the Kyrgyz Republic; ensures the unity of the people and state power; the President is the guarantor of the Constitution, human and civil rights and freedoms.

We also draw attention to the fact that according to Article 9 of the Constitution, no religion in the Kyrgyz Republic shall be recognized as the state or mandatory one. Religion and all cults shall be separated from the state. The involvement of religious associations and ministers of religion in the activity of state authorities shall be prohibited. That is why in the Kyrgyz Republic, among other things, it is prohibited to create political parties on a religious or ethnic basis, as well as for

religious associations to pursue political goals (Article 8.3). At the same time, this prohibition does not detract from the freedom of conscience and belief guaranteed by the Basic Law (Article 34.1).

Regarding traditions, it should be noted that the state takes care of the development of the culture of the people of Kyrgyzstan, preserving customs and traditions that do not infringe on human rights and freedoms (Article 21.1). In the Kyrgyz Republic, folk customs and traditions which do not infringe upon human rights and freedoms shall be supported by the state (Article 65).

The Constitution also contains elements of customary law, such as the people's kurultai – in the administration of the state and the courts of elders in the administration of justice.

There are no relevant court judgments due to the enactment of the new Constitution of the Kyrgyz Republic from May 5, 2021.

## **B. Impact of international norms**

The Kyrgyz Republic has ratified the following international standards:

- UN Universal Declaration of Human Rights;
- International Covenant on Civil and Political Rights;
- International Covenant on Economic, Social and Cultural Rights;
- Commonwealth of Independent States Convention on Human Rights and Fundamental Freedoms, Minsk, May 26, 1995;
- Convention on Standards of Democratic Election, Voting Rights and Freedoms in the Member States of the Commonwealth of Independent States Chisinau, October 7, 2002;
- Commonwealth of Independent States Convention on providing the rights of persons belonging to ethnic minorities Moscow, October 21, 1994;
- Agreement on cooperation in addressing problems related to disability and disabled persons, Moscow, April 12, 1996;
- The safeguards agreement of the rights of citizens in the field of payment of social benefits, compensation payments to families with children and the alimony, Moscow, September 9, 1994;
- Agreement concerning the defense of participants in criminal proceedings, Minsk, November 28, 2006.

In accordance with Article 6.3 of the Constitution of the Kyrgyz Republic,

international treaties that have entered into force under the established legal procedure and also the universally recognized principles and norms of international law shall be the constituent part of the legal system of the Kyrgyz Republic. The procedure and conditions for the application of international treaties and universally recognized principles and norms of international law are determined by law. In turn, the Law “On International Treaties of the Kyrgyz Republic” determines that international treaties of the Kyrgyz Republic are subject to strict observance by the Kyrgyz Republic in accordance with the norms of international law and regulatory legal acts of the Kyrgyz Republic (Article 31).

The Constitution does not directly establish the legal status of international human rights treaties in the legal system of the Kyrgyz Republic.

At the same time, the Constitution stipulates that the Constitution has supreme legal force (Article 6.1) and occupies the top in the hierarchy of normative legal acts in the legal system. The Constitution shall serve the basis for the adoption of constitutional laws, laws as well as other regulatory legal acts.

There are no relevant court decisions due to the enactment of the new Constitution of the Kyrgyz Republic from May 5, 2021.

## **Annex: List of cited legal provisions**

### **1) Constitutional provisions**

Constitution of the Kyrgyz Republic:

- Article 1 (parts 4 and 5)
- Article 2(4)
- Article 6(1)
- Article 10(1)
- Article 13(3)
- Article 15(2)
- Article 23
- Article 25 (parts 1 and 2)
- Article 26(2)
- Article 27(1)
- Article 29 (parts 1, 3 and 5)

- Article 30(1)
- Article 31 (parts 1 and 2)
- Article 32 (parts 1 and 2)
- Article 33 (parts 1, 3 and 5)
- Article 34 (parts 1, 2 and 3)
- Article 35
- Article 36
- Article 37 (parts 1, 2, 3 4, 5 and 6)
- Article 39
- Article 40
- Article 41
- Article 42 (parts 1, 2 and 4)
- Article 43 (parts 1 and 3)
- Article 45(1)
- Article 46 (parts 1 and 3)
- Article 47(1)
- Article 48 (parts 1 and 2)
- Article 49 (parts 1, 2 and 3)
- Article 50
- Article 51 (parts 3 and 7)
- Article 52(1)
- Article 53 (parts 1 and 2)
- Article 54
- Article 56(5)
- Article 58 (parts 1, 2, 4 and 5)
- Article 59(1)
- Article 61 (parts 1, 2 and 4)
- Article 62(2)
- Article 94(1)
- Article 97 (parts 1 and 3)

## **2) Legislative provisions**

Law “On International Treaties of the Kyrgyz Republic” (last amended 27 March 2017)

- Article 31(1)

Law of the Kyrgyz Republic “On Mass Media” (last amended 22 May 2018)

- Article 5

## 7. Malaysia

### Federal Court

#### *Overview*

The fundamental rights provided under the Constitution are termed as “fundamental liberties”. These are found in Part II of the Constitution. Its historical origins can be traced back to the London Conference of January 1956, which led to the establishment of the Reid Commission to draft the Constitution. In essence, Articles 5 to 13 of the Constitution confer a number of civil and political liberties, and various other rights can be found elsewhere in the Constitution as well as in statutes. There are neither explicit constitutional provisions nor other sources of law, which authorise the recognition of unenumerated rights. However, there is some evidence that the superior courts of Malaysia are distilling from the chapter on fundamental liberties, rights that are not explicitly guaranteed but implicit in the Constitution’s promise of liberty and equality. Relevant landmark cases include those on the unenumerated rights to travel and to privacy. In terms of international human rights law, Malaysia has so far ratified three of the nine core UN human rights treaties. Regarding historical or cultural contexts which are particularly relevant to constitutional rights interpretation, these include Malaysia’s multi-ethnic population and Islam being the official religion of the Federation. Recently, the Covid-19 pandemic became a current issue for rights interpretation, such as within the context of Movement Control Orders, the proclamation of emergency, and the use of remote communication technology in court proceedings.

#### *Outline*

##### **I. Rights in the Constitution**

- A. Constitutional bill of rights
- B. Rights elsewhere in the Constitution
- C. Concretization of constitutional rights
- D. Historical background and development

##### **II. Classification and content**

- A. Enumerated constitutional rights
- B. Unenumerated constitutional rights
- C. Protection and limitation

##### **III. Interpretation and current issues**

- A. Rights in diverse contexts
- B. Impact of international norms
- C. Current issues

**Annex 1: List of cited legal provisions**

**Annex 2: List of cited cases**



## I. Rights in the Constitution

### A. Constitutional bill of rights

Malaysia's Federal Constitution ("Constitution") came into force on 27 August 1957 and consists of 15 Parts containing 230 articles and 13 schedules.

The fundamental rights provided under the Constitution are termed as "fundamental liberties". All rights categorised under fundamental liberties are individual rights that are generally regarded as essential conditions for a free and democratic way of life.<sup>149</sup> The Constitution is afforded by the Constitution as the supreme law of Malaysia. It is the duty of the Courts to enforce these rights and to annul any attempt to subvert any of them, whether by legislative or administrative actions or otherwise.<sup>150</sup>

Such fundamental rights are listed in Part II of the Constitution and are as follows:

- (a) Protection against detention without legal authority of the Magistrate, provided under **Article 5**, under the heading of "Liberty of the person", and applies to all persons.
- (b) Protection against slavery or forced labour but not against compulsory service, provided under **Article 6**, under the heading of "Slavery and forced labour prohibited", and applies to all persons.
- (c) Protection against retrospective criminal laws and repeated trials is provided under **Article 7**, under the heading of "Protection against retrospective criminal laws and repeated trials", and applicable to all persons.
- (d) Protection against discrimination is provided under **Article 8**, and it protects against discrimination –
  - (i) by law on the ground of religion, race, descent or place of birth, and discrimination on those grounds by any Government or public authority in making appointments or contracts; and
  - (ii) with regard to the right to carry on any trade, business, profession or occupation.

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<sup>149</sup> Report of The Federation of Malaya Constitution Commission 1957, Food and Agriculture Organisation of the United Nations, Rome, 1957, p. 70.

<sup>150</sup> Ibid.

- (e) Provision to guarantee equality before the law under **Article 8**, under the heading of “Equality” and it applies to all persons.
- (f) Protection against banishment, exclusion from the Federation, and restriction of freedom of movement that applies only to Federation citizens are provided under **Article 9** under the heading of “Prohibition of banishment and freedom of movement”. It applies only to citizens of the Federation.
- (g) Provision to guarantee freedom of speech, assembly and association subject to restriction in the interest of security, public order or morality or in relation to incitement, defamation or contempt of Court, under **Article 10**, under the heading of “Freedom of speech, assembly and association” and it applies to all persons.
- (h) Provision to guarantee freedom of religion, including the right to profess, practise and propagate one’s religion subject to the requirements of public order, health and morality, and that subject also to these requirements each religious group should have the right to manage its own affairs, to maintain religious or charitable institutions including school and to hold a property for these purposes, under **Article 11**, under the heading of “Freedom of religion” and it applies to all persons.
- (i) Provision against discrimination against any citizen on the grounds only of religion, race, descent or place of birth as provided in **Article 12 is applicable** — (a) in the administration of any educational institution maintained by a public authority, and, in particular, the admission of pupils or students or the payment of fees; or (b) in providing out of the funds of a public authority financial aid for the maintenance or education of pupils or students in any educational institution (whether or not maintained by a public authority and whether within or outside the Federation).
- (j) Provision against depriving one’s right to property save in accordance with the law, and any law for compulsory acquisition or requisition of property must provide for adequate compensation. It is provided under **Article 13**, under the heading of “Rights to property”, and it applies to all persons.

## B. Rights elsewhere in the Constitution

Apart from the individual rights in Part II, the Constitution also acknowledges some other rights and protections for a specific group. These rights include rights to vote and provisions to safeguard the special positions of the Malays, the natives in the State of Sabah and Sarawak, and the protection of the aborigines in Peninsular Malaysia.

The Malays and natives are defined under Article 160 and Article 161A of the Constitution as follows:

### Article 160

*“‘Malay’ means a person who professes the religion of Islam, habitually speaks the Malay language, conforms to Malay custom and—*

- (a) was before Merdeka Day born in the Federation or in Singapore or born of parents one of whom was born in the Federation or in Singapore, or is on that day domiciled in the Federation or in Singapore; or*
- (b) is the issue of such a person;”*

### Article 161A

*“(6) In this Article ‘native’ means—*

- (a) in relation to Sarawak, a person who is a citizen and either belongs to one of the races specified in Clause (7) of Article 161A as indigenous to the State or is of mixed blood deriving exclusively from those races; and*
- (b) in relation to Sabah, a person who is a citizen, is the child or grandchild of a person of a race indigenous to Sabah, and was born (whether on or after Malaysia Day or not) either in Sabah or to a father domiciled in Sabah at the time of the birth.”*

The special position of the Malays has been provided in the original treaties with the Malay States, and it has been reaffirmed from time to time. Prior to the provision in the Federal Constitution, the safeguard is guaranteed under Clause 19(1)(d) of the Federation Agreement 1948, which made the High Commissioner

responsible for safeguarding the special position of the Malays and the legitimate interests of other communities.<sup>151</sup>

Article 153 of the Constitution reaffirms the recognition of the special position of the Malays and provides that the Yang di-Pertuan Agong (YDPA) as the Supreme Head of the Federation shall have the responsibility to safeguard the special position of the Bumiputras, a term referring to Malays and the natives in Sabah and Sarawak. These protections include quotas for Federal public service positions, Federal scholarships, Federal trade or business licenses and tertiary education enrolment, the Malay Reservation Land, reservation of land for the natives of Sabah and Sarawak.

In addition to the above, the natives of Sabah and Sarawak also enjoy the constitutional protection against laws that affect their customs<sup>152</sup> and special provisions provided in Part XIIA of the Constitution. Among others, it includes English and native languages as common languages in the States of Sabah and Sarawak, restricting the extension to non-residents of right to practice before Courts in the States of Sabah and Sarawak and the safeguards for the constitutional position of the States of Sabah and Sarawak.

As for the aborigines in Peninsular Malaysia, Article 8(5) of the Federal Constitution permits the Federal Government to legislate for the protection, well-being or advancement of the aboriginal peoples of the Malay Peninsula (including the reservation of land) or the reservation to aborigines of a reasonable proportion of suitable positions in the public service.

The Constitution also provides for specific constitutional duties of the Yang di-Pertuan Agong, the Executive, the Judiciary and the Legislature. Among others, the constitutional duties include upholding the fundamental liberties in Part II of the Constitution.

In addition to the above, the Federal Constitution also provides that Islam is the official religion of the Federation, and other religions may be practised in peace and harmony in any part of the Federation;<sup>153</sup> the status of the Malay language as a National Language;<sup>154</sup> and the right to vernacular education for Chinese and Tamil.<sup>155</sup>

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151 Ibid, p. 71.

152 Article 76(2) and Article 150(6A) of the Federal Constitution.

153 Article 3 of the Federal Constitution.

154 Article 152 of the Federal Constitution.

155 Ibid.

## C. Concretization of constitutional rights

Constitutional rights in the Constitution are stipulated in a general form and constitute basic principles of fundamental liberties and rights for the people, community, states and the Federation as a whole. Acknowledging the Constitution as the supreme law of the Federation and considering the Constitution as an ‘umbrella’ power protecting and laying down the fundamental rights and liberties allows for any law to be enacted and gives power to Parliament to pass the law provided it is not inconsistent with the Constitution (refer to Article 4 of the Constitution). The validity of any law or any provision of any specific law inconsistent with the Constitution can be declared unconstitutional and invalid by the highest Court in Malaysia, the Federal Court.

The constitutional rights in the Constitution require further elaboration, especially on their implementation and detailed provisions. The fundamental liberties or constitutional rights in Part II of the Constitution are further supplemented by specific legislation that safeguard the fundamental rights as entrenched in the Constitution.

In explaining the constitutional rights in Malaysia for this article, the discussion is focused on the provision of the right of life and liberty provided under Article 5 of the Constitution as an example. The provision provides as follows –

### ***“Right to Life and Liberty***

#### **Article 5**

#### ***Liberty of the person***

*5. (1) No person shall be deprived of his life or personal liberty save in accordance with law.*

*(2) Where complaint is made to a High Court or any judge thereof that a person is being unlawfully detained the court shall inquire into the complaint and, unless satisfied that the detention is lawful, shall order him to be produced before the court and release him.*

*(3) Where a person is arrested he shall be informed as soon as may be of the grounds of his arrest and shall be allowed to consult and be defended by a legal practitioner of his choice.*

*(4) Where a person is arrested and not released he shall without*

*unreasonable delay, and in any case within twenty-four hours (excluding the time of any necessary journey) be produced before a magistrate and shall not be further detained in custody without the magistrate's authority."*

Based on this provision, it is clear that the Constitution guarantees the right to life and liberty. A person's life or personal liberty cannot be taken away unless it is in accordance with the law.

The Malaysia Courts have been very generous in defining the word "life" in Article 5 of the Constitution. In the case of **Kanawagi s/o Seperumaniam v. PPC** [2001] 5 MLJ 433, the Court interpreted the word "life" in Article 5 of the Constitution to include the right to livelihood. In addition to that, the Court in **Nor Anak Nyawai v. Borneo Pulp** [2001] 6 MLJ 241 held that native customary rights could be considered as a "right to livelihood."

Additionally, "life" includes reputation. In **Lembaga Tatatertib Perkhidmatan v. Utra Badi a/l K Perumal** [2000] 3 MLJ 281, the Court held that deprivation of reputation would violate Article 5(1) of the Federal Constitution. Thus, employment is, therefore, a fundamental right within the expression of Article 5(1) of the Constitution

In the case of **Tan Teck Seng v. Suruhanjaya Perkhidmatan Pendidikan** [1996] 2 CLJ 771, the Court explained the concept of "life" provided in Article 5(1) of the Constitution as below:

"...the expression "life" appearing in art (5) 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 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."

It is also provided that a person who is arrested or detained must be informed as soon as possible of the grounds of the arrest. He or she has the right to consult and be defended by a lawyer of his or her choice and given access to a legal representation, and he or she must be brought before a magistrate within 24 hours and cannot be detained further unless it is with the authority of a magistrate, and issued with a 'remand order'.

This is clearly enhanced and concretised under the Criminal Procedure Code [Act

593] (“Code”), which among others, provides for the rights of a person arrested and how he would be dealt with.<sup>156</sup> In other words, a person detained would be given the right to be heard and must be brought before a magistrate or Court to be ordered for detention / remand or otherwise released. As demonstrated in the case of **Shamim Reza bin Abdul Samad v. Public Prosecutor [2011] 1 MLJ 471**, the Federal Court held that the right to be represented by competent counsel forms part of the right to a fair trial.

In the case of **Abdul Ghani Haroon v. Ketua Polis Negara & Another Application [2001] 2 CLJ 574**, the preliminary issue before the Court was whether the applicants have a right to be present in Court for the hearing of their Habeas Corpus applications. The High Court held that the right to apply to the High Court for the writ of Habeas Corpus is not a mere legal right. It is also a constitutional right enshrined in Article 5(2) of the Constitution and available to any person who believes he has been unlawfully detained. Consequently, the detainee also has the constitutional right to be present in Court at the hearing of his application for the writ of Habeas Corpus.

<sup>156</sup> See section 28A CPC which provides as below:

- (1) *A person arrested without a warrant, shall be informed as soon as may be of the grounds of his arrest by the police officer making the arrest.*
- (2) *A police officer shall before commencing any form of questioning or recording of any statement from the person arrested, inform the person that he may—*
  - (a) *communicate or attempt to communicate, with a relative or friend to inform of his whereabouts; and*
  - (b) *communicate or attempt to communicate and consult with a legal practitioner of his choice.*
- (3) *Where the person arrested wishes to communicate or attempt to communicate with the persons referred to in paragraphs (2)(a) and (b), the police officer shall, as soon as may be, allow the arrested person to do so.*
- (4) *Where the person arrested has requested for a legal practitioner to be consulted the police officer shall allow a reasonable time—*
  - (a) *for the legal practitioner to be present to meet the person arrested at his place of detention; and*
  - (b) *for the consultation to take place.*
- (5) *The consultation under subsection (4) shall be within the sight of a police officer and in circumstances, in so far as practicable, where their communication will not be over heard;*
- (6) *The police officer shall defer any questioning or recording of any statement from the person arrested for a reasonable time until the communication or attempted communication under paragraph 2(b) or the consultation under subsection (4), has been made;*
- (7) *The police officer shall provide reasonable facilities for the communication and consultation under this section and all such facilities provided shall be free of charge.*
- (8) *The requirements under subsections (2), (3), (4), (5), (6) and (7) shall not apply where the police officer reasonably believes that—*
  - (a) *compliance with any of the requirements is likely to result in—*
    - (i) *an accomplice of the person arrested taking steps to avoid apprehension; or*
    - (ii) *the concealment, fabrication or destruction of evidence or the intimidation of a witness; or*
  - (b) *having regard to the safety of other persons the questioning or recording of any statement is so urgent that it should not be delayed.*
- (9) *Subsection (8) shall only apply upon authorization by a police officer not below the rank of Deputy Superintendent of Police.*
- (10) *The police officer giving the authorization under subsection (9) shall record the grounds of belief of the police officer that the conditions specified under subsection (8) will arise and such record shall be made as soon as practicable.*
- (11) *The investigating officer shall comply with the requirements under subsections (2), (3), (4), (5), (6) and (7) as soon as possible after the conditions specified under subsection (8) have ceased to apply where the person arrested is still under detention under this section or under section 117.*

In the case of **Public Prosecutor v. Tengku Mahmood Iskandar & Anor [1973] 1 MLJ 128**, Raja Azlan Shah J (as His Royal Highness then was) opined that the right to a fair trial is a fundamental right enshrined in the Constitution. His Royal Highness held that:

*“The law is sedulous in giving them the right to a fair trial and to be defended by counsel. Those fundamental rights must always be kept inviolate and inviolable, however crushing the pressure of incriminating proof. Cases are never tried in police stations, but in open courts to which the public has access. The rack and torture chamber must not be substituted for the witness stand. That right is enshrined in our Constitution – ‘No person shall be deprived of his life, or personal liberty save in accordance with law.’ That fundamental right implies that no person is punishable or can be lawfully made to suffer in body except for a distinct breach of law proved in a court of law. All this reduces to the minimum the possibility of arbitrariness and oppression.”*

[emphasis added]

## D. Historical background and development

The establishment of provisions related to the fundamental liberties in the Federal Constitution began in January 1956 at the London Conference. The two main factors agreed at the London Conference were Malaya’s independence and the appointment of a Constitutional Commission to draft the independent Malaya’s first Constitution.

Hence, the Reid Commission was established to draft the Constitution of the Federation of Malaya prior to Malayan independence. The Commission made its recommendations on 20 February 1957. One of the recommendations was a chapter on partially entrenched fundamental rights. When the Federation of Malaya became an independent nation on 31 August 1957, the Constitution of the Federation of Malaya was established as the supreme law of the Federation, and Articles 5 to 13 of the Constitution guarantee the fundamental rights of the people.

In the case of **Phang Chin Hock v. Public Prosecutor [1980] 1 MLJ 70 (FC)**, Suffian LP explained the history of the formation of the Constitution as follows:

*“In Malaya, on the other hand, the Constitution was the fruit of joint Anglo-Malayan efforts and our Parliament had no hand in its drafting. The first draft was put up by a Royal Commission headed by Lord Reid jointly*



*appointed by the British sovereign and the Malay Rulers; it was published for public discussion and debate; an amended draft was agreed by the British Government and the Malay Rulers and also by the then Alliance Government; it was approved by the British Parliament, by the Malayan Legislative Council (the then federal legislature) and by the legislature of every Malay State. When the British finally surrendered legal and political control, Malaya had a ready-made Constitution and there was no occasion for Malaysians to get together to draw up a Constitution.”*

In 1971, Article 10 of the Constitution was amended via Constitution (Amendment) Act 1971 [Act A30/1971] to provide a provision on restrictions of the freedom of speech, assembly and association. This amendment was made in the aftermath of the May 1969 racial clashes and was enforced on 10 March 1971. Through this amendment, Parliament may pass a law prohibiting the questioning of any matter, right, status, position, privilege, sovereignty or prerogative established or protected by the provisions of Part III, Article 152 (national language), 153 (reservation of quotas) or 181 (Savings for Rulers’ sovereignty) in imposing restrictions in the interest of the security of the Federation.

Another significant amendment to the Constitution took place in 2001, where Article 8 was amended via Constitution (Amendment) (No.2) Act 2001 [Act A1130/2001]. Through this amendment, the word “gender” was inserted in Clause (2) with effect from 28 September 2001.

Article 6(3) of the Constitution was also amended in 2001 via Constitution (Amendment) (No.2) Act 2001 [Act A1130/2001], to replace the earlier Clause which provided as follows: “*Work incidental to the serving of a sentence of imprisonment imposed by a court of law shall not be taken to be forced labour.....*” The new amendment substituted the former provision with the following provisions: “*Work or service required from any person as a consequence of a conviction or a finding of guilt in a court of law shall not be taken to be forced labour.....*” With this amendment, a work imposed on a convict does not fall under forced labour.

## II. Classification and content

### A. Enumerated constitutional rights

The Reid Commission sought to provide fundamental individual rights as an essential element for a democratic country. It is clearly enumerated that the fundamental liberties as enshrined in the Constitution are balanced in order to embrace and preserve Malaysia's unique setting as a multi-racial country. These fundamental liberties are also in line and correspond with the Universal Declaration of Human Rights 1948 (UDHR). Nevertheless, these fundamental rights though guaranteed, are still bound by the restrictions provided expressly in the Constitution, as precisely demonstrated in the case of **R v. Lord Chancellor, ex p Witham [1997] 2 All ER 779**, where it was held that:

*“Where a written constitution guarantees a right, there is no conceptual difficulty. The state authorities must give way to it, save to the extent that the constitution allows them to deny it. There may of course be other difficulties, such as whether on the constitution's true interpretation the right claimed exists at all.”*

In essence, Articles 5 to 13 of the Constitution confer a number of civil and political liberties, among others the right to life and liberty, abolition of slavery and forced labour, protection against retrospective criminal laws and repeated trials, equality before the law, freedom of movement and protection against banishment, freedom of speech, assembly and association, freedom of religion, rights in respect of education, and right to property.

Elsewhere in the Constitution, there is a right to vote and to seek elective office, protection for public servants, and some protection for preventive detainees. A number of ordinary statutes confer rights on women, children, workers, pensioners, consumers, trade unionists etc.

For example, Article 119 of the Constitution sets criteria for a citizen to vote. Those who attained the age of twenty-one years on the qualifying date, are a resident in a constituency and have registered in the electoral roll as an elector are entitled to vote in any election to the House of Representatives or Legislative Assembly. In 2019, Parliament passed the Constitution (Amendment) Bill 2019 to lower the age of a citizen who is entitled to vote from twenty-one years to eighteen years. However, the amendment has yet to come into force.

Therefore, whilst the main fundamental liberties were specifically structured, other constitutional rights can also be found in other parts of the Constitution with or without limitations. These provisions must be read together with specific legislation which clearly explained such rights and limitations (if any).

## **B. Unenumerated constitutional rights**

Generally, Malaysia does not have a developed jurisprudence of implied, un-enumerated and non-textual rights. A number of fundamental liberties have explicitly been enumerated in the Constitution in Articles 5 to 13. But some of these entitlements may be rendered meaningless unless supported by other implied but un-enumerated rights. The doctrine of un-enumerated rights holds that if an activity is an integral part of a named fundamental right or partakes of the same basic nature and character as the enumerated right, then the citizen ought to have a constitutional right to make a claim for this activity. Rights corresponding to these activities are not expressly mentioned in the basic charter but are implied in the promise of the constitutional text. These rights may be referred to as un-enumerated and non-textual rights.

For example, the un-enumerated right to an expeditious trial is necessary to give meaning to Article 5's promise of personal liberty. This liberty remains extinguished as long as a person languishes in a remand centre awaiting his day in Court. The right to legal aid, the right to a speedy trial and protection to prisoners from degrading and inhuman treatment, though not explicitly mentioned in the Constitution, ought to be treated as part of the fundamental right to personal liberty under Article 5 of the Constitution.

There are neither explicit constitutional provisions nor other sources of law, which authorise the recognition of unenumerated rights. However, there is some evidence that the superior courts of Malaysia are distilling from the chapter on fundamental liberties, rights that are not explicitly guaranteed but implicit in the Constitution's promise of liberty and equality.

The best example is on the word "Life" provided in Article 5(1), as discussed earlier, where the Court in numerous decisions held that "life" in Article 5 of the Constitution includes the right to livelihood.

Another example is pertaining to the right to privacy as decided in the case of **Lew Cher Phoe @ Lew Cha Paw & Others v. Pua Yong & Another [2011] 1 LNS 1528** where the High Court held as follows:

*“..... To determine whether such unenumerated right exists, it must be shown that the right in question is an integral part of the enumerated right upon which its existence depends. If the unenumerated right is a definite and integral part of the enumerated right, then it has as much force as the enumerated right itself and is subject to the same conditions and restrictions as the enumerated right itself. Otherwise, the enumerated right would be meaningless without providing for certain other rights by implication (Kharak Singh v. State of Uttar Pradesh AIR 1963 SC 1295; Munn v. Illinois 94 US 113; Wolfe v. Colorado 338 US 25; Semayne’s case [1604] 5 Co Rep 91).”*

There is no specific provision in the Constitution guaranteeing the right to privacy. Comparatively, several related rights, including freedom of assembly, speech and movement, are expressly provided. The fact that the right to privacy has not been expressly provided for does not preclude a court of law from holding that such a right exists. Privacy is recognised as a fundamental human right internationally. It is given recognition by international covenants and treaties and regional human rights treaties (see Article 14 UDHR; Article 17 International Covenant on Civil and Political Rights; Article 8 European Convention for the Protection of Human Rights and Fundamental Freedoms 1950). In the present case, the privacy in question relates to a person’s right to respect his private and family life and home.

Some of the key landmark cases regarding unenumerated rights are as follows –

### **1. Unenumerated rights to travel**

The issue had been decided in the High Court case of **Loh Wai Kong v. Government Of Malaysia & Ors [1978] 1 LNS 154** where the High Court, among others, held as follows:

*“Having considered the arguments of counsel for the applicant and of counsel for the respondents and both the majority and minority judgments in the said Satwant Singh’s case, I would prefer with respect to follow the majority judgment which is the decision of the Indian Supreme Court in that case. In my humble opinion, cl(2) of Article 9 of our Constitution only guarantees to every citizen the right to move freely throughout Malaysia and to reside in any part thereof. Our Constitution naturally cannot guarantee freedom of movement to every citizen or to any person in territories outside Malaysia. Article 5(1) of our Constitution is not only applicable to citizens but also guarantees*

*the liberty of any person including non-citizens whilst in this country. The expression 'personal liberty' must therefore be liberty to a person not only in the sense of not being incarcerated or restricted to live in any portion of the country but also includes the right to cross the frontiers in order to enter or leave the country when one so desires. Refusal or withdrawal of one's passport should therefore not be seen so much as affecting the right of a person to travel abroad but should be considered, in my view, in the light of whether there is violation of his right of personal liberty under Article 5(1) of our Constitution."*

## 2. Unenumerated rights to privacy

- a) Tengku Maimun Tuan Mat Chief Justice (dissenting) in the case of **Maria Chin Abdullah v. Ketua Pengarah Imigresen & Anor [2021] 2 CLJ 579** held as follows:

*"[548] In my view, where a right is not expressly enumerated in one particular article, it may be housed in the generic words of 'life' and 'personal liberty' in art. 5(1). And, just because one liberty is already provided for in one article, it does not mean that another article in Part II cannot enlarge the scope of that first-mentioned right. Or just because a particular right is not expressly provided for in an article, that right is excluded. For example, while the right to privacy is not expressly enumerated in the Indian Constitution and the FC, Indian and Malaysian jurisprudence now accept it as part of art. 21 and art. 5(1) respectively..."*

- b) Per Gopal Sri Ram Federal Court Judge delivering the judgment of the Court in the case of **Sivarasa Rasiah v. Badan Peguam Malaysia & Anor [2010] 3 CLJ 507** among others as follows:

*"[15] It is patently clear from a review of the authorities that "personal liberty" in art. 5(1) includes within its compass other rights such as the right to privacy (see, Govind v. State of Madhya Pradesh AIR [1975] SC 1378). By parity of reasoning, the right to be a member of a statutorily created and regulated professional body - in this case the Malaysian Bar - comes within "personal liberty" and is protected by art. 5(1)..."*

## C. Protection and limitation

Article 4 of the Constitution provides that *“this Constitution is the supreme law of the federation and any law passed after Merdeka Day which is inconsistent with this Constitution shall, to the extent of the inconsistency, be void.”* Therefore, this suggests that the fundamental rights in Part II of the Federal Constitution are part of the supreme law that can only be removed or denied within the bounds and limits set by the Constitution itself.

However, it must be noted that the Constitution allows certain reasonable restrictions to be imposed on the aforementioned fundamental rights, and the authority for such restrictions is found within the Constitution itself.

Articles 5 to 13 of the Constitution and elsewhere protects a large number of political, civil, cultural and economic rights. It seeks to protect fundamental freedoms and reconcile the irreconcilable conflict between the might of the state and the rights of the citizens. The chapter on fundamental liberties, the existence of an independent judiciary, the provision for judicial review, the institution of popular elections and representative Parliament are meant to create a democratic and responsible government under the law.

However, the fundamental rights are not absolute. They are subject to certain limitations provided for in the Constitution itself and the legislation made by the Parliament on the grounds (like public order, national security and morality) permitted by the Constitution.

### 1. Emergency powers

The communist insurgency casts a dark shadow on the constitutional development. Through Articles 149 and 150 of the Constitution, the forefathers of the Constitution armed Parliament and the Executive with overriding powers to combat subversion and emergency. These special powers have been employed extensively to restrict many fundamental rights to curb any threat by any substantial body of persons to the Federation.

In the case of **Public Prosecutor v. Ooi Kee Saik & Ors [1971] 2 MLJ 108**, Raja Azlan Shah J (as His Royal Highness then was) concisely held on the nature of the Yang di-Pertuan Agong’s power to proclaim emergency as follows:

*“Clause (1) of article 150 gives the Yang di-Pertuan Agong power to proclaim a state of emergency if satisfied that a grave emergency exists*

*whereby the security of the Federation is threatened. ... The fact that the Yang di-Pertuan Agong issued the proclamation showed that he was so satisfied that a grave emergency existed whereby the security of the whole country was at stake. ... . Counsel have not challenged the validity of the proclamation. Indeed the proclamation is not justiciable. ...”*

[emphasis added]

## 2. Judicial review

The supremacy of our Constitution is supported by judicial review. The Constitution in Articles 4(1), 4(3), 4(4), 128(1), and 128(2) is explicit about the power of the superior courts to examine the constitutionality of all executive and legislative actions.

The importance of judicial review in a democratic society was succinctly illustrated in the case of **Semenyih Jaya Sdn Bhd v. Pentadbir Tanah Daerah Hulu Langat and another case** [2017] 3 MLJ 561 (FC) as follows:

*“[90] The important concepts of judicial power, judicial independence and the separation of powers are as critical as they are sacrosanct in our constitutional framework.*

*[91] The concepts above have been juxtaposed time and again in our judicial determination of issues in judicial reviews. Thus an effective check and balance mechanism is in place to ensure that the Executive and the Legislature act within their constitutional limits and that they uphold the rule of law. The Malaysian apex court had prescribed that the powers of the Executive and the Legislature are limited by the Constitution and that the Judiciary acts as a bulwark of the Constitution in ensuring that the powers of the Executive and the Legislature are to be kept within their intended limit (see Pengarah Tanah Dan Galian, Wilayah Persekutuan v Sri Lempah Enterprise Sdn Bhd [1979] 1 MLJ 135).”*

On the exercise or abuse of emergency powers, we have the Privy Council case of **Teh Cheng Poh v. PP** [1979] 1 MLJ 50, 2 MLJ 238, [1980] AC 458 and **Abdul Ghani Ali @ Ahmad v. PP** [2001] 3 MLJ 561.



### **III. Interpretation and current issues**

#### **A. Rights in diverse contexts**

Malaysia consists of two distinct geographical regions known as Peninsular Malaysia and East Malaysia, with 13 States and 3 Federal Territories. It is a multi-ethnic state and observes separate cultural identities.

The three main ethnic groups in Malaysia are the Malays, Chinese and Indians. According to the Department of Statistics Malaysia, as of the first quarter of 2021, the Malays account for 69.7%, which is over half of the Malaysian population. The Chinese, which consists of 22.5% of the Malaysian population, form the second-largest ethnic group. The Indian community, on the other hand, is the smallest of the three main ethnic groups in Malaysia, which consists of 6.8% of the Malaysian population.

On the aspect of religion, Article 3 of the Constitution provides that Islam is the religion of the Federation. Still, other religions may be practised in peace and harmony in any part of the Federation. These include Christianity, Buddhism, and Hinduism. This unique diversity can be seen in various spectrums of life in this country, be it at schools, universities and workplaces. The co-existence of this multi-ethnic and multicultural society in this country creates different needs, considerations and expectations among the citizens, be it politically, socially and economically.

Under the Constitution, Article 11 guarantees the freedom of religion to every person. Article 11 of the Constitution reads as follows:

#### ***“Freedom of religion***

- 11.** (1) *Every person has the right to profess and practise his religion and, subject to Clause (4), to propagate it.*
- (2) *No person shall be compelled to pay any tax the proceeds of which are specially allocated in whole or in part for the purposes of a religion other than his own;*
- (3) *Every religious group has the right—*
  - (a) *to manage its own religious affairs;*
  - (b) *to establish and maintain institutions for religious or*



- charitable purposes; and*
- (c) to acquire and own property and hold and administer it in accordance with law.*
- (4) *State law and in respect of the Federal Territories of Kuala Lumpur, Labuan and Putrajaya, federal law may control or restrict the propagation of any religious doctrine or belief among persons professing the religion of Islam.*
- (5) *This Article does not authorize any act contrary to any general law relating to public order, public health or morality.”*

The issue of freedom of religion has also been the subject of contentions before the Malaysian Court of law. The issues mainly revolved around jurisdictional issues between the civil Court and Syariah court, conversion of Islam, its impact on the civil marriage, custody and religion of the children. As a multi-racial country that practices civil and Syariah law, this delicate issue has to be treated carefully within the bounds permissible by the Constitution, the applicable laws on the matter in question and the sensitivity that the issue may entail.

For example, in the case of **Rosliza Ibrahim v. Kerajaan Negeri Selangor**, [2021] 3 CLJ 301, the Federal Court Judge held that matters relating to renunciation of Islam is a subject matter that requires a determination by the Syariah Court, which is a separate entity from the civil Court. Thus, the Federal Court, being a civil Court, has no jurisdiction in respect of the matter. The Federal Court of Malaysia held as follows:

*“On the other hand, with regard to the question of ‘whether a person is no longer a Muslim’, there is no dispute of the person affected having been a Muslim. Under the scheme of the Federal Constitution, a Muslim in our country shall be governed by Islamic personal and family law. A Muslim also becomes subject to specific offences, namely, offences against the precepts of Islam, to which a non-Muslim is not. Being a Muslim confers one a legal status and changes the entire regime of personal law applicable to them (see Ketua Pegawai Penguatkuasa Agama & Ors v. Maqsood Ahmad & Ors And Another Appeal [2020] 10 CLJ 748; [2020] MLJU 1259). And having been a Muslim, the person might have existing legal obligations under Muslim laws that require determination owing to his or her apostasy. Renunciation of Islam, therefore carries specific legal consequences. It is for this reason that where the subject matter of a cause or matter requires a determination*

*of whether a person is no longer a Muslim, the Syariah Court has the exclusive jurisdiction to hear and determine the said subject matter; and under cl. (1A) of art. 121 of the Federal Constitution, the civil court has no jurisdiction in respect of the subject matter.”*

In the case of **Hajah Halimatussaadiah Haji Kamaruddin v. Public Service Commission Malaysia & Anor [1992] 1 CLJ 413 (HC)**, the plaintiff wore ‘purdah’ while doing work at the office. ‘Purdah’ is a cloth covering the plaintiff’s face except for her eyes, and wearing purdah at a workplace violates the Government circular on dress codes (Circular No. 2 of 1985). The plaintiff claimed that being a Muslim, she is required by the Qu’ran and hadiths to cover her face. Hence, she claimed that the said Circular, which prohibits the wearing of the purdah, is in contravention of Article 11(1) of the Federal Constitution. The High Court, in this case, held that:

*“The language of Article 11 of the Federal Constitution clearly shows that the article is intended to protect absolutely the religious beliefs of the people but in exercising religious practices, Article 11(5) also clearly forbids any act which may lead to public disorder, affect public health or public morality. The words used in Article 11(5) is not ‘written law’ but ‘general law’. The word ‘law’ has been defined under Article 160 of the Federal Constitution to include any custom or usage having the force of law in the Federation or any part thereof. It was stated in evidence by Dato’ Ariffin bin Zakaria that the office of the State Legal Adviser Perak deals with files relating to government secrets, the handling of which is governed by the Official Secrets Act (Act 88). The identity of a person wearing the purdah is difficult to determine. The Dato’ Mufti when called upon to identify the plaintiff in Court was unable to do so because he said it was impossible for him to identify the plaintiff by just looking at the eyes, and when this question was put to him, there were three persons in Court wearing the purdah. If, therefore, the purdah is allowed to be worn by lady officers during office hours, a stranger or person who is not an officer at a particular Government Office may enter that office wearing a purdah and pretending to be a lady officer working in that office, handles secret files kept there, and this can certainly lead to dangerous and disastrous results. Government secrets and governmental interests must be safeguarded and protected at all costs. Although government employees are required to wear name tags, the wearing of a name tag does not reflect the true identity of a purdah wearer.*

*Under the circumstances, I hold that the term of para. 2.2.1 of the circular is indeed lawful and reasonable and must be obeyed. Disobedience by an officer to such lawful and reasonable directive or order of the Government would justify the taking of disciplinary action against him or her by the appropriate disciplinary authority. I therefore dismiss the plaintiff's application with costs."*

Another provision that relates to the right in a diverse context is Article 153 that grants the Yang di-Pertuan Agong power to safeguard the special position of the Malays, such as establishing quotas for entry into the civil service, public scholarships and public education.

Article 153 of the Federal Constitution states as follows:

*"Reservation of quotas in respect of services, permits, etc., for Malays and natives of any of the States of Sabah and Sarawak*

*153. (1) It shall be the responsibility of the Yang di-Pertuan Agong to safeguard the special position of the Malays and natives of any of the States of Sabah and Sarawak and the legitimate interests of other communities in accordance with the provisions of this Article.*

*(2) Notwithstanding anything in this Constitution, but subject to the provisions of Article 40 and of this Article, the Yang di-Pertuan Agong shall exercise his functions under this Constitutions and federal law in such manner as may be necessary to safeguard the special position of the Malays and natives of any of the States of Sabah and Sarawak and to ensure the reservation for Malays and natives of any of the States of Sabah and Sarawak of such proportion as he may deem reasonable of positions in the public service (other than the public service of a State) and of scholarships, exhibitions and other similar educational or training privileges or special facilities given or accorded by the Federal Government and, when any permit or license for the operation of any trade or business is required by federal law, then, subject to the provisions of that law and this Article, of such permits and licenses."*

## **B. Impact of international norms**

Malaysia has not signed and acceded to the UDHR. However, as a member of the United Nations, Malaysia acquiesced to uphold and recognised the principles of

the UDHR so long as it is consistent with the Federal Constitution, national laws and national policies. This commitment is transpired through Section 4(4) of the Human Rights Commission of Malaysia Act 1999 [Act 597], which provides as follows:

*“Function and powers of the Commission*

*4. (4) For the purpose of this Act, regard shall be had to the Universal Declaration of Human Rights 1948 to the extent that it is not inconsistent with the Federal Constitution.”*

Based on that conceptual background, Malaysia has committed itself to certain UN human rights treaties for a particular category of persons. For example, on 17 February 1995, Malaysia acceded to the Convention on the Rights of the Child (CRC) with reservation. Under the CRC, Malaysia has also acceded to the Optional Protocol I to the Convention on the Rights of the Child (2000) – involvement of children in armed conflict and the Optional Protocol II to the Convention on the Rights of the Child (2000) – sale of children, child prostitution and child pornography.

Malaysia had also acceded to other Conventions such as:

- (a) The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW);
- (b) The Convention on the Rights of Persons with Disabilities (CRPD);
- (c) The UN Convention against Transnational Organized Crime; and
- (d) The Protocol to Prevent, Suppress and Punish Trafficking in Persons and the Worst Forms of Child Labour Convention (ILO Convention No. 182).

It is also pertinent to note that Malaysia is a member state of the ASEAN Human Rights Declaration at the regional level.

Even though Malaysia has not signed and acceded to the UDHR, Malaysia is committed to ensuring that the state meets the standard of human rights required by the Declaration. These include its commitment to adhere to equality provisions, especially on the rights stipulated under Article 2 of the UDHR that prohibits discrimination on an open list of grounds.

The fundamental liberties provisions in Article 5 to Article 13 of the Malaysian Constitution are all in line with the right promoted by UDHR. In addition, Article 8(2) of the Constitution was amended in 2001 as a commitment and to give effect to its obligations under CEDAW. With that amendment, the Constitution expanded

its protection to include “gender”. The amended Article 8(2) reads as follows:

*“There shall be no discrimination against citizens on the ground only of religion, race, descent, place of birth or **gender** in any law or in the appointment to any office or employment under a public authority or in the administration of any law relating to the acquisition, holding or disposition of property or the establishing or carrying on of any trade, business, profession, vocation or employment.” [emphasis added]*

This amendment clearly shows that Malaysia is determined to safeguard its citizens against gender bias and discrimination.

Further, in line with Malaysia’s ratification of the CRC, it is notable that Article 12 of the Constitution has expanded the protection of discrimination stipulated under Article 8 to the area of education. Article 12(1) of the Constitution states that:

*“Without prejudice to the generality of Article 8, there shall be no discrimination against any citizen on the grounds only of religion, race, descent or place of birth:*

- (a) *In the administration of any educational institution maintained by a public authority, and, in particular, the admission of pupils or students or the payment of fees; or*
- (b) *In providing out of the funds of a public authority financial aid for the maintenance or education of pupils or students in any educational institution (whether or not maintained by a public authority and whether within or outside the Federation). ”*

Article 12 of the Constitution is seen as upholding the principle of equality embedded under the CRC. Additionally, having ratified and acceded to the CRC, Malaysia has taken the progressive initiative bypassing and bringing into force the Child Act 2001. The Child Act 2001 is a valuable legal instrument in ensuring children’s right in Malaysia is well protected. The Act seeks to protect children from various forms of violence, ill-treatment and abuse.

Another commitment in acknowledging people’s rights is by enacting the Persons with Disabilities Act 2008. The Act was drafted in line with the obligations arising from the CRPD. The Act pledges that “persons with disabilities are entitled to equal opportunity and protection and assistance in all circumstances and subject only to such limitations, restrictions and the protection of rights as provided by the

Federal Constitution.” In short, the Persons with Disabilities Act 2008 represents good progress in addressing legal protection from discrimination on the ground of disability in this country.

The Malaysia Courts had also applied international human rights norms in some cases. For instances:

(a) In the case of **Indira Gandhi Mutho v. Pengarah Jabatan Agama Islam Perak & Ors And Other Appeals [2018] 3 CLJ 145**, the Federal Court in scrutinising the High Court’s decision held as follows:

*“The High Court preferred an interpretation of art. 12(4) and the Perak Enactment which is consistent with the other fundamental provisions in the Constitution, namely arts. 5, 8 and 11. On the learned JC’s view, the interpretation of art. 12(4) should also be consistent with international norms and conventions vesting equal rights in both parents, such as the Universal Declaration of Human Rights (UDHR), the Convention of the Rights of the Child (CRC) and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). It was concluded that the unilateral conversion of minor children to Islam by one parent without the consent of the other is unconstitutional. By depriving the appellant and her children of the right to be heard prior to the conversion, the conversion was in breach of natural justice.”*

(b) In the case of **Suharman Mohamad Noor @ Ismail v. PP [2020] 1 LNS 2062 (HC)**, the facts of the case show that the appellant was charged with five charges of aggravated rape under section 376(3) of the Penal Code. The trial court convicted him, and he appealed to the High Court. In affirming the appellant conviction, the High Court also acknowledged the connection between the Child Act 2001 and the CRC and held as follows:

*“In our instant appeal, PWI has been violated not only one or twice but many times in the supposed safe sanctuary of her home. A single violation of anyone, much less a child is one too many. Rape in any form is a strong symptom of social illness and a mental one too. While outside the home, many human predators whether paedophile or not, are roaming the streets. Now, in the supposed safety of her own home, PWI has been violated. The Appellant is around for most times. He abused this and put the entire at risk. That in itself, is a sign that illness such as Sodomasochism is on the rise. I take judicial notice that in Malaysia, incestuous rape is, unfortunately, quite rampant. Where is*

*a child to seek sanctuary and protection if not within the walls of her home? If she is pushed to the streets, being a child, she is in grave danger of predators, human or animals. The Child Act 2001 which is a reflection of the Malaysia's wishes to operationalise UN Convention on the Rights of the Child which was adopted and opened for signature, ratification and accession by General Assembly Resolution 44/25 of 20 November 1989 and the entry into force on 2 September 1990, in accordance with Article 49 .....*

*The Preamble on UN CRC (United Nations Convention of the Rights of Children) recognises that there is a need to protect the child and this is (among others) with the home and the family. In Malaysia this is reflected in the Preamble of the Child Act 2001 .....*

*A child, by reason of his physical, mental and emotional immaturity, is in need of special safeguards, care and assistance, and the home and family is where the natural environment for the growth, support and well-being of all its members, particularly children, so that they may develop in an environment of peace, happiness, love and understanding in order to attain the full confidence, dignity and worth of the human person."*

(c) In the case of **Muhd Haslam Abdullah v. PP [2020] 4 CLJ 328**, the facts of the case shows that the appellant has an intellectual disability and is a holder of a disability card. At the trial Court, he was charged and convicted for trafficking in 242g of Cannabis, an offence under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ('DDA'). However, on appeal at the Court of Appeal, the appellate Court referred to Article 13 of the CRPD and overturned the trial Court's decision. The Court of Appeal held that it is a miscarriage of justice to treat the accused with a mental disability like a normally functioning person.

Summarily, the international human rights norms could serve as a persuasive justification in acknowledging certain rights which have not been explicitly addressed in the Constitution.

### **C. Current issues**

The novel severe acute respiratory syndrome coronavirus 2 (SARS-CoV-2) or Covid-19 epidemic outbreak, emerging in December 2019 from Wuhan City, Hubei Province, China and spreading to the rest of the world including Malaysia,



has given a new development in the adjudication of constitutional rights in Malaysia. In combatting the pandemic, the measures taken by the Government of Malaysia which involve law and rights are as follows:

### 1. Movement Control Order (MCO)

On 16th March 2020, the Malaysian Prime Minister announced the first Movement Control Order ('MCO') as a measure to curb the outbreak of the Covid-19 virus. The MCO was made under the Prevention and Control of Infectious Diseases Act 1988 and banned mass gatherings, including religious, sports, social and cultural activities, and imposed the closure of premises and education sectors, except for essential services. Outbound and inbound travellers were prohibited as well as domestic travellers. The prohibitory orders enforced under the MCO could affect the freedom of movement guaranteed under Article 9 of the Constitution.

Article 9(2) of the Federal Constitution provides as follows:

*“Prohibition of banishment and freedom of movement*

9. ....

*(2) Subject to Clause (3) and to any law relating to the security of the Federation or any part thereof, public order, public health, or the punishment of offenders, every citizen has the right to move freely throughout the Federation and to reside in any part thereof...”*

By virtue of Article 9(2) of the Constitution above, freedom of movement in Malaysia is not absolute. It can be restricted by any law relating to the security of the Federation, public order, public health, or the punishment of offenders.

In the case of **Public Prosecutor v Harminder Pal Singh a/l Jagara Singh**, the respondent was charged before the Magistrate's Court for the offence of causing death by reckless or dangerous driving. The Court suspended his driving license under Section 41(5) of the Road Transport Act 1987 ("the Act"). The respondent applied for the order to be set aside and sought a declaration that the Act is inconsistent with Article 5(1) and Article 8(1) of the Federal Constitution ('Constitution'). The Appellate Court held that freedom of movement on the road embodied in Article 9(2) of the Constitution was expressly made subject to "any law relating to the security of the federation, public order, public health or to the punishment of offenders," of which public safety is a part. The freedom of movement on the road is not absolute but is qualified by the overriding interests



of public safety. Hence, the classification in Section 41(5) of the Road Transport Act is permissible discrimination, consistent with Article 9(2) of the Constitution, and does not violate and was not contrary to the equality of protection of the law in Article 8(1) of the Constitution.

Based on the provisions in Article 9(2) of the Constitution and the case above, one might argue that the measures taken by the Minister in imposing MCO and restricting the citizen's movement are unconstitutional.

The Order is meant to safeguard public safety and secure public health from being infected by Covid-19; thus, it would be in accordance with Article 9 of the Constitution. Therefore, the act of the Minister falls under permissible discrimination and is consistent with the Constitution. The argument is in line with the Court decision in the case of **Re Application of Tan Boon Liat @ Allen; Tan Boon Liat v. Menteri Hal Ehwal Dalam Negeri, Malaysia & Ors [1976] 2 MLJ 83 (HC)**, where it was held that:

*“The expression ‘public order’ is not defined anywhere but danger to human life and safety and the disturbance of public tranquillity must necessarily fall within the purview of the expression. It is used in a generic sense and is not necessarily antithetical to disorder, and is wide enough to include considerations of public safety within its signification.”*

Since the issue has never been tested in the Court, the issue of freedom of movement discussed above is premature and remains academic.

## 2. Proclamation of emergency

One of the most significant measures taken by Malaysia is the proclamation of emergency by the Yang Di-Pertuan Agong on 11 January 2021, which takes effect from January 11, 2021, to August 1, 2021. This power was exercised pursuant to Article 150(1) of the Federal Constitution, which provides:

*“If the Yang di-Pertuan Agong is satisfied that a grave emergency exists whereby the security, or the economic life, or public order in the Federation or any part thereof is threatened, He may issue a proclamation of Emergency making therein a declaration to that effect.”*

The proclamation of emergency was made due to the effect of Covid-19, which became a threat to economic life and public order since it is foreseeable that such collapse would lead to serious civil unrest and economic strife. It could be argued

that the grounds for the proclamation is in line with the Privy Council decision in the case of **Stephen Kalong Ningkan against the Government of Malaysia (1968) 2 MLJ 238**, which held as follows:

*“An emergency to be within that Article (Article 150(1) of the Federal Constitution) must be not only grave but such as to threaten the security or the economic life of the Federation or any part of it, the natural meaning of the word itself is capable of covering a very wide range of situations and occurrences, including such diverse events as was famines, earthquakes, floods, epidemics and the collapse of the civil government.”*

The concept of “emergency” elucidated in Stephen Kalong Ningkan above broadened the classical definition of “emergency” to include wars, famines, earthquakes, floods, epidemics, and the collapse of civil government.

The general impact of the proclamation of the emergency shows that the executive manages the nation’s administration, and the Parliament and state legislative assemblies will not sit until decided by Yang di-Pertuan Agong. Nevertheless, Yang di-Pertuan Agong, by virtue of Article 150(2B) of the Constitution, may promulgate Ordinances if His Royal Highness is satisfied that certain circumstances exist which render it necessary to take immediate action without having to comply with the procedures required or the proportion of the total votes needed for the Houses of Parliament. The Ordinances promulgated under Article 150(2B) will have the same power and effect as an Act of Parliament unless it is revoked or annulled or until it lapses. After Parliament convenes, the Ordinances promulgated must be tabled before both Houses. They will continue in force if approved or cease to effect if revoked or annulled by Parliament. Otherwise, at the expiration of a period of six months from the date on which the relevant proclamation of emergency ceases to be in force, the ordinances will automatically lapse.

### **3. The use of remote communication technology in Court’s proceeding**

The other impact of Covid-19 is on the rapid development in technology usage in court cases’ hearings. Amid the Covid-19 chaos, the Judiciary is committed to ensuring access to justice is made available to the public. On this note, the Malaysian Judiciary has taken steps to explore the concept of open justice by allowing hearings to be conducted via remote communication technology by using an online platform such as an in-house system known as e-Review, email, and video conferencing.

The first online hearing is the case of **SS Precast Sdn Bhd v. Serba Dinamik Group Bhd [2020] 1 LNS 316**. The issue argued was whether the courts could conduct online hearings without one of the parties' consent. On this issue, the High Court opined that notwithstanding the plaintiff's objection to the Video Conference, the court has the discretion to give any directions in the interest of justice for the conduct of the matter pursuant to Order 32 of the Rules of Court 2012. This view is consistent with a party's fundamental rights under Article 5(1) FC to have access to justice. This power is given to the courts to ensure and protect the overriding interest of justice consistent with the right of access to justice. In essence, denying a party from the online hearing deprives the party of the fundamental right of access to justice as enshrined in Article 5(1) of the Constitution.

Based on the above backdrop, the Judiciary proposed for amendment of relevant provisions in the law such as the Courts Judicature Act 1964, Subordinate Courts Act 1948, the Rules of Court 2012, Rules of the Federal Court 1995 and the Rules of the Court of Appeal 1994 to give effect to conducting hearings remotely. It is a commitment to ensuring that access to justice is not affected by the pandemic Covid-19. The Chief Justice Direction and Practice Directions on the same effect have also been issued from time to time to ensure smooth implementation of online hearings and ensure the continuity of access to justice. Amongst the directions issued are as follows:

- i. The Chief Justice Practice Direction No. 1 of 2021- Handling of Civil Case Proceedings Through Remote Communication Technology for Courts Across Malaysia and Guidelines for Handling Civil Case Proceedings through Remote Communication Technology
- ii. The Chief Justice Practice Direction No. 1 of 2021- Direction on the Handling of Criminal Case Proceedings in Court During the Period of a Movement Control Order
- iii. The Chief Justice Practice Direction No. 3 of 2021- Settlement of Traffic Summons Case Through Remote Communication Technology for Magistrates Courts Across Malaysia
- iv. The Chief Justice Practice Direction No. 5 of 2021- Handling of Civil Case Proceedings in Court During the Period of Control of Movement Order (MCO)
- v. The Chief Justice Practice Direction No. 6 of 2021- Conducting

### Criminal Appeal Hearing Proceedings Through Remote Communication Technology During Pandemic Periods

- vi. The Chief Justice Practice Direction No. 7 of 2021- Completion of Bail Process Through Remote Communication Technology
- vii. The Chief Justice Practice Direction No. 8 of 2021- Exceptions to The Application of The Provisions of Law in Relation to Court Matters Throughout Malaysia
- viii. The Chief Justice Practice Direction No. 9 of 2021- Managing and Conducting Criminal Case Proceedings in Court During the Period of the National Recovery Plan Phase I and II
- ix. The Chief Justice Practice Direction No. 10 of 2021- Managing and Conducting Proceedings of Civil and Criminal Cases in Court During the Period of the National Recovery Plan Phase II

## **Annex 1: List of cited legal provisions**

### **1) Constitutional provisions**

Federal Constitution of Malaysia (last amended 1 May 2009)

- Article 3
- Article 4
- Article 5
- Article 6
- Article 7
- Article 8
- Article 9
- Article 10
- Article 11
- Article 12
- Article 13
- Article 76(2)
- Article 128
- Article 149
- Article 150

- Article 150(6A)
- Article 153
- Article 160
- Article 161A

Federation Agreement 1948

- Clause 19(1)(d)

## **2) Legislative provisions**

Criminal Procedure Code [Act 593] (last amended 26 September 2018)

- Section 28A

Dangerous Drugs Act 1952 (last amended 29 December 2017)

- Section 39B(1)(a)
- Section 39B(2)

Human Rights Commission of Malaysia Act 1999 [Act 597] (gazetted on 9 September 1999)

- Article 4(4)

Penal Code (last amended 5 April 2017)

- Section 376(3)

Road Transport Act 1987 (last amended 23 October 2020)

- Section 41(5)

Rules of Court 2012 (last amended 15 December 2020)

- Order 32

## **3) International provisions**

Convention on the Elimination of All Forms of Discrimination against Women 1979

Convention on the Rights of the Child 1989

- Article 49

Convention on the Rights of Persons with Disabilities 2006

European Convention for the Protection of Human Rights and Fundamental

Freedoms 1950

- Article 8

International Covenant on Civil and Political Rights 1966

- Article 17

Universal Declaration of Human Rights 1948

- Article 2
- Article 14

## **Annex 2: List of cited cases**

*Dismissal of a public servant - Right to be heard* [Tan Tek Seng v. Suruhanjaya Perkhidmatan [1996] 1 MLJ 261, Court of Appeal, 22 January 1996]

*Distinction between religious faith and belief and religious practice* [Hajah Halimatussaadiah Haji Kamaruddin v. Public Service Commission Malaysia & Anor [1992] 1 CLJ 413, High Court Malaya, 20 January 1992]

*Emergency Proclamation* [Stephen Kalong Ningkan against the Government of Malaysia (1968) 2 MLJ 238, Federal Court, 1 December 1967]

*Emergency regulations declared to be ultra vires* [Teh Cheng Poh v. PP [1979] 2 MLJ 238, Federal Court 27 April 1979]

*Equality before the law - Royal offender* [Public Prosecutor v. Tengku Mahmood Iskandar & Anor [1973] 1 MLJ 128, Magistrate Criminal Appeal, 3 January 1973]

*Equality before the law - freedom of movement* [Public Prosecutor v. Harminder Pal Singh a/l Jagara Singh [2007] 3 MLJ 433, Court of Appeal, 7 March 2007]

*Interpretation of the word 'life' under Article 5 of the Federal Constitution* [Kanawagi s/o Seperumaniam v. PPC [2001] 5 MLJ 433, High Court of Malaya, 16 January 2001]

*Judicial power - Whether judicial power of courts resided in the judiciary and no other - Whether the exercise of judicial power by non-judges or non-judicial officers in superior courts was ultra vires art 121 of the Constitution* [Semenyih

Jaya Sdn Bhd v. Pentadbir Tanah Daerah Hulu Langat and another case [2017] 3 MLJ 561, Federal Court, 20 April 2017]

*Permissible discrimination and consistent with the Constitution- Detention under the Emergency Order* [Re Application of Tan Boon Liat @ Allen; Tan Boon Liat v. Menteri Hal Ehwal Dalam Negeri, Malaysia & Ors [1976] 2 MLJ 83, High Court Malaya, 6 May 1976]

*Power to amend Constitution-Basic structure of Constitution* [Phang Chin Hock v. Public Prosecutor [1980] 1 MLJ 70, Federal Court, 2 August 1979]

*Power to conduct online hearing* [SS Precast Sdn Bhd v. Serba Dinamik Group Bhd [2020] 1 LNS 316, High Court Malaya, 26 April 2020]

*Right of Freedom of Religion for Children- Applications of the international human rights norms by the courts in Malaysia* [Indira Gandhi Mutho v. Pengarah Jabatan Agama Islam Perak & Ors And Other Appeals [2018] 3 CLJ 145, Federal Court, 29 January 2018]

*Right to appear in Court for hearing of habeas corpus application* [Abdul Ghani Haroon v. Ketua Polis Negara & Another Application [2001] 2 CLJ 574, High Court Malaya, 4 May 2001]

*Right to fair hearing-Right to be represented by competent counsel* [Shamim Reza bin Abdul Samad v. Public Prosecutor [2011] 1 MLJ 471, Federal Court (Putrajaya), 15 September 2009]

*Right to Privacy* [Lew Cher Phoe @ Lew Cha Paw & Others v. Pua Yong & Another [2011] 1 LNS 1528, High Court Malaya, 24 June 2011]

*Rights of Child-Applications of the international human rights norms by the courts in Malaysia.* [Suharman Mohamad Noor @ Ismail v. PP [2020] 1 LNS 2062, High Court Malaya, 21 December 2020]

*Rights of 'Person with Disability* [Muhd Haslam Abdullah v. PP [2020] 4 CLJ 328, Court of Appeal, 1 November 2019]

*Rights to freedom of religion* [Rosliza bt Ibrahim v. Kerajaan Negeri Selangor & Anor [2021] MLJU 105, Federal Court, 5 February 2021]

*Validity of Emergency legislation* [Public Prosecutor v. Ooi Kee Saik & Ors

[1971] 2 MLJ 108, High Court of Malaya 11 May 1971]

*Validity of Proclamation of Emergency* [Abdul Ghani Ali @ Ahmad v. PP [2001] 3 MLJ 561, Federal Court, 19 July 2001]

*Whether the right to travel is a fundamental right guaranteed under Federal Constitution* [Maria Chin Abdullah v. Ketua Pengarah Imigresen & Anor [2021] 2 CLJ 579, Federal Court, 8 January 2021]

*Whether the right to travel abroad is a fundamental right* [Loh Wai Kong v. Government Of Malaysia & Ors [1978] 1 LNS 154, High Court Malaya, 27 April 1978]



## 8. Maldives

### Supreme Court

#### *Overview*

In sharp contrast to all previous constitutions, the current Constitution adopted in 2008 stands out in respect of the importance given to the protection of fundamental rights and freedoms. Chapter II of the Constitution, entitled “Fundamental Rights and Freedoms”, contains a comprehensive set of rights. While there has been a total of five amendments to the 2008 Constitution, the provisions in Chapter II have remained the same ever since promulgation. Most economic, social, cultural, and political rights recognized in international and regional human rights instruments are enumerated in the 2008 Constitution of the Republic of Maldives. Since the bill of rights was based on the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, it reflects all the rights ensured in those conventions. The Maldives has so far ratified seven of the nine core UN human rights treaties. Apart from explicitly stipulating constitutional rights, the Constitution of the Maldives also allows for the recognition of unenumerated rights through Article 62. In terms of the impact of particular historical or cultural factors on rights adjudication, the following can be cited as examples: freedom of expression issues, multi-party elections and the right to vote, constitutional provisions on Islam as the official religion, and the issue of gender equality within the context of the right to political participation. Current issues in constitutional rights adjudication include the right to a fair and public hearing within a reasonable time.

#### *Outline*

##### **I. Rights in the Constitution**

- A. Rights in the Constitution
- B. Rights elsewhere in the Constitution
- C. Concretization of constitutional rights
- D. Historical background and development

##### **II. Classification and content**

- A. Enumerated constitutional rights
- B. Unenumerated constitutional rights
- C. Protection and limitation

##### **III. Interpretation and current issues**

- A. Rights in diverse contexts
- B. Impact of international norms
- C. Current issues

##### **Annex 1: List of cited legal provisions**

##### **Annex 2: List of cited cases**

## **I. Rights in the Constitution**

This section will emphasize on the constitutional rights available; whether constitutional duties are in the same list of constitutional rights; how constitutional duties relate to constitutional rights; and, whether constitutional duties hold equal status as the constitutional rights available in the Constitution. Furthermore, the section will focus on the rights stipulated elsewhere in the Constitution, whether there are other rights listed elsewhere in the Constitution in comparison to those rights listed in the “Bills of Rights”, and whether the constitutional text list constitutional duties outside the constitutional “Bill of Rights.”

Additionally, this section will inquire whether there are constitutional rights which require further elaboration on their implementation in the constitutional text itself or which require rights specific legislation. Lastly, this section will look onto the historical background and developments focusing on the relevant historical background and processes regarding the inclusion of explicit rights provisions in the Constitution and whether constitutional rights have been codified since the original promulgation of the Constitution.

### **A. Rights in the Constitution**

Since the first constitution that was adopted in the Maldives in 1932, a lesser role was afforded to the protection of fundamental rights and freedoms of its citizens. In sharp contrast to all previous constitutions, the current Constitution adopted in 2008 stands out in respect of the importance given to the protection of fundamental rights and freedoms. Chapter II of the Constitution contains a comprehensive set of rights.

Although all constitutions that preceded the current constitution also contained a short bundle of fundamental rights and freedoms, it had little significance as there was no mechanism to enforce those rights. The people had no recourse as (i) the courts were functioning directly under the executive branch and independent courts were absent (ii) and the courts did not have the jurisdiction to hear applications relating to violation of fundamental rights.

The political unrest that occurred during 2003 to 2008 and the subsequent reform movement, which led to the current Constitution paved the way for a complete overhaul of the political and the legal system. The Constitution introduced and guarantees additional constitutional rights. The Constitution in fact has a whole

chapter allocated for constitutional rights. Chapter II of the Constitution sets out the fundamental rights and freedoms entrenched by the Constitution, listing the rights from Article 17 to 60 comprising a total of 46 such rights. The Chapter consisting of the constitutional rights is located after the first Chapter (“State Sovereignty and Citizens”) and right before the chapters that stipulate the Articles on government structure.

The Constitution uses “*asaasee hagguthakaa minivankan*” as the title for the Chapter which lists the constitutional rights, which accurately translates into fundamental rights and freedoms. Hence, it could be argued that Chapter II is called “Fundamental Rights and Freedoms”, possibly because the chapter lists the rights that are fundamental<sup>157</sup> and liberties<sup>158</sup> provided under the Constitution.

In addition to the list of the constitutional rights, constitutional duties of individuals and groups are also included in Chapter II. Article 67 of the Constitution states that, “The exercise and enjoyment of fundamental rights and freedoms is inseparable from the performance of responsibilities and duties...”, which means that the constitutional duties hold the same legal status as the constitutional rights and both have a reciprocal effect. The Article regarding responsibilities and duties comes at the end of Chapter II, and it ensures that the fundamental rights and freedoms is exercised in a way that does not violate rights of other individuals, is in the best interest of the community, and upholds rule of law, state religion and culture. Since, the duties and responsibilities that are highlighted in the said Article reflect on how rights and freedoms should be practiced, seemingly is in the best interest to bring duties and responsibilities along with the list of constitutional rights.

## B. Rights elsewhere in the Constitution

Though Chapter II of the Constitution covers fundamental rights available to all,

<sup>157</sup> Non-discrimination, equality, right to life, economic and social rights, privacy, no slavery or forced labour, right to vote and run for public office, right to strike, right to protect reputation and name, right to marry and establishment of the family, special protection to children, young, elderly and disadvantaged people, right to education, right to work, right of pension, right to participate in cultural life, right to acquire and hold property, fair and transparent hearings, fair administrative actions, personal liability, no unlawful arrest or detention, power of arrest and detention, search and seizure, rights on arrest and detention, release of accused, prompt investigation and prosecution, rights of the accused, confession and illegal evidence, assistance of legal counsel, no degrading treatment and torture, no imprisonment for non-fulfilment of contractual obligation, right to appeal, humane treatment of arrested or detained persons, compensation, retrospective legislation, prohibition of double jeopardy, non-compliance with unlawful orders.

<sup>158</sup> Freedom from restraint, freedom of expression, freedom of the media, freedom of acquiring and imparting knowledge, freedom to form political parties, associations and societies, freedom of assembly, freedom of movement and establishment.

the rest of the Chapters of the Constitution also stipulate several rights specifically available in various circumstances, such as those under Article 100 (d) to conduct due process in case of impeachment of the President and Speaker of the Parliament under Article 82 (g).

Article 128 of the Constitution provides immunity to any person who has served as a President. Likewise, Article 90 (a) of the Constitution provides some privileges to parliamentary members. Moreover, under Article 98 (b) of the Constitution, any member of the parliament has the right to question Ministers and members of the Government, in a manner specified by the *People's Majlis*<sup>159</sup> *either orally or in writing, concerning the performance of their duties. Furthermore, subsection (b) of the aforementioned Article states that no person or media shall be made liable in respect of any fair and accurate report of the proceedings of the People's Majlis.*

Lastly, Article 246 (a) of the Constitution states of a right available to all, which imposes a duty upon the Members of the Security Services to treat all persons and groups equally without any discrimination, and with humanity and dignity in accordance with the decorous principles of Islam.

Rights stipulated elsewhere in the Constitution are provided to the above specified individuals by virtue of office, and are not available to all in contrast to the constitutional rights stated in Chapter II of the Constitution.

### **Constitutional duties of individuals and groups**

In Article 133 (b) of the Constitution, it is stipulated that “it is the duty of the Attorney General to advise the Government on all legal matters affecting the State. The Attorney General’s duties include performance of all legal duties pertaining to his office, and discharge of all responsibilities required to be discharged by the Attorney General, by the Constitution and by law.” In addition to this, Chapter 7 of the Constitution introduced Independent Commissions and Offices. Each of these Independent Commissions has numerous duties and responsibilities entrusted to them by the Constitution. For instance, according to Article 159 (d), the Judicial Service Commission has a duty to “advise the President and People’s Majlis on any other matter relating to the Judiciary of the administration of justice.” Moreover, according to Article 170 (a) of the Constitution, the Election Commission is bestowed with the responsibility “to conduct, manage, supervise, and facilitate all elections and public referendums, to ensure the proper exercise

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<sup>159</sup> *People's Majlis* is the unicameral legislative body of the Maldives.

of the right to vote, and to ensure all elections and public referendums are conducted freely and fairly, without intimidation, aggression, undue influence or corruption.” Moreover, Article 192 (a) of the Constitution states that the Human Rights Commission has the responsibility “to promote respect for human rights”, “to promote the protection, development and attainment of human rights”, “to monitor and assess the observance of human rights.”

The duties mentioned elsewhere in the Constitution other than those stipulated in Chapter II (fundamental rights and freedoms) of the Constitution are directly or indirectly related to the rights stipulated in Chapter II of the Constitution.

### **C. Concretization of constitutional rights**

Most of the constitutional rights enumerated in Chapter II require further elaboration for their implementation. Some rights, such as freedom from restraint under Article 19, right to equality under Article 20, right to vote under Article 26, have been described in the Constitution and suffice by themselves. Some other rights require legislative explanation for their exercise.

For instance, the right to no slavery or forced labour and the right to work, guaranteed by Articles 25 and 37, respectively, are defined in the Employment Act.<sup>160</sup> Similarly, the now-repealed Defamation Act<sup>161</sup> elaborated on the exercise of freedom of expression and media, right to protect reputation and name. Likewise, the Information Act<sup>162</sup> guarantees the freedom of acquiring and imparting knowledge guaranteed by Article 29.

Freedom to form political parties is regulated by the Political Parties Act.<sup>163</sup> The Regulation on Resolving Disputes between Employer and Employee<sup>164</sup> formulated by the Economic Ministry stipulates further details on employees exercising the right to strike under Article 31 in the Maldives.

Furthermore, the Judicature Act<sup>165</sup> stipulates the circumstances on how a judgement by court or tribunal can be appealed to a higher court, detailing the

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<sup>160</sup> Act No: 2/2008.

<sup>161</sup> Act No: 16/2016.

<sup>162</sup> Act No: 1/2014.

<sup>163</sup> Act No: 4/2013.

<sup>164</sup> Regulation No: 2011/R-12.

<sup>165</sup> Act No: 22/2010.

right to appeal under Article 56. The Criminal Procedure Code<sup>166</sup> similarly ensures that the rights, especially those of the accused, are protected as stipulated in various Articles in Chapter II. Comparably, the Child Protection Act<sup>167</sup> and the Juvenile Justice Act<sup>168</sup> further strengthen the right to special protection given to children and young persons under Article 35.

It should be noted, even though there are specific legislations enacted in the Maldives to elaborate the respective rights for the purposes of implementation, several rights enshrined in the Constitution have been explained and clarified by judgements of the courts. Some of such instances are included in the following sections.

## **D. Historical background and development**

Sultan Muhammad Shamsuddeen Iskandar III ratified the first written Constitution of the Maldives on December 22, 1932.

The 1932 Constitution comprised 92 articles and a bill of rights that guaranteed many rights such as equality before the law, freedom from arbitrary arrest and torture, protection of private property, right to a pension and freedom of expression, association and press.

The 1932 Constitution, though said to be a milestone, was repealed within the first year of its adoption, marking the beginning promulgation of the many Constitutions the Maldives had seen until 2008, when the current Constitution was ratified.

Notable Maldivian Constitutions with their significance in the history of the Maldives are listed below:

### **1953 Constitution**

In the first constitutional referendum held on April 17 and 18, 1952, Maldivians voted to change from a sultanate to a republic form of Government. The 1953 Constitution, which converted the Maldives from a monarchy to a republic for the first time in Maldivian history, came into effect on January 01, 1953. The 1953

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<sup>166</sup> Act No: 12/2016.

<sup>167</sup> Act No: 18/2019.

<sup>168</sup> Act No: 19/2019.

Constitution established a president to be elected through a direct vote, judiciary to be appointed by the president and a bicameral legislature consisting of an eighteen-member Senate and 47-member House of Representatives. A woman was for the first time elected to the parliament under the 1953 Constitution.

### **1954 Constitution**

The second constitutional referendum was held on August 21, 1954, reverting the Maldives to a sultanate again. The 1954 Constitution was promulgated to reflect this change of Government and a new king was installed. The 1954 Constitution declared the Maldives an elected monarchy, and a unicameral legislature was reinstated with fifty-four members. Only Maldivian men were given the right to vote to elect the members of *People's Majlis*.

### **1968 Constitution**

The third constitutional referendum was held on March 15, 1968 to decide whether to convert from a constitutional monarchy to a presidential system again. The proposal was approved, the 1954 Constitution was repealed, and the Second Republic was declared on November 11, 1968.

The new Constitution, the 1968 Constitution, ratified on November 11, 1968 declared the Maldives an independent and free state. The 1968 Constitution was amended three times, in 1970, 1972 and 1975 respectively.

In 1980, a special assembly was convened to amend the 1968 Constitution. After a lengthy process that took 18 years to complete, finally a new constitution was written and came into force on 1 January 1998. One remarkable feature was that this Constitution for the first time allowed multi-candidates to contest the presidency. It allowed any individual who wished to stand for presidency to apply to the *People's Majlis*, and the *People's Majlis* to choose a candidate to be approved through a public referendum.

### **1998 Constitution**

Several fundamental rights, though enumerated in the 1998 Constitution, were not enforceable. Lack of enforcement was mainly due to the absence for a mechanism to enforce the rights.

In September of 2003, anti-government street protests broke out in the capital Malé, sparked by the deaths of four prison inmates. Despite this, in October of the

same year, after winning more than 90% of the vote, President Maumoon Abdul Gayoom was re-elected as the president for an unprecedented sixth term.

Nevertheless, because of the internal and external pressure, in his inaugural address, President Maumoon Abdul Gayoom pledged various constitutional changes, including developing a new Constitution and establishing a Human Rights Commission. Accordingly, in December 2003, through a special presidential decree, the first National Human Rights Institution was established in the Maldives. Thus, began the four-year-long reform process leading to the promulgation of the current Constitution.

**The following events occurred in the next few years:**

In June 2004, to reform the 1998 Constitution, a special assembly was convened, to consider and pass constitutional reforms to strengthen the democracy. The proposal for the new Constitution included the right to establish political parties, greater separation of powers, and limiting the president's tenure to two terms of five years.

In August 2004, a state of emergency was declared on the Maldives, when a mass rally held in the capital ended in violence and arrests of political activists. However, the Government lifted the state of emergency in October 2004 and held general elections in January 2005.

The subsequent year, the Government unveiled the "Roadmap for the Reform Agenda" aimed to nurture democracy. This roadmap was said to enhance multi-party politics in the Maldives and contained a timetable of legislative, executive, and communicative measures to execute the reform process. As a result, *People's Majlis* unanimously voted to allow multi-party politics in the Maldives the same year.

A further notable historical event is the referendum that took place in August 2007 following a decision made by the *People's Majlis*. In this referendum, 60% of the Maldivians backed the proposal for a presidential system. This outcome is reflected in the Constitution and is still the system of Government in the Maldives.

The Government and legislators focused on completing the constitutional amendments by November 2007, but the drafting process of the Constitution was only completed by June of 2008. President Maumoon Abdul Gayoom ratified the new Constitution in August 2008, which paved the way for the first multi-party presidential election, resulting in the change of Government after more than 30



years.

Compared to the 1998 Constitution, the current Constitution introduced many new constitutional rights such as social, economic, and cultural rights, right to vote and run for public office, right to information, right to strike, and several rights specific to persons accused of a crime, and established a better enforcement process.

### **Amendments to the 2008 Constitution**

While there has been a total of five amendments to the 2008 Constitution, the provisions in Chapter II have remained the same ever since promulgation.

However, it is worth mentioning that, while only citizens have the right to acquire property under Article 40, the Second Amendment<sup>169</sup> to the Constitution introduced in 2015, amending Article 251 (a) and 251 (b) and adding a new Chapter 15, allowed foreigners who invest more than US\$ 1 billion to purchase land within the project site. Formerly, Article 251 prohibits foreign ownership of the Maldivian territory but allowed land leasing for up to ninety nine years. The Second Amendment was later repealed in 2019 through the Fourth Amendment<sup>170</sup> to the Constitution. The Fourth Amendment restored Articles 251 (a) and 251 (b) and repealed Chapter 15.

## **II. Classification and content**

This section firstly analyses the classifications, holders, and structure of the constitutional rights in Chapter II (Bill of Rights). In addition, this section also examines whether the Constitution allows for the recognition of unenumerated rights and sources of such potential recognition. Subsequently, a discussion on whether any unenumerated constitutional rights are identified in the Maldives is followed by the conditions that make it easier and more challenging for such recognition. Finally, this section highlights the constitutional provisions that expressly prescribe how constitutional rights are protected and limited in the Maldives.

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<sup>169</sup> Act No: 20/2015.

<sup>170</sup> Act No: 3/2019.

## **A. Enumerated constitutional rights**

### **1. Classification of enumerated constitutional rights**

Most economic, social, cultural, and political rights recognized in international and regional human rights instruments are enumerated in the 2008 Constitution of the Republic of Maldives. These include, among other rights, right to life, right to equality, right to non-discrimination, right to education, right to clothing and housing, and a good standard of health care, including physical and mental health care, right to an adequate standard of living, right to vote and form political parties, right to a healthy environment and the right to participate in cultural activities. These are hence even inclusive of all the three generations of rights.

### **2. Holders of rights**

Article 16 stipulates that the Constitution guarantees to all persons, in a manner not contrary to a tenet of Islam, the rights and liberties contained within Chapter II.

However, the Constitution does differentiate between a citizen and a person or persons. As per Article 274 and Article 9 of the Constitution, “a citizen” is any person who was a citizen of the Maldives at the commencement of the Constitution, children born to a citizen of the Maldives, and foreigners who, in accordance with the law, become citizens of the Maldives. Person or persons are defined as to include natural and legal personalities under Article 274.

Hence, considering the text of the individual provisions of Chapter II, it is clear that all Maldivian citizens enjoy all the constitutional rights enshrined in the Constitution and that some rights such as the right to vote and run for office,<sup>171</sup> the right to acquire property, and the right to engage in any employment or occupation are only held by citizens. Similarly, only the citizens enjoy the freedom to form political parties and freedom of movement and establishment in the Maldives.

All persons, irrespective of legal status, equally enjoy the rest of the constitutional rights in Chapter II. Article 17 further strengthens this by prohibiting any form of discrimination based on race, national origin, color, sex, age, mental or physical impediment, political or other opinions, birth or other status, or native island. Article 62 (a) also explicitly holds that enumerated constitutional rights and liberty in Chapter II are guaranteed equally

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<sup>171</sup> Article 26 of the Constitution of the Republic of Maldives 2008 states that unless otherwise provided for in the Constitution, only citizens of age 18 and above have the right to vote and run for public offices.

to female and male persons.

### **3. Structure of enumerated constitutional rights**

The same category of rights or inter-related rights is assorted in the Constitution. Chapter II begins with civil rights such as the right to life, right to equality, followed by fundamental social and economic rights. Subsequently, political rights such as right to vote and freedom to form parties and others are listed. After that, it lists more current socio-economic and cultural rights. Chapter II concludes with several civil rights such as, but not limited to, the rights of the accused, the right to a fair trial, and the right of protection from arbitrary detention.

Since the bill of rights was based on the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, it does reflect all the rights ensured in those conventions. Chapter II consists of detailed provisions, each containing elaborate definitions of each right; for example, Article 17 states how discrimination based on numerous factors is prohibited while providing instances that cannot be considered discrimination. In the same way, Article 23 states the economic and social rights guaranteed by the Constitution, the responsibilities of the State, and the limits to those responsibilities. Article 37 states how citizens have the right to engage in any form of employment, how everyone is entitled to just and safe working conditions, and the right to rest and leisure. The rights ensured to anyone accused of committing a crime are further elaborated in Article 52.

### **4. Limitation provision in the Constitution**

Individual rights provisions do not include how a right can be limited, and there is a general limitations provision, which is Article 16. Article 16 states how and the extent to which constitutional rights can be limited by an Act of Parliament and judicial interpretation. Article 16 then states what courts must consider when determining whether the limits of the rights and liberties are limited per the Constitution.

## **B. Unenumerated constitutional rights**

The Constitution allows for the recognition of unenumerated rights through Article 62.

Article 62 states that it should not be construed that enumeration of the rights and liberties individually in Chapter II can deny or negate other rights retained by the

people, not specified in that Chapter. While Article 62 does not provide details of the conditions which may hinder the recognition of unenumerated rights, the right to retention of other rights, as will be mentioned later, cannot be limited even in a state of emergency.

However, when reading the Constitution as a whole, it could be noted that certain instances can either hinder or aid in the recognition of unenumerated rights. An instance of the former would be a right that contradicts a tenet of Islam. Then again, a right set down in Islam would be an example of the latter.

A few rights are, as explained before, already recognized within the boundaries of Islam. For example, the Constitution does not recognize the right to abortion. However, considering the circumstances that allow abortion in Islam, the Maldivian Government's Council of Religious Scholars, *Islamic Fiqh Academy*, has issued a *fatwa*<sup>172</sup> on the conditions and gestational limit under which abortions are allowed in the Maldives.

According to the *fatwa*, an abortion can be permitted under five conditions. It is only permitted if performed within 120 days (about four months) of conception, as Islam believes that the fetus becomes a living soul after 120 days of pregnancy. Abortion after this time is considered impermissible.

Cases where the mother's life is in danger during pregnancy, or where the fetus has abnormalities that can make it difficult for the fetus to survive, are two of the five of the instances the mother can choose to terminate her pregnancy.

### Case law

Until recently, there was no significant case law stipulating how unenumerated rights can be recognized in the Maldives. However, in a landmark decision,<sup>173</sup> the Civil Court of the Maldives ordered the respondent to pay compensation for the Loss of Consortium, which until then was a right not recognized in the Maldives.

In this case, Dr. Farzana Hussain and her husband Mohamed Kamaaluddin Javid filed the case in Civil Court seeking damages for financial and mental losses they suffered due to the loss of their daughter, Rawshan Jian, in an unfortunate incident that occurred in a construction site.

<sup>172</sup> Number: IFA/2013/06, '*Fatwa 06*'.

<sup>173</sup> Case No: 3143/Cv-C/2019 of Civil Court of the Maldives.

These damages included compensation for the loss of filial consortium. The defendant, W Construction Company Pvt Ltd, objected to the claim, on the basis that no law or precedent exists in the Maldives, under which such damages can be ordered.

The Civil Court citing Article 62 and referring to judgments of other democratic countries, such as the USA as instructed under Article 68, decided that the parents should be compensated for the loss of filial consortia caused by the untimely death of their daughter.

It is believed this case will encourage more of such claims and hence pave the way for the recognition of other unenumerated rights in the Maldives.

## **C. Protection and limitation**

### **1. Protection**

Article 18 directs that the State must follow the Constitution's provisions and protect and promote the rights and freedoms provided in Chapter II. Similarly, Article 23 requires that the State achieve the progressive realization of the socio-economic rights listed in Chapter II, by reasonable measures within its ability and resources.

Likewise, Article 36 (b) states that parents and the State must provide primary and secondary education for the children, ensuring that every child in the Maldives enjoys their right to education without any hindrances. Exceptional protection and assistance from family, the Community, and the State should also be given to children, young people, disadvantaged people, and the elderly under Article 35. These Articles safeguard these special categories of people and further protects their right to enjoy fundamental rights guaranteed by the Constitution.

Accordingly, under Article 65, anyone whose rights or freedoms are infringed or denied has the right to petition a court to obtain a just remedy. Comparable to Article 65, Article 58 holds that everyone arrested or detained without legal authority or justification has the right to be compensated. All these provisions ensure the full exercise of the enumerated rights by everyone in the Maldives.

The following cases are examples where the courts applied the provisions of the Constitution to make sure that no one's constitutional rights are infringed, and in instances where they were, they are served justice.

In *Fazeen Hassan v. Prosecutor General's Office*,<sup>174</sup> the High Court overruled and set aside the judgment of S. Hithadhoo. Maldives Police Service gave Fazeen Hassan three days to appoint a lawyer. The High Court held that, considering that most of the lawyers resided in the capital Malé and for Fazeen Hassan, being in police custody, not finding a lawyer was more likely than finding one in three days. Accordingly, the High Court decided that three days was not an adequate time to find a lawyer. The High Court observed that Fazeen Hassan's right to be defended through legal counsel of his choosing as guaranteed by Article 51 (f) was infringed.

Likewise, in *Gasim Ibrahim v. Maldives Police Service*,<sup>175</sup> Gasim Ibrahim appealed the High Court's decision claiming that his detention was unconstitutional and unlawful. Gasim Ibrahim asserted that Article 49 of the Constitution does not allow any person to be held in custody during investigation, except under the circumstances specified in Article 45. In deciding the matter, the Supreme Court stated that Gasim Ibrahim was deprived of the right to life guaranteed under Article 21 and freedom of movement under Article 41 of the Constitution.

It was also stated that it could not be established that Gasim Ibrahim's rights were limited to the extent required as stipulated in Article 57 of the Constitution. Supreme Court also stated that there was no legal or judicial basis for the Court to establish that the arrest of Gasim Ibrahim and subsequent remand extension complied with the Constitution. Gasim Ibrahim was thus ordered to be released from detention.

Furthermore, in *Prosecutor General's Office v. Hassan Abdulla & 5 Ors*,<sup>176</sup> the Supreme Court of Maldives held that confessions made by an accused outside the Court could not be admitted as the sole evidence used to convict the accused. Article 52 of the Constitution states that no confession should be admissible in evidence unless made in Court by an accused person in a good state of mind. Hence, admission of confession made during an investigation would be unconstitutional as there is a clear breach of Article 52 of the Constitution. The Supreme Court upheld the High Court's decision not to admit Hassan Abdulla's and the others' confessions during the investigation.

Article 66 further states that all existing statutes, regulations, decrees, and notices

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174 Case Number 2009/HC-A/355 of High Court of the Maldives.

175 Case Number 2010/SC-A/19 of Supreme Court of the Maldives.

176 Case Number 2011/SC-A/23 of Supreme Court of the Maldives.

inconsistent with the fundamental rights and freedoms provisions in Chapter II of the Constitution should have, to the extent of the inconsistency, become void on the commencement of the Constitution.

For instance, the current Constitution introduced the right to engage in political activities and the freedom to form political parties. Civil servants, who are the majority of the government staff force, were prohibited from running for public office while they were employed at the Civil Service. The Civil Service Act<sup>177</sup> came into force in 2007, much before the 2008 Constitution.

In *Ahmed Athif v. State*,<sup>178</sup> Ahmed Athif challenged that Section 51 of the Civil Service Act infringes the rights of civil servants to run for public office and, therefore, contradicts Article 26. Section 51 of the Civil Service Act stated that employees of the Maldivian Civil Service intending to contest in general elections prescribed in the Constitution of the Republic of the Maldives should resign six months before the date of the election. The High Court Justices stated that the objective of Section 51 of the Civil Service Act could be achieved by limiting the right to run for public office to a lesser degree and hence held that Section 51 of the Civil Service Act contradicts Article 26 and is void.

It is clear from the cases above how it is ensured through the judicature that no legislation in the Maldives can contain any clause that contradicts any provisions of the Constitution, especially Chapter II.

Moreover, Article 68 states that courts and tribunals should promote the values that underlie an open and democratic society based on human dignity, equality, and freedom. Courts should also consider international treaties to which the Maldives is a party when interpreting and applying the rights and freedoms of Chapter II.

## 2. Limitations

According to Article 16 of the Constitution, rights and freedoms guaranteed in Chapter II can be subjected to reasonable limits prescribed by a law enacted by the *People's Majlis*. Such laws should only limit a right or freedom as provided for in the Constitution and protect and maintain the tenets of Islam. Rights and freedoms can be limited in this manner to any extent as long as it is demonstrably justified in sovereign and democratic countries.

<sup>177</sup> Act No: 5/2007.

<sup>178</sup> Case Number 2009/HC-DM/4 of High Court of the Maldives.

Additionally, no constitutional provision can be interpreted or translated in a manner that would grant the State or any group or person the right to engage in any activity or perform any act aimed at the destruction of the rights and freedoms set out in this Constitution as per Article 69 of the Constitution. Thus, no law ratified in the Maldives can give the State or any group any right that may destroy the rights and freedoms of others. In violation of any fundamental rights and liberties guaranteed by Chapter II, legislation as a whole or the part of the legislation would be void or void to the extent of such inconsistency under Article 63 of the Constitution.

Any person who feels that a law or a part of a law is infringing on a right or freedom can submit such matters to the relevant court of law. When deciding if a right or freedom has been limited per Article 16, the courts must be fully cognizant of and should refer to all the facts below:

- (a) the nature and character of the right or freedom
- (b) the purpose and importance of limiting the right or freedom
- (c) the extent and manner of limiting the right or freedom
- (d) the relationship between the limitation of the right or freedom
- (e) and the importance of the right or freedom
- (f) the extent to which objective for which the right or freedom has been limited could have been achieved by limiting the right or freedom to a lesser degree
- (g) the extent to which the right or freedom must be limited to protect the tenets of Islam

The onus of establishing that rights are limited to the extent within reasonable limitations prescribed in the Constitution is on the State or the person asserting limitation of the right or freedom.

The following are recent cases where it was reviewed whether the limitation of constitutional rights was limited under the Constitution.

In *Moosa Anwar v. State* (2020),<sup>179</sup> the High Court of the Maldives confirmed the decision of the Elections Commission of the Maldives to reserve a certain number of seats on the council for women. Moosa Anwar filed the constitutional case claiming that amendment to the Decentralization of Administrative Divisions Act<sup>180</sup> discriminates against men and cited Article 26 (b) and (c) of the

<sup>179</sup> Case Number 2020/HC-DM/02 of High Court of the Maldives.

<sup>180</sup> Act No: 31/2020.



Constitution, which states that every citizen over 18 years of age has the right to run for public office. The amendment to the Decentralization of Administrative Divisions Act stated that in five-member councils, two elected councillors must be women. In contrast, three seats on seven-member councils must be allocated for women.

In deciding the matter, the High Court stated that the discrimination challenged by Moosa Anwar falls within discrimination permissible under Article 17 (b) of the Constitution. Article 17 (b) provides that special assistance and protection to disadvantaged individuals or groups or groups requiring special assistance, as provided by law, cannot be deemed as discrimination stated in Article 17 (a) of the Constitution. The five High Court judges, Mohamed Niyaz, Ali Sameer, Abdul Rauf Ibrahim, Hussain Shaheed, and Hathif Hilmy, unanimously supported the Elections Commission's decision.

In the same way, in *Export Import Bank of Malaysia v. One and Half Degree Maldives Pvt Ltd*,<sup>181</sup> the appellant appealed the High Court's decision to remand the case. The main ground of appeal was that the remanding of the case to the lower Court for reconsideration infringes on the appellant's right to appeal, which is guaranteed by Article 56 of the Constitution. The appellant also contested that the decision was also in contradiction with Article 68 of the Constitution as the High Court failed to consider the values promoted in independent democratic countries. However, the Supreme Court Justices reviewing this case unanimously held that the High Court's decision was in alignment with the Constitution. The reasoning for that was, within the specified constraints set through the legislation passed by the *People's Majlis*, appeal courts are empowered to remand cases. Therefore, this cannot be seen as a limitation to the right to appeal contrary to Article 16. The presiding Justice Aisha Shujune Muhammad further noted that, although the limits on remand or remittal differ, it is a court procedure established in many independent democratic countries. Hence, the High Court's decision was held neither to contradict Article 68 of the Constitution.

The exercise and enjoyment of fundamental rights and freedoms are inseparable from the performance of responsibilities and duties. Under Article 67, it is the responsibility of every citizen to respect and protect the rights and freedoms of others and to foster tolerance, mutual respect, and friendship among all people and groups. Likewise, every citizen must contribute to the well-being and advancement of the community and promote sovereignty, unity, security, integrity, and dignity of the Maldives. They also must respect the Constitution and the rule

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181 Case Number 2018/SC-A/40 of the Supreme Court of the Maldives.

of law and promote democratic values and practices consistent with any tenets of Islam. Citizens must equally preserve and protect the state religion of Islam's culture, language, and heritage. They should preserve and protect the natural environment, biodiversity, resources, and beauty of the country, abstain from all forms of pollution and ecological degradation and respect the national flag, state emblem, and national anthem. Every person in the Maldives should also respect these duties.

The exercise and enjoyment of fundamental rights and freedoms and their relation to the performance of responsibilities and duties were explored in *Ex Parte State (Attorney General's Office)* (2012).<sup>182</sup> In this case, the Attorney General claimed that freedom of expression does not include:

- (a) defaming people
- (b) advocating the commission of crimes against specific targets
- (c) gathering near people's private residences, especially during late hours impacting people's right to personal life protected under Article 24 and obstructing the rights of children and the elderly protected under Article 35

The State sought to exclude the acts above from the scope of freedom of expression guaranteed under Article 27, freedom to conduct political activities under Article 30, and freedom to conduct peaceful gatherings under Article 32. The State also pursued that those acts violate the right to life under Article 21, right to private and family life under Article 24, right to protect reputation and name as per Article 33, and special protection of children, young persons, elderly, and disadvantaged persons as under Article 35.

In deciding this case, the Supreme Court further considered relevant provisions stated in the Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR). The Court referred to Article 3, Article 12, Article 16 (3) and 29 (2) of the UDHR and Article 6, Article 9, Article 12 (1), Article 17, Article 19 (2), Article 21, and Article 23 of ICCPR.

The Supreme Court, referring to these legal provisions, held that the right to establish and participate in political parties, freedom of assembly and other fundamental rights should align with Article 67. Thus, gatherings held to defame people, gatherings advocating the commission of crimes against specific targets, or gatherings near people's private residences, especially during late hours,

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182 Case Number 2012/SC-C/24 of the Supreme Court of the Maldives.

impacted people's right to personal life protected under Article 24. Moreover, those acts which similarly obstructed children's and the elderly's rights protected under Article 35, are a direct violation of constitutional rights. Therefore, the said acts were decided not to reflect the freedom of expression or freedom of assembly.

### **3. Limiting constitutional rights in a state of emergency**

A declaration of the President announcing a state of emergency under Article 253 could overstep some rights and freedoms guaranteed by the Constitution. Any such infringement of rights and liberties can only be to the degree stringently required by the emergency under Article 255 (c). Similarly, Article 255 (d) states that the measures adopted in an emergency should similarly be consistent with the obligations of the Maldives under international laws applicable to states of emergency.

The President can only declare a state of emergency in the events of natural disaster, dangerous epidemic disease, war, and threat to national security or foreign aggression, according to Article 253. As such, the period for such a declaration cannot be longer than thirty days. This restraint shows how the Constitution ensures that all persons can enjoy fundamental rights and freedoms without hindrance, even in the most extreme circumstances.

In contrast, rights such as the right to life, freedom of expression and media, rights of the accused, and others listed down in Article 255 (b) are absolute and cannot be restricted even in an emergency.

## **III. Interpretation and current issues**

This section will focus on three major parts: Rights in diverse context, impact of national norms and current issues. The first part will analyse the constitutional provisions which directly or indirectly reflect on some of the cultural and historical contexts of the Maldives which had an impact on the interpretation of constitutional rights and some of the key judgements on constitutional rights, in which the historical and cultural context of the Maldives played an important role.

The second part will be an in-depth study of the international and regional human rights treaties that the Maldives has ratified or acceded and the legal status these ratified treaties enjoy in the Maldivian Legal System. Furthermore, this part

will elaborate constitutional rights cases which have made significant use of international human rights norms and whether the norms played a decisive role in the outcome of the case.

The last part of this section will look into certain current issues which have led to particular innovations or new perspectives and developments in the adjudication of constitutional rights.

## **A. Rights in diverse contexts**

As stated previously, Maldives had its first written Constitution in 1932. Since the first written constitution to the promulgation of the current Constitution, Maldivians saw a diverse range of Constitutions, which were repealed and amended to fit the needs of the Maldivian community. The 1998 Constitution is to be emphasized because it contained articles related to fundamental rights which have been highlighted in the first section.

The establishment of the current Constitution can be construed as a new era of the political system in the Maldives, introducing a new set of fundamental rights. In addition to the rights available in the 1998 Constitution, all are entitled to rights such as the freedom of media and right to strike for the first time. As enlightened earlier, prior to 2008, freedom of expression was not explicitly exercised in the Maldives. If we explore the Maldivian history and historical books, we can discern that there have been years-long detentions for expressing and writing on their views about the Government. Public media was immensely managed and monitored, with a set of limitations on the content that can be broadcasted to the public. However, with the Constitution in force, a lot of private media were set up and media and individual citizens freely raised their voice openly, exercising their right of freedom of expression and media under Article 27 and 28 of the Constitution, respectively.

Moreover, for the first time in the Maldives the party system was introduced and freedom to form political parties, associations and societies was given under Article 30 and this led to the first multi-party election which was held in October of 2008.

Since, the Maldives converted to Islam in the 12<sup>th</sup> century, Islam was the only religion practiced by its citizen. Any other religion was not publicly practiced in the Maldives even when the Constitutional Assembly was established to draft a new Constitution. Hence, the current Constitution recognizes Islam as the

only religion of the country. According to Article 9, a non-Muslim cannot be a citizen of the Maldives. Consequently, Article 10 of the Constitution states that the religion of the state of the Maldives is Islam and no law contrary to any tenet of Islam should be enacted in the Maldives. Similarly, under Article 16 of the Constitution, the rights and freedoms contained in Chapter II are guaranteed to all persons in a way that is not contrary to any tenet of Islam. Under Article 19, a citizen is free to engage in any conduct or activity that is not expressly prohibited by Islamic Shari'ah or by law. Equivalently, freedom of expression can also be exercised as long as it is not contrary to any tenet of Islam. Also, Article 67 of the Constitution provides that it is a responsibility and duty of the citizens to promote democratic values and practices in a manner that is not inconsistent with any tenet of Islam and to preserve and protect the State religion of Islam.

If we look into the historical events of the Maldives, only men had the right to vote, and women were deprived of this right until very recently. Right to vote under Article 26 (a) of the Constitution states that every citizen of the Maldives eighteen years of age or older has the right to vote in elections and in public referendums. No distinction is made on the basis of sex.

Also, culturally it was not common in the Maldives for women to run for public office or contest in elections. Article 26 of the Constitution states that every citizen of the Maldives eighteen years of age or older has the right to run for public office. Therefore irrespective of their gender, every Maldivian has the right to run for public office. However, if we look at relevant statistics, the number of women elected to public offices has been very low, because of the Maldivian culture and beliefs. The numbers have not shown much improvement even since the promulgation of the Constitution.

On 5<sup>th</sup> December 2019, the *People's Majlis* passed an amendment to the Decentralization of Administrative Divisions Act, which included provisions allocating 33% of the Local Council seats to women. The said bill was unanimously approved by the Parliament by 76 Parliament Members after the Decentralization Committee made several amendments which included inserting a whole chapter focusing on increasing the role of women in local governance. According to the said amendment two elected members should be women in a five-member council whereas seven-member councils should allocate three seats for women. This, introduces a quota system for women in the Maldives for the first time in the Maldives.<sup>183</sup>

183 <https://edition.mv/news/13806> (Parliament approves 33 percent quota for women on Island Councils) Mariyam Malsa, 6<sup>th</sup> Dec 2019, MVT 14:59.

Regarding the aforementioned amendment to introduce a quota system for women in the Local Council Election a constitutional case was submitted to the High Court of the Maldives by Moosa Anwar (*Moosa Anwar v Attorney General's Office*)<sup>184</sup> on competing rights. He appeals that establishing a quota for women in Local Council is in violation of Article 17 of the Constitution. Moosa Anwar stated that some of the provisions of the Decentralization of Administrative Divisions Act and Local Council Election Regulation<sup>185</sup> supersedes men's right to run for office.

Moosa Anwar further claimed that, formulating and ratifying a general law in a way which will restrict and limit the fundamental rights provided to men to compete in a general election, is in contradiction to Articles 8, 16 (a), 17 and 26 (a) (b) (c), 62 (a). He further stated that under Article 16 (d) of the Constitution the onus lies on the State to prove that the said rights are held and limited as per the Constitution and in a reasonable manner.

In response, the Attorney General's Office said that the principle stated in Articles 17 (a) and 20 is "formal equity" and the exception given under 17 (b) is "substantive equality" which is now recognized by other developed countries as well. And women fall within the exception stated under 17 (b) of the Constitution, as persons who need social protection. And this protection and assistance is provided under affirmative action, positive discrimination and reverse discrimination. Furthermore, the Attorney General's Office noted that, Article 4 of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), Article 2(2) of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), and Article 157(4) of the European Union's Equal Treatment Directive 1976, provide that state parties creating special rules for women in itself is not gender discrimination. Hence, it demonstrates that women should be given special protection.

Referring to some of the decisions by the European Court of Human rights and European Court of Justice, the Attorney General's Office also stated that essentially creating special procedure by the State to empower women avoids discrimination.

Explaining, whether the discrimination has been brought by the State within the "margin of appreciation" stated under the law, the Attorney General stated that it can be determined under the following test which comprises of the following:

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184 Case Number 2020/HC-DM/02 of the High Court of Maldives.

185 Regulation No: 2020/R-6.

1. Is there an objective and reasonable justification?
2. Does it pursue a legitimate aim or if there is a “reasonable relationship of proportionality between the means employed and the aim sought to be realized.”

In deciding the case, the High Court stated that Articles 17 and 20 of the Constitution should be read together because not discriminating basically means equality. The High Court further noted that Article 20 has two interpretations, one being “equal before the law” and the other being “equal protection and equal benefit of the law.” Referring to the claim, the court pointed out that the claim is whether the questioned “law and regulation” is discriminative and whether it is within the aforesaid interpretation of Article 20. The law does not construe the concept of “equal before the law” and providing “equal protection and equal benefit of the law” as treating everyone in an equal manner in all situations but rather it means that treating the people in the same situation in the same manner. So, when a case of discrimination is brought before the court, the responsibility of a judge is to ensure that the law in question treats the people in the same situation in the same manner and equally.

Further discussing the case, the court stated that Article 16 of the Constitution states that a fundamental right stated in Chapter II of the Constitution can be limited by an Act enacted by the parliament. The next question is, whether the said discrimination is legitimate, and if the answer is yes, then the law or the regulation will and should be considered as valid.

The case was decided against Moosa Anwar, and the High Court stated that the challenged provision in the Act and the Local Council Election Regulation was amended according to the Constitution and rules out any illegitimate discrimination.

## **B. Impact of international norms**

A treaty is defined in Article 2 of the Vienna Convention on the Law of Treaties (1969) as “an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.”

There are bilateral and multilateral treaties and the treaties are only binding on the parties to the agreement.



To achieve international cooperation in promoting and encouraging respect for human rights and fundamental freedoms, the United Nations (UN) has so far established nine major human rights treaties which are being monitored by committees of independent experts.<sup>186</sup> To date, the Maldives has signed eight out of the nine major UN human rights treaties. The Convention for the Protection of All Persons from Enforced Disappearance (CED) has not been yet ratified since it was signed on February 6, 2007. The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW) is the only major UN human rights treaty that the Maldives has yet neither ratified nor signed. Among the major UN human rights treaties the Maldives has signed and ratified are the International Convention on the Elimination of All Forms of Racial Discrimination (CERD), the International Covenant on Civil and Political Rights (CCPR), the International Covenant on Economic, Social and Cultural Rights (CESCR), the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), the Convention on the Rights of the Child (CRC) and the Convention on the Rights of Persons with Disabilities (CRPD).

Apart from the above-mentioned major UN treaties, the Maldives also has signed the Optional Protocol of the Convention against Torture (CAT-OP), the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict (CRC-OP-AC) and the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography. (CRC-OP-SC).<sup>187</sup>

According to the 1998 Constitution, international agreements were to be signed with the written authorization from the President and such agreements can only be ratified with the advice from the Presidential Cabinet. Hence, treaties ratified under the 1998 Constitution were never sent to the Parliament for ratification. However, the 2008 Constitution provides that the primary power to enter into treaties is vested in the President of the State. Article 115 (k) of the Constitution anticipates two different procedures to be followed for the two types of treaties stipulated in the aforementioned Article. General treaties can be entered into without the involvement of the Parliament solely by the President or the Executive, whereas the treaties which create an obligation upon the Maldivian Citizens can be entered into and ratified by the President with the approval of the

186 From the official website of the Human Rights Commission of the Maldives ([http://hrcm.org.mv/Monitoring/Introduction\\_to\\_the\\_HR\\_System\\_v19.aspx](http://hrcm.org.mv/Monitoring/Introduction_to_the_HR_System_v19.aspx)).

187 United Nations Treaty Body Data Base ([https://tbinternet.ohchr.org/\\_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=106&Lang=EN](https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=106&Lang=EN)).



Parliament.

Though the treaties are classified as stated above, Article 93 of the Constitution stipulates treaties entered by the Executive in the name of the State with foreign states and international organizations shall be only approved by the Parliament and can only come into force following the decisions of the Parliament. This means the general treaties stipulated in Article 115 (k) can also come into force with the approval of the Parliament. The contradiction between the said two articles was debated and clarified in the 239<sup>th</sup> session of the Constitutional Assembly before the approval of the Constitution. They justified the issue stating that the general treaties entered by the President should also be done in accordance to the provisions of the Constitution. Hence, making it necessary for the general treaties also be sent to the Parliament for ratification following Article 93. The view was further validated by the speaker of the Parliament and when both Article 93 and 115 (k) are read together, it becomes clear that even the general treaties along with treaties that create an obligation upon the citizen shall be sent to the Parliament for ratification.

Though all treaties are approved and ratified by the Parliament, according to Article 93 (b), citizens shall only be required to act in compliance with treaties ratified by the State as provided for in a law enacted by the Parliament. The Parliament shall ensure that the treaty obligations are adopted in the domestic law to create treaty obligations upon the citizens and assert their rights in the legal system since it can be part of the domestic legal system only under a law enacted by the Parliament.

Hence, the correct interpretation for the Maldives would be that Constitution and general laws are above international treaties, as the Maldives follows a dualist system in which treaties can be incorporated into the national legal system by incorporating them via legislation and the treaty obligations become only binding on the individuals once it comes into force in the form of domestic law.

Though the Maldives is a very young democracy, within the short period of time, citizens have become quite familiar of their constitutional rights and we can perceive individuals verbalizing and taking a stand for their constitutional rights, when rights are violated and infringed. A great number of cases are being adjudicated at the Courts of the Maldives regarding violations of fundamental rights and competing rights.

As stated earlier in this section, the Maldives is a party to most of the human rights treaties of the United Nations. However, the treaties themselves do not

create any obligation on the citizens. For the provisions to be binding on the citizens they need to be reflected in the national legislation and regulations of the Maldives enacted by the Parliament. International norms and treaties are often used and referred to by the Parties during proceedings to support a case. Judges also give reference to the treaties in their decisions.

In the case of *Ali Murthala v. Raufiyya Hussain*<sup>188</sup> on completing the adjudication process within an adequate time frame, the Presiding Justice Ali Rasheed Hussain stated that the right to be entitled to a fair and public hearing is a fundamental right and in providing an interpretation of the right. A court or tribunal shall uphold the values that underlie an open and democratic society based on human dignity, equality, and freedom, and shall consider international treaties to which the Maldives is a party as stipulated in Article 68 of the Constitution. The Justice further noted that the provisions or the parts related to a fair and public hearing is in Article 14 of the International Covenant on Civil and Political Rights, and 3 (b) of Article 14 provides that “To have adequate time and facilities for the preparation of his defense adequate time and facilities shall be available and the person shall be provided with the chance to communicate with counsel of his preference.” Since, it was quite apparent, that Ali Murthala’s right to a fair and adequate trial was infringed, the case was decided unanimously in favor of Ali Murthala declaring the judgment by the Kaafu Maafushi Magistrate Court and High Court null and void. Though the case is not solely determined based on the Convention, reference to the treaty was given as it gives more weight to the Justices’ opinion on the issue.

Similarly, in the Supreme Court’s case of *Mohamed Fahmy Hassan v. People’s Majlis of the Republic of the Maldives*,<sup>189</sup> reference is given to the Universal Declaration of Human Rights. The Declaration clearly states that human rights should be protected by the principle of the “rule of law.” Reference to Article 10 of the Declaration was also made, which 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 any criminal charge against him. The Court finds that the aforementioned treaty ensures that the principles of rule of law give the courts the authority to declare that the action of the executive and legislative are constitutional under laws and principles of law. The Court gives reference to the aforesaid treaty to support that the best examples of rule of law in reference to the discussed case would be constituting a judicial review to decide whether the action of the executive and judiciary is acceptable.

<sup>188</sup> Case Number 2019/SC-A/61 of the Supreme Court of Maldives.

<sup>189</sup> Case Number 2012/SC-C/35 of the Supreme Court of Maldives.

Also, in the Supreme Court's case of *Ibrahim Abdul Latheef v. Onus Private Limited*<sup>190</sup> on supervisory jurisdiction, the Presiding Justice Dr. Azmiralda Zahir stated that international standards including the Universal Declaration of Human Rights, constitutions and courts of foreign countries, international organizations and associations were recognized, and relied on the basic fundamental rules and principles such as determining the case without bias, hearing both parties and adjudication of the case within a reasonable period. This concludes that judges rely on the original text of internationally accepted norms to support the cases, though for implementation of treaties that creates an obligation upon the citizens requires the obligations to be included in the local regulations and laws.

### C. Current issues

The number of cases adjudicated at courts regarding constitutional rights has been on the rise since the promulgation of the 2008 Constitution. The Constitution guarantees the rights and freedoms stated in the Constitution to all persons, in a manner that is not contrary to any tenet of Islam, subject only to such reasonable limits prescribed by a law enacted by the *Peoples Majlis* not contrary to the Constitution. Cases are submitted when a certain constitutional right is infringed or otherwise limited.

When cases are discussed at court, the judges give a clear interpretation of the conflicted or competing rights based on the original text, previous judicial precedents, and social, political, and economic consequences of the interpretation.

The case of *Ali Murthala v. Raufiyya Hussain*<sup>191</sup> on completing the adjudication process within a reasonable period of time, which was first heard at the Kaafu Maafushi Magistrate Court and then appealed at the High Court of the Maldives, was subsequently appealed at the Supreme Court of the Maldives. It was appealed that the High Court has not enlightened on the point that the Kaafu Maafushi Magistrate Court has given the verdict in contradiction to Article 42 (a), (b) and 68 of the Constitution of the Republic of the Maldives and the Principles of Natural justice.

Regarding the said issue, the Supreme Court of the Maldives noted that:

It was evident from the Court summons that Ali Murthala received the summons

<sup>190</sup> Case Number 2019/SC-A/15 of the Supreme Court of Maldives.

<sup>191</sup> Case Number 2019/SC-A/61 of the Supreme Court of Maldives.

at 20:05hrs on the July 25, 2017 which requires him to be present at the Court for hearing on the July 26, of 2017 at 09:00hrs, which also falls on the Independence Day (A Public Holiday) of the Maldives.

The Court summons states that he is summoned to Court regarding a case of breach of contract and hence Ali Murthala claimed that when he presented himself at the court, he was unaware of the exact case or matter that he was summoned for, and the Magistrate Court stated that it is not evident from its records that the documents related to the case were shared with him before the trial.

During the trial, a statement was taken from Ali Murthala at the Magistrate Court. Though he requested to be represented by a lawyer, it was not recorded in his statement. He claimed that he had signed the statement and as soon as he signed, the verdict was issued directly after. According to the case report of the case, the verdict date was July 26, 2017.

The Court also found that it was not clear from the statements given nor the case report why the hearing was conducted on a public holiday and so early in the morning when this case is not a fast track case.

Ali Murthala has appealed the following point at the High Court and it was evident from the statement he has given to the High Court on November 12, 2017. Regarding this matter in the High Court's judgment, they have ruled out that, since Ali Murthala has given a statement at Kaafu Maafushi Magistrate Court and the fact that he has not requested for another opportunity to give a second statement nor to appoint a lawyer, the court is of the view that he has not used the rights though he had the opportunity at the Magistrate Court level.

Presiding Justice Ali Rasheed Hussain stated that the case has been determined without giving enough consideration to the relevant factors and only based on Ali Murthala's statement without considering the situation, the time frame in which the statement was signed, how it was signed and without giving reasonable consideration to Ali Murthala's appeal, that he has requested for a lawyer though not recorded on the statement and despite not been given the right to a lawyer as requested by him, he had signed the statement upon their request. Afterwards the Justice stated that every citizen is entitled to a fair and public hearing within a reasonable time by an independent court or tribunal established by law.<sup>192</sup> He stated that considering the timeline of the case, it shows that Ali Murthala did not

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192 Article 42 (a) of the Constitution of the Republic of the Maldives 2008.

get enough time to prepare for the case and the reference to “everyone is entitled to a fair and public hearing within a reasonable time” in the Constitution does not only refer to attending a case without a reasonable delay but it also means carrying out a trial in a way the accused gets reasonable time to prepare to respond to the case. He further stated that the right of being entitled to a fair and public hearing is a fundamental right and when interpreting and applying the said right, a court or tribunal shall promote the values that underlie an open and democratic society based on human dignity, equality and freedom, and shall consider international treaties to which the Maldives is a party to, by giving reference to the aforementioned Article of the Constitution, he noted that in the International Covenant on Civil and Political Rights the provisions or the parts related to a fair and public hearing is in Article 14 and the part (b) of the third number, which states that “To have adequate time and facilities for the preparation of his defense and to communicate with counsel of his own choosing.”

Considering the above-said facts and since it was clear that the fundamental right to have a fair and adequate trial was infringed, the case was decided unanimously by the Presiding Justice, Ali Rasheed Hussain, Justice Dr. Azmiralda Zahir, and Justice Dr. Mohamed Ibrahim, declaring that a trial has not been conducted, and the magistrate court’s and high court’s judgement null and void.

This case gives a detailed explanation of the application of Article 42 of the Constitution. It implies a different approach to the interpretation of Article 42 of the Constitution. Article 42, stating that “everyone is entitled to a fair and public hearing within a reasonable time”, does not necessarily only mean finishing the proceedings within an adequate time. It also means conducting the proceedings within a reasonable period, that the accused gets to prepare to respond to the case.

In the recent Supreme Court case *Maldives Inland Revenue Authority v. Maldives Quality Seafood Private Limited*,<sup>193</sup> the Maldives Inland Revenue Authority (MIRA) submitted this case because they were discontented by the High Court’s decision regarding the submission made by MIRA to acquire an Order on motion of delay enforcement (stay order).

Maldives Quality Seafood objected to paying the tax money that MIRA requested to settle on its notice of tax assessment and goods and service tax report. Hence, they submitted this objection in detail in the “Notice of Objection.” Regarding the Notice of Objection, MIRA made an “Objection Review Report” which stated

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<sup>193</sup> Case Number 2021/SC-A/28 of the Supreme Court of Maldives.

that under Section 22 of the Goods and Service Act,<sup>194</sup> tax payable at 0% is for the transaction of selling the fish, not for the processing, therefore Maldives Quality Sea Food should pay tax for the processing of the fish.

Upon MIRA's decision, Maldives Quality Seafood appealed at the Tax Appeal Tribunal objecting to the above-stated tax claimed by MIRA.

A unanimous decision was made by the three members who heard this case at the Tribunal rejecting the decision made by MIRA to obtain tax from the processing of fish and ordered MIRA to return the tax money taken from Maldives Quality Sea Food concerning the disputed matter.

MIRA appealed at the High Court stating that the decision made by the Tribunal is in contradiction to the law and regarding the case, MIRA requested for a stay order which was eventually rejected by the High Court of the Maldives unanimously.

The High Court in its decision stated that lack of stay order for every case that is appealed does not itself infringe the right to appeal nor is it a reason that will disrupt the appeal to be carried out successfully.

Referring to the Writ of Prohibition issued by the Supreme Court,<sup>195</sup> MIRA stated that since it is a civil case, and the minute the Tribunal's decision gets appealed, a stay order is required to ensure the right to appeal.

Regarding this issue, Presiding Justice Aisha Shujune Muhammad stated that a writ of prohibition is not issued to delay the enforcement of a judgment but rather it is issued by a superior court to a lower court prohibiting an act of the lower court because the lower court does not have the jurisdiction to do the act. She further stated that the procedures to be followed in issuing a stay order are usually written down in their respective civil procedures.

Thirdly, she stated that even with regards to the general rule of law, a case being appealed, in essence, does not automatically make it a reason to issue a stay order. And a stay order should be issued by a superior court, only after considering the appeal, the facts and considering the arguments for and against the issuing of an order.

Taking MIRA's appeal into account, which stated that its right to appeal was

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<sup>194</sup> Act No: 10/2011.

<sup>195</sup> The writ of prohibition issued by the Supreme Court in case number: 2011/SC-SJ/04, regarding the Civil Court Case number: 434/MC/2008.

infringed because a Stay Order was not issued, presiding Justice Aisha Shujune Muhammad stated that, right to appeal is available under Article 56 of the Constitution and it is among those rights that can be limited under Article 16 of the Constitution. She further stated the High Court has acted within its jurisdiction and authority under the law to issue a stay order, hence she does not consider that as a limitation to a fundamental right. Further, she stated that when a case is submitted to the court generally there are at least two parties to the case and it is impossible that the case is decided in favor of both the parties, since, a case is heard at the court because there is a dispute and the case will be decided in favor of one of the parties. This does not necessarily mean the case is decided against the principle of justice and similarly, a court rejecting a submission by one party does not mean that the right to appeal is limited. Hence, unanimously the court decided to dismiss the appeal by MIRA. The case clarifies that Article 56 of the Constitution is among those rights that can be limited under Article 16 of the Constitution and lack of a stay order does not automatically infringe the right to appeal.

## **Annex 1: List of cited legal provisions**

### **1) Constitutional provisions**

The Constitution of the Republic of Maldives (1932)

The Constitution of the Republic of Maldives (1953)

The Constitution of the Republic of Maldives (1954)

The Constitution of the Republic of Maldives (1968)

The Constitution of the Republic of Maldives (1998)

The Constitution of the Republic of Maldives (2008)

- Article 9
- Article 10
- Article 16
- Article 17, 17 (a) (b)
- Article 19
- Article 20

- Article 21
- Article 23, 23 (b)
- Article 24
- Article 25
- Article 26, 26 (b) (c)
- Article 27
- Article 28
- Article 29
- Article 30
- Article 31
- Article 32
- Article 33
- Article 35
- Article 36 (b)
- Article 37
- Article 40
- Article 41
- Article 42
- Article 45
- Article 49
- Article 51 (f)
- Article 52
- Article 56
- Article 57
- Article 58
- Article 62 (a)
- Article 63
- Article 65
- Article 66
- Article 67
- Article 68
- Article 69
- Article 82 (g)
- Article 90 (a)
- Article 93
- Article 98 (b)
- Article 100 (d)
- Article 115 (k)
- Article 126 (a)
- Article 128
- Article 133 (b)



- Article 156
- Article 159 (d)
- Article 168
- Article 170 (a)
- Article 192 (a)
- Article 246 (a)
- Article 251
- Article 253
- Article 255 (b) (c) (d)

## **2) Legislative provisions**

Civil Service Act (Act no: 5/2007)

- Section 51

Employment Act (Act no: 2/2008)

Judicature Act (Act no: 22/2010)

Regulation on resolving disputes between Employer and Employee (Regulation no: 2011/R-12)

Goods and Service Act (Act no: 10/2011)

- Section 22

Political Parties Act (Act no: 4/2013)

Information Act (Act no: 1/2014)

The Criminal Procedure Code (Act no: 12/2016)

Defamation Act (Act no: 16/2016)

Child Protection Act (Act no: 18/2019)

Juvenile Justice Act (Act no: 19/2019)

Local Council Election Regulation (Regulation no: 2020/R-6)

Decentralization of Administrative Divisions Act (Act no: 31/2020)

### 3) International provisions

Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)

- Article 4

Convention on the Elimination of All Forms of Racial Discrimination (CERD)

- Article 2(2)

Equal Treatment Directive (1976) of the European Union

- Article 157(4)

International Covenant on Civil and Political Rights (ICCPR)

- Article 6
- Article 9
- Article 12(1)
- Article 14
- Article 14, 3(b)
- Article 17
- Article 19(2)
- Article 21
- Article 23

Universal Declaration of Human Rights (UDHR)

- Article 10
- Article 3
- Article 12
- Article 16(3)
- Article 29(2)

## **Annex 2: List of cited cases**

*Ahmed Athif v. State - Case Number 2009/HC-DM/4 of High Court of the Maldives [18.6.2012]*

*Ali Murthala v. Raufiyya Hussain - Case Number 2019/SC-A/61 of the Supreme Court of Maldives [15.4.2021]*

*Dr. Farzana Hussain and Mohamed Kamaaluddin Javid v. W Construction Company Pvt Ltd - Case Number 3143/Cv-C/2019 of Civil Court of the Maldives [31.8.2021]*

*Export Import Bank of Malaysia v. One and Half Degree Maldives Pvt Ltd - Case Number 2018/SC-A/40 of the Supreme Court of the Maldives [23.11.2020]*

*Ex Parte State (Attorney General's Office) (2012) - Case Number 2012/SC-C/24 of the Supreme Court of the Maldives [4.12.2021]*

*Fazeen Hassan v. Prosecutor General's Office - Case Number 2009/HC-A/355 of High Court of the Maldives [25.4.2010]*

*Gasim Ibrahim v. Maldives Police Service - Case Number 2010/SC-A/19 of Supreme Court of the Maldives [01.07.2010]*

*Ibrahim Abdul Latheef v. Onus Private Limited - Case Number 2019/SC-A/15 of the Supreme Court of Maldives [15.2.2021]*

*Moosa Anwar v. State (2020) - Case Number 2020/HC-DM/02 of High Court of the Maldives [24.1.2021]*

*Mohamed Fahmy Hassan v. People's Majlis of the Republic of the Maldives - Case Number 2012/SC-C/35 of the Supreme Court of Maldives [15.3.2013]*

*Maldives Inland Revenue Authority v. Maldives Quality Seafood Private Limited) - Case Number 2021/SC-A/28 of the Supreme Court of Maldives [17.6.2021]*

*Prosecutor General's Office v. Hassan Abdulla & 5 Ors - Case Number 2011/SC-A/23 of Supreme Court of the Maldives [11.6.2012]*

## 9. Mongolia

### Constitutional Court

#### *Overview*

The bill of rights is found in Chapter Two of the Constitution, entitled “Human Rights and Freedoms”. The majority of civil, political, economic, social and cultural rights commonly recognized in democratic societies are embraced in the Constitution under Chapter Two. However, human rights are also found in other parts of the Constitution. The Constitution of Mongolia does not have explicit provisions on unenumerated constitutional rights, and so far Mongolia has not had unenumerated constitutional rights in its history. This is also due to the fact that the eighteen rights and freedoms enumerated in Article 16 of the Constitution of Mongolia have a complex content that can be explained in detail. In terms of overall historical context, one can point out that although previous constitutions contained provisions on human rights, such provisions were “declarative”. Therefore, the new Constitution of 1992 provided guarantees for the protection of “those declarative” human rights to be implemented in practice by establishing an open economy system, acknowledging pluralism, assuring the values of democratic society and separating the state powers. In terms of international human rights law, Mongolia has so far ratified eight of the nine core UN human rights treaties. From a cultural perspective on rights adjudication, one key issue concerns traditional practices during the Mongolian National Festival (Naadam). Current issues in constitutional rights concern the right to safe drinking water and sanitation, as well as the right to know about environmental impacts.

#### *Outline*

##### **I. Rights in the Constitution**

- A. Constitutional bill of rights
- B. Rights elsewhere in the Constitution
- C. Concretization of constitutional rights
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##### **II. Classification and content**

- A. Enumerated constitutional rights
- B. Unenumerated constitutional rights
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**Annex 1: List of cited legal provisions**

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## **I. Rights in the Constitution**

### **A. Constitutional bill of rights**

The Mongolian Revolution of 1990 was a peaceful democratic revolution that started with demonstrations and eventually moved towards the democratic present-day Mongolia and the writing of the new constitution. The new Constitution of Mongolia, adopted in January 1992 as part of the country's transition to democracy, is now twenty-nine years old, making it one of the most stable constitutions in the world. The significance of the 1992 Constitution lies with the fact that it created guarantees for human rights, civil, political, economic, social and cultural rights, which are commonly recognized in democratic societies around the world in a comprehensive way. According to the constitution-makers, civil society stands for an individual-centered society, based on respect and protection of human rights. Respecting human beings and adoring their rights and freedoms in accordance with the above valuation is one of the main concepts of the Constitution. This concept was the most important value for Mongolian society and the reason for constitutional reform.

Fundamental rights entrench rights and freedoms enshrined in the Constitution and international human rights treaties ratified by Mongolia. The Constitution of Mongolia consists of a Preamble, and six Chapters with seventy Articles. The main body of the Constitution consists of Chapter One "Sovereignty of the State" (Articles 1 to 13); Chapter Two "Human Rights and Freedoms" (Articles 14 to 19<sup>1</sup>);<sup>196</sup> Chapter Three "Structure of the State" (Articles 20 to 56); Chapter Four "Administrative and Territorial Units" (Articles 57 to 63); Chapter Five "The Constitutional Court" (Articles 64 to 67); Chapter Six "Amendment of the Constitution" (Articles 68 to 70).

The bill of rights is found in Chapter Two "Human Rights and Freedoms", under Article 16 (1-18) of the Constitution, which stipulates that the citizens of Mongolia shall enjoy the following rights and freedoms:<sup>197</sup>

1) The right to life. Deprivation of human life is strictly prohibited unless capital punishment as constituted by Mongolian penal law for the most serious crimes is imposed as final decision by a competent court.

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<sup>196</sup> Article 19<sup>1</sup> has been added by the Amendments and changes to the Constitution of Mongolia enacted on 14<sup>th</sup> November 2019. The footnote number is added to avoid changing the numeration of all the articles throughout the Constitution.

<sup>197</sup> The Constitution of Mongolia Chapter Two Article 16 [Citizen's Rights].

2) The right to a healthy and safe environment and to be protected against environmental pollution and ecological imbalance.

3) The right to fair acquisition, possession, and inheritance of movable and immovable property. Illegal confiscation and requisitioning of the private property of citizens are prohibited. The state and its bodies may expropriate private property for exclusive public needs only with due compensation and payment.

4) The right to free choice of employment, favorable conditions of work, remuneration, rest, and private enterprise. No one may be unlawfully forced to work.

5) The right to material and financial assistance in old age, disability, childbirth, and childcare and in other cases as provided by law.

6) The right to the protection of health and medical care. The procedure and conditions of free medical aid are determined by law.

7) The right to education. The state provides basic general education free of charge. Citizens may establish and operate private schools if these meet the requirements of the State.

8) The right to engage in creative work in cultural, artistic, and scientific fields and to benefit thereof. Copyrights and patents are protected by law.

9) The right to take part in the government of the country directly or through representative bodies. The right to elect and to be elected to State bodies. The right to elect is enjoyed from the age of eighteen years and the age eligible for being elected is determined by law according to the requirements in respect of the bodies or posts concerned.

10) The right to freedom of association in political parties or other voluntary organizations on the basis of social and personal interests and opinion. Political parties and other mass organizations shall uphold public order and state security and abide by law. Discrimination and persecution of a person for joining a political party or other associations or for being their member are prohibited. Party membership of some categories of state employees may be suspended.

11) Men and women enjoy equal rights in political, economic, social, and cultural fields as well as in marriage. Marriage is based on the equality and mutual consent of the spouses who have reached the age determined by law. The State protects

the interests of the family, motherhood, and the child.

12) The right to submit a petition or a complaint to State bodies and officials. The State bodies and officials are obliged to respond to the petitions or complaints of citizens in conformity with law.

13) The right to personal liberty and safety. No one may be searched, arrested, detained, persecuted, or restricted of liberty except on such grounds and in accordance with such procedures as determined by law. No one may be subjected to torture, inhuman, cruel, or degrading treatment. Where a person is arrested his or her family and counsel shall be notified within a specific period of time set by law of the reasons for the arrest. Privacy of citizens, their families, correspondence, and homes are protected by law.

14) The right to appeal to the court for protection if one considers the rights or freedoms stipulated by the Mongolian law or an international treaty have been violated;

- to be compensated for the damage illegally caused by others;
- not to testify against oneself, one's family, parents, or children;
- to defense;
- to receive legal assistance;
- to have evidence examined;
- to fair trial;
- to be tried in one's presence;
- to appeal against a court decision;
- to seek pardon.

Compelling to testify against oneself is prohibited. Every person is presumed innocent until proven guilty by a court by due process of law. The penalties imposed on the convicted may not be applicable to his or her family members and relatives.

15) Freedom of conscience and religion.

16) Freedom of thought, opinion, expression, speech, press, and peaceful assembly. Procedures for organizing demonstrations and other assemblies are determined by law.

17) The right to seek and receive information except that which the state and its bodies are legally bound to protect as secret. In order to protect human rights, dignity, and reputation of persons and to ensure national defense, security, and

public order, the information which is not subject to disclosure must be classified as confidential and protected by law.

18) The right to freedom of movement and residence within the country, to travel and reside abroad, and to return home to the country. The right to travel and reside abroad may be limited exclusively by law for the purpose of ensuring the security of the country and population and protecting public order.

Aside from the freedoms and rights of citizens, Chapter Two also covers duties of citizens listed in Article 17 (1(1-4) and 2):

1. Citizens of Mongolia, while upholding justice and humanism, shall fulfill in good faith the following basic duties:

- 1) to respect and abide by the Constitution and other laws;
- 2) to respect dignity, reputation, rights, and legitimate interests of others;
- 3) to pay taxes levied by law;
- 4) to defend the motherland and serve in the army according to law.

2. It is a sacred duty for every citizen to work, protect his or her health, bring up and educate his or her children and to protect nature and the environment.

The drafters of the Constitution not only declared human rights and freedoms, but they also paid special attention to the government obligation to ensure conditions for the realization of rights. Article 19.1 of the Constitution reads, “The State is responsible to the citizens for the creation of economic, social, legal, and other guarantees ensuring human rights and freedoms, for the prevention of violations of human rights and freedoms, and restoration of infringed rights.” There are national and international human rights protection mechanisms. International mechanisms include the Universal Periodic Review of the UN Human Rights Council, treaty bodies and special procedures. National mechanisms include the State Great Khural, National Human Rights Commission, courts, prosecutors, lawyers, central and local government, civil society, media, private sector, other government units and offices in charge of the protection of human rights.

The Constitutional Court, National Human Rights Commission, Human Rights Sub-Committee of the Parliament, courts and investigation unit at the General Prosecutor’s Office have important roles in the national mechanism. Enabling the Constitutional Court to hear human rights complaints would be significant at least in three ways. First, the Constitutional Court will have competence to resolve human rights violations if “petition” is interpreted as complaint. Second, it will be



able to offer judicial interpretation of certain human rights concepts to be used as precedent. Third, the Constitutional Court will develop into a court, which focuses on resolution of human rights violations. As a result, it will enjoy reduced tensions with political institutions. Demand for courts that hear and resolve human rights complaints is on the rise.

## **B. Rights elsewhere in the Constitution**

The majority of civil, political, economic, social and cultural rights commonly recognized in democratic societies are embraced in the Constitution under Chapter Two “Human Rights and Freedoms.” However, human rights are found in other parts of the Constitution. In other words, an account of constitutional rights should not only be limited to Chapter Two of the Constitution.

### **1. Equality and liberty**

Articles 1.2<sup>198</sup> and 3.1<sup>199</sup> of the Mongolian Constitution stipulate that equality is one of the supreme principles of the state activities, whereas Article 14.1 ensures everyone’s equal rights before the law and the court. These articles speak for everyone’s equal value and dignity. Everyone’s equality before the courts and tribunals, and their entitlement without any discrimination to the equal protection of the law stipulated in Articles 14 and 26 of the International Covenant on Civil and Political Rights, apply this concept. For instance, discrimination on the grounds of sexual orientation and disability is not explicitly prohibited in Article 14.2 of the Constitution, but the broader concept of equality prohibits discrimination on these grounds. Furthermore, account of fundamental rights extends to implicit rights based on constitutional concepts such as equality and liberty.<sup>200</sup> For example, Articles 21.2 and 31.3 on universal, free, direct suffrage and secret ballot, Article 53.2 on the right to use his/her native language at the trial, and Article 54 on open trial.

### **2. Right to be free from discrimination**

Right to be free from discrimination is found in Article 14.2 of the Constitution.

198 Constitution of Mongolia Article 1.2 - Securing democracy, justice, freedom, equality, national unity and respecting the rule of law are the fundamental principles of the State activities.

199 All governance power in Mongolia shall be vested upon its people. The people of Mongolia shall directly participate in State affairs and shall exercise such right through the representative organ of the State power established by their election.

200 Munkhsaikhan O., “Framing fundamental rights protected by the Constitution of Mongolia,” Human Rights Journal, No. 1, 2016.11.09.

At the international level, Article 2 paragraphs 1 and 26 of the ICCPR prohibit discrimination on the ground of sex. The UN Human Rights Committee defined sex as inclusive of sexual orientation and this became a basis for advocacy of rights of lesbian, gay, bi-sexual, transgender and intersex people by UN human rights mechanisms. Non-discrimination envisages both negative and positive obligations of the government not to discriminate and to take measures to protect individuals from discrimination by creating criminal and other legal sanctions.

### **3. Right to be free from arbitrary interference**

Another fundamental right, which needs conceptualization and protection, is the right to be free from arbitrary interference. The right to liberty includes a number of rights both enumerated and not enumerated in Article 16.13 of the Constitution ranging from physical integrity to privacy of the individual and their family life, correspondence and home. Similarly, Article 16.13 of the Constitution also combines rights stated in Article 7, 9, and 17. Right to liberty extends to rights not to be subject to arbitrary search, arrest, detention, persecution, deprivation of liberty, torture or to cruel, inhuman or degrading treatment or punishment, interference with privacy, family, home or correspondence, honor and reputation, and economic freedom. The broad interpretation of the right to liberty is widely shared among scholars.

Everyone is entitled to human rights and freedoms embedded in the international human rights treaties of Mongolia, even if the Constitution does not contain these rights and freedoms (provided that there is no applicable constitutional prohibition).<sup>201</sup> For instance, the right to strike is not in the Constitution. However, by making reference to Article 8.2 of the International Covenant on Economic, Social and Cultural Rights, the Constitutional Court overruled a provision of the 1990 Procedure for Labor Dispute Resolution adopted by State Great Khural. Similarly, one cannot assume that the right to disseminate information is not protected simply because it is not enumerated in the Constitution. This right is contained in the right to freedom of expression and enumerated in Article 19.2 of International Covenant on Civil and Political Rights.

### **4. Right to vote**

Article 3 of the 1992 Constitution stipulates, “State power shall be vested in the people of Mongolia.” This concise declaration has very broad implications, and is further elaborated in Article 16.9 granting the right to participate in government,

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201 Chimid B., *The Conceptions of the Constitution: Human rights and Judiciary*, Volume 2, 2004.12.09.

to vote and stand for election. The Constitution guarantees equal suffrage. Article 14.1 says, “All persons lawfully residing within Mongolia are equal before the law and the court” whereas Article 16.9 guarantees the right of citizens to elect officials. The notion of equality includes equal suffrage. In addition, Mongolia has an international obligation to protect equal suffrage according to Article 21 of the Universal Declaration of Human Rights.

## **5. The Constitution also contains general restrictions**

Members of the People’s Great Khural were of the opinion that limitation of human rights to protect the rights of others meets the principle of social justice. For this reason, the Constitution declares in Article 19.3 “in exercising one’s rights and freedoms, one may not infringe the national security or rights and freedoms of others or violate public order.” This provision signifies that 1) fundamental purpose of state activity is the rule of law and therefore must be achieved by law; 2) limitations guard the interests of national security, rights and freedoms of others or public order; and 3) limitations are necessary for the protection of these interests.

Both the Constitution and international human rights law requires limitations of fundamental rights to meet all three qualifications to be valid. UN experts and Members of the People’s Great Khural conceded that some limitations on rights to peaceful assembly, freedom of expression, and association would qualify on all three grounds.

## **C. Concretization of constitutional rights**

The guarantee for fundamental rights in the Constitution was influenced by the doctrine of natural rights. The constitution-drafters emphasized a conceptual shift, from viewing civil rights as bestowed by the government toward viewing rights as inherent.<sup>202</sup> That is why the right to life, right to freedom of conscience and religion, freedom from torture, inhuman and degrading treatment were declared to be non-derogable under any circumstance according to Article 19.2 of the Constitution. These four rights were taken as natural rights which cannot be subject even to lawful restrictions in time of emergency and war.<sup>203</sup> Article 16 of the Constitution provides fundamental rights and freedoms guaranteed to citizens of Mongolia. Foreign nationals and stateless persons are guaranteed inalienable

202 “Concepts of the new constitutional draft”, Bayar S., then Chair of the Standing Committee on State Structure of the Baga Khural, 10.

203 Chimid B., *The Conceptions of the Constitution: Human rights and Judiciary*, Volume 2 (2004), 16.

rights and freedoms contained in international human rights treaties of Mongolia. It is prohibited to place restriction on these rights even by law under Article 18.5.<sup>204</sup> The Constitution allows restrictions on fundamental rights exclusively by law, except on the set of natural and inalienable rights.

The Constitution sets both specific and general restrictions. Conditions for specific restrictions are explicitly enumerated in the Constitution. The members of the People's Great Khural were of the opinion that purpose of such law must protect the right to freedom of expression and therefore must not violate the substance of this right. They approved the revised provision on this notion.<sup>205</sup>

The citizens of Mongolia are granted personal democratic freedoms and political, social, economic rights by the Article 16 of the Constitution (in 18 sub-articles). It does not mean a grace given by the powerful "State" to the poor "person" but it means that a person enjoys the rights and freedoms in a natural way in the democratic society. So, the state shall only provide guarantees to ensure human rights. Consequently, the most important function of the state and civil society is the evaluation of guarantees for human rights and freedoms and the establishment of state organizations and public servants' responsibility for violation of human rights.

Each citizen as an owner of his homeland and source of the state shall have legal and sacred duties before the state besides enjoyment of the rights. Enjoyment of rights shall comply with the principle to not harm the national security, other person's rights and public order thus meaning the limitation of liberty and implementation of democratic concepts. It should be emphasized that democratic society is a humanitarian, charitable society with discipline and organizational order. Rule of law shall be the major characteristic of democratic societies where persons and citizens have a right to do everything that are not prohibited by laws and state organizations and public servants undertake their activities under strict rules and procedures. Law governs both the state and the citizen, and in this sense makes them equal parties in private (civil) legal relations.

By joining the United Nations in 1961 as the 101st member-state, Mongolia accepted human rights and freedoms preserved in the Universal Declaration of Human Rights. Mongolia ratified the International Covenant on Civil and Political

204 Article 18.5. Mongolia may establish necessary restrictions upon the rights other than the inalienable rights defined in international instruments to which Mongolia is a Party, out of the consideration of ensuring the security and population, and the public order, in allowing the foreign nationals and stateless persons under the jurisdiction of Mongolia to exercise the fundamental rights and freedoms as prescribed in Article 16 of the Constitution.

205 Lundeejantsan N., Records of People's Great Khural sessions No.16, 1991.11.27, p93; p110, Tsog. L, Records of People's Great Khural sessions No.17, 1991.11.28.

Rights (1966) and the Covenant on Economic, Social and Cultural Rights (1966) in 1974.

At the same time the UN General Assembly adopted the International Covenant on Civil and Political Rights (1966) and the International Covenant on Economic, Social, Cultural Rights (1966) that are recognized to be the main parts of the International Bill of Human Rights. It was the crucial step to the globalization of human rights. Since then, many international conventions have been adopted and states have acceded to them. Mongolia became a party to the above-mentioned covenants in 1974 and since then has acceded and ratified about 30 international treaties and conventions on human rights.<sup>206</sup> Although Mongolia accepted the two major instruments concerning human rights in 1974 as other countries did, human rights issues were still decided from the different concepts that were set forth in the Constitution that was adopted in 1960. For instance, the Constitution of 1960 did not provide natural rights and the rights and duties were determined from the class position and communist ideology until the adoption of the democratic Constitution of 1992. This situation was changed with adoption of the new Constitution in 1992 where human beings were recognized as a center of social relations and the citizens of Mongolia became the real owners of their state destiny, and it was the great step to reconcile the political atmosphere of Mongolia at the international level.

## **D. Historical background and development**

The new Constitution of Mongolia established a representative democracy after revolution from socialist society to democratic society. It was adopted on January 13, 1992 and amended in 1999, 2000, and 2019. Under the last amendment of the Constitution, new paragraphs were added on sections regarding sovereignty, human rights and freedoms, structure of state including the State Great Khural, government, judiciary, municipal governing body, Constitutional Court and amendments of the Constitution. This Constitution was approved to better protect the human rights than the previous constitutions, which were adopted in 1924, 1940 and 1960 respectively.

The State Great Khural of Mongolia passed amendments on the Constitution on November 14, 2019. These amendments became effective starting from May 25, 2020. In brief, the amendments concerned the following issues:

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<sup>206</sup> International treaties Mongolia ratified (compilation), UB, 2003.

- State Great Khural (Parliament)
- Executive Branch
- Judiciary
- Local governance

The amendment, which touched on around 28.5 percent of the contents in the Constitution or 70 articles and 35 clauses, is deemed to have maintained the control and balance of governance, increasing the government stability and accountability of the parliament and aimed to strengthen the independence of the local governance and to improve six of the seven changes of 2000. Those seven amendments were not made to human rights or freedoms, but to the functioning power of state institutions, parliament and stable government.

Mongolia, that has abundant natural resources including gold, copper, coal, and oil, and 70 million head of livestock, was considered to be subject to the resource curse in recent years for failing to leverage its natural resources, equitably distribute wealth to its people, and carry out rehabilitation and for other apparent reasons. Therefore, a constitutional amendment added details to the Article 6.2 of the Constitution that reads, “The land, except those given to the citizens of Mongolia for private possession, as well as the subsoil with its mineral wealth, forest, water resources and wildlife shall be the property of the State.”

Specifically, the Article 6.2 now reads, “The land, except those given to the citizens of Mongolia for private possession, as well as the subsoil with its mineral wealth, forest, water resources and wildlife/fauna shall be the public property of the State. In compliance with the country’s long term development policy, the State Natural Resource Exploitation Policy shall aim to ensure citizens’ right to healthy and safe environment and equitably distribute wealth through the Sovereign Wealth Fund.” The practice of exploiting natural resources without a coordinated policy will stop with the implementation of the government’s long-term development policy. The constitutional amendment also requires not harming the ecosystem when exploiting natural resources as a big step in preserving the wilderness and wildlife in the country.

The Constitution of Mongolia does not contain provisions directly taken from foreign laws, nor does it specify any foreign legal norms being higher than the Constitution. But Mongolia fully acknowledges and adheres to our duties under international treaties as an independent state. This can be seen and proved by the following:

Mongolia provides human rights not only for the citizens of Mongolia but for

foreign citizens and stateless persons. Therefore, human rights are determined in broader frame in Chapter Two “Human Rights and Freedoms.” In the Constitution of 1924 this issue was determined in Chapter One as “Declaration of Real People's Freedom” and rights of some people (feudal, businessmen, lamas) were limited in the Chapter Five “Right to elect and be elected.” Citizen’s rights and freedoms and basic duties were strengthened for the “working class, incorporated people, labor intelligentsia” in Chapters Seven to Eight of the Constitution of 1960. As mentioned above, the Constitution of 1992 provided in Chapter Two titled as “Human Rights and Freedoms” that not only the citizens of Mongolia, but foreign citizens and stateless persons shall have equal rights and duties without any discrimination.

Mongolia has numerous legal sources for ensuring human rights and freedoms as mentioned above, therefore the Constitution of Mongolia does not provide with the full list of inalienable and other human rights but gives the basis for all of them. For instance, the principle of equality before the law and the court, non-discrimination based on ethnic origin, language, race, age, sex, social origin and status, property, occupation and post, religion, opinion or education and the right to act as a legal person are provided in the Constitution of Mongolia (Article 14.2). We can summarize that a great contribution was made to the legal development of our country by providing non-restriction of natural rights such as right to life, freedom of conscience and religion, protection against torture, inhumane and other cruel treatment under any circumstances especially in case of war and other state of emergency. The above provisions fully conform to the Article 5.2 of the International Covenant on Civil and Political Rights: “There shall be no restriction upon or derogation from any of the fundamental human rights recognized or existing in any State Party to the present Covenant pursuant to law, conventions, regulations or custom on the pretext that the present Covenant does not recognize such rights or that it recognizes them to a lesser extent.” Human rights are as source and nature divided into natural and positive rights. These two types of rights are considered on equal basis in the Constitution of Mongolia. Continental legal theory also recognizes that there are different types of rights, some being rights given by God. While the Constitution of Mongolia declared human rights and freedoms, it took into account that liberty may in certain circumstances be limited.



## **II. Classification and content**

### **A. Enumerated constitutional rights**

Mongolia has a legacy of respecting human rights, freedom, justice, and national unity. As a member of the United Nations, it has ratified around 30 international instruments, including the International Covenant on Civil and Political Rights; the International Covenant on Economic, Social and Cultural Rights (both in 1974); the Convention on the Political Rights of Women (1969); and the International Convention on the Rights of the Child (1990).

The citizens of Mongolia are granted personal democratic freedoms and political, social, economic rights by Article 16 of the Constitution (which contains 18 sub-articles). Mongolia provides human rights not only for the citizens of Mongolia but for foreign citizens and stateless persons. The Constitution of 1992 provided in Chapter Two titled as “Human Rights and Freedoms” that not only the citizens of Mongolia, but foreign citizens and stateless persons shall have equal rights and duties without any discrimination. They are mostly brief, broadly worded statements which are specified and inquired in detail through ordinary laws. They are also not structured to be interrelated but only as a list of rights granted to Mongolian citizens, foreign citizens and stateless persons.

Article 16 of the Constitution on human rights and freedoms in the Constitution states that everyone is an equal legal subject, and any discrimination based on racial origin, nationality, language, age, gender, social origin, status, economic condition, official position, religion, opinion, or educational attainment is not allowed. It declares the basic political, social, economic, cultural, ecological, and other rights of citizens: the rights to personal security; to live in a healthy and safe environment; to acquire, possess, own, or inherit property; to freely choose education; to protect one’s own health; to receive medical care; to participate in government directly or through a representative organization; to either worship or not; to freely express one’s own opinion; and to organize peaceful demonstrations. It also respects freedom of the press.

Mongolia is an independent country, therefore the legal status of foreign citizens and stateless persons is determined by Mongolian laws and inter-governmental bilateral treaties concluded with the state concerned, provided however that the “principle of mutual equality” can be applied as it proved to be the effective beginning of international relations. It is also provided that the state shall determine the legal status of stateless persons by adopting a law on the issue



(Article 18 of the Constitution). This shall be treated as legal and natural concept considering the State sovereignty, national security and other basic interests. Currently this issue is regulated by many legal instruments such as the Law of Mongolia on Legal Status of Foreign Citizens (1995) and inter-governmental bilateral treaties.

Constitutional rights set forth in the Constitution of Mongolia have no particular order or logic reflecting any kind of classification, but they provide for a variety of rights that are universal and non-alienable. The enumerated rights and freedoms listed in Article 16 of the Constitution of Mongolia include civil, political and socio-economic rights. In the rights and freedoms listed to all the citizens of Mongolia, four unalienable rights may not be restricted under any conditions. According to Article 19.2 of the Constitution of Mongolia, it states that “In case of a state of emergency or war, the human rights and freedoms as defined by the Constitution and other laws are subject to limitation only by a law. Such a law may not affect the right to life, the freedom of thought, conscience, and religion, as well as the right not to be subjected to torture or inhuman and cruel treatment.” Thus, these rights can be viewed as absolute rights and are not to be limited under any circumstances.

Rights constituted in Article 16 of the Constitution of Mongolia mainly consists of civil and political rights but there are also socio-economic rights such as the right to the free choice of employment, the right to material and financial assistance in old age, the right to health and protection, the right to learn and education and others that are also specified in the said provision. While rights of the citizens of Mongolia are constituted in Article 16 of the Constitution there is no particular order in association with civil, political and socio-economic rights.

The limitation of liberty was not missed while declaring human rights and freedoms in the Constitution of Mongolia. Each citizen as an owner of his homeland and source of the state shall have legal and sacred duties before the state besides enjoying of the rights. Enjoyment of rights shall comply with the principle to not harm the national security, other person's rights and public order thus meaning the limitation of liberty and implementation of democratic concepts.

## **B. Unenumerated constitutional rights**

The Constitution of Mongolia does not have explicit provisions which help, hinder or admit the recognition of unenumerated constitutional rights. In the 29 years since the adoption of the fourth Constitution, Mongolia has not had unenumerated

constitutional rights in its history. This is also due to the fact that the 18 rights and freedoms enumerated in Article 16 of the Constitution of Mongolia have a complex content that can be explained in detail.

But the Constitutional Court of Mongolia has resolved a number of human rights and freedoms disputes in the past. In particular, the right of citizens to own and acquire property fairly; the right to freely choose one's profession, to work, to receive pensions and benefits, and to protect one's health; freedom of religion, non-religion and belief; the right to be elected, to associate voluntarily, to hold demonstrations, to lodge complaints with government organizations and officials, and to seek and receive information; the right to inviolability and freedom, not to restrict his / her rights without grounds provided by law, and to protect his / her personal secrets; our courts have made decisions on the right to appeal to a court, to appeal a decision, and to seek professional legal assistance, all of which have been found to be effective and well-received.

Here are some brief examples:

In relation to personal rights and freedoms, the relevant law regulates the detention (rehabilitation) of drunken and intoxicated citizens by a procedure approved by a certain official, not by law, and is considered invalid as a violation of the constitutional principle of infringing on citizens' rights. (Resolution Ref. No 06 of June 6, 2002). In addition, the Law on Personal Confidentiality was amended to remove information on people with acquired immunodeficiency syndrome from the category of personal secrets. The dispute was reviewed by a Constitutional Court, which ruled that the provision violated the privacy, honor, and reputation of the patient (Resolution Ref. No 02 of December 12, 2014).

Regarding economic rights, several provisions of the Civil Code and the Mortgage Law that have weakened the rights of owners, granted privileges and rights to pledgers and government organizations, were repealed by the resolutions of the Constitutional Court (Resolution Ref. No 01 of January 11, 2006, Resolution Ref. No 02 of June 15, 2006, and Resolution Ref. No 11 of December 9, 2015).

In connection with political rights and freedoms, the law prohibiting any convicted person from running for Parliament for life was revoked on the grounds that it violated the right of a citizen to be elected and his or her supporters to vote (Judgment Ref. No 06 of May 14, 2008). It also ruled that the right to stand for election was restricted by making the same demands as ordinary civil servants, such as doctors and teachers (Resolution Ref. No 10 of November 27, 2015).

Regarding socio-cultural rights, the Parliament annulled the right of employees of legal entities to receive pensions by extending the social insurance premiums of the relevant legal entity. The Constitutional Court of Mongolia ruled that this violated the right to freely choose a profession by setting unreasonable criteria for judges to run for office. (Resolution Ref. No 01 of February 02, 2012, Resolution Ref. No 02 of February 11, 2015).

### **C. Protection and limitation**

According to Article 19.1 of the Constitution of Mongolia “The State is responsible to the citizens for the creation of economic, social, legal, and other guarantees ensuring human rights and freedoms, for the prevention of violations of human rights and freedoms, and restoration of infringed rights.” Therefore, the State is obligated and responsible for the protection of the rights and freedoms of the citizens of Mongolia.

Also, Article 19.2 of the Constitution of Mongolia provides that “In case of a state of emergency or war, the human rights and freedoms as defined by the Constitution and other laws are subject to limitation only by a law. Such a law may not affect the right to life, the freedom of thought, conscience, and religion, as well as the right not to be subjected to torture or inhuman and cruel treatment.” Thus, the rights of the citizens of Mongolia may be limited in the case of emergency or war but the right to life, the freedom of thought, conscience, and religion, as well as the right not to be subjected to torture or inhuman and cruel treatment may not be limited under any circumstances unless a law is enacted.

## **III. Interpretation and current issues**

### **A. Rights in diverse contexts**

#### **1. From historical perspectives**

During the Mongol monarchs of many generations, people were not considered as citizens but “servants”. Thus, issues on human rights were not specifically considered in political and state policies.

Mongolia adopted four constitutions, in 1924, 1940, 1960, and 1992. The first

Constitution abolished the system of monarchical theocracy and reflected the revolutionary stage towards socialism. The Constitution of 1940 was to build the socialist system and the Constitution of 1960 was to ensure the victory of the transition into socialism. In other words, the constitutions of 1924, 1940, and 1960 belong to the “socialist type of constitutions”.

In contrast, the Constitution of 1992 determined the guarantees for the protection of human rights and freedoms, strengthened the legal status of the state structure, system of state organizations and local governance, and defined the methods of supervision over the implementation of the Constitution.

## **2. In terms of provisions on human rights and freedoms**

- Chapter Four titled as “Right to Vote and to be Elected” of the Constitution of 1924, some groups of citizens (such as nobles, citizens pursuing profit and exploiting other people, clergymen and monks) were denied the right to vote and be elected. Women were given the right to election.
- Chapter Ten on fundamental rights and duties of the Constitution of 1940 guaranteed the rights of herdsmen, working people and nobles. However, the feudal class, some nobles, lamas and rebel participants were not provided with the same level of political rights as the working class.
- Chapter Seven and Eight of the Constitution of 1960 defended the rights and interests of working people, intelligentsia and the workers of agricultural associations and other cooperative organizations.

The new Constitution of 1992 prohibited discrimination based on class and group, guaranteed equality and defined rights and freedoms of all persons including foreign nationals and stateless people by Article 16.<sup>207</sup>

Although the Constitutions of 1924, 1940, and 1960 provided separate chapters and articles on human rights, such provisions were “declarative” rather than providing guarantees for the protection of human rights. However, equality of men and women was well guaranteed in these constitutions. This is because of the history of Mongolia where the equality of men and women was all well protected. The new Constitution of 1992 provided guarantees for the protection of “those declarative” human rights to be implemented in practice by establishing an open economy system, acknowledging pluralism, assuring the values of democratic society, and separating the state powers.

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207 Chimid B., The concept of the Constitution (2017) 129-130.

### 3. From cultural perspectives

Traditional practices reflect values assumed by a certain community for a long period of time spanning generations. The Constitution of Mongolia (1992) proclaimed inheriting the traditions of national statehood, history, and culture as one of the aspirations of Mongolians.<sup>208</sup> Amongst all, horse racing is integral to Mongolian culture. In October 2010, UNESCO recognized the Mongolian National Festival (Naadam),<sup>209</sup> also known as the Three Games of Men, as part of Mongolia's intangible cultural heritage.

However, the rights of child jockeys raised public discussions. In particular, the children's right to life, survival and development, right to nondiscrimination, right to education, and freedom from exploitation of work are challenged.

Mongolia joined the UN Convention on the Rights of the Child in 1990 and under Article 4 of the Convention, Mongolia has the obligation to take all appropriate legislative, administrative, and other measures to implement the rights of children stipulated in the Convention.

On 12 July 2017, the UN Committee on the Rights of the Child issued concluding observations on the fifth periodic report of Mongolia that was sent to the Committee on 3 June 2015. In the concluding observations, issues concerning child jockeys are addressed, and recommended the Mongolian Government to enforce effectively the elimination of child labor.

In response, some improvements were made, such as the adoption of the National Program to Eliminate the Worst Forms of Child Labor, the establishment of a national registration system for child jockeys, the adoption of the lists of hazardous works that prohibits employment of children, including child jockeys in race competitions from 1st of November to 1st of May, the establishment of national standards garments for child jockeys, and legal improvements such as requirement for child jockeys to be covered by accident insurance.

Horse racing using minors is part of Mongolian long-lived culture and is protected by the Constitution. Thus, preservation of this cultural heritage is essential and should be inherited with thoughtful national programs that can protect children's rights from potential violation.

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208 The Preamble of the Constitution of Mongolia.

209 Naadam Festival consist of three traditional games: horse racing, wrestling and archery. In Mongolia, children as young as 7-10 years old are as child jockeys in horse racing competition.

## B. Impact of international norms

International and regional human rights instruments that Mongolia has ratified or acceded to are as follows (ordered in accordance with their date of ratification/ accession):

- Convention against Discrimination in Education<sup>210</sup>
- Convention on the Political Rights of Women<sup>211</sup>
- Convention on the Prevention and Punishment of the Crime of Genocide<sup>212</sup>
- Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity<sup>213</sup>
- International Convention on the Elimination of All Forms of Racial Discrimination<sup>214</sup>
- International Covenant on Economic, Social and Cultural Rights<sup>215</sup>
  - Optional Protocol to the International Covenant on Economic, Social and Cultural Rights<sup>216</sup>
- International Covenant on Civil and Political Rights<sup>217</sup>
  - First Optional Protocol to the International Covenant on Civil and Political Rights<sup>218</sup>
  - Second Optional Protocol to the International Covenant on Civil and Political Rights aiming to the abolition of the death penalty<sup>219</sup>
- International Convention on the Suppression and Punishment of the Crime of Apartheid<sup>220</sup>
- Convention on the Elimination of All Forms of Discrimination against Women<sup>221</sup>
  - Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women<sup>222</sup>

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210 Ratified on 22 September 1964.

211 Acceded on 18 August 1965.

212 Acceded on 5 January 1967.

213 Ratified on 21 May 1969.

214 Ratified on 6 August 1969.

215 Ratified on 18 November 1974.

216 Ratified on 1 July 2010.

217 Ratified on 18 November 1974.

218 Acceded on 16 April 1991.

219 Acceded on 13 March 2012.

220 Ratified on 8 August 1975.

221 Ratified on 10 July 1981.

222 Ratified on 28 March 2002.

- International Convention Against Apartheid in Sports<sup>223</sup>
- Convention on the Rights of the Child<sup>224</sup>
  - Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict<sup>225</sup>
  - Optional Protocol to the Convention on the Rights of the Child on the Sale of children, child prostitution and child pornography<sup>226</sup>
  - Optional Protocol to the Convention on the Rights of the Child on a communication procedure<sup>227</sup>
- Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages<sup>228</sup>
- ILO Convention No.182 on the Worst Forms of Child Labor<sup>229</sup>
- ILO Convention No.138 on Minimum Age<sup>230</sup>
- Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment<sup>231</sup>
  - Optional Protocol of the Convention against Torture<sup>232</sup>
- Convention on the Rights of Persons with Disabilities<sup>233</sup>
- Convention for the Protection of All Persons from Enforced Disappearance<sup>234</sup>

The relations between international law and domestic legal system are regulated specifically in Article 10 of the Constitution of Mongolia.

Under Article 10.2 of the Constitution, it provides that the international treaties to which Mongolia is a Party become effective as domestic legislation upon the entry into force of the laws on their ratification or accession. International human rights instruments are above ordinary legislation. International treaties shall prevail where any provisions of ordinary law differ from those of the international treaties of Mongolia. Moreover, Mongolia may not abide by any international treaty or other instruments incompatible with the Constitution.<sup>235</sup>

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223 Approval on 16 December 1987.

224 Ratified on 5 July 1990.

225 Ratified on 6 October 2004.

226 Ratified on 27 June 2003.

227 Ratified on 28 September 2015.

228 Acceded on 6 June 1991.

229 Ratified on 26 February 2001.

230 Ratified on 16 December 2002.

231 Acceded on 24 January 2002.

232 Ratified on 12 February 2015.

233 Acceded on 13 May 2009.

234 Ratified on 12 February 2015.

235 Article 10.4 of the Constitution.

Moreover, under criminal, civil and administrative procedure laws, ordinary courts may apply international treaties that are consistent with the Constitution in the adjudication procedure.

Article 2 of the Law on Constitutional Court provides that the Constitutional Court shall be governed by basic principles such as adherence to the Constitution of Mongolia, based on rational and clear reasoning, impartiality and openness.

During the process of adjudicating the case, the Constitutional Court conducts research on whether there exists incompliance with international treaties.

As of now, the Constitutional Court has made over 30 judgments which specifically referenced international human rights norms and instruments.

One of the most recent judgments which referenced international human rights instruments is the adjudication dated January 20, 2021 on the matter whether certain provisions of the Law on Allowances for Mothers and Single Mothers/Fathers with Many Children breach the Constitution of Mongolia.

The said law regulates relations with respect to granting childcare allowances to pregnant women, mothers who are taking care of their children aged 0-3 years old to whom they have given birth, parents who have twin babies under 4 years old and single parents with three or more children. As per the said law, a mother who is caring for her child of 0-3 years of age is entitled to receive childcare allowances.<sup>236</sup>

According to the Constitutional Court of Mongolia, this prevents fathers who are caring for their children under the same condition from receiving the monthly child care allowance and creates gender disparity in parenting. In addition, it is deemed to indirectly give more responsibility to mothers in parenting and limit the choice for equal parental responsibility to mothers and fathers.

In resolving the case, the Constitutional Court of Mongolia referenced Article 7 of the Universal Declaration of Human Rights adopted by the General Assembly of the United Nations, Article 26 of the International Covenant on Civil and Political Rights, Article 3 of the International Covenant on Economic, Social and Cultural Rights, and Article 16 (1) “d” and “f” of the Convention on Eliminating All Forms of Discrimination against Women in its judgment.

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236 Article 6.2 of the Law on Allowances for Mothers and Single Mothers/Fathers with Many Children.



In its Medium Bench session, the Constitutional Court of Mongolia made a judgment that provisions in 1.1,<sup>237</sup> 3.1.3,<sup>238</sup> and 6.2<sup>239</sup> of the Law on Allowances for Mothers and Single Mothers/Fathers with Many Children, conflict with Articles 16.11,<sup>240</sup> 14.1,<sup>241</sup> and 14.2<sup>242</sup> of the Constitution and suspended the disputed provisions. The Parliament of Mongolia accepted the judgment and made amendments to the said law.

As to other judgments in which international human rights norms are not referenced, the Constitutional Court of Mongolia furthermore considers international human rights treaties because Mongolia has the obligation to protect human rights acknowledged by the international human rights instruments.

Though the Constitution of Mongolia enumerated eighteen fundamental rights of citizens, it is considered that the contextual scope of human rights and freedoms is broadly stipulated within a single provision, which contains these rights as a group.

One of the achievements in the Constitution is that the group of eighteen fundamental rights are stipulated in a way that they can be broadly interpreted. Besides, the Constitutional Court of Mongolia interpreted some human rights broadly in its several judgments. In other words, it would be erroneous to consider that the scope of human rights is restricted as to those only stipulated in the Constitution.

When human rights and freedoms in the international treaties are not restricted under the Constitution, everyone who is residing in Mongolian territory can enjoy such human rights and can be protected from breach of those human rights.

When human rights and freedoms in the international treaties are not restricted under the Constitution, everyone who is residing in Mongolian territory can enjoy

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237 Article 1.1. The purpose of this law is to regulate relations with respect to granting childcare allowances to pregnant women, mothers who are taking care of their children aged 0-3 years old to whom they have given birth, parents who have twin babies under 4 years old and single parents with three or more children.

238 Article 3.1.3. "Someone who is taking care of children" means a mother who is on childcare leave as per Article 106.1 of Law on Labor and an unemployed mother who is taking care of her child aged 0-3 years old as per Article 3.1.3 of Law on Employment Promotion of Mongolia.

239 Article 6.2. Mothers who are taking care of their children aged 0-3 years old to whom they have given birth are entitled to monthly childcare allowances.

240 Article 16.11. Men and women enjoy equal rights in political, economic, social, and cultural fields as well as in marriage. Marriage is based on the equality and mutual consent of the spouses who have reached the age determined by law. The State protects the interests of the family, motherhood, and the child.

241 Article 14.1. All persons lawfully residing within Mongolia are equal before the law and the courts.

242 Article 14.2. No person may be discriminated on the basis of ethnic origin, language, race, age, sex, social origin or status, property, occupation or post, religion, opinion, or education. Everyone is a person before the law.

such human rights and can be protected from breach of those human rights.

Mongolia shall not adhere to the international treaties that are inconsistent with the Constitution. It has the obligation to respect, protect and fulfil human rights that are stipulated in the international treaties to which Mongolia is a party. Therefore, it is crucial to consider the norms of international treaties and bilateral/multilateral agreements that protect human rights, even if these are not included in the Constitution.

## **C. Current issues**

### **1. Right to safe drinking water and sanitation**

Increasing negative impacts on the water ecosystem and scarcity of water reserves due to global climate change and mining activities have become part of global discussion. As a result of these improper use and over-use of water reserves, many countries lack access to fresh water, and are vulnerable to infectious diseases because of consuming polluted water. Fulfilment of rights to safe drinking water and sanitation unarguably is an important problem for Mongolia.

In the Report of the Special Rapporteur on the human rights to safe drinking water and sanitation of the Human Rights Council of the UN General Assembly (A/HRC/39/55/Add.2), it was concluded that there are inequalities in access to drinking water and sanitation services in Mongolia.<sup>243</sup> Normative content of these services refers to human rights to safe drinking water and sanitation, namely, availability, accessibility, affordability, quality and safety, acceptability, dignity and privacy.

Water is a limited natural resource and a public good fundamental for life and health. Access to water is of crucial importance for the enjoyment of all the elements of the right to an adequate standard of living, including the right to food.

Some constitutions from other jurisdictions such as South Africa stipulated that everyone has the right to access to sufficient food and water and the state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of these rights. The Constitution of Mongolia does not stipulate specifically the realization of a right to access to water, however, the right to safe drinking water and sanitation is interpreted within the right to a

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243 Available in English at: [https://ap.ohchr.org/documents/dpage\\_e.aspx?c=122&su=126](https://ap.ohchr.org/documents/dpage_e.aspx?c=122&su=126).

healthy and safe environment, and to be protected against environmental pollution and ecological imbalance.<sup>244</sup>

## **2. Right to know about environmental impacts and sovereign wealth funds**

Mongolia has abundant mineral resources. Under Article 6 of the Constitution, the land subsoil with its wealth, forests, water resources and fauna shall be public property of the State.

For resource-rich countries, good governance over its natural resources is vital. There are many international good practices of the resource-rich countries that avoided the resource curse by creating sovereign wealth funds. In 1953, the first sovereign wealth fund was established in the State of Kuwait, an oil-rich country. Over fifty countries established sovereign wealth funds to avoid mismanagement of government revenue and promote responsible investment of resource revenues. More than half of those fifty wealth funds are created on natural resource revenues.<sup>245</sup>

International good practices of the resource-rich countries led to amendment of the Constitution of Mongolia in 2019. In particular, the constitutional amendments of Mongolia of 14th of November 2019 provided a constitutional foundation for the sovereign wealth funds for equal distribution of resource wealth to the future generation.<sup>246</sup> Moreover, it outlined the right to know about environmental impacts arising out of extracting natural wealth within the context of the right to live in a healthy and safe environment.

According to Article 19.1 of the Constitution of Mongolia “The State is responsible to the citizens for the creation of economic, social, legal, and other guarantees ensuring human rights and freedoms, for the prevention of violations of human rights and freedoms, and restoration of infringed rights.” Therefore, the State is obligated and responsible for the protection of the rights and freedoms of the citizens of Mongolia.

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<sup>244</sup> Article 16.2 of the Constitution.

<sup>245</sup> Evaristus Oshionebo, ‘Managing Resource Revenues: Sovereign Wealth Funds in Developing Countries’ (2015) 15 *Asper Pev Int’l Bus & Trade L* 217, 218.

<sup>246</sup> Article 6.2 of the Constitution.

## **Annex 1: List of cited legal provisions**

### **1) Constitutional provisions**

Constitution of Mongolia (last amended 14 Nov. 2019)

- Article 1.2
- Article 3.1
- Article 6.2
- Article 7
- Article 9
- Article 10.1
- Article 10.2
- Article 13
- Article 14.1
- Article 14.2
- Article 16
- Article 17
- Article 18.5
- Article 19.1
- Article 19.2
- Article 19.3
- Article 21.2
- Article 26
- Article 31.3
- Article 53.2
- Article 54

### **2) Legislative provisions**

Law on Legal Status of Judges (annulled 1 March 2021)

- Article 28.1

Law on Allowances for Mothers and Single Mothers/Fathers with Many Children  
(last amended 6 May 2021)

- Article 1.1
- Article 3.1.3
- Article 6.2

### **3) International provisions**

## Universal Declaration of Human Rights

- Article 7

## International Covenant on Civil and Political Rights (ratified 18 Nov. 1974)

- Article 14
- Article 19.2
- Article 26

## International Covenant on Economic, Social and Cultural Rights (ratified 18 Nov. 1974)

- Article 3
- Article 8.2

## Convention on Eliminating All Forms of Discrimination against Women (ratified 10 July 1981)

- Article 16 (1) d, f.

## Convention on the Rights of the Child (ratified 5 Jul. 1990)

- Article 4

## **Annex 2: List of cited cases**

### **Constitutional Court<sup>247</sup>**

- Resolution Ref. No 06, June 6, 2002
- Resolution Ref. No 01, January 11, 2006
- Resolution Ref. No 02, June 15, 2006

<sup>247</sup> Decisions of the Constitutional Court shall be delivered in the form of a judgment, resolution and certification.

The Constitutional Court shall issue a judgment on the disputes regarding:

- the constitutionality of law and other decisions of the State Great Khural;
- decrees and other decisions of the President of Mongolia;
- decisions of the Government;
- international treaties to which Mongolia is a signatory party;
- decisions of the Central electoral body on referendums, and elections of the State Great Khural, its members, and the President.

Moreover, the Court shall deliver acts of non-compliance with the Constitution of the officials (the President, Chairman of the State Great Khural, a member of the State Great Khural, the Prime Minister, a member of the Government, the Chief Justice of the Supreme Court, and the Prosecutor General), and on existence of grounds for the resignation or withdrawal of the President, the Chairman of the State Great Khural, the Prime Minister, and a member of the State Great Khural.

The Court shall issue a resolution on reconsidered disputes, and a certification on complaints against a decision of a member of the Constitutional Court on initiating/not initiating a legal proceedings raised by disputing parties or proposed by a member of the Constitutional Court.

- Judgment Ref. No 06, May 14, 2008
- Resolution Ref. No 01, February 02, 2012
- Resolution Ref. No 02, December 12, 2014
- Resolution Ref. No 02, February 11, 2015
- Resolution Ref. No 10, November 27, 2015
- Resolution Ref. No 11, December 9, 2015
- Judgment Ref. No 01, January 20, 2021

# 10. Myanmar

## Constitutional Tribunal of the Union

### *Overview*

Constitutional rights are found in Chapter VIII of the Constitution, entitled “Citizen, Fundamental Rights and Duties of the Citizens.” These rights can be classified into the following categories: right to equality; right to freedoms; right against exploitation; rights relating to religion; cultural, educational, and health rights; right to elect and right to be elected; economic rights; and the right to constitutional remedies. Unenumerated constitutional rights can be recognized in Myanmar’s Constitution, where the basic principles provided in Chapter I are assumed as potential sources for unenumerated rights. In terms of international human rights law, Myanmar has so far ratified four of the nine core UN human rights treaties. In Myanmar, there are two ways to protect the constitutional rights, one is to submit application to the Union Supreme Court for issuing writs and another is to complain to the Myanmar National Human Rights Commission. In spite of the Constitutional Tribunal not being empowered with a direct jurisdiction on individual fundamental rights, the Tribunal has an authority and duty to recognize the constitutional rights of the citizens and their remedies will be assured by way of the judicial processes under the Constitution. Regarding particular historical or cultural factors impacting rights adjudication, the following are examples: political transitions as reflected in the past three constitutions; Myanmar being a multi-ethnic state; constitutional provisions on the freedom of religion, custom, literature, language and art; and the role of the Supreme Court in protecting constitutional rights.

### *Outline*

#### **I. Rights in the Constitution**

- A. Constitutional rights
- B. Rights guaranteed elsewhere in the Constitution
- C. Concretization of constitutional rights
- D. Historical background and development

#### **II. Classification and content**

- A. Enumerated constitutional rights
- B. Unenumerated constitutional rights
- C. Protection and limitation

#### **III. Interpretation and current issues**

- A. Rights in diverse contexts
- B. Impact of international norms

#### **Annex 1: List of cited legal provisions**

#### **Annex 2: List of cited cases**

## **I. Rights in the Constitution**

### **A. Constitutional rights**

The Constitution of the state consists of rules or laws which determine the forms of its government and the respective rights and obligations. The Constitution of the state means as fundamental law of the sovereign state, which is mandated as political law adopted by people of the state by means of referendum as a legal document under its legal system. The Constitution expresses the state's power and the structure of each of the political institutions, such as the legislative, executive and judiciary. It also mentions that the mandated power and duties of each of the sovereign pillars as rights and obligations of the government and of its individual citizen.

Whether a constitution is written or unwritten, flexible or rigid, unitary or federal, each and every constitution has a basic structure, and its principles are mentioned in the initial chapter of constitution. Rights and obligations of the individual citizens and the government are then mentioned in a separate chapter, which could be entitled with the terms “fundamental rights and obligations of the citizens” and applying these to relations between the citizens and the state.

Rights can be called constitutional rights when these rights refer to fundamental rights or to a bill of rights contained in a constitution. Our Constitution only expresses the term of the “fundamental rights of the citizens.” Similarly, in some ASEAN countries' Constitutions, constitutional rights are provided under different terminology. For example, “Fundamental Liberties” in Singapore's Constitution, “Rights and Liberties of the Thai People” in Thailand's Constitution, “Human Rights” in Indonesia's Constitution, and “Bill of Rights” in the Philippines Constitution, etc.

Myanmar gained its Independence in 1948. After that, Myanmar had three Constitutions up to this day in the Republic of the Union of Myanmar. They are the Constitution of the Union of Burma (1947), the Constitution of the Socialist Republic of the Union of Burma (1974), and the Constitution of the Republic of the Union of Myanmar (2008). The 2008 Constitution is the current one that is put in practice in Myanmar.

All of these Constitutions of Myanmar have included or include a chapter on Fundamental Rights. These are as follows: Chapter II (“Fundamental Rights”), sections 9 to 29 of the first Constitution; Chapter XI (“Rights and Duties of



Citizens”), sections 145 to 165 of the second Constitution; and Chapter VIII (“Citizen, Fundamental Rights and Duties of the Citizens”), sections 345 to 382 of the current and third Constitution. However, even though the current Chapter VIII has a name that states “fundamental rights of citizen and duties”, the rights also contain the obligation of the government to provide guarantees as mandated by the Constitution.

Most of the rights provided in the Constitution of the Republic of the Union of Myanmar (2008) are included in the Universal Declaration of Human Rights.

## **1. Rights of the citizens**

Our Constitution guarantees the fundamental rights of citizens. These rights may be categorized as the rights to equality; the rights to freedom; the rights to religion; economic, social, and cultural rights; political rights; and rights to remedies.

Regarding the rights to equality, section 347 to section 353 provide as follows:

- The Union shall guarantee any person to enjoy equal rights before the law and shall equally provide legal protection. (Section 347)
- The Union shall not discriminate any citizen of the Republic of the Union of Myanmar, based on race, birth, religion, official position, status, culture, sex and wealth. (Section 348)
- Citizens shall enjoy equal opportunity in carrying out public employment; occupation, trade, business, technical know-how and vocation, exploration of art, science and technology. (Section 349)
- Women shall be entitled to the same rights and salaries as that received by men in respect of similar work. (Section 350)
- Mothers, children and expectant women shall enjoy equal rights as prescribed by law. (Section 351)
- The Union shall, upon specified qualifications being fulfilled, in appointing or assigning duties to civil service personnel, not discriminate for or against any citizen of the Republic of the Union of Myanmar, based on race, birth, religion, and sex. However, nothing in this section shall prevent appointment of men to the positions that are suitable for men only. (Section 352)
- Nothing shall, except in accord with existing laws, be detrimental to the life and personal freedom of any person. (Section 353)

In respect of “Equality before the Law and Equal Treatment by the Law”, as

provided in sections 347 and 348 of the Constitution respectively, relevant rulings are *Tinsa Maw Naing vs. Commissioner of Police, Rangoon & Another* (1950, B.L.R. (SC) 37), *The Union of Myanmar vs. Maung Shwe (a) Maung Shae* (1966 M.L.R. (H.C.) P.616), *King Emperor vs. Nga Lun Thoung* (13 Yangon 570), and *Maung Par vs. the Union of Myanmar* (1962 M.L.R. P.479).<sup>248</sup>

Regarding “Presumption of Innocence and Benefit of the Doubt”, relevant legal norms are section 101, section 102, section 103, section 104 of the Evidence Act and the paragraph 415 (3) of the Jail Manual; relevant cases include the rulings *Maung Tin Mya vs. The Union of Burma* (1966 B.L.R. 644) and *Maung Saw Bwar vs. The Union of Burma* (1964 B.L.R.686).<sup>249</sup>

Concerning with the rights to freedom, sections 354 to 359 prescribe the following:

- Every citizen shall be subject to the laws, enacted for Union Security, prevalence of law and order, community peace and tranquility or public order and morality: to express and publish freely their convictions and opinions; to assemble peacefully without arms and holding procession; to form associations and organizations; to develop their language, literature, culture they cherish, religion they profess, and customs without prejudice to the relations between one national race and another or among national races and to other faiths. (Section 354)
- Every citizen shall have the right to settle and reside in any place within the Republic of the Union of Myanmar according to law. (Section 355)
- The Union shall protect according to law movable and immovable properties of every citizen that are lawfully acquired. (Section 356)
- The Union shall protect the privacy and security of home, property, correspondence and other communications of citizens under the law subject to the provisions of this Constitution. (Section 357)
- The Union prohibits the enslaving and trafficking in persons. (Section 358)
- The Union prohibits forced labor except hard labor as a punishment for crime duly convicted and duties assigned by the Union in accord with the law in the interest of the public. (Section 359)

In respect of the religious rights, section 361 to 363 are enacted as follows:

- The Union recognizes the special position of Buddhism as the faith

<sup>248</sup> Constitutional Law Journal Volume IV, 2020, p. 190.

<sup>249</sup> Ibid.

- professed by the great majority of the citizens of the Union. (Section 361)
- The Union also recognizes Christianity, Islam, Hinduism and Animism as the religions existing in the Union at the day of the coming into operation of this Constitution. (Section 362)
- The Union may assist and protect the religions it recognizes to its utmost. (Section 363)

Social and economic rights are prescribed in sections 365 to 368, and sections 370 and 372:

- Every citizen shall, in accord with the law, have the right to freely develop literature, culture, arts, customs and traditions they cherish. (Section 365)
- Every citizen in accord with the educational policy laid down by the Union: has the right to education, shall be given basic education which the Union prescribes by law as compulsory, have the right to conduct scientific research explore science, work with creativity and write to develop the arts and conduct research freely other branches of culture. (Section 366)
- Every citizen shall, in accord with the health policy laid down by the Union, have the right to health care. (Section 367)
- The Union shall honour and assist citizens who are outstanding in education irrespective of race, religion and sex according to their qualifications. (Section 368)
- Every citizen has, in accord with the law, the right to conduct business freely in the Union. (Section 370)
- The Union guarantees the right to ownership, the use of property and the right to private invention and patent in the conducting of business if it is not contrary to the provisions of this Constitution and the existing laws. (Section 372)

Rights of the accused are protected under sections 373 to 376:

- Any person who committed a crime, shall be convicted only in accord with the relevant law then in operation. Moreover, he shall not be penalized to a penalty greater than that is applicable under that law. Any person convicted of acquitted by a competent court for an offence shall not be retried unless a superior court annuls the judgment and orders the retrial. (Section 373 and 374)
- An accused shall have the right of defense in accord with the law. (Section 375)
- No person shall be held in custody for more than 24 hours without the

remand of a competent magistrate. (Section 376)

Moreover, regarding “Protection from Arbitrary Detention” relevant legal norms are section 21(b) and the section 376 of the Constitution, and sections 339, 340, 341, 342, 348 of the Penal Code, as well as sections 61, 100, 167, 491 of the Code of Criminal Procedure. Relevant rulings include *Bo San Lin vs. The Commissioner of Police and one* (1948, B.L.R (SC) 372) respectively.<sup>250</sup>

With respect to protection of constitutional rights, our Constitution enacts provisions on the protection and guarantee of fundamental rights. If the guaranteed rights and liberties that are provided in the Constitution have been breached, there is the right to obtain remedies under section 377 of the Constitution. Section 377 of the Constitution stipulates that in order to obtain the rights mentioned above, application shall be made in accord with the stipulations, to the Supreme Court of the Union.

## 2. Duties of the citizens

The duties of the citizens under the Constitution of the Republic of the Union of Myanmar (2008) are as follows:

- Every citizen has the duty to uphold non-disintegration of the Union, non-disintegration of national solidarity and perpetuation of sovereignty. (Section 383)
- Every citizen has the duty to abide by the provisions of this Constitution. (Section 384)
- Every citizen has the duty to safeguard independence, sovereignty and territorial integrity of the Republic of the Union of Myanmar. (Section 385)
- Every citizen has the duty to undergo military training in accord with the provisions of the law and to serve in the Armed Forces to defend the Union. (Section 386)
- Every citizen has the duty to enhance unity among national races and to ensure public peace and stability with the Union Spirit. (Section 387)
- Every citizen has the duty for the emergence of a modern developed Nation. (Section 388)
- Every citizen has the duty to pay taxes to be levied according to law. (Section 389)
- Every citizen has the duty to assist the Union in carrying out preservation

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250 Constitutional Law Journal Volume IV, 2020, p. 190.

and safeguarding of cultural heritage, environmental conservation, striving for development of human resources and protection and preservation of public property. (Section 390)

## **B. Rights guaranteed elsewhere in the Constitution**

The Constitution of the Republic of the Union of Myanmar (2008) prescribes the Basic Principles of the Union in Chapter I. These principles include the Judicial Principles, which find their basis under the objectives of the Union stated in section 6 (e): “enhancing the eternal principles of Justice, Liberty and Equality of the Union”. The Judicial Principles are mentioned in section 19 with sub-sections (a), (b) and (c), which consist of having an independent judicial system, to dispense justice in open court in accordance with the law, and to guarantee the right of defence and the right of appeal in all cases.

Section 21 sub-sections (a), (b), (c) and (d) mention the fundamental rights and obligations of citizens in the context of the rule of law, embodying the right of equality, liberty and justice and that no citizens shall be placed in custody for more than 24 hours without permission of a court. It further states that every citizen is responsible for public peace and tranquility and prevalence of law and order, and that the obligation of the state is to enact necessary law to make citizens’ freedoms, rights, benefits, responsibilities and restrictions effective, steadfast and complete.

Moreover, some rights prescribed in the Basic Principles are as follows:

- The Union shall enact necessary laws to protect the rights of the peasants and assist peasants to obtain equitable value of their agricultural produce. (Section 23)
- The Union shall enact necessary laws to protect the rights of workers. (Section 24)
- The Union shall care for mothers and children, orphans, fallen Defence Services personnel’s children, the aged and the disabled. (Section 32 (a))
- The Union shall permit citizens’ right of private property, right of inheritance, right of private initiative and patent in accord with the law. (Section 37 (c))
- Every citizen shall have the right to elect and be elected in accord with the law. (Section 38 (a))
- Electorate concerned shall have the right to recall elected people’s representatives in accord with the provisions of this Constitution.

## (Section 38 (b))

However, the basic principles on which they are based, are applied as the guidelines for the government in framing and enacting laws. Furthermore, those principles must be taken into account by the courts in dealing with constitutional interpretation.

### C. Concretization of constitutional rights

Regarding the right to access constitutional rights, the state enacts the relevant laws to implement them effectively. Some laws protect the fundamental rights of citizens, especially the rights of children, women, and disabled persons. Regarding the protection of the rights of children and women, section 82 of the Penal Code (1860), section 14 (d), (e), (f) of the Control of Smoking and Consumption of Tobacco Product Law (2006), section 2 (b) of the People's Military Service Law (2010), section 2 (b) of the Legal Aid Law (2016) and Child Rights Law (2019) are provided. The disabled persons have the rights to equality with others that are provided in sections 8, 9, 10, 11, and 12 of the Right of Persons with Disabilities Law (2015).

Every citizen has the right to access security and freedom of privacy, which are provided in section 3 of the Law Protecting the Privacy and Security of Citizens (2017).

In order to implement a free and compulsory primary education system, which is mentioned in section 28 (c) of the Constitution, the Basic Education Law (2019) was enacted.

Certain laws restrict rights in order to protect the interest of public safety and the rule of law of the state. These laws are the Press Law (2014), the Law Relating to Peaceful Assembly and Peaceful Procession (2016), etc.

As an example of relevant provisions on the restriction of rights, section 9 of the Press Law (2014) provides that a press man is responsible to comply with the following ethics and terms and conditions:

- (a) censoring the information to be precise, correct, and complete as much as possible;
- (b) mentioning the correction on the prominent page the soonest, if it is the printing media and mentioning at the nearest time, if it is the other

media when it needs to correct for having mentioned the news which is not precise and true;

- (c) presuming the accused as an innocent until he has been convicted by the Court and refraining from mentioning the criticism of news which amounts to the contempt of Court in mentioning news relating to the cases being tried before the Court;
- (d) refraining from improper modification using any technology in expressing news photos, pictures and sounds;
- (e) not being contained the estimation and the opinion of the news writer except writing of criticism of news, opinion and article;
- (f) refraining from copying and mentioning of intellectual property owned by other person without permission;
- (g) refraining from mentioning of writing which may intentionally effect the reputation of a person or organization and writing which may effect the human right if the writing is not related to public interest;
- (h) refraining from writing of instigation which may cause conflict based on a birthplace, religion, nationality;
- (i) complying with the ethic, terms and conditions issued by the Myanmar News Media Council.

Another illustration relates to the constitutional right to assemble peacefully without arms and holding a procession, as provided in section 354 b. of the Constitution. The Law Relating to Peaceful Assembly and Peaceful Procession is enacted to implement that right. In section 3 of that law, the objectives are as follows:

- (a) to preserve and safeguard the Union security, prevalence of law and order, community peace and tranquility, public order and morality by every citizen;
- (b) to entitled to enjoy and exercise systematically the right to peaceful assembly and peaceful procession which are fundamental rights of the citizens in the Constitution of the Republic of the Union of Myanmar and to protect them according to law;
- (c) to prevent from causing disturbance, danger, damage, injury and obstruction to the public by the persons who enjoy and exercise the rights to peaceful assembly and peaceful procession.

## **D. Historical background and development**

Myanmar's constitutional legal history is long but variation depends on its politics, since 1947 until today. During the 74 years after gaining Independence,

Myanmar has had a lot of political experiences with three constitutions.

According to the National Convention Record, in order to provide the citizens' rights in the constitution, the National Convention plenary meeting was held on 27 January 2006. In this meeting, the detailed basic provisions for the Fundamental Rights and Duties of Citizen in the drafting of the constitution were discussed.<sup>251</sup>

Constitutional rights are protected and guaranteed by all constitutions of Myanmar that had been ratified in Myanmar history. In the 1947 Constitution, provided in Chapter II, in the 1974 Constitution, provided in Chapter XI, and in the 2008 Constitution of the Republic of the Union of Myanmar, provided in Chapter VIII.

## **II. Classification and content**

### **A. Enumerated constitutional rights**

#### **1. Explicitly enumerated rights**

The Constitution (2008) lists the rights that would be specially protected as “Fundamental Rights”. Fundamental rights are the basic rights and freedoms described in the Constitution. The Constitution of Myanmar guarantees basic human rights to each and every citizen of the country. The Constitution of the Republic of the Union of Myanmar (2008) embodies fundamental rights in Chapter VIII titled “Citizen, Fundamental Rights and Duties of Citizens”.

Those rights can be generally categorized as:

- right to equality (Sections 347, 348, 349, 350, 351 and 352)
- right to freedoms (Sections 353, 354, 355, 356, 357, 373, 374, 375 and 376)
- right against exploitation (Sections 358 and 359)
- rights relating to religion (Sections 361, 362, 363 and 364)
- cultural, educational and health rights (Sections 365, 366, 367 and 368)
- right to elect and right to be elected (Section 369)
- economic rights (Sections 370, 371 and 372)
- right to constitutional remedies (Section 377)

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<sup>251</sup> National Convention Record, Volume VIII, Part I, p. 932.



## 2. Absolute and limited rights

Everyone enjoys their rights ensured by international conventions and the constitution of the state. But some rights are absolute and some are not. Absolute rights may not in any circumstances be overridden by the authorities of the state.

Some rights may be limited. Section 354 of the Constitution of Myanmar (2008) provides as follows:

*Every citizen shall be at liberty in the exercise of the following rights, if not contrary to the law, enacted for Union security, the prevalence of law and order, community peace and tranquility or public order and morality:*

- a. *to express and publish freely their convictions and opinions;*
- b. *to assemble peacefully without arms and holding procession;*
- c. *to form associations and organizations;*
- d. *to develop their language, literature, culture they cherish, religion they profess, and customs without prejudice to the relations between one national race and another or among national races and to other faiths.*

Section 354 of the Constitution establishes the right to express and publish freely, the right to assemble, the right to form associations and organizations, and etc., and then sets out specific limitations which apply to the exercise of each of these rights.

This provision stipulates that the rights enjoyed must be in line with the provided exceptions of the purpose of protection of union security, the prevalence of law and order, community peace and tranquility, or public order and morality.

Section 365 of the Constitution (2008) states that “every citizen shall, in accord with the law, have the right to freely develop literature, culture, arts, customs, and traditions they cherish. In the process, they shall avoid any act detrimental to national solidarity. Moreover, any particular action which might adversely affect the interests of one or several other national races shall be taken only after coordinating with and obtaining the settlement of those affected.”

In accordance with the above section, the Union shall guarantee freedom of literary, cultural, arts, customs, and traditions for every citizen. However, this right requires citizens to avoid any act of detriment to national solidarity and to coordinate any action likely to adversely affect the interest of national races with that group.

### 3. Rights holders

Basically, citizens are entitled to constitutional rights provided in Chapter VIII of the Constitution. However, not only the citizen but also the person who is not a citizen of the Union of Myanmar may also be entitled to the rights under sections 347 and 353 of the Constitution (2008).

Section 347 provides that “the Union shall guarantee any person to enjoy equal rights before the law and shall equally provide legal protection”.

By the above provision, every person, citizen or non-citizen, as also envisaged in the Universal Declaration of Human Rights, has the right to enjoy equal rights before the law and legal protection.

Equality before the law means every person has to follow the rules and regulations of law that are implemented according to the constitution of a state. If anyone violates the existing law of a state, he is punishable by a court of law. Similarly, he has the right to legal protection, if he does nothing wrong under the law.

Section 353 provides that “nothing shall, except in accord with existing laws, be detrimental to the life and personal freedom of any person”.

In conclusion, right to liberty and equality are guaranteed according to sections 347 and 353.

### 4. Individual rights provisions

Individual rights are the most important rights that belong to every person. Rights that protect the individual cannot be disregarded. The Constitution of the Republic of the Union of Myanmar (2008) protects the personal and private rights of an individual. Rights provided in sections 347, 349, 353, 355, 365, 366, 367, 369, 370, 373, 374, 375, 376 and 377 are related to the individual rights.

For example, section 347 guarantees to enjoy equal rights before the law and legal protection. Section 349 provides the right to equal opportunity in carrying out public employment, occupation, trade, business, technical know-how, and vocation and exploration of art, science, and technology. Under section 355, every citizen shall have the right to settle and reside in any place within the Republic of the Union of Myanmar according to the law.

## B. Unenumerated constitutional rights

Generally, constitutional rights, including enumerated constitutional rights and unenumerated constitutional rights, are rights that are the protections and liberties guaranteed to the people.

Unenumerated constitutional rights can be recognized in Myanmar's Constitution, where the basic principles provided in Chapter I, such as sections 19, 21 to 26 (b), 27 to 34, 36, 37 (c), 38, 43 to 45, are assumed as potential sources for unenumerated rights.

*Section 19. The following are prescribed as judicial principles:*

- 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 defense and the right of appeal under law.*

*Section 21.*

- a. *Every citizen shall enjoy the right of equality, the right of liberty, and the right of justice, as prescribed in this Constitution.*
- b. *No citizen shall be placed in custody for more than 24 hours without the permission of a Court.*
- c. *Every citizen is responsible for public peace and tranquility and prevalence of law and order.*
- d. *Necessary law shall be enacted to make citizens' freedoms, rights, benefits, responsibilities, and restrictions effective, steadfast, and complete.*

*Section 22. The Union shall assist:*

- a. *to develop language, literature, fine arts, and culture of the National races;*
- b. *to promote solidarity, mutual amity and respect, and mutual assistance among the National races;*
- c. *to promote socio-economic development including education, health, economy, transport, and communication, so forth, of less-developed National races.*

*Section 23. The Union shall:*

- a. *enact necessary laws to protect the rights of the peasants;*
- b. *assist peasants to obtain equitable value of their agricultural produce.*

*Section 24. The Union shall enact necessary laws to protect the rights of workers.*

*Section 25. The Union shall assist to promote the interests of the intellectuals and intelligentsia.*

*Section 26.*

- a. [...]
- b. *The Union shall enact necessary laws for Civil Services personnel to have security and sufficiency of food, clothing and shelter, to get maternity benefits for married women in service, and to ease livelihood for welfare of retired Service personnel.*

*Section 27. The Union shall assist development, consolidation and preservation of National culture.*

*Section 28. The Union shall:*

- a. *earnestly strive to improve education and health of the people;*
- b. *enact the necessary law to enable National people to participate in matters of their education and health;*
- c. *implement free, compulsory primary education system;*
- d. *implement a modern education system that will promote all-around correct thinking and a good moral character contributing towards the building of the Nation.*

*Section 29. The Union shall provide inputs, such as technology, investments, machinery, raw materials, so forth, to the extent possible for changeover from manual to mechanized agriculture.*

*Section 30. The Union shall provide inputs, such as technology, investments, machinery, raw materials, so forth, to the extent possible, for development of industries.*

*Section 31. The Union shall, to the extent possible, assist to reduce unemployment among the people.*

*Section 32. The Union shall:*

- a. *care for mothers and children, orphans, fallen Defence Services personnel's children, the aged and the disabled;*
- b. *ensure disabled ex-Defence Services personnel a decent living and free vocational training.*

*Section 33. The Union shall strive for youth to have strong and dynamic patriotic spirit, the correct way of thinking and to develop the five noble strengths.*

*Section 34. Every citizen is equally entitled to freedom of conscience and the right to freely profess and practice religion subject to public order, morality or health and to the other provisions of this Constitution.*

*Section 36. The Union shall:*

- a. permit all economic forces such as the State, regional organizations, cooperatives, joint-ventures, private individual, so forth, to take part in economic activities for the development of National economy;*
- b. protect and prevent acts that injure public interests through monopolization or manipulation of prices by an individual or group with intent to endanger fair competition in economic activities;*
- c. strive to improve the living standards of the people and development of investments;*
- d. not nationalize economic enterprises;*
- e. not demonetize the currency legally in circulation.*

*Section 37. The Union:*

- a. [...]*
- b. [...]*
- c. shall permit citizens right of private property, right of inheritance, right of private initiative and patent in accord with the law.*

*Section 38.*

- a. Every citizen shall have the right to elect and be elected in accord with the law.*
- b. Electorate concerned shall have the right to recall elected people's representatives in accord with the provisions of this Constitution.*

*Section 43. No Penal law shall be enacted to provide retrospective effect.*

*Section 44. No penalty shall be prescribed that violates human dignity.*

*Section 45. The Union shall protect and conserve natural environment.*

The judiciary has the power to enforce the Fundamental Rights but most of the Basic Principles of the Union are not enforceable by law. However, with regards to the unenumerated constitutional rights, there was a case in Myanmar.

In the case of *Daw Win Win Khaing (owner), (her recognized agent U Kyaw Zaya) Gallant Ocean Refrigeration Plant vs. Arbitration Council and two others*,<sup>252</sup> it was held as follows:

- According to Chapter VIII (“Citizen, Fundamental Rights and Duties of the Citizens”) of the Constitution of the Republic of the Union of Myanmar, section 377 and 378 provided that in order to obtain a right given by this Chapter, the application shall be made in accord with the stipulations and the Supreme Court of the Union has the power to issue any of the writs relating to such applicable matters.
- The provisions of these sections stipulate that a writ can be applied in order to obtain any of the rights granted in that chapter. These provisions cannot necessarily be interpreted as meaning that a writ can only be issued in regard to rights in Chapter VIII of the Constitution.
- Chapter VI of the Constitution, section 296 mentioned that the Supreme Court of the Union has the power to issue five kinds of the writ. Such provisions do not limit a writ to being only able to be issued for the rights set forth in Chapter VIII.
- Therefore, the authority to issue writs by the Supreme Court of the Union is not restricted to only issuing writs for rights contained in Chapter VIII (“Citizen, Fundamental Rights and Duties of the Citizens”) of the Constitution of the Union of Myanmar (2008).

### C. Protection and limitation

The judiciary has the powers and responsibility to protect fundamental rights given by the Constitution (2008). If executive functions, i.e. the function of administrative bodies of the executive, violate any of the rights guaranteed in Chapter VIII, such violations shall be redressed by the courts of law, including the highest court of law, which is the Supreme Court of the Union.

The state has the legal obligation to protect and promote especially citizen rights according to Chapter I (“Basic Principles of the Union”) and Chapter VIII (“Citizen, Fundamental Rights and Duties of the Citizens”) of the Constitution of the Republic of the Union of Myanmar (2008).

Concerning to the anti-trafficking in persons, Section 358 of the Constitution

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<sup>252</sup> *Daw Win Win Khaing (owner), (her recognized agent U Kyaw Zaya) Gallant Ocean Refrigeration Plant vs. Arbitration Council and two others* (2015 December 7), 2015, Myanmar Law Report, p. 245.

(2008) provides that “the Union prohibits the enslaving and trafficking of persons.”

In 2005, the Anti-trafficking in Persons Law was enacted and aims, as a matter of national duty, to prevent and suppress the trafficking in persons, and in doing so paying particular attention to women, children and youth; to enable effective and speedy investigation to expose and take action against persons guilty of trafficking in persons and to prevent further trafficking in persons by passing effective and deterrent punishment; to liaise and coordinate with international organizations, regional organizations, intergovernmental organizations formed between governmental organizations and non-governmental organizations in accordance with the international conventions relating to suppression of trafficking in persons which Myanmar has acceded; and to perform effectively the functions of rescuing, receiving, safeguarding, rehabilitation and reintegration into society of trafficked persons.<sup>253</sup>

The Constitution (2008) recognizes a right, contained in Chapter VIII, regarding the submission of application of writs. It aims to safeguard and protect the interests and fundamental rights of the people, i.e. citizens of Myanmar.

Section 378 a. of the Constitution provides that in connection with the filing of an application for rights granted under Chapter VIII of the Constitution, the Supreme Court of the Union shall have the power to issue five kinds of writs:

- Writ of Habeas Corpus
- Writ of Mandamus
- Writ of Prohibition
- Writ of Quo Warranto
- Writ of Certiorari

The highest organ of the judiciary, the Supreme Court of the Union, has the power to issue the writs according to section 296 a. of the Constitution. According to section 296 b. of the Constitution, the application to issue writs shall be suspended in the areas where the state of emergency is declared. In case of exceptional situations, fundamental rights are suspended under section 296 b.

Exceptional situations are listed in sections 479 and 381.

*Section 379. At the time of the occurrence the following situation, the rights under section 377 shall not be suspended unless the public safety may so require:*

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<sup>253</sup> Section 4 of the Anti-trafficking in Persons Law, 2005.

- a. *in time of war;*
- b. *in time of foreign invasion;*
- c. *in time of insurrection.*

*Section 381. Except in the following situations and time, no citizen shall be denied redress by due process of law for grievances entitled under law:*

- a. *in time of foreign invasion;*
- b. *in time of insurrection;*
- c. *in time of emergency.*

During the above three exceptions of situation mentioned in section 381, the citizens shall be denied their rights to apply the writs.

The state protects constitutional rights by enacting necessary laws in order to make citizens' freedoms, rights, benefits, responsibilities and restrictions effective, steadfast and complete.<sup>254</sup>

The 2008 Constitution provides us with a democratic form of government. Writs introduced under the 2008 Constitution provide citizens with greater protection in situations where the state does not follow the law. The Supreme Court of the Union has the power to issue the relevant writs in order to remedy the infringement of individuals' rights that result from unlawful conducts or decisions done by public administrative and judicial. However, even though cases dealing with the infringements of fundamental rights of the Constitution are cases of constitutional legal matters, the Constitutional Tribunal does not have the power to review these infringements of the "Fundamental Rights" of the Constitution under Chapter VIII of the Constitution.<sup>255</sup>

Myanmar makes its best efforts to ensure rule of law in Myanmar and to promote and protect the fundamental human rights, fair and just treatment of all citizens, an independent judiciary and to enhance the principle of good governance, the right of equal access to justice for all citizens, which are in line with the UN General Assembly's Declaration of the High-Level Meeting of the General Assembly on the Rule of Law at the National and International Levels (resolution of and adopted by the General Assembly, 30 November 2012).<sup>256</sup>

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<sup>254</sup> Constitutional Law Journal Volume IV, 2020, p. 189.

<sup>255</sup> Ibid p. 192.

<sup>256</sup> Ibid.



### **III. Interpretation and current issues**

#### **A. Rights in diverse contexts**

No constitution can be adopted today which does not have a bill of rights. Constitutions include certain fundamental individual rights which are generally regarded as essential conditions for a free and democratic way of life.

At the time of the drafting of the 2008 Constitution, constitutional scholars defined that the essence of the Constitution consists of every citizen being able to access social life, and that there is justice in the economy, justice in politics, freedom of expression, freedom of religion, freedom to work, and that these are based on justice, liberty, and equality.<sup>257</sup>

Accordingly, based on that view, “many Constitutions drafted in the nineteenth and twentieth centuries drew heavily by incorporating various rights into their constitutions. Most preambles now refer in some form to human rights: either to recognize past violations of rights or to emphasize the commitment of the State to protect rights.”<sup>258</sup>

After independence, Myanmar has enacted three Constitutions: the Constitution of the Union of Burma (1947), the Constitution of the Socialist Republic of the Union of Burma (the then Myanmar) (1974) and the Constitution of the Republic of the Union of Myanmar (2008). The preambles of these constitutions commit to the citizen’s rights as follows.

The Preamble of the Constitution of the Union of Burma (1947) stated that “We, the people of Burma determined to establish in strength and unity a sovereign independent state, to maintain social order on the basis of the eternal principles of justice, liberty and equality and to guarantee and secure to all citizens justice social, economic and political; liberty of thought, expression, belief, faith, worship, vocation, association and action; equality of status, of opportunity and before the law.”

The Preamble of the Constitution of the Socialist Republic of the Union of Burma (1974) expressed that, “We, the working people, firmly resolved that we shall – build a socialist economic system by the Myanmar Way to Socialism,

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257 National Convention Record, Volume VIII, Part I, p. 821.

258 Yash Ghai & Jill Cottrell, *The Millennium Declaration, Rights and Constitution*, Oxford University Press, 2011, p.82.

for the country to be peaceful and prosperous, opposing all pernicious systems characterized by exploitation of man by man, and of one national race by another, with a view to promoting justice and goodwill among the people, and to freeing them from apathy and callousness, ignorance, backwardness and want of opportunity, live forever in harmony, unity and racial equality sharing joys and sorrows through weal and woe in the Socialist Republic of the Union of Burma, –efficiently perform all duties and fulfil all obligations in the interest of the State and for the cause of Socialism while enjoying the democratic rights and personal rights and freedom bestowed by this Constitution, constantly strive to promote international peace and friendly relations among the nations.”

The Preamble of the Constitution of the Republic of the Union of Myanmar (2008) provides that, “We, the National people, drafted this Constitution of the Republic of the Union of Myanmar in accord with the Basic Principles and Detailed Basic Principles laid down by the National Convention. We, the National people, firmly resolve that we shall: - steadfastly adhere to the objectives of non-disintegration of the Union, non-disintegration of National solidarity, and perpetuation of sovereignty; - stalwartly strive for further burgeoning the eternal principles namely justice, liberty, equality, and perpetuation of peace and prosperity of the National people; - uphold racial equality, living eternally in unity fostering the firm Union Spirit of true patriotism; - constantly endeavor to uphold the principles of peaceful co-existence among nations with a view to having world peace and friendly relations among nations.”

Myanmar is a Nation with magnificent historical traditions. Many national ethnic races are living in our country and they have different religions, customs, arts, literatures, and languages. Our Constitution protects the rights of these different groups. Therefore, they access the right to freedom of religion, custom, literature, language, art as a basic right. Myanmar comprises eight major national ethnic races with some 135 ethnic groups. In the religious sector, 89.2% of the population is Buddhist, while Christianity, Islam, Hinduism, and Animism are also practiced.<sup>259</sup>

In the Constitution of the Republic of the Union of Myanmar (2008), provisions regarding the rights of national ethnicities and the right to freedom of religion are provided in sections 347, 348, 362, 363, 22, 362 and 363. These provisions are as follows:

*Section 347. The Union shall guarantee any person to enjoy equal rights before*

<sup>259</sup> [https://myanmarbsb.org/\\_site/general-information/](https://myanmarbsb.org/_site/general-information/)

*the law and shall equally provide legal protection.*

*Section 348. The Union shall not discriminate any citizen of the Republic of the Union of Myanmar, based on race, birth, religion, official position, status, culture, sex and wealth.*

*Section 362. The Union also recognizes Christianity, Islam, Hinduism and Animism as the religions existing in the Union at the day of the coming into operation of this Constitution.*

*Section 363. The Union may assist and protect the religions it recognizes to its utmost.*

*Section 22. The Union shall assist:*

- a. to develop language, literature, fine arts and culture of the National races;*
- [...]*

*Section 365. Every citizen shall, in accord with the law, have the right to freely develop literature, culture, arts, customs and traditions they cherish. In the process, they shall avoid any act detrimental to national solidarity. Moreover, any particular action which might adversely affect the interests of one or several other national races shall be taken only after coordinating with and obtaining the settlement of those affected.*

With respect to the protection of constitutional rights in Myanmar, the Constitution ratified in 2008 enacts provisions protecting and guaranteeing citizens' rights. The Union Supreme Court plays an important role in protecting and promoting the citizens' constitutional rights. People whose rights or liberty as recognized by the Constitution have been violated have the right to submit writs to the Supreme Court for a ruling to grant a remedy in order to obtain justice and to protect their rights.

Section 296 of the Constitution provides that for the protection of constitutional rights, the Supreme Court has the power to issue writs such as habeas corpus, mandamus, prohibition, quo warranto, and certiorari. But the applications to issue writs shall be suspended in the areas where a state of emergency is declared.

The most successful and remarkable case involving civil service personnel who was injured by the punishment resulting from the decision of a Union Minister was the case of *Professor Daw Kyin Htay vs. Minister for Education*

(2014).<sup>260</sup> In this case, the applicant is a former professor of economics, and civil service personnel. As she is capable of working at her position before the age of retirement (which is 60 years of age in Myanmar), she had been forced to retire from her position by the Ministry of Education. Thus, she applied to issue the writ of mandamus because the order of forcing her to retire was not in conformity with the existing civil service personnel law and rules.

According to the Civil Service Personnel Rules, if a Civil Service Personnel breaches the rules of conduct and disciplines of Civil Service Personnel, departmental enquiry must be performed to take action. In this case, there was no performance of any departmental enquiry, and the Union Minister issued the order of forcing to retire. Therefore, the applicant lost the right to defense and the right to appeal under the law. Moreover, she also lost the rights of civil service personnel.

In taking departmental action, one or more than one of the penalties contained in section 53 of the Civil Service Personnel Law may be imposed in accord with the rules, regulations and by-laws:

- written warning
- withholding of increment
- withholding of promotion
- reduction of pay within pay scale
- demotion
- compensation for loss
- not permitting full pay for temporary suspension period or not treating such suspension period as on duty
- removal from the post
- dismissal from services personnel

Therefore, the punishment of forced retirement imposed on the applicant is not included in the provisions of section 53 of the Civil Service Personnel Law and this punishment was not in conformity with the relevant law and rules of civil service discipline.

In hearing the case, not only both parties but also *Amicus Curiae* (from the Attorney General Office) were considered. The Union Supreme Court decided as follows: “The punishment of the Ministry of Education (defendant) on the applicant by the facts is not in conformity with the law and procedure of civil

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260 *Professor Daw Kyin Htay V Minister for Education*, civil miscellaneous Case No. 290/ 2013, Union Supreme Court, 5 June 2014.

service discipline. Moreover, the punishment of forcing to retire is not included in the punishment of civil service discipline. According to the issue of fact and issue of law which were above mentioned, it is clear that the order ‘force to retire’ was the situation of the loss of the rights enforced by law. Therefore, the application of the writ of mandamus was awarded.”

In this case, the court’s decision was in favor of the applicant in accordance with the law. The decision of the Ministry to force her to retire was beyond the powers of the Ministry, and the applicant was awarded the writ of mandamus as a remedy. Therefore, the applicant’s two constitutional rights were protected by this court decision: equal rights before the law (section 347) and equal opportunity in public employment (section 349 a.).

The Constitutional Tribunal does not have the power to directly protect of constitutional rights. However, the Constitutional Tribunal does have the authority to protect citizens’ rights by way of constitutional interpretation. Constitutional interpretation is one of the main functions of the Constitutional Tribunal. It is vested under section 322 a. of the Constitution.

Section 325 of the Constitution states that the following persons and organizations shall have the right to submit matters directly to obtain the interpretation, resolution and opinion of the Constitutional Tribunal of the Union:

- a. the President;
- b. the Speaker of the Pyidaungsu Hluttaw;
- c. the Speaker of the Pyithu Hluttaw;
- d. the Speaker of the Amyotha Hluttaw;
- e. the Chief Justice of the Union;
- f. the Chairperson of the Union Election Commission.

Furthermore, according to Section 323 of the Constitution, in hearing a case by a court, if there arises a dispute about whether the provisions contained in any law contradict or conform to the Constitution and if no resolution has been made by the Constitutional Tribunal of the Union on the said dispute, the said court shall stay the trial and submit its opinion to the Constitutional Tribunal of the Union in accord with the prescribed procedures and shall obtain a resolution. In respect of the said dispute, the resolution of the Constitutional Tribunal of the Union shall be applied to all cases. Therefore, in order to protect constitutional rights, the courts apply to the Constitutional Court for decisions as to whether enacted laws are constitutional or not.

Therefore, an individual does not have the right to apply to the Tribunal

directly and the Tribunal does not have the possibility to directly interpret the constitutional rights.

## **B. Impact of international norms**

In order to respect constitutional rights or human rights, states sign international human rights treaties and conventions, and the legislative bodies must make sure that enacted laws are in line with the Constitution as well as the conventions that have been ratified.

National laws are the implementation of constitutional rights and the implementation of conventions ratified by the states, especially human rights conventions. Accordingly, some countries amend their respective constitution in line with the provisions of conventions that have been ratified by them. But for international conventions to affect the domestic law of Myanmar, a correspondingly relevant national law has to be enacted.

As Myanmar is a member state of ASEAN, Myanmar has accepted the purposes and principles of ASEAN as enshrined in the ASEAN Charter, in particular the respect for and promotion and protection of human rights and fundamental rights as well as the principles of democracy, the rule of law and good governance, Universal Declaration of Human Rights, and the Charter of the United Nations.

Among the human rights conventions, Myanmar has ratified the International Covenant on Economic, Social and Cultural Right (ICESCR) in 2017, Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) in 1997, Convention on the Rights of the Child (CRC) in 1991, Convention on the Rights of Persons with Disabilities (CRPD) in 2011.

Signing the ICESCR is to acknowledge the cultures of the national ethnicities. Currently, a draft law on protecting women against violence is being drawn up by the relevant Ministry, aiming to bring relevant domestic law in line with the provisions of CEDAW.

Concerning the protection of the rights of women, and as member of the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW), Myanmar has obligations to punish a person who commits violence against women, and to rehabilitate the women who suffer the violence and to provide access to the mechanism of justice. In accordance with such obligations, Myanmar has provided sections 347 and 348 of the Constitution, and sections

312, 313, 314, 354, 366, 372, 373, 376, 493, 498 and 509 of the Penal Code, and sections 52, 382, 488, 489, 497 and 552 of the Code of Criminal Procedure, and sections 53 (a) (b) (c) (d) of the Child Law; a relevant ruling is *Union of Myanmar vs. Thin Thein (and 3)* (2002 M.L.R. 36).<sup>261</sup>

After ratification of the Convention on the Rights of the Child, the Child Law was enacted in 1993 at the national level. However, that law was repealed in 2019 as a result of the enactment of the Child Rights Law and the Law of the Protection of Child Rights (2019).

Although Myanmar has not ratified the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984), the Constitution provides the protection of human dignity in section 44 as follows: “No penalty shall be prescribed that violates human dignity.”

In respect of “Protection from Torture and Degrading Treatment”, relevant norms are section 44 of the Constitution, section 3 of the Union Judiciary Law (2010), section 17 of the Myanmar Police Force Maintenance of Discipline Law, and the sections 330 and 331 of the Penal Code.<sup>262</sup>

To promote human rights protection in Myanmar, on 5 September 2011 the Myanmar National Human Rights Commission (MNHRC) was established. According to the Myanmar National Human Rights Commission Law, the Commission independently functions under its own mandate given by statute law. The formation of the Commission was based on the Paris Principles, and is authorized to investigate complaints of human rights violations.

Duties and Powers of the Commission are provided in Section 22. The objectives of this Law are as follows: “to safeguard the fundamental rights of citizens enshrined in the constitution of the Republic of the Union of Myanmar effectively; to create a society where human rights are respected and protected in recognition of the Universal Declaration of Human Rights adopted by the United Nations; to effectively promote and protect the human rights contained in the international conventions, decisions, regional agreements and declarations related to human rights accepted by the State; to coordinate and cooperate with the international organizations, regional organizations’ national statutory institutions, civil society and nongovernmental organizations related to human rights”.

261 Constitutional Law Journal Volume IV, 2020, p. 191.

262 Constitutional Law Journal Volume IV, 2020, p. 190.

In Myanmar, some rights are considered as basic rights although some Human Rights Conventions have not been ratified yet. In addition, it cannot be denied that all of the provisions of the rights in the Constitution are born from the Universal Declaration of Human Rights.

There are two ways to protect the constitutional rights, one is to submit application to the Union Supreme Court for issuing writs and another is to complain to the Myanmar National Human Rights Commission.

In spite of the Constitutional Tribunal not being empowered with a direct jurisdiction on individual fundamental rights, the Tribunal has an authority and duty to recognize the constitutional rights of the citizens and their remedies will be assured by way of the judicial processes under the Constitution.

In conclusion, Myanmar is striving to safeguard and protect its constitutional rights in the interests of its people while going through its transition to democracy.

## **Annex 1: List of cited legal provisions**

### **1) Constitutional provisions**

The Constitution of the Union of Burma (1947)

The Constitution of the Socialist Republic of the Union of Burma (1974)

Constitution of the Republic of the Union of Myanmar (2008)

- Section 19
- Section 21
- Section 22
- Section 23
- Section 24
- Section 25
- Section 26 b.
- Section 27
- Section 28
- Section 29
- Section 30
- Section 31



- Section 32
- Section 33
- Section 34
- Section 36
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- Section 38
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- Section 45
- Section 296 b.
- Section 347
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## **2) Legislative provisions**

Basic Education Law (2019)

Child Rights Law (2019)

- Sections 53 (a), (b), (c), (d)

Criminal Procedure Code (1898)

- Sections 52, 61, 100, 167, 382, 488, 489, 491, 497, 552

Law Protecting the Privacy and Security of Citizens 2017 (amen. 2020)

- Section 3

Myanmar National Human Rights Commission Law (MNHRC) (2011)

- Section 22

Myanmar Police force Maintenance of Discipline Law (1995)

- Section 17

Penal Code (1861)

- Sections 82, 330, 331, 312, 313, 314, 339, 340, 341, 342, 348, 354, 366, 372, 373, 376, 493, 498, 509

People's Military Service Law (2010)

- Section 2 (b)

The Anti-Trafficking in Persons Law (2005)

- Section 4

The Control of Smoking and Consumption of Tobacco Product Law (2006)

- Sections 14 (d), (e), (f)

The Evidence Act (1872)

- Sections 101, 102, 103, 104

The Law relating to the Right of Peaceful Assembly and Peaceful Procession (2016)

- Sections 3 (a), (b), (c)

The Legal Aid Law (2016)

- Section 2 (b)

The Press Law (2014)

- Sections 9 (a), (b), (c), (d), (e), (f), (g), (h), (i)

The Right of Persons with Disabilities Law (2015)

- Sections 8, 9, 10, 11, 12

The State Peace and Development Council Law No. 5/2005

Union Judiciary Law (2010)

- Section 3

### **3) International provisions**

Universal Declaration of Human Rights (UDHR) (1948)

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984)

Convention on the Rights of the Child (CRC) (1991)

Convention of All Forms of Discrimination Against Women (CEDAW) (1997)

ASEAN Charter (2007)

Convention on the Rights of Persons Disabilities (CRPD) (2011)

International Covenant on Economic, Social and Cultural Right (ICESCR) (2015)

## **Annex 2: List of cited cases**

### **Supreme Court of India**

*King Emperor vs. Nga Lun Thoung*, 13 Yangon 570 (India Law Reports, Rangoon Series, 1935, Vol. 13)

### **Supreme Court**

*Bo San Lin vs. The Commissioner of Police and one*, 1948, B.L.R (SC) 372  
*Tinsa Maw Naing vs. Commissioner of Police, Rangoon & Another*, 1950, B.L.R (SC) 37

### **High Court**

*Maung Par vs. the Union of Myanmar*, 1962 M.L.R. P. 479  
*The Union of Myanmar vs. Maung Shwe (a) Maung Shae*, 1966 M.L.R. (H.C.) P. 616  
*Maung Saw Bwar vs. The Union of Burma*, 1964 B.L.R. 686  
*Maung Tin Mya vs. The Union of Burma*, 1966 B.L.R. 644  
*Union of Myanmar vs. Thin Thein (and 3)*, 2002 M.L.R. 36

### **Union Supreme Court**

*Professor Daw Kyin Htay vs. Minister for Education* (2013) Union Supreme Court, 5 June 2014  
*Daw Win Win Khaing (owner), (her recognized agent U Kyaw Zaya) Gallant Ocean Refrigeration Plant vs. Arbitration Council and two others* (2015 December 7), 2015, Myanmar Law Report, p. 245

# 11. Pakistan

## Supreme Court

### *Overview*

Chapter 1 of Part II of the Constitution is titled “Fundamental Rights” and it enumerates 23 constitutional rights specified in as many articles. The Constitution also guarantees rights other than those specified in the chapter on fundamental rights. The most important constitutional provision in this regard is Article 4, which embodies the rule of law. The Supreme Court has expounded the positive and negative nature of the fundamental rights. The fundamental rights guaranteed in the Constitution as such do not follow a strictly scientific order. However, the 23 rights enumerated in Chapter 1 of Part II may be divided into ten categories. Also, the broad contours of certain fundamental rights, coupled with constitutional provisions which espouse constitutional values, have led to the recognition of certain constitutional rights, which though not specified in the Constitution, have been granted by the Courts. Regarding the interpretation of constitutional rights in historical and cultural context, themes of relevance include Islam as the state religion of Pakistan, and the role of particular parts of the Constitution such as the Objectives Resolution, the Preamble, and the Principles of Policy. Pakistan has ratified seven of the nine core UN human rights treaties. The courts sometimes refer to international human rights norms while interpreting constitutional rights, including when unenumerated constitutional rights are recognized. Current issues in constitutional rights adjudication include climate justice, water justice, sustainable development and the rights of the dead.

### *Outline*

#### **I. Rights in the Constitution**

- A. Constitutional bill of rights
- B. Rights elsewhere in the Constitution
- C. Concretization of constitutional rights
- D. Historical background and development

#### **II. Classification and content**

- A. Enumerated constitutional rights
- B. Unenumerated constitutional rights
- C. Protection and limitation

#### **III. Interpretation and current issues**

- A. Rights in diverse contexts
- B. Impact of international norms
- C. Current issues

#### **Annex 1: List of cited legal provisions**

#### **Annex 2: List of cited cases**

## I. Rights in the Constitution

### A. Constitutional bill of rights

The Constitution of the Islamic Republic of Pakistan 1973 (“Constitution”) explicitly contains a bill of rights. These rights are embodied in Chapter 1 of Part II of the Constitution. This Chapter is titled “Fundamental Rights” and it enumerates 23 constitutional rights specified in as many articles. These rights are called fundamental because no organ of the state power, whether it be executive, judicial or legislative, can act in violation of them, and they can be restricted only in the manner in which the Constitution provides for their suspension, abridgment or elimination.<sup>263</sup> They are fundamental as they are mentioned in and guaranteed by the Constitution. These rights limit legislative and executive powers and serve as a clog on the ‘temporary’ will of the ‘simple’ majority in the legislature. They embody a permanent and paramount law which cannot be disturbed by the will of the legislature or of the executive. These fundamental rights serve a dual function. They not only destroy those portions of existing laws which are in conflict with these rights but also operate to render void any state action (whether in the legislative or executive field) which, after the coming into force of the Constitution, has the effect of taking away or abridging any of the fundamental rights.<sup>264</sup> Even, citizens of Pakistan cannot themselves waive out of the various fundamental rights which the Constitution grants them.<sup>265</sup> The title “Fundamental Rights” also implies that these rights define basic human freedoms that every person (citizen in some cases)<sup>266</sup> has the right to enjoy for a proper and harmonious development of personality. These rights apply to all, irrespective of race, place of birth, religion, caste or gender. They are enforceable by the courts and demand a high degree of protection from government encroachment.

Chapter 1 of Part II of the Constitution generally does not contain constitutional duties explicitly. However, Article 8, i.e., the first Article of this chapter, in clause (2) has provided for a negative obligation of the State in respect of fundamental rights, that is, the obligation to refrain from making any law which takes away or abridges fundamental rights. It commands, “The State shall not make any law which takes away or abridges the rights so conferred and any law made in contravention of this clause shall, to the extent of such contravention, be void.”

263 A. K. Brohi, *Fundamental Law of Pakistan* (First Edition Karachi 1958) 303.

264 Hamid Khan, *Constitutional and Political History of Pakistan* (Oxford University Press First Edition 2001) 170.

265 *PML (N) v Federation of Pakistan* PLD 2007 Supreme Court 642.

266 Some fundamental rights are for all persons, some for citizens only, others for communities.

Fundamental rights guaranteed by the Constitution are primarily addressed to the State. And the term “State” has been defined, by Article 7 of the Constitution, to mean the Federal Government, Parliament, a Provincial Government, a Provincial Assembly, and such local or other authorities in Pakistan as are by law empowered to impose any tax or cess. The State’s obligation with regard to fundamental rights is, therefore, to be fulfilled and discharged by all tiers of the government and all organs of the State as per their power, authority, obligation, and competence, as prescribed under the Constitution.<sup>267</sup> Executive/public functionaries working under these tiers of government are bound to act, under the Constitution, for protection of the fundamental rights of the citizens.<sup>268</sup> The Supreme Court of Pakistan has held that the State is duty-bound and is under an obligation to guarantee the enforcement of the fundamental rights enshrined in the Constitution, and to carry out all necessary steps to ensure realization of this goal.<sup>269</sup> The State being guardian of its citizens is bound to implement the constitutional provisions in letter and spirit particularly the fundamental rights.<sup>270</sup>

The Supreme Court has also expounded the positive and negative nature of the fundamental rights. In *Province of Sindh v M.Q.M.*,<sup>271</sup> Chief Justice Tassaduq Hussain Jilani, speaking for the Court, observed, “Human rights law makes a distinction between positive and negative rights, wherein positive rights usually oblige action and negative rights usually oblige inaction. Similarly, many of the fundamental rights granted by our Constitution pertain to both positive and negative rights. The holder of a negative right is entitled to non-interference, while the holder of a positive right is entitled to provision of some good or service. . . . Negative rights place a duty on the state not to interfere in certain areas where individuals have rights. The right holder can thereby exercise his right to act a certain way or not to act a certain way and can exercise his or her freedom of choice within the existing right. . . . Negative rights extend to all civil and political rights . . . . Positive rights place a positive duty on the state and include social and economic rights.” The Supreme Court has, with this elaboration, held that many of the fundamental rights granted by our Constitution pertain to both positive and negative rights.

Furthermore, there are a few scattered provisions which point to some obligations of individuals and groups. For instance, clause 4(b) of Article 11, which forbids slavery, forced labour etc., provides that nothing in this Article shall be deemed to

267 *Government of Sindh v Dr. Nadeem Rizvi* 2020 SCMR 1 (Per Justice Maqbool Baqar).

268 *Watan Party v Federation of Pakistan* PLD 2011 Supreme Court 997.

269 *Government of Sindh v Dr. Nadeem Rizvi* 2020 SCMR 1 (Per Justice Ijaz ul Ahsan).

270 *Rohaiifa v Federation of Pakistan* PLD 2014 Supreme Court 174.

271 PLD 2014 Supreme Court 531.

affect compulsory service required by any law for public purpose. In this regard, some laws providing for compulsory service like Compulsory Service (Armed Forces) Ordinance 1965, Compulsory Service in the Armed Forces Ordinance 1971 and Baluchistan Medical Graduates (Compulsory Service) Act 1974 were enacted. Moreover, clause 3 of Article 17 which guarantees freedom of association imposes an obligation on every political party to account for the source of its funds in accordance with law. The Supreme Court has held that all political parties are to account for the source of their funds and the Election Commission must fulfil the responsibilities earmarked by the Constitution in this regard. If a political party does not comply with the law governing political parties, the Election Commission must proceed against it in accordance with the law.<sup>272</sup> With regard to the right to protest, the Court observed that the right of assembly, the freedom of association and the freedom of speech could not be exercised by infringing the fundamental rights of others. Public meetings could not be held on roads without obtaining permission nor could a road be used as a camping ground indefinitely because the roads were for vehicular use and pavements were for the use of pedestrians to enable the travelling public to move freely which was their fundamental right.<sup>273</sup> It, thus, follows that the chapter on fundamental rights also places duty on state as well as private parties (non-state actors) and these rights can be enforced against them.

## B. Rights elsewhere in the Constitution

The Constitution also guarantees rights other than those specified in the chapter on fundamental rights. The most important constitutional provision in this regard is Article 4. This Article, which embodies the rule of law, affords a more substantial right to the citizens as compared to fundamental rights. It provides:

### **Right of individuals to be dealt with in accordance with law, etc.**

(1) To enjoy the protection of law and to be treated in accordance with law is the inalienable right of every citizen. Wherever he may be, and of every other person for the time being within Pakistan.

(2) In particular—

(a) no action detrimental to the life, liberty, body, reputation or property of any person shall be taken except in accordance with law;

(b) no person shall be prevented from or be hindered in doing that

<sup>272</sup> *Suo Motu Case No.7 of 2017* PLD 2019 Supreme Court 318.

<sup>273</sup> *ibid.*



which is not prohibited by law; and  
 (c) no person shall be compelled to do that which the law does not require him to do.

So predominant is the position of Article 4 that it furnishes the only guarantee or assurance to the citizens when the fundamental rights stand suspended, for example, during an emergency, so that “no action detrimental to life, liberty, body, reputation or property of any person shall be taken except in accordance with law.” While the fundamental rights can be suspended, the right given by Article 4 cannot. Therefore, this article confers a right which is more basic than fundamental rights.<sup>274</sup> Article 4 reflects the will of the People of Pakistan, that is, to enjoy the protection of law and to be treated in accordance with law is the inalienable right of not only the citizens of Pakistan, but of every other person who is for the time being in Pakistan. As per mandate of Article 4, a foreigner living for the time being in Pakistan is also entitled to protection of law and no action detrimental to his life, liberty, body, reputation or property can be taken except in accordance with law. Nor can he be prevented from or be hindered in doing that which is not prohibited by law and be compelled to do that which the law does not require him to do. Article 4 of the Constitution is a restraint on the legislative, executive and judicial organs of the State to abide by the rule of law. It is an original contribution as its equivalent is not to be found in the American or Indian Constitutions.<sup>275</sup> It embodies an important charter and prevents the government from taking any action in this country for which there is no legal sanction and at the same time it debars the legislature from creating an authority whose acts are not subject to law.<sup>276</sup>

The Constitution is not a code of rights only. It lays great stress on obligations. Nobody is above the law and everybody, how high so ever he may be, is under a basic obligation to obey the Constitution and law. Article 5 stresses obligations and duties of the citizens.<sup>277</sup> It provides:

**Loyalty to State and obedience to Constitution and law**

- (1) Loyalty to the State is the basic duty of every citizen.
- (2) Obedience to the Constitution and law is the inviolable obligation of every citizen wherever he may be and of every other person for the time being within Pakistan.

<sup>274</sup> Justice Fazal Karim, *Access to Justice in Pakistan* (Pakistan Law House First Edition 2003) 8-9.

<sup>275</sup> Mohammed Munir, *Constitution of the Islamic Republic of Pakistan: Being a Commentary on the Constitution of Pakistan 1973* (Law Publishing Company Lahore 1975) 82.

<sup>276</sup> *ibid* 83.

<sup>277</sup> Justice Fazal Karim, *Access to Justice in Pakistan* (Pakistan Law House First Edition 2003) 9-10.

Clause (2) of Article 5, which makes the obedience to the Constitution and law as inviolable obligation of every citizen and of every other person for the time being within Pakistan extends the obligation of acting in a manner that respects and protects the fundamental rights of others, to the non-state actors also. Article 199(1)(c) of the Constitution authorizes the High Courts, and likewise Article 184(3) authorizes the Supreme Court, to make appropriate directions to any person or authority including any Government for the enforcement of fundamental rights. The Supreme Court and the High Courts are collectively referred to as the Constitutional Courts of Pakistan. The Supreme Court of Pakistan has, therefore, held that the Constitutional Courts have plenary powers to positively enforce fundamental rights not merely against public authorities but also against private parties.<sup>278</sup> Fundamental rights may also be enforced against private parties (non-state actors), in Pakistan, by resorting to remedies under the law of tort, such as by instituting a suit for damages.<sup>279</sup> Furthermore, the State, under Article 3 of the Constitution, is bound to ensure the elimination of all forms of exploitation and the gradual fulfilment of the fundamental principle, from each according to his ability to each according to his work.<sup>280</sup>

### C. Concretization of constitutional rights

There are a few fundamental rights guaranteed in the Constitution which contain elaborate details. For instance, Article 10 which provides safeguards as to arrest and detention is divided into two distinct parts – arrests under the ordinary law and arrests under any law relating to preventive detention – and elaborates certain safeguards required to be satisfied whether arrest or detention are made under the ordinary law or under the law relating to preventive detention.<sup>281</sup> Moreover, Article 24 which provides protection to property rights contains certain detailed exceptions protecting laws permitting the compulsory acquisition or taking possession of any property for preventing danger to life, property or public health; or permitting the taking over of any property which has been acquired by, or come into the possession of, any person by any unfair means, or in any manner, contrary to law; or relating to the acquisition, administration or disposal of any property which is or is deemed to be enemy property or evacuee property under any law (not being property which has ceased to be evacuee property under any law); or

278 *Human Rights Commission of Pakistan v Government of Pakistan* PLD 2009 Supreme Court 507.

279 *Punjab Road Transport Corporation v Zahida Afzal* 2006 SCMR 207, *Shariq Saeed v Mansoor Ali Khan* 2010 YLR 1647.

280 *APNS v Federation of Pakistan* PLD 2012 Supreme Court 1.

281 Mohammed Munir, *Constitution of the Islamic Republic of Pakistan: Being a Commentary on the Constitution of Pakistan 1973* (Law Publishing Company Lahore 1975) 112.

providing for the taking over of the management of any property by the State for a limited period, either in the public interest or in order to secure the proper management of the property, or for the benefit of its owner; or providing for the acquisition of any class of property for the purpose of providing education and medical aid to all or any specified class of citizens; or providing housing and public facilities and services such as roads, water supply, sewerage, gas and electric power to all or any specified class of citizens; or providing maintenance to those who, on account of unemployment, sickness, infirmity or old age, are unable to maintain themselves; or any existing law or any law made in pursuance of maximum limits as to property. Also, Article 27 providing safeguards against discrimination in service contains provisions allowing for affirmative action in the interests of securing adequate representation in the service of Pakistan of persons belonging to any class or area as well as reservation of specified posts or services for members of either sex if such posts or services entail the performance of duties and functions which cannot be adequately performed by members of the other sex.

The rights guaranteed by the Constitution are sometimes further elaborated in some rights specific legislations. For instance, Article 17 i.e. ‘freedom of association’ in clause 2 provides that every citizen, not being in the service of Pakistan, shall have the right to form or be a member of a political party, subject to any reasonable restrictions imposed by law. The Political Parties Order 2002 has been promulgated to provide for the formation and regulation of political parties. Similarly, Article 19A guarantees that every citizen shall have the right to have access to information in all matters of public importance subject to regulation and reasonable restrictions imposed by law. Right of Access to Information Act 2017 has been enacted to provide for the right of access to information in transparent and effective manner, subject only to reasonable restrictions imposed by law. Fundamental rights, except those guaranteed by Article 10A, Article 11 (except compulsory service), Article 13, Article 14 (except privacy of home), Article 15 (to the extent to remain in Pakistan), Article 21 and Article 25A which are absolute, are subject to law and different laws have been passed to elaborate on the scope of some of these rights.

## **D. Historical background and development**

The specific mentioning of fundamental rights in constitutional documents owes its genesis and historic orientation to the fashion set in that behalf by the American people.<sup>282</sup> There was no bill of rights under the Government of India Act 1935

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282 A. K. Brohi, *Fundamental Law of Pakistan* (First Edition Karachi 1958) 309.

which served as the Interim Constitution of Pakistan following the establishment of the country in 1947 and experience with the rule of law during British rule was not always happy because the British practice in their colonies differed from that in their own country. Naturally, the idea of a bill of rights, as incorporated in many modern constitutions, appealed greatly to nationalist leaders during the struggle for the independence of the subcontinent. After partition, the preponderance of views in Pakistan as in other new democracies was in favour of a bill of rights being incorporated into the constitution. The nature and content of fundamental rights engaged the attention of the framers of the constitution from the very beginning. A committee on the fundamental rights of the citizens and on matters relating to minorities was set up at the inaugural session of the first Constituent Assembly in August 1947. There were raised strong arguments in favour of fundamental rights being defined and inserted in the proposed constitution. In a country such as Pakistan where the English tradition of democratic practices was lacking and where public opinion was not yet articulate or powerful, the need for such a declaration was imperative. Moreover, since Pakistan had religious minorities, it was necessary to define and protect the rights of individuals, irrespective of caste, creed, or religion. The interim report of the Committee of Fundamental Rights was accepted in 1950. The single idea, in the interim report on fundamental rights, was, to quote the words of the first Prime Minister of Pakistan Liaqat Ali Khan, 'to respect the dignity of man'. The fundamental rights, as adopted by the first Constituent Assembly, included familiar liberties such as equality of status, of opportunity and before law; social, economic and political justice; and freedom of thought, expression, belief, faith, worship, and association. Fundamental rights were guaranteed to Muslim and non-Muslim citizens without discrimination. The second Constituent Assembly retained all these rights, liberties, and liberal principles and ideals behind them, but with improvement in the content of some. The first Constitution of Pakistan, promulgated in 1956, laid great emphasis on fundamental rights by asserting that if any existing law or custom or usage having the force of law was inconsistent with any provision of fundamental rights, it would be void to the extent of such inconsistency and similarly no authority in Pakistan was competent to make any law, regulation, or any order which might be repugnant to any of the provisions of the fundamental rights. The democratic concept of limited government, that is, a government that rules by law is itself ruled by law, was thus established.<sup>283</sup>

The second Constitution of Pakistan, promulgated in 1962, contained the substance of fundamental rights as 'principles of lawmaking' but they were not

283 Hamid Khan, *Constitutional and Political History of Pakistan* (Oxford University Press First Edition 2001) 167-168.

enforceable by the courts. The principles of lawmaking sought to maintain most of the fundamental rights guaranteed under the 1956 Constitution such as freedom of speech and expression, of assembly and association, of movement and profession subject to the usual safeguards; but they were merely pious declarations and no remedy was provided should the principles be violated. Subsequently, a bill on fundamental rights was introduced in the National Assembly in March 1963 and these rights were made justiciable. The effect of the amendment was to convert the principles of lawmaking in the Constitution into constitutional restrictions on the power of a legislature, so that the decision of whether the legislature safeguarded fundamental rights would be vested in law courts.<sup>284</sup> The Interim Constitution of 1972 and the Constitution of 1973 contained fundamental rights more or less in the same form as written down in the 1956 Constitution.<sup>285</sup> In total, the Constitution of 1973 i.e. the present Constitution of Pakistan in its original form guaranteed 20 fundamental rights. In 2010, three new fundamental rights were added to Chapter 1 of Part II of the Constitution viz. right to fair trial,<sup>286</sup> right to information<sup>287</sup> and right to education<sup>288</sup> by the Constitution (Eighteenth Amendment) Act.

## **II. Classification and content**

### **A. Enumerated constitutional rights**

The fundamental rights guaranteed in the Constitution as such do not follow a strictly scientific or logical order. The 23 rights enumerated in Chapter 1 of Part II may be divided into 10 categories. The first category relates to security of person, safeguards against arrest and detention, right to fair trial, prohibition of slavery and forced labour, protection against retrospective punishment and double punishment as well as self-incrimination, inviolability of dignity of man, and freedom of movement; the second to freedom of association, assembly and profession; the third to freedom of speech and right to information; the fourth to freedom of religion; the fifth to property rights; the sixth to equality of citizens; the seventh to right to education; the eighth to access to public places; the ninth to discrimination in services; and the tenth to language, script and culture. It

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<sup>284</sup> *ibid* 295.

<sup>285</sup> *ibid* 449.

<sup>286</sup> The Constitution of the Islamic Republic of Pakistan 1973, art 10A.

<sup>287</sup> *ibid*, art 19A.

<sup>288</sup> *ibid*, art 25A.

can be observed that the list mainly contains civil and political rights but is also interspersed with economic, social and cultural rights like freedom of profession, property rights, right to education and preservation of language, script and culture. The Constitution thus contains first generation rights (civil and political rights) as well as second generation rights (social, economic and cultural rights). The Supreme Court has held that human rights cannot be confined only to basic civil rights and liberties, including political liberty, because a man cannot think for individual and collective development, when he cannot meet the basic necessities of life such as minimum food, clothing and housing; rights to these basic necessities of life are basically and fundamentally economic rights; and both basic civil rights and liberties and economic rights must go hand in hand and are inseparable and indivisible.<sup>289</sup>

The examples of absolute fundamental rights in the Constitution are those guaranteed by Article 10A, Article 11 (except compulsory service), Article 13, Article 14 (except privacy of home), Article 15 (to the extent to remain in Pakistan), Article 21 and Article 25A. Article 10A guarantees right to fair trial and due process for the determination of civil rights and obligations of a person or in any criminal charge against a person. Article 11, clause (1) says that slavery is non-existent and forbidden; clause (2) provides that all forms of forced labour and traffic in human beings are prohibited; and clause (3) says that no child below the age of 14 shall be engaged in any factory or mine or any other hazardous employment though an exception is created for compulsory service. Article 13 provides protection against double punishment and self-incrimination. Article 14 provides absolute guarantee that the dignity of man shall be inviolable and that no person shall be subjected to torture for the purpose of extracting evidence. Right to remain in Pakistan is couched in absolute language in Article 15 while Article 21 ensures that no person is compelled to pay any special tax the proceeds of which are to be spent on the propagation or maintenance of any religion other than his own. Article 25A says that the State shall provide free and compulsory education to all children of the age of five to sixteen years, however, the manner of doing so is to be determined by law. Rights which are not absolute are subject to law or reasonable restrictions imposed by law.

Some fundamental rights are for all persons, some for citizens only, others for communities. The rights for all persons include security of person, safeguards as to arrest and detention, right to fair trial, prohibition of slavery and forced labour, protection against retrospective punishment, protection against double punishment and self-incrimination, inviolability of dignity of man, privacy of

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289 *Al-Raham Travels & Tours (Pvt) Ltd v Ministry of Religious Affairs* 2011 SCMR 1621.

home, safeguard against taxation and as to educational institutions for purposes of any particular religion, protection of property rights and right to education as no distinction between a citizen and non-citizen is made in Articles conferring these rights.<sup>290</sup> The citizens have rights viz. freedom of movement, assembly, association, profession, speech; right to information; freedom to profess religion; non-discrimination in respect of admission to any educational institution receiving aid from public revenues on the ground only of race, religion, caste or place of birth; right to acquire, hold and dispose of property; equality; nondiscrimination in respect of access to public places; safeguard against discrimination in services; and preservation of language, script and culture. The rights guaranteed to community are that every religious denomination and sect has the freedom to establish, maintain and manage religious institutions; there shall be no discrimination against any community in the granting of exemption or concession in relation to taxation in respect of any religious institution; no religious community or denomination shall be prevented from providing religious instruction for pupils of that community or denomination in any educational institution maintained wholly by that community or denomination; and any section of citizens having a distinct language, script or culture shall have the right to preserve and promote the same and subject to law establish institutions for that purpose. There are special provisions permitting affirmative action to provide for the advancement of any socially or educationally backward class of citizens, the protection of women and children, and reservation of posts for adequate representation of any class or area in the service of Pakistan.

The right to have recourse to the Constitutional Courts of Pakistan for the enforcement of fundamental rights is not restricted to natural persons only; the juristic person can also move the Courts for such relief. Person is defined as including any body politic or corporate. The Lahore High Court has very elaborately held that “[t]he State has been prevented from enacting any law inconsistent with the fundamental rights and to the extent of inconsistency such law is void. The actions and non-actions inconsistent with the fundamental rights also require to be declared void and illegal. Petitions for enforcement of fundamental rights have, therefore, to be entertained more liberally, because enforcement of a fundamental right is the duty of Court itself. In this view of the matter, the right to move the Court for enforcement of fundamental rights cannot be restricted to natural persons only. All persons whether natural or juristic are equally competent to move the High Court with a view to seek appropriate relief from the High Court.”<sup>291</sup> It is in this backdrop that many cases are instituted by

290 *Al-Jehad Trust v Federation of Pakistan* 1999 SCMR 1379.

291 *Pakistan Chest Foundation v Government of Pakistan* 1997 CLC 1379.



juristic persons, like Bar Associations, Corporations, Societies, Foundations etc., in the Constitutional Courts of Pakistan for the enforcement of fundamental rights. Further, the liberty, which is an all-encompassing term, of foreigners who are for the time being living in Pakistan is fully secured by the provisions of Article 4 of the Constitution which is the bedrock for the rule of law in Pakistan. To enjoy the protection of law and to be treated in accordance with law is the inalienable right of not only the citizens of Pakistan, but of every other person who is for the time being in Pakistan.<sup>292</sup> As per mandate of Article 4 a foreigner living for the time being in Pakistan is also entitled to protection of law and no action detrimental to his life, liberty, body, reputation or property can be taken except in accordance with law. Nor can he be prevented from or be hindered in doing that which is not prohibited by law and be compelled to do that which the law does not require him to do. Article 4 of the Constitution is a restraint on the legislative, executive and judicial organs of the State to abide by the rule of law.<sup>293</sup>

There is a mixture of short as well as long provisions in Chapter 1 of Part II of the Constitution. Some provisions embodying fundamental rights like security of person; right to fair trial; protection against double punishment and self-incrimination; inviolability of dignity of man; freedom of movement, assembly, speech and religion; right to information and education; and preservation of language, script and culture contain brief statements. There are others like prohibition of slavery and forced labour; protection against retrospective punishment; freedom of association and profession; equality; and non-discrimination which describe rights in some detail. There are still others like safeguard as to arrest and detention, property rights and safeguard against discrimination in services which describe fundamental rights in fairly comprehensive manner.

## **B. Unenumerated constitutional rights**

The Constitution of Pakistan does not explicitly contain a provision authorizing the recognition of unenumerated constitutional rights. It, however, does not mean that constitutional rights in Pakistan are only limited to those expressly stated in the chapter on fundamental rights. There are other sources like the Preamble, the Objectives Resolution<sup>294</sup> and the Principles of Policy (Articles 29-

<sup>292</sup> *Ahmad Nawaz v The State* PLD 1998 Karachi 180.

<sup>293</sup> *Federation of Pakistan v Muhammad Nawaz Sharif* PLD 2009 Supreme Court 644.

<sup>294</sup> A resolution popularly known as the Objectives Resolution was passed by the nascent constituent assembly in March 1949. It laid the foundation of the future constitution and indicated the broad outlines of its structure. The Objectives Resolution later served as the preamble to the Constitutions of 1956, 1962 and 1973. In 1985, it became a substantive part of the Constitution through the insertion of Article 2A in the Constitution of 1973.



40) which espouse constitutional values, and coupled with broad contours of certain fundamental rights, recognize certain constitutional rights which though not specified in the Constitution have been granted by the Courts. The Supreme Court in *Benazir Bhutto v Federation of Pakistan*<sup>295</sup> held, “Articles 3, 37 and 38 of the Constitution juxtapose to advance the cause of socio-economic principles and should be given a place of priority to mark the onward progress of democracy. These provisions become in an indirect sense enforceable by law and thus, bring about a phenomenal change in the idea of co-relation of Fundamental Rights and directive principles of State Policy. If an egalitarian society is to be formed under the rule of law, then necessarily it has to be by legislative action in which case it would be harmonious and fruitful to make an effort to implement the socio-economic principles enunciated in the Principles of Policy, within the framework of the Fundamental Rights, by enlarging the scope and meaning of liberties, while judicially defining them and testing the law on its anvil and also, if necessary, with the co-related provisions of the Objectives Resolution which is now a substantive part of the Constitution. The liberties, in this context, if purposefully defined, will serve to guarantee genuine freedom; freedom not only from arbitrary restraint of authority, but also freedom from want, from poverty and destitution and from ignorance and illiteracy.”

The Supreme Court has expanded the right to life guaranteed by Article 9 of the Constitution to recognize a number of constitutional rights. The Court in *Shehla Zia v WAPDA*<sup>296</sup> held, “The word ‘life’ has not been defined in the Constitution but it does not mean nor can it be restricted only to the vegetative or animal life or mere existence from conception to death. Life includes all such amenities and facilities which a person born in a free country, is entitled to enjoy with dignity, legally and constitutionally.” *It has been laid down that Article 9 of the Constitution which guarantees life and liberty according to law is not to be construed in a restrictive manner, rather, life has larger concept which includes the right of enjoyment of life, maintaining adequate level of living for full enjoyment of freedom and rights.*<sup>297</sup> It has been held that fundamental right to life includes the right to pure and unpolluted water,<sup>298</sup> right to basic health care,<sup>299</sup>

295 PLD 1988 Supreme Court 416.

296 PLD 1994 Supreme Court 693.

297 *Employees of Pakistan Law Commission v Ministry of Works* 1994 SCMR 1548.

298 *West Pakistan Salt Miners Labour Union, Khewra v Industries And Mineral Development, Punjab* 1994 SCMR 2061.

299 *Suo Motu Case No. 19 of 2016* 2017 SCMR 683.

right to livelihood,<sup>300</sup> right to safe and health-friendly environment,<sup>301</sup> protection against adverse effects of electromagnetic fields,<sup>302</sup> the right of access to justice<sup>303</sup> and right to provision of electricity and gas.<sup>304</sup> ***Right to life as envisaged by Article 9 of the Constitution includes all those aspects of life which go to make a man's life meaningful, complete and worth living.***<sup>305</sup>

Moreover, the jurisprudence evolved in Pakistan also recognizes the penumbras around fundamental rights.<sup>306</sup> Article 17(2) has been held to guarantee not only the right to form or be a member of a political party but also to operate as a political party. The forming of a political party necessarily implies the right of carrying on of all its activities, else, the formation itself would be of no consequence. Also, Article 17(2) provides a basic guarantee to the citizen against usurpation of his will to freely participate in the affairs and governance of Pakistan through political activity relating thereto.<sup>307</sup> It has been held that right to form or to be a member of a political party comprises the right to participate in and contest an election.<sup>308</sup> The basic right to form or be a member of a political party conferred by Article 17(2) comprises the right of that political party not only to form the political party, contest elections under its banner but also, after successfully contesting the elections, the right to form the government if its members, elected to that body, are in possession of the requisite majority. The Government of the political party so formed must implement the program of the political party which the electorate has mandated it to carry into effect. Any unlawful order which results in frustrating this activity, by removing it from office before the completion of its normal tenure would, therefore, constitute an infringement of this fundamental right.<sup>309</sup> The freedom of association, as enunciated by Article 17 of the Constitution, confers

300 *Pir Imran Sajid v Telephone Industries of Pakistan* 2015 SCMR 1257, *Abdul Wahab v HBL* 2013 SCMR 1383, *National Bank of Pakistan v Nusrat Perveen* 2021 SCMR 702.

301 *Barrister Zafarullah Khan v Federation of Pakistan* 2018 SCMR 2001, *West Pakistan Salt Miners Labour Union Khewra v Industries and Mineral Development* 1994 SCMR 2061, *Suo Motu Case No. 10 of 2010 (Contamination of Water of Mancher Lake due to Disposal Effluent from MNV Drain now converted into RBOD)* 2011 SCMR 73, *Shahab Usto v Government of Sindh* 2017 SCMR 732, *Shehla Zia v WAPDA* PLD 1994 Supreme Court 693.

302 *Shehla Zia v WAPDA* PLD 1994 Supreme Court 693.

303 *Government of Balochistan v Aziz Ullah Memon* PLD 1993 Supreme Court 341, *Al-Jehad Trust v Federation of Pakistan* PLD 1997 Supreme Court 84, *Asfandiyar Wali v Federation of Pakistan* PLD 2001 Supreme Court 607, *Munir Hussain Bhatti v Federation of Pakistan* PLD 2011 Supreme Court 407.

304 *OGRA v Midway II, CNG Station* 2014 SCMR 220, *Iqbal Zafar Jhagra v Federation of Pakistan* PTD 2014 Supreme Court 243.

305 *Younas Abbas v Additional Sessions Judge, Chakwal* PLD 2016 Supreme Court 581, *NESPAK v Kamil Khan Mumtaz* 2018 SCMR 211.

306 *Mansoor Sarwar Khan v ECP* 2015 CLC 1477.

307 *Benazir Bhutto v Federation of Pakistan* PLD 1988 Supreme Court 416.

308 *Benazir Bhutto v Federation of Pakistan* PLD 1989 Supreme Court 66, *Javed Jabbar v Federation of Pakistan* PLD 2003 Supreme Court 955.

309 *Mian Muhammad Nawaz Sharif v President of Pakistan* PLD 1993 Supreme Court 473.

a fundamental right on every individual to partake in the political governance of the State, whilst concurrently reinforcing the constitutional mandate to protect and advance this right through a democratic system. The freedom of assembly guaranteed by Article 16 and freedom of speech guaranteed by Article 19 also serve to realize this constitutional imperative. Article 17(2) underscores the integrality and importance of a functional political party to democracy.<sup>310</sup> Also, the Supreme Court has observed that the expression “political justice” used in the Objectives Resolution has been placed in the category of fundamental rights, and political parties have become a subject-matter of a fundamental right in consonance with it.<sup>311</sup>

*Shehla Zia v WAPDA*<sup>312</sup> stands tall in the category of cases recognizing unenumerated constitutional rights. Some citizens expressed apprehension against construction of a grid station in their locality. The Court found that the matter raised two questions namely whether any government agency had a right to endanger the life of citizens by its actions without the latter’s consent and whether zoning laws vest rights in citizens which could not be withdrawn or altered without the citizen’s consent. It was held that the right to a clean environment was a fundamental right of all citizens of Pakistan covered by the right to life. They were entitled to protection of law from being exposed to hazards of electromagnetic field or any other such hazards which may be due to installation and construction of any grid station, any factory, power station or such like installations. Opinion of scientists and scholars was that likelihood of adverse effects of electromagnetic fields on human health could not be ruled out. The Court observed that in such circumstances the balance should be struck between the rights of the citizens and also the plans which were to be executed by the government agency for the welfare, economic progress and prosperity of the country and if there were threats of serious damage, effective measures should be taken to control it and it should not be postponed merely on the ground that the scientific research and studies were uncertain and not conclusive. With the consent of both the parties, the Court appointed a commission to examine the plan and the proposals/schemes of the government agency in the light of complaint made by the citizens and submit its report and if necessary to suggest any alteration or addition which may be economically possible for construction and location of the grid station.

The petitioners in *West Pakistan Salt Miners Labour Union, Khewra v Director*,

310 *Workers Party Pakistan v Federation of Pakistan* PLD 2012 Supreme Court 681.

311 *Benazir Bhutto v Federation of Pakistan* PLD 1988 Supreme Court 416.

312 PLD 1994 Supreme Court 693.

*Industries and Mineral Development, Punjab*<sup>313</sup> sought enforcement of the right of residents to have clean and unpolluted water. Their apprehension was that in case coal mining activity extending in the water catchment areas was allowed to continue; the watercourse, reservoir, and the pipelines would get contaminated. The Court entertained the petition in its original jurisdiction and held that water was a source of life and the right to have unpolluted water was the right of every person wherever he lived. It issued a number of directions to the concerned departments and directed the miners to shift within four months, the location of the mouth of the specified mine at a safe distance from water reservoir in such a manner that it was not polluted by mine debris, carbonised material and water spilling out from the mines.

In *Pir Imran Sajid v Telephone Industries of Pakistan*,<sup>314</sup> the petitioners had remained in continuous service of the respondents for a period of one decade as contract employees. The question was whether any vested rights had been created in their favour for the grant of relief of regularization of their employment. It was held that renewal of employees' contracts on year to year basis since the inception and grant of increments to them clearly showed that the nature of their duties was permanent and that they had been performing their functions to the satisfaction of their employer. It was further observed that retaining the employees in question on contract basis, instead of permanent basis was wholly mala fide, whimsical and unfair. The Court held that right to life as envisaged by Article 9 of the Constitution included the right to livelihood.

The Court in *Suo Motu Case No. 19 of 2016*<sup>315</sup> took notice of an anonymous complaint about embezzlement of huge amounts of money in the projects being executed by Sindh Coal Authority which was established to explore, develop, process, mine and utilize coal in the province of Sindh. The Court held that the Authority undertook activities beyond the mandate conferred by the statute. It was further observed that good governance was not a favour to be bestowed on the people; it was their right. "The Fundamental Right to life (Article 9), includes the right to adequate and safe drinking water and basic health care to which a large number of these projects/schemes pertain. The Fundamental Right to live a life with dignity (Article 14) would be meaningless if the people are deprived of the benefit of projects and schemes that are paid out of the public exchequer."

A constitutional petition was filed before the Supreme Court in *Shahab Usto*

313 1994 SCMR 2061.

314 2015 SCMR 1257.

315 2017 SCMR 683.

*v Government of Sindh*<sup>316</sup> to ensure provision of clean drinking water and safe environment to the people of the province of Sindh. The Court held that provision of clean water for drinking was the duty of the State. A commission was formed to record findings on the issue. The Court directed that visuals and footage recorded by the commission should be sent to the Speaker of the Provincial Assembly who may arrange its viewing in the Provincial Assembly to enable the peoples' representatives to have a clear view of the prevailing situation in the province; that a task force formed to comply with the recommendations of the commission shall immediately start its work under the supervision of the provincial Chief Secretary and shall report to the commission; that the commission shall have further powers to ensure compliance of the recommendations made in its report and shall continue taking all steps to achieve the objective for which the commission was formed etc.

### C. Protection and limitation

There are explicit provisions in the Constitution which stipulate the State's obligation to protect fundamental rights. Article 8(2) provides, "The State shall not make any law which takes away or abridges the rights so conferred and any law made in contravention of this clause shall, to the extent of such contravention, be void." The High Courts under Article 199(1)(c) of the Constitution and the Supreme Court under Article 184(3) have powers to make appropriate directions to any person or authority including any government for the enforcement of fundamental rights.

There are certain provisions which limit the protection afforded by fundamental rights. Article 8 which is captioned 'Laws inconsistent with or in derogation of Fundamental Rights to be void' in clause (3) provides that the provisions of this Article shall not apply to any law relating to members of the Armed Forces, police etc. for the purpose of ensuring the proper discharge of their duties or the maintenance of discipline among them; and some other laws which were to be brought in conformity with fundamental rights in a given period of time. Part X of the Constitution contains provisions relating to emergency situations in Articles 232 to 237. The President has the power to issue proclamation of emergency in three situations – when the security of the country is threatened by external aggression or internal disturbance, when constitutional machinery fails in a province and when financial stability of the country or a part is threatened.<sup>317</sup> The

<sup>316</sup> 2017 SCMR 732.

<sup>317</sup> The Constitution of the Islamic Republic of Pakistan 1973, arts 232, 234 and 235.

President may suspend fundamental rights during the imposition of emergency but such order would have to be placed before the Parliament for approval.<sup>318</sup>

Nevertheless the Constitution provides certain limits within which emergency powers are to be exercised in order to curb the arbitrary exercise of authority. The power of executive to proclaim emergency is checked by parliamentary oversight. Proclamations of emergency would cease to have effect after two months unless approved by joint parliamentary sitting. The Parliament may disapprove the proclamation by passing a resolution to that effect. Though executive and legislative authority of the federation is extended to the provincial sphere during an emergency, judicial authority of the High Courts remains unaffected. Emergency issued for failure of constitutional machinery in a province or for threat to financial stability cannot remain in force for more than six months. All actions related to curbing fundamental rights during an emergency need to be placed before the Parliament. In order to protect the provinces from the federal government's hegemony, a resolution from the provincial assembly or a resolution by a joint sitting of the Parliament within ten days is required in case of a proclamation of emergency due to internal disturbance beyond the control of provincial government. The Constitution in Article 236(2) provides that the validity of any Proclamation issued or Order made under this Part (Part X) shall not be called in question in any court. However, the Supreme Court of Pakistan has decided that even if the impugned act or action has been protected by Constitutional provision by ouster clause, the superior Courts still have the jurisdiction to interfere within three categories of cases, namely, without jurisdiction, *coram non judice* and *mala fides*.<sup>319</sup> It was reiterated that provisions of Article 236(2) of the Constitution which bar the jurisdiction of the Courts from examining the validity of any Proclamation will not cover a Proclamation which is without jurisdiction, *coram non judice* or *mala fide* and the Court has jurisdiction to review/re-examine the continuation of an emergency at any subsequent stage.<sup>320</sup>

### **III. Interpretation and current issues**

#### **A. Rights in diverse contexts**

The 1973 Constitution embodies the best possible arrangement to accommodate

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<sup>318</sup> *ibid*, art 233.

<sup>319</sup> *Sabir Shah v Federation of Pakistan* PLD 1994 Supreme Court 738.

<sup>320</sup> *Farooq Ahmad Khan Leghari v Federation of Pakistan* PLD 1999 Supreme Court 57.

the various political parties, political issues and demands, economic interests, parties' manifestos, and so on. The majority party in the National Assembly, the Pakistan Peoples Party, had promised in the general elections of 1970 to introduce an egalitarian set up in Pakistan. The National Awami Party was the main opposition party in the National Assembly and it championed the cause of provincial autonomy. A formula had to be devised which would strike a balance between the conflicting demands of provincial autonomy and a strong federation. A clear distribution of powers between the federal and provincial governments was provided and the principle of decentralization was accepted. There was a provision for a council of common interests meant to be an important body for the provinces to air their grievances against the Federation or other provinces and for addressing of such grievances. A bicameral legislature was introduced and thus the smaller provinces were given a greater voice and larger role in the national affairs. The Supreme Court was specifically given the power to adjudicate in any dispute between any two or more governments. It was also necessary to reach a compromise between the Islamic and the socialist concept. The Islamic and socialist ethos were satisfied through Articles 2 and 3 of the Constitution respectively. Article 2 declared Islam as the state religion of Pakistan and Article 3 provided for the elimination of all forms of exploitation. The Objectives Resolution 1949 describing the aims and objects of the Constitution and making a provision for guaranteeing fundamental rights was added as the preamble to the Constitution and was subsequently made its substantive part through the insertion of Article 2A. A national consensus had been arrived on the rejection of the presidential form of government as introduced in the 1962 Constitution. A federal parliamentary form of government was thus reintroduced as was the case in the 1956 Constitution.<sup>321</sup> The State was to be guided in the formulations of policies by the Principles of Policy which visualized the manifesto of the policies and programs of the State as visualized by the founding fathers.<sup>322</sup>

The Constitutional Courts of Pakistan have interpreted fundamental rights in their particular constitutional context. The Lahore High Court in *Muhammad Yousaf v Chairman FPSC*<sup>323</sup> held, "Our Constitution is prefaced by timeless and immutable constitutional values, which reflect the will and resolve of the people of Pakistan. Principles of democracy, freedom, equality, tolerance and social justice, the guaranteed fundamental rights, including equality of status, of opportunity and before law, social, economic and political justice, and freedom of thought, expression, belief, faith, worship and association, subject to law and public

321 Hamid Khan, *Constitutional and Political History of Pakistan* (Oxford University Press First Edition 2001) 486-487.

322 *ibid* 171.

323 PLD 2017 Lahore 406.



morality. These constitutional values, inter alia, flow into fundamental rights, like the right to life (Article 9), the right to dignity (Article 14) and the right to equality (Article 25) making our Constitution evergreen, organic and a living document.” It was observed in *Mansoor Sarwar Khan v ECP*,<sup>324</sup> “Objectives Resolution and the Preamble to our Constitution underline that Pakistan is a representative democracy, wherein political justice is guaranteed and the State is dedicated to the preservation of democracy achieved by the unremitting struggle of the people against oppression and tyranny. Parliamentary democracy is actualized through participatory and representative political process of elections. Going to polls is an expression of democracy. Cluster of freedoms (fundamental rights) under the Constitution embolden this constitutional promise. Freedoms of movement, speech, assembly, association and information enjoy a unique symbiotic relationship which nurtures democracy and strengthens political institution. Articles 15, 16, 19 and 19A bolster political associations by allowing its members the right of movement across the country, the freedom of speech to express and disseminate their political views, the right to hold lawful assemblies to meet, debate and share their political ideas and by giving them access to information. Under Article 17(2) every citizen, not being in the service of Pakistan, has the right to form or be a member of a political party subject to any reasonable restrictions imposed by law in the interest of the sovereignty or integrity of Pakistan. While Article 17(2) literally provides for the right to formation and membership of a political party it has deeper political and democratic undertones, which though unwritten, begin to surface when purposively contextualized in the background of constitutional ethos of political justice and representative democracy.”

The Supreme Court in *LDA v Imrana Tiwana*<sup>325</sup> held that Objectives Resolution and Principles of Policy could be used to understand and interpret the fundamental rights guaranteed by the Constitution in their proper context as it may facilitate an interpretation of fundamental rights in harmony with and not divorced from their constitutional setting. The Court, in the particular conflict situation in the province of Balochistan, observed in *President Balochistan High Court Bar Association v Federation of Pakistan*<sup>326</sup> that the government was bound to enforce fundamental rights in the context of the scenario in Balochistan, providing security of life, property and liberty, in accordance with law; that non enforcement of such rights of the citizens called for the superior courts to issue directions to the Federal as well as Provincial Governments to protect the life and property of all the citizens

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324 2015 CLC 1477.

325 2015 SCMR 1739.

326 2012 SCMR 1784.



equally; that unfortunately both Federal and Provincial Governments avoided for one or the other reason to honour the commitments they had made of ensuring early and safe recovery of missing persons, of taking measures to identify and arrest the culprits involved in the target/sectarian killings, kidnapping for ransom and putting them to justice and of restoring peace and harmony amongst all the segments of society in the province and creating conducive environment for the economic development, well-being and prosperity of the province.

## **B. Impact of international norms**

Pakistan traditionally operates as a dualist state insofar as international law is concerned. Dualism approaches national and international law as separate entities that only overlap when international law is incorporated through legislative action into national law. In Pakistan, for international instruments to have the same status as domestic law, implementation through legislation or executive action is required. Where treaty provisions are not incorporated through legislation into the formal law of the state, they do not have the effect of altering the existing laws which means rights arising therefrom called treaty rights cannot be enforced and the court is not vested with the power to do so. Article 175(2) of the Constitution of Pakistan provides “no Court has any jurisdiction unless conferred by or under any law or the Constitution.” It is well-established that the provisions of an international treaty to which Pakistan is a party do not form part of Pakistani law unless those provisions have been validly incorporated into Pakistan’s municipal law by statute. International treaties become applicable in Pakistan after they have been validly incorporated in the statute book. The Constitution brings within the legislative competence of federal legislature the matters relating to the international treaties, conventions etc.<sup>327</sup> The relevant portions of the Fourth Schedule Federal Legislative List are items three and thirty-two viz. external affairs; the implementing of treaties and agreements, including educational and cultural pacts and agreements, with other countries; extradition, including the surrender of criminals and accused persons to Governments outside Pakistan and international treaties, conventions and agreements and international arbitration.

Human rights conventions ratified by Pakistan include Convention on the Prevention and Punishment of the Crime of Genocide, International Convention on the Suppression and Punishment of the Crime of Apartheid, International Covenant on Civil and Political Rights (ICCPR), International Covenant on Economic, Social and Cultural Rights (ICESCR), Convention against Torture and

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<sup>327</sup> The Constitution of Islamic Republic of Pakistan 1973, art 70(4) and Fourth Schedule.

other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), Convention on the Rights of the Child (CRC), Optional Protocol on the involvement of Children in Armed Conflict, Optional Protocol to the Convention on the Rights of the Child, on the sale of children, child prostitution and child pornography, Convention on the Rights of Persons with Disabilities (CRPD), International Convention on the Elimination of all forms of Discrimination Against Women (CEDAW), Geneva Conventions 1949, Hague Convention for the Protection of Cultural Property 1954, Hague Protocol for the Protection of Cultural Property 1954, Hague Convention on the Civil Aspects of International Child Abduction or Hague Abduction Convention.<sup>328</sup>

The Constitutional Courts of Pakistan sometimes refer to international human rights norms while interpreting constitutional rights. The Lahore High Court in *Hafiz Junaid Mahmood v Government of Punjab*<sup>329</sup> held that interpretation of fundamental rights in the light of United Nations Convention on the Rights of Persons with Disabilities showed that a person with disabilities could not be debarred from applying on open merit for the general seats for the post of Senior Elementary School Educator and the three percent quota under the relevant statute was an additional benefit which did not restrict a person with disabilities to apply for the general quota. Significant use of the United Nations Convention on the Rights of Persons with Disabilities was made in *Muhammad Yousaf v Chairman FPSC*<sup>330</sup> and the government was directed to move to a more inclusive policy to accommodate persons with disabilities in all Pakistan Service.

The Supreme Court in *National Commission on Status of Women v Government of Pakistan*<sup>331</sup> referred to international human rights norms to remind the government of its obligations. It observed that Articles 7 and 8 of the Universal Declaration of Human Rights (UDHR) 1948, Article 2 and 26 of International Covenant on Civil and Political Rights (ICCPR) 1966, and Article 15 of Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) 1979, placed a responsibility on the State of Pakistan to ensure that all women in Pakistan had access to courts or tribunals, were treated equally before the law and that in civil matters identical legal capacity and opportunities were accorded to them as those accorded to men and they be treated equally in all stages of procedure in courts and tribunals.

328 Conventions/Treaties Signed/Ratified by Pakistan. <<http://mofa.gov.pk/mous-agreements/>>

329 PLD 2017 Lahore 1.

330 PLD 2017 Lahore 406.

331 PLD 2019 Supreme Court 218.

The Constitutional Courts of Pakistan make use of international human rights instruments while recognizing unenumerated constitutional rights. The Sindh High Court in *Getz Pharma (Pvt) Ltd v Federation of Pakistan*<sup>332</sup> observed that the Constitution does not explicitly recognize the ‘right to health.’ Right to life is enshrined under Article 9 of the Constitution and when it is read with Article 14 of the Constitution, which grants right to ‘dignity of man’ the same gives birth to the ‘right to health’ as a fundamental right. Such ‘right to health’ is also covered by several international human rights instruments, including International Covenant on Economic, Social and Cultural Rights ratified by Pakistan, which recognizes the right of nationals to the enjoyment of the highest attainable standard of physical and mental health.

### C. Current issues

The fundamental rights guaranteed by the Constitution of Pakistan are not static but pregnant with immense energy to address the growing complexities of modern democracy.<sup>333</sup> The Constitutional Courts endeavour to discover unwritten constitutional nuances which make the Constitution an evergreen and living document. Climate change and climate justice, water justice, sustainable development and rights of the dead are some of the important current themes being dilated upon by the Constitutional Courts of Pakistan in the context of constitutional rights.

The Lahore High Court in *Asghar Leghari v Federation of Pakistan*<sup>334</sup> held that the Court could be approached for an appropriate order for the enforcement of the fundamental rights of the people in the context of climate change: “Climate Justice links human rights and development to achieve a human-centred approach, safeguarding the rights of the most vulnerable people and sharing the burdens and benefits of climate change and its impacts equitably and fairly. Climate justice is informed by science, responds to science and acknowledges the need for equitable stewardship of the world’s resources. . . . Climate Change has moved the debate from a linear local environmental issue to a more complex global problem. In this context of climate change, the identity of the polluter is not clearly ascertainable and by and large falls outside the national jurisdiction. Who is to be penalized and who is to be restrained? On the global platform the remedies are adaptation or mitigation.” It was further observed that Water Justice is a sub-concept of

332 PLD 2017 Karachi 157.

333 *Mansoor Sarwar Khan v ECP* 2015 CLC 1477.

334 PLD 2018 Lahore 364.

Climate Justice: “Water justice refers to the access of individuals to clean water. More specifically, the access of individuals to clean water for survival (drinking, fishing, etc.) and recreational purposes as a human right. Water justice demands that all communities be able to access and manage water for beneficial uses, including drinking, waste removal, cultural and spiritual practices, reliance on the wildlife it sustains, and enjoyment for recreational purposes. Right to life and Right to human dignity under Articles 9 and 14 of the Constitution protect and realise human rights in general, and the human right to water and sanitation in particular. In adjudicating water and water-related cases, we have to be mindful of the essential and inseparable connection of water with the environment, land and other ecosystems.”

The Supreme Court in *DG Khan Cement Company Limited v Government of Punjab*<sup>335</sup> while hearing a dispute concerning the legality of a government decision banning expansion of cement activity in a designated zone referred to the precautionary principle, in dubio pro natura, environmental legal personhood, climate change and climate justice, and water justice. “Robust democracies need to be climate democracies in order to save the world and our further generations from being colonized at the hands of climate change. The preambular constitutional value of democracy under our Constitution is in effect climate democracy, if we wish to actualize our Constitution and the fundamental rights guaranteed under the Constitution for ourselves and our future generations. . . Sustainable development means development that meets the needs of the present generation without compromising the ability of future generations to meet their needs and it is in step with our constitutional values of social and economic justice.” The Court held that the governmental approach of placing an embargo on expansion of cement manufacturing in a delineated area is constitutionally compliant as the courts are to protect the fundamental rights of the public and in this case right to life, sustainability and dignity of the community surrounding the negative zone remains paramount till such time that the government is of the view that cement activity has no adverse environmental effects.

The Supreme Court in *National Bank of Pakistan v Nusrat Perveen*<sup>336</sup> has held that not all legal rights terminate on death. “Fundamental rights under the Constitution do not only protect and safeguard a citizen but extend beyond his life and protect and safeguard his survivable interests by being equally available to his legal heirs. It is reiterated that other than pecuniary and pensionary benefits that inure to the benefit of the legal heirs, the right to restore one’s reputation is also a

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335 2021 SCMR 834.

336 2021 SCMR 702.

survivable right and flows down to the legal heirs to pursue and take to its logical conclusion. Any slur on the reputation of a civil servant impinges on his human dignity and weighs equally on the dignity and honour of his family.”

The Lahore High Court while hearing a grievance against variation and alteration of the terms and conditions of the license of a television channel by the Pakistan Electronic Media Regulatory Authority observed that the planet had become a global village in the digital age of connectivity, and we could not shut ourselves to the ideas, thoughts, art, culture and literature all around us and just a click away.<sup>337</sup> The Court held that reasonable restrictions under the Constitution and the prohibitions under the law were to be examined with this perspective and that the restrictions must be substantive, real, proximate, tangible and immediate and not remote, conjectural or farfetched. It was observed that action under the Pakistan Electronic Media Regulatory Authority Ordinance could only be taken subject to existence of public interest.

## **Annex 1: List of cited legal provisions**

### **1) Constitutional provisions**

The Constitution of the Islamic Republic of Pakistan 1973

- Preamble
- Article 2
- Article 2A
- Article 3
- Article 4
- Article 5
- Article 7
- Article 8(2) and (3)
- Article 9
- Article 10
- Article 10A
- Article 11
- Article 13
- Article 14
- Article 15

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<sup>337</sup> *Leo Communication (Pvt) Ltd v Federation of Pakistan* PLD 2017 Lahore 709.

- Article 16
- Article 17
- Article 19
- Article 19A
- Article 21
- Article 24
- Article 25
- Article 25A
- Article 27
- Part II, Chapter 2 (Articles 29 to 40)
- Article 70(4)
- Article 175(2)
- Article 184(3)
- Article 199(1)(c)
- Part X (Articles 232 to 237)
- Fourth Schedule

## 2) International provisions

Universal Declaration of Human Rights (UDHR) 1948

- Article 7
- Article 8

International Covenant on Civil and Political Rights (ICCPR) 1966

- Article 2
- Article 26

Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) 1979

- Article 15

## **Annex 2: List of cited cases**

- *Abdul Wahab v HBL* [2013 SCMR 1383, 17 October 2012]
- *Ahmad Nawaz v The State* [PLD 1998 Karachi 180, 13 October 1997]
- *Al-Jehad Trust v Federation of Pakistan* [1999 SCMR 1379, 28 May 1999]
- *Al-Jehad Trust v Federation of Pakistan* [PLD 1997 Supreme Court 84, 4

- December 1996]
- *Al-Raham Travels & Tours (Pvt) Ltd v Ministry of Religious Affairs* [2011 SCMR 1621, 25 July 2011]
  - *APNS v Federation of Pakistan* [PLD 2012 Supreme Court 1, 19 October 2011]
  - *Asfandiyar Wali v Federation of Pakistan* [PLD 2001 Supreme Court 607, 24 April 2001]
  - *Asghar Leghari v Federation of Pakistan* [PLD 2018 Lahore 364, 25 January 2018]
  - *Barrister Zafarullah Khan v Federation of Pakistan* [2018 SCMR 2001, 4 July 2018]
  - *Benazir Bhutto v Federation of Pakistan* [PLD 1988 Supreme Court 416, 20 June 1988]
  - *Benazir Bhutto v Federation of Pakistan* [PLD 1989 Supreme Court 66, 2 October 1988]
  - *DG Khan Cement Company Limited v Government of Punjab* [2021 SCMR 834, 15 April 2021]
  - *Employees of Pakistan Law Commission v Ministry of Works* [1994 SCMR 1548, 24 May 1994]
  - *Farooq Ahmad Khan Leghari v Federation of Pakistan* [PLD 1999 Supreme Court 57, 28 July 1998]
  - *Federation of Pakistan v Muhammad Nawaz Sharif* [PLD 2009 Supreme Court 644, 26 May 2009]
  - *Getz Pharma (Pvt) Ltd v Federation of Pakistan* [PLD 2017 Karachi 157, 7 October 2016]
  - *Government of Balochistan v Aziz Ullah Memon* [PLD 1993 Supreme Court 341, 10 April 1993]
  - *Government of Sindh v Dr. Nadeem Rizvi* [2020 SCMR 1, 17 January 2019]
  - *Hafiz Junaid Mahmood v Government of Punjab* [PLD 2017 Lahore 1, 19 December 2016]
  - *Human Rights Commission of Pakistan v Government of Pakistan* [PLD 2009 Supreme Court 507, 29 December 2008]
  - *Iqbal Zafar Jhagra v Federation of Pakistan* [PTD 2014 Supreme Court 243, 3 December 2013]
  - *Javed Jabbar v Federation of Pakistan* [PLD 2003 Supreme Court 955, 10 February 2003]
  - *LDA v Imrana Tiwana* [2015 SCMR 1739, 8 July 2015]
  - *Leo Communication (Pvt) Ltd v Federation of Pakistan* [PLD 2017 Lahore 709, 18 July 2017]
  - *Mansoor Sarwar Khan v ECP* [2015 CLC 1477, 25 May 2015]

- *Mian Muhammad Nawaz Sharif v President of Pakistan* [PLD 1993 Supreme Court 473, 26 May 1993]
- *Muhammad Yousaf v Chairman FPSC* [PLD 2017 Lahore 406, 11 January 2017]
- *Munir Hussain Bhatti v Federation of Pakistan* [PLD 2011 Supreme Court 407, 4 March 2011]
- *National Bank of Pakistan v Nusrat Perveen* [2021 SCMR 702, 23 December 2020]
- *National Commission on Status of Women v Government of Pakistan* [PLD 2019 Supreme Court 218, 16 January 2019]
- *NESPAK v Kamil Khan Mumtaz* [2018 SCMR 211, 17 April 2017]
- *OGRA v Midway II, CNG Station* [2014 SCMR 220, 3 December 2013]
- *Pakistan Chest Foundation v Government of Pakistan* [1997 CLC 1379, 4 March 1997]
- *Pir Imran Sajid v Telephone Industries of Pakistan* [2015 SCMR 1257, 18 May 2015]
- *PML (N) v Federation of Pakistan* [PLD 2007 Supreme Court 642, 23 August 2007]
- *President Balochistan High Court Bar Association v Federation of Pakistan* [2012 SCMR 1784, 8 September 2012]
- *Province of Sindh v M.Q.M.* [PLD 2014 Supreme Court 531, 21 February 2014]
- *Punjab Road Transport Corporation v Zahida Afzal* [2006 SCMR 207, 2 December 2005]
- *Rohaifa v Federation of Pakistan* [PLD 2014 Supreme Court 174, 3 December 2013]
- *Sabir Shah v Federation of Pakistan* [PLD 1994 Supreme Court 738, 21 April 1994]
- *Shahab Usto v Government of Sindh* [2017 SCMR 732, 16 March 2017]
- *Shariq Saeed v Mansoob Ali Khan* [2010 YLR 1647, 19 April 2010]
- *Shehla Zia v WAPDA* [PLD 1994 Supreme Court 693, 12 February 1994]
- *Suo Motu Case No. 19 of 2016* [2017 SCMR 683, 24 March 2017]
- *Suo Motu Case No. 10 of 2010 (Contamination of Water of Mancher Lake due to Disposal Effluent from MNV Drain now converted into RBOD)* [2011 SCMR 73, 30 September 2010]
- *Suo Motu Case No. 7 of 2017* [PLD 2019 Supreme Court 318, 6 February 2019]
- *Watan Party v Federation of Pakistan* [PLD 2011 Supreme Court 997, 13 September 2011]
- *West Pakistan Salt Miners Labour Union Khewra v Industries and Mineral Development* [1994 SCMR 2061, 12 July 1994]



- *Workers Party Pakistan v Federation of Pakistan* [PLD 2012 Supreme Court 681, 8 June 2012]
- *Younas Abbas v Additional Sessions Judge, Chakwal* [PLD 2016 Supreme Court 581, 12 February 2016]

# 12. Philippines

## Supreme Court

### Overview

A comprehensive list of constitutional rights can be found in Article III of the 1987 Constitution. It has the title “Bill of Rights” and contains 22 sections. Coming right after the Declaration of Principles and State Policies, the Bill of Rights is a significant part of the framework for the protection of human rights in the Philippines. As held in *Sales v. Sandiganbayan, et al.*, quoting *Allado v. Diokno*, the Bill of Rights guarantees the preservation of our natural rights. The constitutional rights found in Article III of the Constitution are in the nature of civil rights, political rights, and rights of the accused. The economic, social, and cultural rights can be found in other parts of the Constitution. Although the present Philippine Constitution draws most of its significant provisions from the US Constitution, it does not have a provision similar or related to the “unenumerated rights clause” of the US Constitution’s Ninth Amendment. In terms of the interpretation of constitutional rights in diverse contexts, various parts of Article III covering the following themes have been of particular relevance: Freedom of religion, the right to a balanced and healthful ecology, the nature of the human rights writ of *amparo*, and the right to a speedy trial. The Philippines adheres to various international human rights laws and conventions, having ratified eight of the nine core UN human rights treaties. Current issues in constitutional rights adjudication include responses to the Covid-19 pandemic.

### Outline

#### I. Rights in the Constitution

- A. Constitutional bill of rights
- B. Rights elsewhere in the Constitution
- C. Concretization of constitutional rights
- D. Historical background and development

#### II. Classification and content

- A. Enumerated constitutional rights
- B. Unenumerated constitutional rights
- C. Protection and limitation

#### III. Interpretation and current issues

- A. Rights in diverse contexts
- B. Impact of international norms
- C. Current issues

#### Annex 1: List of cited legal provisions

#### Annex 2: List of cited cases

#### Annex 3: Selected secondary literature

## **I. Rights in the Constitution**

### **A. Constitutional bill of rights**

A comprehensive list of constitutional rights can be found in Article III of the 1987 Constitution of the Republic of the Philippines. It contains 22 sections. The enumeration reserves for the people certain areas of liberty against arbitrary actions of the government and guarantees a measure of freedom from unwarranted restraints of other members of society.<sup>338</sup> Article III reads:

#### ARTICLE III

##### Bill of Rights

SECTION 1. No person shall be deprived of life, liberty, or property without due process of law, nor shall any person be denied the equal protection of the laws.

SECTION 2. The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures of whatever nature and for any purpose shall be inviolable, and no search warrant or warrant of arrest shall issue except upon probable cause to be determined personally by the judge after examination under oath or affirmation of the complainant and the witnesses he may produce, and particularly describing the place to be searched and the persons or things to be seized.

SECTION 3. (1) The privacy of communication and correspondence shall be inviolable except upon lawful order of the court, or when public safety or order requires otherwise as prescribed by law.

(2) Any evidence obtained in violation of this or the preceding section shall be inadmissible for any purpose in any proceeding.

SECTION 4. No law shall be passed abridging the freedom of speech, of expression, or of the press, or the right of the people peaceably to assemble and petition the government for redress of grievances.

SECTION 5. No law shall be made respecting an establishment of religion, or prohibiting the free exercise thereof. The free exercise and enjoyment of religious

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<sup>338</sup> De Leon, Hector S., *Philippine Constitutional Law, Principles and Cases*, Vol. I, 1991 Edition, p. 138.

profession and worship, without discrimination or preference, shall forever be allowed. No religious test shall be required for the exercise of civil or political rights.

SECTION 6. The liberty of abode and of changing the same within the limits prescribed by law shall not be impaired except upon lawful order of the court. Neither shall the right to travel be impaired except in the interest of national security, public safety, or public health, as may be provided by law.

SECTION 7. The right of the people to information on matters of public concern shall be recognized. Access to official records, and to documents, and papers pertaining to official acts, transactions, or decisions, as well as to government research data used as basis for policy development, shall be afforded the citizen, subject to such limitations as may be provided by law.

SECTION 8. The right of the people, including those employed in the public and private sectors, to form unions, associations, or societies for purposes not contrary to law shall not be abridged.

SECTION 9. Private property shall not be taken for public use without just compensation.

SECTION 10. No law impairing the obligation of contracts shall be passed.

SECTION 11. Free access to the courts and quasi-judicial bodies and adequate legal assistance shall not be denied to any person by reason of poverty.

SECTION 12. (1) Any person under investigation for the commission of an offense shall have the right to be informed of his right to remain silent and to have competent and independent counsel preferably of his own choice. If the person cannot afford the services of counsel, he must be provided with one. These rights cannot be waived except in writing and in the presence of counsel.

(2) No torture, force, violence, threat, intimidation, or any other means which vitiate the free will shall be used against him. Secret detention places, solitary, incommunicado, or other similar forms of detention are prohibited.

(3) Any confession or admission obtained in violation of this or Section 17 hereof shall be inadmissible in evidence against him.

(4) The law shall provide for penal and civil sanctions for violations of this section

as well as compensation to and rehabilitation of victims of torture or similar practices, and their families.

SECTION 13. All persons, except those charged with offenses punishable by reclusion perpetua when evidence of guilt is strong, shall, before conviction, be bailable by sufficient sureties, or be released on recognizance as may be provided by law. The right to bail shall not be impaired even when the privilege of the writ of habeas corpus is suspended. Excessive bail shall not be required.

SECTION 14. (1) No person shall be held to answer for a criminal offense without due process of law.

(2) In all criminal prosecutions, the accused shall be presumed innocent until the contrary is proved, and shall enjoy the right to be heard by himself and counsel, to be informed of the nature and cause of the accusation against him, to have a speedy, impartial, and public trial, to meet the witnesses face to face, and to have compulsory process to secure the attendance of witnesses and the production of evidence in his behalf. However, after arraignment, trial may proceed notwithstanding the absence of the accused provided that he has been duly notified and his failure to appear is unjustifiable.

SECTION 15. The privilege of the writ of habeas corpus shall not be suspended except in cases of invasion or rebellion when the public safety requires it.

SECTION 16. All persons shall have the right to a speedy disposition of their cases before all judicial, quasi-judicial, or administrative bodies.

SECTION 17. No person shall be compelled to be a witness against himself.

SECTION 18. (1) No person shall be detained solely by reason of his political beliefs and aspirations.

(2) No involuntary servitude in any form shall exist except as a punishment for a crime whereof the party shall have been duly convicted.

SECTION 19. (1) Excessive fines shall not be imposed, nor cruel, degrading or inhuman punishment inflicted. Neither shall death penalty be imposed, unless, for compelling reasons involving heinous crimes, the Congress hereafter provides for it. Any death penalty already imposed shall be reduced to reclusion perpetua.

(2) The employment of physical, psychological, or degrading punishment against

any prisoner or detainee or the use of substandard or inadequate penal facilities under subhuman conditions shall be dealt with by law.

SECTION 20. No person shall be imprisoned for debt or non-payment of a poll tax.

SECTION 21. No person shall be twice put in jeopardy of punishment for the same offense. If an act is punished by a law and an ordinance, conviction or acquittal under either shall constitute a bar to another prosecution for the same act.

SECTION 22. No ex post facto law or bill of attainder shall be enacted.

The constitutional rights guaranteed to the people in Article III of the 1987 Constitution now in force has the title “Bill of Rights.” A bill of rights may be defined as a declaration and enumeration of a person’s rights and privileges which the Constitution is designed to protect against violations by the government, or by individuals or groups of individuals. It is a charter of liberties for the individual and a limitation upon the power of the State.<sup>339</sup> The Bill of Rights, which comes right after the Declaration of Principles and State Policies in the 1987 Constitution, is a significant part of the framework for the protection of human rights in the Philippines.

As held in *Sales v. Sandiganbayan, et al.*,<sup>340</sup> quoting *Allado v. Diokno*,<sup>341</sup> the Bill of Rights guarantees the preservation of our natural rights:

The purpose of the Bill of Rights is to protect the people against arbitrary and discriminatory use of political power. This bundle of rights guarantees the preservation of our natural rights which include personal liberty and security against invasion by the government or any of its branches or instrumentalities. Certainly, in the hierarchy of rights, the Bill of Rights takes precedence over the right of the State to prosecute, and when weighed against each other, the scales of justice tilt towards the former. Thus, relief may be availed of to stop the purported enforcement of criminal law where it is necessary to provide for an orderly administration of justice, to prevent the use of the strong arm of the law in an oppressive and vindictive manner, and to afford adequate protection to constitutional rights.

The rights of the accused or the civil rights intended for the protection of a person

339 De Leon, Hector S. & De Leon, Hector M., Jr., *Philippine Constitutional Law, Principles and Cases*, Vol. I, 6th Edition, 2017, p. 174.

340 G.R. No. 143802, November 16, 2001.

341 G.R. No. 113630, May 5, 1994.

accused of any crime is embodied in Sections 11 to 22 of Article III of the 1987 Constitution.

The 1987 Constitution does not have a specific article on duties and obligations of citizens unlike that in Article V of the 1973 Constitution. However, for every right of the people recognized as fundamental, there lies a corresponding duty on the part of those who govern, to respect and protect that right. That is the very essence of the Bill of Rights in a constitutional regime. Only governments operating under fundamental rules defining the limits of their power so as to shield individual rights against its arbitrary exercise can properly claim to be constitutional. Without a government's acceptance of the limitations imposed upon it by the Constitution in order to uphold individual liberties, without an acknowledgment on its part of those duties exacted by the rights pertaining to the citizens, the Bill of Rights becomes a sophistry, and liberty, the ultimate illusion.<sup>342</sup> The members of the Constitutional Commission decided not to include Article V of the 1973 Constitution in the framing of the 1987 Constitution.

MR. LAUREL. ...

Madam President, it is axiomatic that for every right there is a corresponding responsibility. This is a principle understood in every civilized society and embodied in Article V of the Constitution of 1973. Under the 1935 charter, which had a bill of rights but no bill of responsibility, many people felt that they could enjoy their liberties without discharging the obligations that were part and parcel of such liberties. I imagine that it was for the purpose of correcting that attitude that the framers of the 1973 Constitution saw fit to incorporate therein an enumeration of the duties and obligations of citizens. The purpose, I suppose, was to impress upon the nation the undeniable fact that rights are inseparable from responsibilities.

The trouble, however, is that in specifying such responsibilities, the authors succeeded only in excluding many others no less important than those mentioned. Expression *unius est exclusio alterius*, or to put it in more colloquial terms, the more particularized, the less said.

After considering all these facts, your Committee has decided not to include Article V of the 1973 Constitution in the fundamental law we are now framing, perhaps we may incorporate elsewhere in the document the reminder that every right entails a concomitant responsibility to discharge it with due regard to the rights of others and subject to reasonable requirements and restrictions in the common

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342 *Legaspi v. Civil Service Commission*, G.R. No. L-72119, May 29, 1987.

interest. This can be incorporated in the Article on General Provisions.<sup>343</sup> ...

## B. Rights elsewhere in the Constitution

Apart from the constitutional rights under the Bill of Rights there are other rights in the body of the Constitution that are secured to all people. The guarantees of civil and political rights found principally in the Bill of Rights are self-executory and ready for use. One can assert those rights in a court of justice. Social rights are a different phenomenon. Except to the extent that they prohibit the government from embarking in activity contrary to the ideals of social justice, they generally are not rights in the strict sense that the rights in the Bill of Rights are. In legal effectiveness, they are primarily in the nature of claims or demands which people expect government to satisfy, or they are ideals which government is expected to respect.<sup>344</sup>

Provisions on economic, social, and cultural rights that exist in other parts of the Constitution, may appear not to be self-executing, but may not be considered as less important.

In the case of *Oposa v. Factoran*,<sup>345</sup> the justiciability of economic, social, and cultural rights was decided. Article II, Section 15 (right to health) and Section 16 (right of the people to a balanced and healthful ecology) formed the constitutional basis for standing in a class suit seeking the cancellation of Timber License Agreements. The Court ruled that while the right to a balanced and healthful ecology was found under the Declaration of Principles and State Policies and not under the Bill of Rights, it did not follow that it was less important than any of the civil and political rights enumerated in the latter. Such a right belongs to an entirely different category of rights for it concerns nothing less than self-preservation and self-perpetuation, the advancement of which may even be said to predate all governments and constitutions.

The following are the rights in the 1987 Constitution other than in Article III:

343 Record of the Constitutional Commission Proceedings and Debates, Vol. 1, July 17, 1986.

344 Bernas, the 1987 Constitution of the Republic of the Philippines: A Commentary, 2005 Ed. p. 1192.

345 G.R. No. 101083 July 30, 1993.



## ARTICLE II

### Declaration of Principles and State Policies

#### State Policies

SECTION 9. The State shall promote a just and dynamic social order that will ensure the prosperity and independence of the nation and free the people from poverty through policies that provide adequate social services, promote full employment, a rising standard of living, and an improved quality of life for all.

SECTION 11. The State values the dignity of every human person and guarantees full respect for human rights.

SECTION 12. The State recognizes the sanctity of family life and shall protect and strengthen the family as a basic autonomous social institution. It shall equally protect the life of the mother and the life of the unborn from conception. The natural and primary right and duty of parents in the rearing of the youth for civic efficiency and the development of moral character shall receive the support of the Government.

SECTION 13. The State recognizes the vital role of the youth in nation-building and shall promote and protect their physical, moral, spiritual, intellectual, and social well-being. It shall inculcate in the youth patriotism and nationalism, and encourage their involvement in public and civic affairs.

SECTION 14. The State recognizes the role of women in nation-building, and shall ensure the fundamental equality before the law of women and men.

SECTION 15. The State shall protect and promote the right to health of the people and instill health consciousness among them.

SECTION 16. The State shall protect and advance the right of the people to a balanced and healthful ecology in accord with the rhythm and harmony of nature.

SECTION 18. The State affirms labor as a primary social economic force. It shall protect the rights of workers and promote their welfare.

SECTION 22. The State recognizes and promotes the rights of indigenous cultural communities within the framework of national unity and development.

## **ARTICLE V**

### **Suffrage**

SECTION 1. Suffrage may be exercised by all citizens of the Philippines not otherwise disqualified by law, who are at least eighteen years of age, and who shall have resided in the Philippines for at least one year and in the place wherein they propose to vote for at least six months immediately preceding the election. No literacy, property, or other substantive requirement shall be imposed on the exercise of suffrage.

## **ARTICLE IX**

### **Constitutional Commissions**

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#### **B. The Civil Service Commission**

##### **SECTION 2**

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(3) No officer or employee of the civil service shall be removed or suspended except for cause provided by law.

(5) The right to self-organization shall not be denied to government employees.

(6) Temporary employees of the Government shall be given such protection as may be provided by law.

#### **C. The Commission on Elections**

SECTION 4. The Commission may, during the election period, supervise or regulate the enjoyment or utilization of all franchises or permits for the operation of transportation and other public utilities, media of communication or information, all grants, special privileges, or concessions granted by the Government or any subdivision, agency, or instrumentality thereof, including any government-owned or controlled corporation or its subsidiary. Such supervision or regulation shall aim to ensure equal opportunity, time, and space, and the right to reply, including reasonable, equal rates therefor, for public information campaigns and forums

among candidates in connection with the objective of holding free, orderly, honest, peaceful, and credible elections.

## **ARTICLE XII**

### **National Economy and Patrimony**

SECTION 1. The goals of the national economy are a more equitable distribution of opportunities, income, and wealth; a sustained increase in the amount of goods and services produced by the nation for the benefit of the people; and an expanding productivity as the key to raising the quality of life for all, especially the underprivileged.

The State shall promote industrialization and full employment based on sound agricultural development and agrarian reform, through industries that make full and efficient use of human and natural resources, and which are competitive in both domestic and foreign markets. However, the State shall protect Filipino enterprises against unfair foreign competition and trade practices.

In the pursuit of these goals, all sectors of the economy and all regions of the country shall be given optimum opportunity to develop. Private enterprises, including corporations, cooperatives, and similar collective organizations, shall be encouraged to broaden the base of their ownership.

SECTION 5. The State, subject to the provisions of this Constitution and national development policies and programs, shall protect the rights of indigenous cultural communities to their ancestral lands to ensure their economic, social, and cultural well-being.

SECTION 6. The use of property bears a social function, and all economic agents shall contribute to the common good. Individuals and private groups, including corporations, cooperatives, and similar collective organizations, shall have the right to own, establish, and operate economic enterprises, subject to the duty of the State to promote distributive justice and to intervene when the common good so demands.

## **ARTICLE XIII**

### **Social Justice and Human Rights**

SECTION 1. The Congress shall give highest priority to the enactment of measures

that protect and enhance the right of all the people to human dignity, reduce social, economic, and political inequalities, and remove cultural inequities by equitably diffusing wealth and political power for the common good.

To this end, the State shall regulate the acquisition, ownership, use, and disposition of property and its increments.

SECTION 2. The promotion of social justice shall include the commitment to create economic opportunities based on freedom of initiative and self-reliance.

### **Labor**

SECTION 3. The State shall afford full protection to labor, local and overseas, organized and unorganized, and promote full employment and equality of employment opportunities for all.

It shall guarantee the rights of all workers to self-organization, collective bargaining and negotiations, and peaceful concerted activities, including the right to strike in accordance with law. They shall be entitled to security of tenure, humane conditions of work, and a living wage. They shall also participate in policy and decision-making processes affecting their rights and benefits as may be provided by law.

The State shall promote the principle of shared responsibility between workers and employers and the preferential use of voluntary modes in settling disputes, including conciliation, and shall enforce their mutual compliance therewith to foster industrial peace.

The State shall regulate the relations between workers and employers, recognizing the right of labor to its just share in the fruits of production and the right of enterprises to reasonable returns on investments, and to expansion and growth.

### **Agrarian and Natural Resources Reform**

SECTION 4. The State shall, by law, undertake an agrarian reform program founded on the right of farmers and regular farmworkers, who are landless, to own directly or collectively the lands they till or, in the case of other farmworkers, to receive a just share of the fruits thereof. To this end, the State shall encourage and undertake the just distribution of all agricultural lands, subject to such priorities and reasonable retention limits as the Congress may prescribe, taking into account ecological, developmental, or equity considerations, and subject to the payment of

just compensation. In determining retention limits, the State shall respect the right of small landowners. The State shall further provide incentives for voluntary land-sharing.

SECTION 5. The State shall recognize the right of farmers, farmworkers, and landowners, as well as cooperatives, and other independent farmers' organizations to participate in the planning, organization, and management of the program, and shall provide support to agriculture through appropriate technology and research, and adequate financial, production, marketing, and other support services.

SECTION 6. The State shall apply the principles of agrarian reform or stewardship, whenever applicable in accordance with law, in the disposition or utilization of other natural resources, including lands of the public domain under lease or concession suitable to agriculture, subject to prior rights, homestead rights of small settlers, and the rights of indigenous communities to their ancestral lands.

The State may resettle landless farmers and farmworkers in its own agricultural estates which shall be distributed to them in the manner provided by law.

SECTION 7. The State shall protect the rights of subsistence fishermen, especially of local communities, to the preferential use of local marine and fishing resources, both inland and offshore. It shall provide support to such fishermen through appropriate technology and research, adequate financial, production, and marketing assistance, and other services. The State shall also protect, develop, and conserve such resources. The protection shall extend to offshore fishing grounds of subsistence fishermen against foreign intrusion. Fishworkers shall receive a just share from their labor in the utilization of marine and fishing resources.

SECTION 8. The State shall provide incentives to landowners to invest the proceeds of the agrarian reform program to promote industrialization, employment creation, and privatization of public sector enterprises. Financial instruments used as payment for their lands shall be honored as equity in enterprises of their choice.

### **Urban Land Reform and Housing**

SECTION 9. The State shall, by law, and for the common good, undertake, in cooperation with the public sector, a continuing program of urban land reform and housing which will make available at affordable cost decent housing and basic services to underprivileged and homeless citizens in urban centers and resettlements areas. It shall also promote adequate employment opportunities to such citizens. In the implementation of such program the State shall respect the

rights of small property owners.

SECTION 10. Urban or rural poor dwellers shall not be evicted nor their dwellings demolished, except in accordance with law and in a just and humane manner.

No resettlement of urban or rural dwellers shall be undertaken without adequate consultation with them and the communities where they are to be relocated.

### **Health**

SECTION 11. The State shall adopt an integrated and comprehensive approach to health development which shall endeavor to make essential goods, health and other social services available to all the people at affordable cost. There shall be priority for the needs of the underprivileged sick, elderly, disabled, women, and children. The State shall endeavor to provide free medical care to paupers.

SECTION 12. The State shall establish and maintain an effective food and drug regulatory system and undertake appropriate health manpower development and research, responsive to the country's health needs and problems.

SECTION 13. The State shall establish a special agency for disabled persons for rehabilitation, self-development and self-reliance, and their integration into the mainstream of society.

### **Women**

SECTION 14. The State shall protect working women by providing safe and healthful working conditions, taking into account their maternal functions, and such facilities and opportunities that will enhance their welfare and enable them to realize their full potential in the service of the nation.

### **Role and Rights of People's Organizations**

SECTION 15. The State shall respect the role of independent people's organizations to enable the people to pursue and protect, within the democratic framework, their legitimate and collective interests and aspirations through peaceful and lawful means.

People's organizations are bona fide associations of citizens with demonstrated capacity to promote the public interest and with identifiable leadership, membership, and structure.

SECTION 16. The right of the people and their organizations to effective and reasonable participation at all levels of social, political, and economic decision-making shall not be abridged. The State shall, by law, facilitate the establishment of adequate consultation mechanisms.

## **ARTICLE XIV**

### **Education, Science and Technology, Arts, Culture, and Sports**

#### **Education**

SECTION 1. The State shall protect and promote the right of all citizens to quality education at all levels and shall take appropriate steps to make such education accessible to all.

SECTION 2. The State shall:

- (1) Establish, maintain, and support a complete, adequate, and integrated system of education relevant to the needs of the people and society;
- (2) Establish and maintain a system of free public education in the elementary and high school levels. Without limiting the natural right of parents to rear their children, elementary education is compulsory for all children of school age;
- (3) Establish and maintain a system of scholarship grants, student loan programs, subsidies, and other incentives which shall be available to deserving students in both public and private schools, especially to the underprivileged;
- (4) Encourage non-formal, informal, and indigenous learning systems, as well as self-learning, independent, and out-of-school study programs particularly those that respond to community needs; and
- (5) Provide adult citizens, the disabled, and out-of-school youth with training in civics, vocational efficiency, and other skills.

SECTION 5. (1) The State shall take into account regional and sectoral needs and conditions and shall encourage local planning in the development of educational policies and programs.

- (2) Academic freedom shall be enjoyed in all institutions of higher learning.

(3) Every citizen has a right to select a profession or course of study, subject to fair, reasonable, and equitable admission and academic requirements.

(4) The State shall enhance the right of teachers to professional advancement. Non-teaching academic and non-academic personnel shall enjoy the protection of the State.

(5) The State shall assign the highest budgetary priority to education and ensure that teaching will attract and retain its rightful share of the best available talents through adequate remuneration and other means of job satisfaction and fulfillment.

### **Science and Technology**

SECTION 13. The State shall protect and secure the exclusive rights of scientists, inventors, artists, and other gifted citizens to their intellectual property and creations, particularly when beneficial to the people, for such period as may be provided by law.

### **Arts and Culture**

SECTION 17. The State shall recognize, respect, and protect the rights of indigenous cultural communities to preserve and develop their cultures, traditions, and institutions. It shall consider these rights in the formulation of national plans and policies.

SECTION 18. (1) The State shall ensure equal access to cultural opportunities through the educational system, public or private cultural entities, scholarships, grants and other incentives, and community cultural centers, and other public venues.

## **ARTICLE XV**

### **The Family**

SECTION 3. The State shall defend:

(1) The right of spouses to found a family in accordance with their religious convictions and the demands of responsible parenthood;

(2) The right of children to assistance, including proper care and nutrition, and special protection from all forms of neglect, abuse, cruelty, exploitation, and other



conditions prejudicial to their development;

(3) The right of the family to a family living wage and income; and

(4) The right of families or family associations to participate in the planning and implementation of policies and programs that affect them.

## **ARTICLE XVI**

### **General Provisions**

SECTION 7. The State shall provide immediate and adequate care, benefits, and other forms of assistance to war veterans and veterans of military campaigns, their surviving spouses and orphans. Funds shall be provided therefor and due consideration shall be given them in the disposition of agricultural lands of the public domain and, in appropriate cases, in the utilization of natural resources.

SECTION 9. The State shall protect consumers from trade malpractices and from substandard or hazardous products.

SECTION 10. The State shall provide the policy environment for the full development of Filipino capability and the emergence of communication structures suitable to the needs and aspirations of the nation and the balanced flow of information into, out of, and across the country, in accordance with a policy that respects the freedom of speech and of the press.

SECTION 11. (1) The ownership and management of mass media shall be limited to citizens of the Philippines, or to corporations, cooperatives or associations, wholly-owned and managed by such citizens.

The Congress shall regulate or prohibit monopolies in commercial mass media when the public interest so requires. No combinations in restraint of trade or unfair competition therein shall be allowed.

(2) The advertising industry is impressed with public interest, and shall be regulated by law for the protection of consumers and the promotion of the general welfare.

Only Filipino citizens or corporations or associations at least seventy per centum of the capital of which is owned by such citizens shall be allowed to engage in the advertising industry.

The participation of foreign investors in the governing body of entities in such industry shall be limited to their proportionate share in the capital thereof, and all the executive and managing officers of such entities must be citizens of the Philippines.

The constitutional rights found in Article III of the Constitution are in the nature of civil rights, political rights, and rights of the accused. The economic, social, and cultural rights can be found in other parts of the Constitution. Socio-economic rights are found in Article II (Declaration of Principles and State Policies), others in Article XIII (Social Justice and Human Rights), Article XIV (Education, Science and Technology, Arts, Culture and Sports), and Article XV (The Family). The right of suffrage is found in Article V. It is instructive to note that the constitutional rights found in Article III are self-executing in character. In contrast, the economic, social, and cultural rights enumerated herein are not generally self-executing, unless clarified by the Supreme Court in case law.

The Constitution contains the guaranteed rights of individuals, as well as the powers granted to and restrictions imposed on government officials and instrumentalities. The tenor of the constitutional text provides for the duty of the state to safeguard the life liberty and property of individual and society to attain their happiness, progress and welfare. When the Constitution addresses the State it refers not only to the people but also to the government as elements of the State. After all, government is composed of three (3) divisions of power: legislative, executive, and judicial.<sup>346</sup> In Section 3(2) of Article XIV, educational institutions too, have the constitutional duty of teaching the values of patriotism and nationalism, foster love of humanity and respect for human rights.

## **C. Concretization of constitutional rights**

### **1. Access to justice**

In the Philippines, access to justice is a right guaranteed under Section 11, Article 3 of the Constitution. In recognizing access to justice as a constitutional right, the Supreme Court granted the request of the Misamis Oriental Chapter of the Integrated Bar of the Philippines (IBP) for exemption from the payment of filing, docket, and other fees of the clients of the legal aid offices of the various IBP chapters, in A.M. No. 08-11-7-SC,<sup>347</sup> to “open the doors of justice to the

<sup>346</sup> *Manila Prince Hotel v. Government Service Insurance System*, 335 Phil. 82 (1997).

<sup>347</sup> Re: Request of National Committee on Legal Aid to Exempt Legal Aid Clients from Paying Filing, Docket and Other Fees, dated August 28, 2009.

underprivileged and to allow them to step inside the courts to be heard of their complaints. In particular, indigent litigants are permitted under Section 21, Rule 3 and Section 19, Rule 141 of the Rules of Court to bring suits in *forma pauperis*.<sup>348</sup> Access to justice by all, especially by the poor, is not simply an ideal in our society. Its existence is essential in a democracy and in the rule of law. The Supreme Court recognizes the right of access to justice as the most important pillar of legal empowerment of the marginalized sectors of our society. It held:

The IBP, pursuant to its general objectives to “improve the administration of justice and enable the Bar to discharge its public responsibility more effectively,” assists the Court in providing the poor access to justice. In particular, it renders free legal aid under the supervision of the NCLA [IBP National Center for Legal Aid].

## 2. Right to bail

The right to bail is a constitutional guaranty which every person under legal custody may invoke, except those disqualified under the law.<sup>349</sup>

The right to bail springs from the presumption of innocence accorded every accused upon whom should not be inflicted incarceration at the outset since, after trial, he would be entitled to acquittal, unless his guilt be established beyond reasonable doubt.<sup>349</sup> This presumption of innocence is rooted in the guarantee of due process, and is safeguarded by the constitutional right to be released on bail, and further binds the Court to wait until after trial to impose any punishment on the accused.<sup>350</sup> In any event, it is settled that bail may be applied for and granted by the trial court at any time after the applicant has been taken into custody prior to judgment, even after bail has been previously denied.<sup>351</sup>

On March 14, 2013, Congress passed Republic Act No. 10839, an *Act Institutionalizing Recognizance as a Mode of Granting the Release of an Indigent Person in Custody as an Accused in a Criminal Case and for Other Purposes*. This does not apply to those charged with crimes punishable by death, *reclusion perpetua*, or life imprisonment. Section 3 of the said law defines recognizance as a mode of securing the release of any person in custody or detention for the commission of an offense who is unable to post bail due to abject poverty. The court where the case of such person has been filed shall allow the release of the accused on recognizance as provided herein, to the custody of a qualified member

<sup>348</sup> Moslares v. Court of Appeals, G.R. No. 129744, June 26, 1998.

<sup>349</sup> Paderanga v. Court of Appeals, G.R. No. 115407, August 28, 1995.

<sup>350</sup> Enrile v. Sandiganbayan, G.R.No. 213847, August 18, 2015.

<sup>351</sup> Government of the United States of America v. Hon. Guillermo Purganan, G.R. No. 148571, Sept. 24, 2002.

of the barangay, city or municipality where the accused resides.

### 3. Respect for human rights

One of the State Policies of the Philippines provides that “[T]he State values the dignity of every human person and guarantees full respect for human rights.”<sup>352</sup>

Republic Act No. 9745, the *Anti-Torture Act*, is a statutory implementation of Article III, Section 12 (2) of the 1987 Constitution. It gives a suspect the right to demand physical examination by an independent and competent doctor of choice before and after interrogation.

### 4. Enforcement of constitutional rights

Aside from its judicial power, Supreme Court also has the power under Article VIII, Section 5 (5) of the 1987 Constitution to “promulgate rules concerning the protection and enforcement of constitutional rights” In the exercise of such power, the Supreme Court has provided for the remedies of the writ of *amparo*<sup>353</sup> (*right to life, liberty, and security*), which covers extralegal killings and enforced disappearances or threats thereof; the writ of *habeas data*<sup>354</sup> (*right to privacy*), available to any person whose right to privacy in life, liberty, or security is violated or threatened by an unlawful act or omission of a public official or employee, or of a private individual or entity engaged in the gathering, collecting, or storing of data or information regarding the person, family, home, and correspondence of the aggrieved party; and writ of *kalikasan*<sup>355</sup> (*environmental writ*). The writ of *kalikasan* is a remedy that is available to a natural or juridical person, entity authorized by law, people’s organization, non-governmental organization, or any public interest group accredited by or registered with any government agency, on behalf of persons whose constitutional right to a balanced and healthful ecology is violated, or threatened with violation by an unlawful act or omission of a public official or employee, or private individual or entity, involving environmental damage of such magnitude as to prejudice the life, health, or property of inhabitants in two or more cities or provinces.

352 1987 Constitution, Article II, Section 11.

353 A.M. No. 07-9-12-SC dated September 25, 2007.

354 A.M. No. 08-1-16-SC dated January 22, 2008.

355 A.M. No. 09-6-8-SC dated April 13, 2010.

## D. Historical background and development

In his separate opinion in *Republic v. Sandiganbayan, et al*, then Senior Associate Justice (who later became the Chief Justice) Reynato Puno presented the history of the Philippine Constitution and the Bill of Rights, thus:

During the Spanish colonization of the Philippines, Filipinos ardently fought for their fundamental rights. The Propaganda Movement spearheaded by our national hero Jose Rizal, Marcelo H. del Pilar, and Graciano Lopez-Jaena demanded assimilation of the Philippines by Spain, and the extension to Filipinos of rights enjoyed by Spaniards under the Spanish Constitution such as the inviolability of person and property, specifically freedom from arbitrary action by officialdom particularly by the Guardia Civil and from arbitrary detention and banishment of citizens. They clamored for their right to liberty of conscience, freedom of speech and the press, freedom of association, freedom of worship, freedom to choose a profession, the right to petition the government for redress of grievances, and the right to an opportunity for education. They raised the roof for an end to the abuses of religious corporations. With the Propaganda Movement having apparently failed to bring about effective reforms, Andres Bonifacio founded in 1892 the secret society of the Katipunan to serve as the military arm of the secessionist movement whose principal aim was to create an independent Filipino nation by armed revolution. While preparing for separation from Spain, representatives of the movement engaged in various constitutional projects that would reflect the longings and aspirations of the Filipino people. On May 31, 1897, a republican government was established in Biak-na-Bato, followed on November 1, 1897 by the unanimous adoption of the Provisional Constitution of the Republic of the Philippines, popularly known as the Constitution of Biak-na-Bato, by the revolution's representatives. The document was an almost exact copy of the Cuban Constitution of Jimaguayu, except for four articles which its authors Felix Ferrer and Isabelo Artacho added. These four articles formed the constitution's Bill of Rights and protected, among others, religious liberty, the right of association, freedom of the press, freedom from imprisonment except by virtue of an order issued by a competent court, and freedom from deprivation of property or domicile except by virtue of judgment passed by a competent court of authority.

The Biak-na-Bato Constitution was projected to have a life-span of two years, after which a final constitution would be drafted. Two months after it was adopted, however, the Pact of Biak-na-Bato was signed whereby the Filipino military leaders agreed to cease fighting against the Spaniards and guaranteed peace for at least three years, in exchange for monetary indemnity for the Filipino men in arms and for promised reforms. Likewise, General Emilio Aguinaldo, who by then had

become the military leader after Bonifacio's death, agreed to leave the Philippines with other Filipino leaders. They left for Hongkong in December 1897.

A few months later, the Spanish-American war broke out in April 1898. Upon encouragement of American officials, Aguinaldo came back to the Philippines and set up a temporary dictatorial government with himself as dictator. In June 1898, the dictatorship was terminated and Aguinaldo became the President of the Revolutionary Government. By this time, the relations between the American troops and the Filipino forces had become precarious as it became more evident that the Americans planned to stay. In September 1898, the Revolutionary Congress was inaugurated whose primary goal was to formulate and promulgate a Constitution. The fruit of their efforts was the Malolos Constitution which, as admitted by Felipe Calderon who drafted it, was based on the constitutions of South American Republics<sup>8</sup> while the Bill of Rights was substantially a copy of the Spanish Constitution. The Bill of Rights included among others, freedom of religion, freedom from arbitrary arrests and imprisonment, security of the domicile and of papers and effects against arbitrary searches and seizures, inviolability of correspondence, due process in criminal prosecutions, freedom of expression, freedom of association, and right of peaceful petition for the redress of grievances. Its Article 28 stated that "(t)he enumeration of the rights granted in this title does not imply the prohibition of any others not expressly stated." This suggests that natural law was the source of these rights. The Malolos Constitution was short-lived. It went into effect in January 1899, about two months before the ratification of the Treaty of Paris transferring sovereignty over the Islands to the United States. Within a month after the constitution's promulgation, war with the United States began and the Republic survived for only about ten months. On March 23, 1901, American forces captured Aguinaldo and a week later, he took his oath of allegiance to the United States. In the early months of the war against the United States, American President McKinley sent the First Philippine Commission headed by Jacob Gould Schurman to assess the Philippine situation. On February 2, 1900, in its report to the President, the Commission stated that the **Filipino people wanted above all a "guarantee of those fundamental human rights which Americans hold to be the natural and inalienable birthright of the individual but which under Spanish domination in the Philippines had been shamefully invaded and ruthlessly trampled upon."** (emphasis supplied) In response to this, President McKinley, in his *Instruction* of April 7, 1900 to the Second Philippine Commission, provided an authorization and guide for the establishment of a civil government in the Philippines and stated that "(u)pon every division and branch of the government of the Philippines . . . must be imposed these inviolable rules . . ." These "inviolable rules" were almost literal reproductions of the First to Ninth and the Thirteenth Amendment of the United States Constitution, with the

addition of the prohibition of bills of attainder and *ex post facto* laws in Article 1, Section 9 of said Constitution. The “inviolable rules” or Bill of Rights provided, among others, that no person shall be deprived of life, liberty, or property without due process of law; that no person shall be twice put in jeopardy for the same offense or be compelled to be a witness against himself; that the right to be secure against unreasonable searches and seizures shall not be violated; that no law shall be passed abridging the freedom of speech or of the press or of the rights of the people to peaceably assemble and petition the Government for redress of grievances. Scholars have characterized the *Instruction* as the “Magna Charta of the Philippines” and as a “worthy rival of the Laws of the Indies.”

The “inviolable rules” of the *Instruction* were re-enacted almost exactly in the Philippine Bill of 1902, an act which temporarily provided for the administration of the affairs of the civil government in the Philippine Islands, and in the Philippine Autonomy Act of 1916, otherwise known as the Jones Law, which was an act to declare the purpose of the people of the United States as to the future of the Philippine Islands and to provide an autonomous government for it. These three organic acts - the *Instruction*, the Philippine Bill of 1902, and the Jones Law - extended the guarantees of the American Bill of Rights to the Philippines. In **Kepner v. United States**, Justice Day prescribed the methodology for applying these “inviolable rules” to the Philippines, *viz*: “(t)hese principles were not taken from the Spanish law; they were carefully collated from our own Constitution, and embody almost verbatim the safeguards of that instrument for the protection of life and liberty.” Thus, the “inviolable rules” should be applied in the sense “**which has been placed upon them in construing the instrument from which they were taken.**” (emphasis supplied)

Thereafter, the Philippine Independence Law, popularly known as the Tydings-McDuffie Law of 1934, was enacted. It guaranteed independence to the Philippines and authorized the drafting of a Philippine Constitution. The law provided that the government should be republican in form and the Constitution to be drafted should contain a Bill of Rights. Thus, the Constitutional Convention of 1934 was convened. In drafting the Constitution, the Convention preferred to be generally conservative on the belief that to be stable and permanent, the Constitution must be anchored on the experience of the people, “providing for institutions which were the natural outgrowths of the national life.” As the people already had a political organization buttressed by national traditions, the Constitution was to sanctify these institutions tested by time and the Filipino people’s experience and to confirm the practical and substantial rights of the people. Thus, the institutions and philosophy adopted in the Constitution drew substantially from the organic acts which had governed the Filipinos for more than thirty years, more particularly

the Jones Law of 1916. In the absence of Philippine precedents, the Convention considered precedents of American origin that might be suitable to our substantially American political system and to the Filipino psychology and traditions. Thus, in the words of Claro M. Recto, President of the Constitutional Convention, the 1935 Constitution was “frankly an imitation of the American charter.”

Aside from the heavy American influence, the Constitution also bore traces of the Malolos Constitution, the German Constitution, the Constitution of the Republic of Spain, the Mexican Constitution, and the Constitutions of several South American countries, and the English unwritten constitution. Though the Tydings-McDuffie law mandated a republican constitution and the inclusion of a Bill of Rights, with or without such mandate, the Constitution would have nevertheless been republican because the Filipinos were satisfied with their experience of a republican government; a Bill of Rights would have nonetheless been also included because the people had been accustomed to the role of a Bill of Rights in the past organic acts.

The Bill of Rights in the 1935 Constitution was reproduced largely from the report of the Convention’s committee on bill of rights. The report was mostly a copy of the Bill of Rights in the Jones Law, which in turn was borrowed from the American constitution. Other provisions in the report drew from the Malolos Constitution and the constitutions of the Republic of Spain, Italy and Japan. There was a conscious effort to retain the phraseology of the well-known provisions of the Jones Law because of the jurisprudence that had built around them. The Convention insistently avoided including provisions in the Bill of Rights not tested in the Filipino experience. Thus, upon submission of its draft bill of rights to the President of the Convention, the committee on bill of rights stated:

“Adoption and adaptation have been the relatively facile work of your committee in the formulation of a bill or declaration of rights to be incorporated in the Constitution of the Philippine Islands. No attempt has been made to incorporate new or radical changes. . .

The enumeration of individual rights in the present organic law (Acts of Congress of July 1, 1902, August 29, 1916) is considered ample, comprehensive and precise enough to safeguard the rights and immunities of Filipino citizens against abuses or encroachments of the Government, its powers or agents. . .

Modifications or changes in phraseology have been avoided, wherever possible. **This is because the principles must remain couched in a**



**language expressive of their historical background, nature, extent and limitations, as construed and expounded by the great statesmen and jurists that have vitalized them.”** (emphasis supplied)

The 1935 Constitution was approved by the Convention on February 8, 1935 and signed on February 19, 1935. On March 23, 1935, United States President Roosevelt affixed his signature on the Constitution. By an overwhelming majority, the Filipino voters ratified it on May 14, 1935.

Then dawned the decade of the 60s. There grew a clamor to revise the 1935 charter for it to be more responsive to the problems of the country, specifically in the socio-economic arena and to the sources of threats to the security of the Republic identified by then President Marcos. In 1970, delegates to the Constitution Convention were elected, and they convened on June 1, 1971. In their deliberations, “the spirit of moderation prevailed, and the . . . Constitution was hardly notable for its novelty, much less a radical departure from our constitutional tradition.” Our rights in the 1935 Constitution were reaffirmed and the government to which we have been accustomed was instituted, albeit taking on a parliamentary rather than presidential form.

The Bill of Rights in the 1973 Constitution had minimal difference from its counterpart in the 1935 Constitution. Previously, there were 21 paragraphs in one section, now there were twenty-three. The two rights added were the recognition of the people’s right to access to official records and documents and the right to speedy disposition of cases. To the right against unreasonable searches and seizures, a second paragraph was added that evidence obtained therefrom shall be inadmissible for any purpose in any proceeding. The 1973 Constitution went into effect on January 17, 1973 and remained the fundamental law until President Corazon Aquino rose to power in defiance of the 1973 charter and upon the “direct exercise of the power of the Filipino people” in the EDSA Revolution of February 23-25, 1986. On February 25, 1986, she issued Proclamation No. 1 recognizing that “sovereignty resides in the people and all government authority emanates from them” and that she and Vice President Salvador Laurel were “taking power in the name and by the will of the Filipino people.” The old legal order, constitution and enactments alike, was overthrown by the new administration. A month thenceforth, President Aquino issued Proclamation No. 3, “Declaring National Policy to Implement the Reforms Mandated by the People, Protecting their Basic Rights, Adopting a Provisional Constitution, and Providing for an Orderly Transition to Government under a New Constitution.” The Provisional Constitution, otherwise known as the “Freedom Constitution” adopted certain provisions of the 1973

Constitution, including the Bill of Rights which was adopted *in toto*, and provided for the adoption of a new constitution within 60 days from the date of Proclamation No. 3.

Pursuant to the Freedom Constitution, the 1986 Constitutional Commission drafted the 1987 Constitution which was ratified and became effective on February 2, 1987. As in the 1935 and 1973 Constitutions, it retained a republican system of government, but emphasized and created more channels for the exercise of the sovereignty of the people through recall, initiative, referendum and plebiscite. Because of the wide-scale violation of human rights during the dictatorship, the 1987 Constitution contains a Bill of Rights which more jealously safeguards the people's "fundamental liberties in the essence of a constitutional democracy", in the words of ConCom delegate Fr. Joaquin Bernas, S.J. It declares in its state policies that "(t)he state values the dignity of every human person and guarantees full respect for human rights." In addition, it has a separate Article on Social Justice and Human Rights, under which, the Commission on Human Rights was created.

Moreover, the 1987 Constitution similar to the 1935 and 1973 Constitutions vests the judicial power "in one Supreme Court and in such lower courts as may be established by law." (Article VII, Sec.1)

Unlike all previous Constitutions, however, the 1987 Constitution defines the concept of judicial power in a very specific way. Article VIII, Section 1, paragraph 2 provides that "(j)udicial power includes the duty of the courts of justice to settle actual controversies involving rights which are legally demandable and enforceable. And to determine whether or not there has been a grave abuse of discretion amounting to lack or excess of jurisdiction on the part of any branch or instrumentality of the government." The 1987 Constitution also provides for the specific safeguards to enhance judicial power and to protect judicial independence.

The 1987 Constitution textually altered the power-sharing scheme under the previous charters by deleting in Section 5(5) of Article VIII Congress' subsidiary and corrective power.<sup>356</sup> This glaring and fundamental omission led the Court to observe in *Echegaray v. Secretary of Justice*<sup>357</sup> that this Court's power to promulgate judicial rules "is no longer shared by this Court with Congress."

The Bill of Rights (Article III) in the 1935 Constitution has 21 sections. In the

<sup>356</sup> In Re Cunanan, 94 Phil. 534 (1954).

<sup>357</sup> 361 Phil. 73, 88 (1999).

1973 Constitution, the Bill of Rights was placed in Article IV and has 23 sections. The two sections added were the right to information on matters of public concern (Section 6) and the right to speedy disposition of cases (Section 16). The Article that followed was Article V (Duties and Obligations of Citizens). At present, the 1987 Constitution's Bill of Rights (Article III) contains 22 sections. Section 10 ("No law granting a title of royalty or nobility shall be enacted") of Article IV in the 1973 Constitution was removed from the list and was transferred to Section 31 of Article VI (Legislative Department) of the 1987 Constitution. Article V on the Duties and Obligations of the Citizens in the 1973 Constitution was deleted in the 1987 Constitution. Section 9 of Article IV of the 1973 Constitution which reads: "No law shall be passed abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and petition the Government for redress of grievances" was amended in Article III of the 1987 Constitution by adding the phrase "of expression." It now reads: "Section 4. No law shall be passed abridging the freedom of speech, of expression, or of the press, or the right of the people peaceably to assemble and petition the government for redress of grievances." Section 5 of Article IV of the 1973 Constitution which reads: "The liberty of abode and of travel shall not be impaired except upon lawful order of the court, or when necessary in the interest of national security, public safety, or public health" was amended in Article III of the 1987 Constitution to read: "Section 6. The liberty of abode and of changing the same within the limits prescribed by law shall not be impaired except upon lawful order of the court. Neither shall the right to travel be impaired except in the interest of national security, public safety, or public health, as may be provided by law." Section 6 of Article IV of the 1973 Constitution which reads: "The right of the people to information on matters of public concern shall be recognized. Access to official records, and to documents and papers pertaining to official acts, transactions, or decisions, shall be afforded the citizen subject to such limitations as may be provided by law" was amended in Article III of the 1987 Constitution to read: "Section 7. The right of the people to information on matters of public concern shall be recognized. Access to official records, and to documents and papers pertaining to official acts, transactions, or decisions, as well as to government research data used as basis for policy development, shall be afforded the citizen, subject to such limitations as may be provided by law." Section 7 of Article IV of the 1973 Constitution which reads: "The right to form associations or societies for purposes not contrary to law shall not be abridged." was amended in Article III of the 1987 Constitution to include the right of those employed in the public sector. It now reads: "Section 8. The right of the people, including those employed in the public and private sectors, to form unions, associations, or societies for purposes not contrary to law shall not be abridged." Section 18 of Article IV of the 1973 Constitution which reads: "All persons, except those charged with capital offenses when evidence of guilt

is strong, shall, before conviction, be bailable by sufficient sureties. Excessive bail shall not be required” was amended in Section 13 of Article III of the 1987 Constitution to read: “All persons, except those charged with offenses punishable by reclusion perpetua when evidence of guilt is strong, shall, before conviction, be bailable by sufficient sureties, or be released on recognizance as may be provided by law. The right to bail shall not be impaired even when the privilege of the writ of habeas corpus is suspended. Excessive bail shall not be required.”

## **II. Classification and content**

### **A. Enumerated constitutional rights**

The constitutional rights may be classified as political rights, civil rights, social and economic rights, and rights of the accused. *Political rights* are rights of the citizens which give them the power to participate directly, or indirectly in the establishment or administration of the government. Among these rights are the right of citizenship (Article IV), the right of suffrage (Article V), the right to seek and hold public office (Article X, Section 1), the right to information on matters of public concern (Article III, Section 7), the right to form political parties (Article IX C, Section 6), the right to seek or hold public office (Article XI, Section 1), etc. *Civil rights* are those rights which the law will enforce at the instance of private individuals for the purpose of securing to them the enjoyment of their means of happiness. They include the rights against involuntary servitude (Article III, Section 18[2]) and imprisonment for non-payment of poll tax (Article III, Section 20.); the constitutional rights of the accused (Article III, Sections 11-22); the social and economic rights; liberty of abode, and of changing the same (Article II, Section 6); etc. The freedom of speech, of expression, or of the press, the right of assembly and petition, and the right to form associations (Sections 4, 8) are likewise civil rights. However, they partake of the nature of political rights when they are utilized as a means to participate in the government. *Social and economic rights* include those rights which are intended to insure the well-being and economic security of the individual. They are protected mainly in other provisions of the Constitution not because of the primacy of civil and political rights but because, unlike the latter, which are designed to be immediately enforceable in courts of law, they are usually addressed to the political organs, requiring the adoption of legislative measures for their realization.<sup>358</sup> They are also

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<sup>358</sup> De Leon Hector S. Philippine Constitutional Law Principles and Cases, 1991 Edition Vol. 1 pp.141-142.

provided in the articles dealing with the promotion of social justice (Article XIII), the conservation and utilization of natural resources (Article XII, Section 2), and the promotion of education (Article XIV, Sections 1-5), science and technology (Sections 10-13), and arts and culture (Sections 17 and 18). *Rights of the accused* (Sections 11-22) are rights intended for the protection of a person accused of any crime, which among others include the right to presumption of innocence, the right to speedy and impartial trial, and the right against cruel, degrading, or inhuman punishment.

Pursuant to Article 32<sup>359</sup> of the Civil Code, which further implements the civil liberties guaranteed by the Constitution, a person whose constitutional rights have been violated or impaired is entitled to actual and moral damages from the public officer or employee, or any private individual responsible therefor. In addition, exemplary damages may also be awarded, when warranted.

Except for the political rights, practically all the above constitutional rights, particularly the rights of the accused, are not limited to citizens alone but are

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359 Article 32. Any public officer or employee, or any private individual, who directly or indirectly obstructs, defeats, violates or in any manner impedes or impairs any of the following rights and liberties of another person shall be liable to the latter for damages:

- (1) Freedom of religion;
- (2) Freedom of speech;
- (3) Freedom to write for the press or to maintain a periodical publication;
- (4) Freedom from arbitrary or illegal detention;
- (5) Freedom of suffrage;
- (6) The right against deprivation of property without due process of law;
- (7) The right to a just compensation when private property is taken for public use;
- (8) The right to the equal protection of the laws;
- (9) The right to be secure in one's person, house, papers, and effects against unreasonable searches and seizures;
- (10) The liberty of abode and of changing the same;
- (11) The privacy of communication and correspondence;
- (12) The right to become a member of associations or societies for purposes not contrary to law;
- (13) The right to take part in a peaceable assembly to petition the Government for redress of grievances;
- (14) The right to be a free from involuntary servitude in any form;
- (15) The right of the accused against excessive bail;
- (16) The right of the accused to be heard by himself and counsel, to be informed of the nature and cause of the accusation against him, to have a speedy and public trial, to meet the witnesses face to face, and to have compulsory process to secure the attendance of witness in his behalf;
- (17) Freedom from being compelled to be a witness against one's self, or from being forced to confess guilt, or from being induced by a promise of immunity or reward to make such confession, except when the person confessing becomes a State witness;
- (18) Freedom from excessive fines, or cruel and unusual punishment, unless the same is imposed or inflicted in accordance with a statute which has not been judicially declared unconstitutional; and
- (19) Freedom of access to the courts.

In any of the cases referred to in this article, whether or not the defendant's act or omission constitutes a criminal offense, the aggrieved party has a right to commence an entirely separate and distinct civil action for damages, and for other relief. Such civil action shall proceed independently of any criminal prosecution (if the latter be instituted), and may be proved by a preponderance of evidence.

The indemnity shall include moral damages. Exemplary damages may also be adjudicated.

The responsibility herein set forth is not demandable from a judge unless his act or omission constitutes a violation of the Penal Code or other penal statute.

guaranteed to every person within our territorial limits without regard to any differences of race, color, or nationality.<sup>360</sup>

The 1987 Bill of Rights provisions set the extent of the constitutional protection *vis-a-vis* the liberty guaranteed to individuals and provide for the limitation on the State's law-making power.

## B. Unenumerated constitutional rights

There is no explicit constitutional provision authorizing the recognition of unenumerated rights. Unenumerated rights may refer to legal rights inferred from other rights that are implied by existing laws, but are not themselves expressly coded or “enumerated” among the explicit writ of the law.

Recently retired Justice Edgardo L. Delos Santos in his separate opinion in the case of *In the Matter of the Urgent Petition for the Release of Prisoners on Humanitarian Grounds in the midst of the Covid-19 Pandemic*,<sup>361</sup> posited the view that the present Philippine Constitution, although it draws most of its significant provisions from the US Constitution, does not have a provision similar or related to the “unenumerated rights clause” of the Ninth Amendment which suggests either the existence of implied rights or that the legal system or tradition should predominantly adhere or be based on common law instead of civil law. He noted that the Declaration of Principles and State Policies in Article II as well as the Bill of Rights in Article III of the 1987 Constitution contain no such “unenumerated rights” provision and opined that neither does Article VIII nor all the other articles in the Constitution have the effect of giving the Judiciary the power to “determine” any right which may have been “implied” in the Constitution.

Justice Delos Santos added that in fact, the opposite seems to be the case as it is explicitly shown in Section 1, Article VIII of the Constitution which states that “...Judicial power **includes the duty of the courts of justice to settle actual controversies** involving rights which are legally demandable and enforceable, and to **determine** whether or not there has been a **grave abuse of discretion** amounting to lack or excess of jurisdiction on the part of any branch or instrumentality of the Government” (emphasis in the original). He opined that there is nothing in the aforementioned provision that the power “to settle actual controversies” which can be interpreted to mean that the Judiciary may “recognize

<sup>360</sup> Ichong v. Hernandez, 101 Phil. 1155 (1957).

<sup>361</sup> GR. No. 252117, July 28, 2020.

certain rights” implied in the Constitution through interpretation or simple application of laws.

### C. Protection and limitation

Section 11 of Article II of the Constitution, declares the obligation of the state under the same Constitution to value the dignity of every human person and guarantees full respect for human rights. Article II, Section 5 of the 1987 Constitution lays down the basis for the exercise of police power: “The maintenance of peace and order, the protection of life, liberty, and property, and promotion of the **general welfare** are essential for the enjoyment by all the people of the blessings of democracy” (emphasis supplied). The police power is based on the maxim “*salus populi est suprema lex*” and the welfare of the people is the first law.

The constitutional limitations on the exercise of the state’s powers are found in Article III of the Constitution which states: “No person shall be deprived of life, liberty or property without due process of law, nor shall any person be denied the equal protection of the laws.” The Bill of Rights, which guarantees against the taking of life, property, or liberty without due process under Section 1 is generally a limitation on the state’s powers in relation to the rights of its citizens. The right to due process is meant to protect ordinary citizens against arbitrary government action, but not from acts committed by private individuals or entities. In the latter case, the specific statutes that provide reliefs from such private acts apply. The right to due process guards against unwarranted encroachment by the state into the fundamental rights of its citizens and cannot be invoked in private controversies involving private parties.<sup>362</sup>

## III. Interpretation and current issues

### A. Rights in diverse contexts

#### Article III, Section 5 (Freedom of religion)

In *Islamic Da’wah Council of the Philippines, Inc. v. Office of the Executive*

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362 Atienza v. Commission on Elections, 626 Phil. 654 (2010).



*Secretary*,<sup>363</sup> the Supreme Court ruled that freedom of religion was accorded preferred status by the framers of our fundamental law and that it has consistently affirmed this preferred status, well aware that it is “designed to protect the broadest possible liberty of conscience, to allow each man to believe as his conscience directs, to profess his beliefs, and to live as he believes he ought to live, consistent with the liberty of others and with the common good.”

### **Article II, Section 16 (Right to a balanced and healthful ecology)**

In *Metro Manila Dev. Auth. v. Concerned Residents of Manila Bay*,<sup>364</sup> the Supreme Court ordered concerned government agencies to coordinate the cleanup, restoration, and preservation of the water quality of Manila Bay in line with the country’s development objective of attaining economic growth consistent with the protection, preservation, and revival of marine waters. It held that the State, through petitioners, has to take the lead in the preservation and protection of Manila Bay.

### **Article II, Section 11 (Human rights)**

In *Razon v. Tagitis*,<sup>365</sup> the Court reflected on the nature of the writ of *amparo*—a protective remedy against violations or threats of violation against the rights to life, liberty and security. It held the same embodies, as a remedy, the court’s directive to police agencies to undertake specified courses of action to address the disappearance of an individual. It does not determine guilt or pinpoint criminal culpability for the disappearance; rather, it determines responsibility, or at least accountability, for the enforced disappearance for purposes of imposing the appropriate remedies to address the disappearance. The Court held that the writ of *amparo* is justified by the primary goal of addressing the disappearance, so that the life of the victim is preserved and his liberty and security are restored.

### **Article III, Section 16 (Right to speedy trial)**

In the case of *Magno v. People of the Philippines*,<sup>366</sup> the Court ruled that the right to a speedy trial may be defined as one free from vexatious, capricious, and oppressive delays, its “salutary objective” being to assure that an innocent person may be free from the anxiety and expense of a court litigation or, if otherwise, of having his guilt determined within the shortest possible time compatible with

363 G.R. No. 153888, July 9, 2003.

364 G.R. No. 171947-48, December 18, 2008.

365 G.R. No. 182498, December 3, 2009.

366 G.R. No. 230657, March 14, 2018.



the presentation and consideration of whatsoever legitimate defense he may interpose.<sup>367</sup>

## B. Impact of international norms

The Philippines adheres to various international human rights laws and conventions including the Universal Declaration of Human Rights; the International Covenant on Civil and Political Rights (ICCPR); the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT); the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD); the Optional Protocol to the International Covenant on Civil and Political Rights; the Convention on the Rights of the Child (CRC); the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICMW); and the Hague Service Convention on the Service Abroad of Judicial Documents in Civil and Commercial Matters.

The Philippines is a party to the ICCPR which it signed and ratified on December 19, 1966 and October 23, 1986, respectively. Thus, it is bound to implement the rights enshrined in the treaty. Under the doctrine of transformation, international laws ratified by the Philippines form part of the law of the land. Also, the Philippines adheres to the three foundational principles of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) geared towards non-discrimination, state obligation and substantive equality, ensuring equal opportunities, access and benefits for women in all fields and spheres. Both state and non-state actors will be held liable in case of violation of said rights.

Pursuant to the Bill of Rights, the Universal Declaration of Human Rights, as well as the International Covenant on Civil and Political Rights (ICCPR), and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) to which the Philippines is a signatory, Congress enacted Republic Act No. 10368, entitled *Human Rights Victims Reparation and Recognition Act of 2013*. Said law prohibits the use of torture, force, violence, threat, intimidation, or any other means which vitiate the free will, and it mandates the compensation and rehabilitation of victims of torture or similar practices and their families. By virtue of Section 2 of Article II of the 1987 Constitution adopting generally accepted principles of international law as part of the law of the land, the Philippines adheres to these international human rights laws and conventions, which impose on each State party the obligation to enact

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367 Citing *Tan v. People*, 604 Phil. 68, 78-79 (2009).

domestic legislation to give effect to the rights recognized therein and ensure that any person whose rights or freedoms have been violated shall have an effective remedy, even if the violation is committed by persons acting in an official capacity.

## C. Current issues

### **Resolution, G.R. No. 252556, Citizens Urgent Response to End COVID-19 Spokesperson Prof. Judy M. Taguiwalo, et al. v. Dr. Francisco T. Duque III, in his capacity as Secretary of Department of Health, et al. September 1, 2020**

In this Special Civil Action (petition) for mandamus, petitioners sought to compel the government, through the Department of Health (DOH) and any and all agencies involved in addressing the COVID-19 pandemic, to conduct positive mass testing, efficient contact tracing and isolation, and effective treatment of positive cases.

The Supreme Court dismissed the petition, holding that while the Constitution enjoins respondents to protect the right to health, mandamus will not lie to compel them to exercise said protection in a certain way or to a certain degree. It ruled that courts have no authority to issue a writ of mandamus, no matter how dire the emergency, without a demonstration that an official in the executive branch failed to perform a mandatory, nondiscretionary duty. It declared that mandamus is an appropriate remedy only where the law prescribes and defines the duty to be performed with such precision and certainty as to leave nothing to the exercise of discretion or judgment.

The Supreme Court also held that petitioners failed to exhaust administrative remedies since they have recourse to the government offices which respondents represent, i.e., Department of Health, Department of National Defense, Department of Interior and Local Government, Department of Budget and Management, Department of Labor and Employment, Office of the Cabinet Secretariat, and ultimately, the Office of the President.

Justice Marvic M.V.F. Leonen dissented, opining that the constitutional right to health and the State's duty to provide for people's health are self-executory. He found that petitioners' claim that without the effective response system that complies with the World Health Organization's recommendations, respondents deny them their right to health, bolsters their petition and merits comment from the respondents.

## **Annex 1: List of cited legal provisions**

### **1) Constitutional provisions**

The 1935 Philippine Constitution

The 1973 Philippine Constitution

The 1987 Philippine Constitution

- Article II, Sections 9, 11-16, 18, 22
- Article III, Sections 1-22
- Article V, Section 1
- Article VII, Section 18
- Article VIII, Sections 1, 4(2)
- Article IX, Sections 2(3), 4
- Article XII, Sections 1, 5, 6
- Article XIII, Sections 1-16
- Article XIV, Sections 1, 2, 5, 13, 17, 18
- Article XV, Section 3
- Article XVI, Sections 7, 9

### **2) Legislative provisions**

Republic Act No. 386 Civil Code of the Philippines Art. 32

Republic Act No. 10368 Human Rights Victims Reparation and Recognition Act of 2013.

### **3) International provisions**

Universal Declaration of Human Rights

International Covenant on Civil and Political Rights (ICCPR)

Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)

Convention on the Rights of the Child (CRC)

Convention on the Elimination of All Forms of Racial Discrimination (ICERD)

Optional Protocol to the International Covenant on Civil and Political Rights

International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICMW)

Hague Service Convention on the Service Abroad of Judicial Documents in Civil and Commercial Matters

#### **4) Other**

Writ of *Amparo*, A.M. No. 07-9-12-SC dated September 25, 2007

Writ of *Habeas Data*, A.M. No. 08-1-16-SC dated January 22, 2008

Writ of *Kalikasan*, A.M. No. 09-6-8-SC dated April 13, 2010

### **Annex 2: List of cited cases**

Allado v. Diokno, G.R. No. 113630, May 5, 1994

Atienza v. Commission on Elections, 626 Phil. 654 (2010)

Enrile v. Sandiganbayan, G.R. No. 213847, August 18, 2015

Government of United States of America v. Hon. Guilermo Purganan, G.R. No. 148571, September 24, 2002

Islamic Da'wah council of the Philippines, Inc. v. Office of the Executive Secretary, G.R. No. 153888, July 9, 2003

In the Matter of the Urgent Petition for the Release of Prisoners on Humanitarian Grounds in the Midst of the Covid 19 Pandemic G.R. No. 252117, July 28, 2020

Legaspi v Civil Service Commission, G.R. No. L-72119, May 29, 1987

Manila Prince Hotel v. Government Service Insurance System, 335 Phil. 82 (1997)

Metro Manila Dev. Autho. v. Concerned Residents of Manila Bay, G.R. No. 171947-48, December 18, 2008

Moslare v. Court of Appeals, G.R. No. 129744, June 26, 1998

Oposa v. Factoran, G.R. No. 101083, July 30, 1993

Paderanga v. Court of Appeals, G.R. No. 115407, August 28, 1995

Re: Request of National Committee on Legal Aid to Exempt Legal Aid Clients From Paying Filing, Docket and other Fees, dated August 28, 2009

Resolution, G.R. No. 252556, Citizens Urgent Response to End COVID – 19 Spokesperson Prof. Judy M. Taguiwalo, et al. v. Dr. Francisco T. Duque III, in his capacity as Secretary of Department of Health, et al. September 1, 2020

Sales v. Sandiganbayan, et.al G.R. No. 143802, November 16, 2001

### **Annex 3: Selected secondary literature**

Bernas, Joaquin the 1987 Constitution of the Republic of the Philippines: A Commentary, 2005 Ed., p. 1192.

De Leon, Hector S., Philippine Constitutional Law, Principles and Cases, Vol. 1, 1991 Edition, p. 138.

De Leon, Hector S. & De Leon Hector M. Jr., Philippine Constitutional Law, Principles and Cases, Vol. 1, 6<sup>th</sup> Edition, 2017, p. 138.

# 13. Russia

## Constitutional Court

### *Overview*

Chapter 2 of the Constitution of the Russian Federation is entitled “Human and Civil Rights and Freedoms.” This Chapter, consisting of 48 articles, represents the national catalogue of human and civil rights and freedoms. Chapter 2 of the Constitution is fundamental to the Russian legal system, and as such it cannot be amended without adoption of a new Constitution. In Chapter 2, personal rights are listed first, then political rights, and then socio-economic and cultural rights; this Chapter also includes rights of legal protection (procedural guarantees), basic criteria for limitation of rights, main obligations and provisions on affording rights to foreign citizens. The Constitution contains no special provision foreseeing “unenumerated” constitutional rights and the Constitutional Court does not “invent” new rights. However, the Court does adapt to concrete situations the interpretation of the constitutional text in force. In terms of international human rights law, the Russian Federation is subject to the European Convention on Human Rights, and has ratified seven of the nine core UN human rights treaties. Historical or cultural contexts particularly relevant to rights adjudication include democratization in the late 1980s and early 1990s i.e. during the late USSR and upon its dissolution. Current issues in rights adjudication relate to the implementation and interpretation of the judgements of international courts, the emergence of a new generation of rights and related problems of their regulation, the expansion of constitutional review to spheres previously deemed to be outside its reach, and also the recent challenge posed by the unprecedented Covid-19 pandemic.

### *Outline*

#### **I. Rights in the Constitution**

- A. Constitutional bill of rights
- B. Rights elsewhere in the Constitution
- C. Concretization of constitutional rights
- D. Historical background and development

#### **II. Classification and content**

- A. Enumerated constitutional rights

- B. Unenumerated constitutional rights

- C. Protection and limitation

#### **III. Interpretation**

- A. Rights in diverse contexts
- B. Impact of international norms
- C. Current issues

#### **Annex 1: List of cited legal provisions**

#### **Annex 2: List of cited cases**

*Note: The information below was prepared by the Secretariat of the Constitutional Court of the Russian Federation within the context of an AACC research project. It neither is an official position of the Constitutional Court nor binds the Court in any way. This paper was prepared on the basis of legislation in force as of 1 June 2021.*

## **I. Rights in the Constitution**

### **A. Constitutional bill of rights**

#### **1. Overview**

Chapter 2 of the Constitution of the Russian Federation adopted by popular vote on 12 December 1993 with amendments approved by all-Russian vote on 1 July 2020 (hereinafter – the Constitution) is entitled “Human and Civil Rights and Freedoms”. This Chapter represents the national catalogue of human and civil rights and freedoms. It includes 48 articles (Articles 17-64 of the Constitution).

This Chapter, together with Chapter 1 concerning the basis of the constitutional system, and Chapter 9, establishing the rules of introduction of amendments to the Constitution, occupies the leading place within the Constitution. Its importance is emphasised by impossibility to amend it without adoption of a new Constitution of the state (same is true for Chapters 1 and 9). The fundamental and unwavering nature of constitutional provisions reflecting the basics of the constitutional system and the relations between the individual, society and the state (Chapters 1 and 2) condition the special mechanism for introducing constitutional amendments reflected in Chapter 9 “Constitutional Amendments and Revision of the Constitution” (Articles 134-137). This also ensures stability of the Constitution of the Russian Federation, and creates protective machinery preventing arbitrary changes to it.<sup>368</sup>

Within the structure of the Constitution of the Russian Federation, Chapter 2 of the Constitution of the Russian Federation precedes detailed principles of the federal relations (Chapter 3 “The Federal Structure”), organisation of

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<sup>368</sup> Decision of the Constitutional Court of the Russian Federation of 17 July 2014 No. 1567-O “Upon the request of the group of deputies of the state Duma of the Federal Assembly of the Russian Federation as regards verification of constitutionality of a number of provisions of the Law of the Russian Federation on Amendment to the Constitution of the Russian Federation ‘On the Supreme Court of the Russian Federation and the Public Prosecution Service of the Russian Federation’”.

the state authorities (Chapters 4-7) and of local self-government (Chapter 8 “Local Self-Government”). During the drafting of the current Constitution suggestions were made to begin it with the section devoted to human and civil rights and freedoms.<sup>369</sup> This structure was not adopted in the final version of the constitutional text; its logic instead defines the basic social and state order in the first place. The place of Chapter 2 in the text of the Constitution, seen in connection with the provisions establishing the basics of the constitutional system of the Russian Federation, keynotes and supports a certain “internal rhythm” of the constitutional provisions. Article 2 of the Constitution defines rights and freedoms as a supreme value, and Chapter 2 elaborates the relevant provisions. The set of provisions of the first chapters of the Constitution establishes standards, the requirements for the state on observing the relevant rights. It also establishes such basis of public authorities’ organisation and the state’s work that are capable of adequate protection of these rights.

At that, the provisions defining human rights and freedoms can be found in Chapter 1 of the Constitution, and further throughout its text. For example, Article 75<sup>1 \*</sup> elaborates on the constitutional catalogue of human and civil rights and freedoms, stating *inter alia* that balance between rights and obligations of the citizen shall be ensured in the Russian Federation.

Provisions of Chapter 2 of the Constitution, as well as norms of Chapter 1 “The Basis of the Constitutional System” acquire particular legal importance in the context of adoption of the Law of the Russian Federation on the amendment to the Constitution of the Russian Federation of 14 March 2020 No. 1- ФКЗ “On Enhancement of Regulation of Certain Issues concerning Organisation and Functioning of Public Authority”, and extension of competence of the Constitutional Court of the Russian Federation as regards *ex ante* review of draft law of the Russian Federation on amendments to the Constitution of the Russian Federation (Article 125, part 5<sup>1</sup>, item “a”<sup>\*\*</sup>).

369 Kozlova E.I., Kutafin O.E. Constitutional Law of Russia: textbook. – 4<sup>th</sup> edition, revised and supplemented. M.: Prospekt, 2009 – p. 79. ISBN 978-5-392-00410-2 [Козлова Е.И., Кутафин О.Е. Конституционное право России: учебник. – 4-е изд., перераб и доп. – М.: Проспект, 2009].

\* A footnote numerical near the article number is a feature of Russian legal drafting. Such numbers mark that an article was inserted between two existing articles and the footnote number is added to avoid changing the numeration of all the articles throughout the law. This numeration is sometimes represented by a number placed after the period mark (e.g. 75.1), but official publications use footnote numbers. Hence, this method is used throughout this fact file.

\*\* The items within articles of the Constitution and their parts originally use the Russian alphabet. Within this fact file they are cited with the use of the English alphabet for suitability of reference, since the same method was used in preparation of the non-official translations by the Constitutional Court (available on the website of the Constitutional Court of the Russian Federation at URL: <http://www.ksrf.ru/en/Info/LegalBases/ConstitutionRF/Documents/CONSTITUTION-Eng.pdf>).



## 2. Obligations

Chapter 2 of the Constitution contains more than just a list of human and civil rights and freedoms. Some rights in this Chapter are supported by concrete guarantees of their realisation, i.e. essentially by pointing out the obligations of the state. This is true, for example, with regard to guaranteeing “everyone” the freedom of conscience and religion (Article 28); freedom of thought and speech (Article 29). Certain obligations of the state and its bodies are reflected in a more concrete manner. For instance, the concealment by officials of facts and circumstances, which pose a threat to the life and health of people, shall result in liability according to federal law (Article 41, part 3).

This Chapter enshrines also human and civil obligations. These are described as including payment of legally established taxes and levies (Article 57); preservation of nature and the environment and treatment of natural resources with care (Article 58); defence of the Fatherland, which is “a duty and obligation” of a citizen of the Russian Federation (Article 59).<sup>370</sup> In fact the Constitution establishes more obligations, both of very general nature (obligation to observe the Constitution of the Russian Federation and laws – Article 15, part 2 in Chapter 1 of the Constitution), and depending on the legal status of a concrete individual. For example, “the equal right and duty of parents” is the care for children and their upbringing, as well as the caring for disabled parents by able-bodied children over 18 years old (Article 38, parts 2 and 3); compulsory basic general education and ensuring by parents or guardians that children receive basic general education (Article 43, part 4).

Within the structure of Chapter 2, main obligations (Articles 57-59) are listed after provisions on the fundamental rights (Articles 17-54), and the conditions of limitation of human and civil rights and freedoms (Articles 55-56). The constitutional obligations have intrinsic connection with constitutional rights, which is underlined by the constitutional text itself, and also confirmed by the case-law of the Constitutional Court of the Russian Federation (hereinafter – the Constitutional Court).

For instance, the Constitutional Court has pointed out more than once that the tax obligation (“to pay legally established taxes and levies”) should be understood *inter alia* as obligation to pay taxes in the amount not more than established by law; and the law has to establish all the essential elements of tax obligation, including the object of taxation, taxation base, order of calculation and payment

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370 Kozlova E.I., Kutafin O.E. op. cit., p. 251-252.

of tax; and the mechanism of taxation should ensure comprehensiveness and timely character of taxing of those obliged to pay a tax, and at the same time the lawfulness of actions of competent authorities and officials, connected to exaction of taxation resources.<sup>371</sup>

Rulings of the Constitutional Court also addressed the connection e.g. between the duty and obligation of a citizen of the Russian Federation to protect the Fatherland, as provided for by Article 59, part 1 of the Constitution, and the right to replace military service with alternative civilian service provided for in part 3 of the same Article. In this regard the Constitutional Court held that military or alternative civilian service is a constitutional obligation of a citizen, reflecting his attitude towards the duty before the Fatherland, and obligation to observe the Constitution of the Russian Federation and the laws (Article 15, part 2). But the possibility to replace the military service with alternative civilian service also demonstrates properties of a right enshrined directly by the Constitution of the Russian Federation, and as such it is subject to protection, extending also to acquiring of this right and to its preservation, at least insofar as a citizen adequately (that is, *inter alia*, in good faith) put this right into effect.<sup>372</sup>

## B. Rights elsewhere in the Constitution

### 1. Overview

Provisions on human and civil rights and freedoms are not confined exclusively to Chapter 2 of the Constitution “Human and Civil Rights and Freedoms”. They are also reflected in the Preamble of the Constitution, and Chapters 1 “The Basis of the Constitutional System” and 3 “The Federal Structure”. They take the form of principles and fundamental norms defining the meaning, content and guarantees of ensuring fundamental rights and freedoms.

For example, the meaning of human and civil rights and freedoms is enshrined in the Preamble and Article 2 (Chapter 1 “The Basis of the Constitutional System”) of the Constitution. It defines, that “man, his rights and freedoms shall be the

371 See e.g.: Judgement of the Constitutional Court of the Russian Federation of 30 June 2020 No.31-II “In the case of review of constitutionality of provisions of Article 164, item 1, sub-item 12 and item 3, and Article 165, item 14 of the Tax Code of the Russian Federation in connection with the complaint of “Gazprom Neft Trading GmbH””.

372 Decision of the Constitutional Court of the Russian Federation of 9 July 2020 No. 1644-O “Upon complaint of citizen Igor Aleksandrovich Suvorov as regards violation of his constitutional rights by Article 328, part one, of the Criminal Code of the Russian Federation, and Article 13, item 4 of the Federal Law “On Alternative Civilian Service””.

supreme value”, and views their recognition, observance and protection as an obligation of the state.

Other articles of Chapter 1 of the Constitution emphasise conditions for realisation of the constitutional catalogue of fundamental human and civil rights listed in Chapter 2. For instance, Article 6 (part 2) points out that every citizen of the Russian Federation shall enjoy all rights and freedoms on its territory and shall bear equal responsibilities as envisaged in the Constitution; Article 7 (part 1) defines the Russian Federation as “a social state whose policy is aimed at creating conditions ensuring a worthy life and a free development of Man”; part 2 of the same Article states that the labour and health of people shall be protected in Russia and enumerates some of the guarantees of social protection; Articles 8 (part 2) and 9 (part 2) underline protection of private, state, municipal and other forms of property, and the possibility to privately own land; Article 13 recognises ideological and political diversity and the multi-party system; Article 14 enshrines the freedom of religion; Article 15 establishes the requirement to publish normative legal acts concerning human and civil rights, freedoms and obligations.

In this regard it can be accepted that obligations of the state established in Chapter 1 of the Constitution are of a twofold legal nature and have a double purpose: on the one hand, they flow from the function of public authority on organisation of society, on the other hand, they are personalised towards an individual as a subject of legal entitlement, and serve as guarantees of individual rights.<sup>373</sup>

Article 2 of the Constitution holds: “the recognition, observance and protection of human and civil rights and freedoms shall be an obligation of the state”. It is noted that this is the only instance of using the wording “obligation of the state” in the Constitution.<sup>374</sup> Nevertheless, this obligation is multifaceted, it is textually applicable to all human and civil rights and freedoms, and establishes a sort of “reference point” with regard to their interpretation within the current legal system. It is no coincidence therefore that the wording “obligation of the state” (обязанность государства) was used in the Constitutional Court’s decisions around a thousand times – both for description of “fundamental tenets” subject to further analysis of legal norms,<sup>375</sup> and in description of concrete obligations to

373 Commentary to the Constitution of the Russian Federation / ed. Valery D. Zorkin – 2nd edition, revised. – Moscow: Norma: Infra-M, 2011 – p.65. ISBN 978-5-91768-218-1 [Комментарий к Конституции Российской Федерации / под ред. В.Д.Зорькина. – 2-е изд. пересмотр. – М.: Норма: Инфра-М, 2011].

374 Ibid, p. 66.

375 For example, in its Judgement of 13 April 2021 No.13-II immediately after describing the subject of consideration of the Constitutional Court, the following was underlined: “The Constitution of the Russian Federation proclaims Man, his rights and freedoms to be of supreme value, and recognition, observance and protection of human rights and freedoms as an obligation of state; it establishes that they have direct force, and determine the meaning, content and implementation of laws, the functioning of legislative and executive

ensure protection of citizens' rights.<sup>376</sup>

Provisions on human and civil rights and freedoms are reflected also in Chapter 3 of the Constitution, devoted to the federal structure of the Russian Federation. For example, the regulation of human and civil rights and freedoms is vested under the jurisdiction of the Russian Federation, and their protection – under the joint jurisdiction of the Russian Federation and its constituent entities (item “c” of Article 71 and item “b” of Article 72 – Chapter 3 “The Federal Structure”).

Regulation of human rights and freedoms encompasses a wide range of normative regulatory possibilities, including recognition by law and the state, legal establishing, defining their normative content, determination of conditions for their realisation, introduction of possible limitations. Placing regulation of rights and freedoms into the jurisdiction of the Russian Federation corresponds *inter alia* to rules on the possibility of limiting the human and civil rights and freedoms in accordance with Article 55. This Article establishes that limitations to human and civil rights and freedoms can be introduced only by federal law. “Regulation” of rights and freedoms is also closely connected to “protection” of civil and human rights and freedoms. The latter is understood as effective possibility to use rights and freedoms, that is secured by the state, and includes creation of necessary conditions for their realisation, provision of help or facilitation of their realisation, excluding obstacles for it, preventing violations of rights and freedoms and refraining of the state itself from unjustified and unlawful intrusion in rights and freedoms, from blocking the possibility to use them, and finally from encroaching upon their essence.<sup>377</sup>

Article 69 (part 1) of the Constitution is another important provision concerning establishment of rights and freedoms. It provides that the Russian Federation “shall guarantee the rights of indigenous small peoples in accordance with the universally recognised principles and norms of international law and international treaties of the Russian Federation.” In 2020, Article 69 of the Constitution was supplemented by the provision establishing that the state protects cultural identity of all the nations and ethnic communities of the Russian Federation, guaranteeing

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authority and of local self-government, and are ensured by justice on the basis of equality of all before the law and courts; but exercise of human and civil rights and freedoms must not violate rights and freedoms of other people.” Such language citing this constitutional provision may be considered typical.

376 For example the Judgement of 15 June 2020 No. 36-II indicates: “Possibility to apply [provisions as regards compensation of moral harm] in relations that are public law by nature, including in the cases of remedying by the state of the harm inflicted by unlawful actions (omission) of public state authorities and their officials in performing administrative prosecution, is connected with the obligation of state to create concrete procedures ensuring realisation of the right to obtain compensation of harm from the state, and therefore – to create compensatory mechanisms aimed at protection of violated rights.”

377 Commentary to the Constitution of the Russian Federation op. cit. p. 548.

preservation of ethnic-cultural and language variety. These provisions are of special importance in the Russian Federation, since it is a state with extremely large territory accommodating a lot of different nationalities.

Special federal laws have been adopted in furtherance of the said constitutional provisions taking into account the international standards in the sphere of protection of indigenous small peoples (national minorities). These include federal laws of 30 April 1999 No.82-ФЗ “On Guarantees of the Rights of Indigenous Small Peoples in the Russian Federation”, of 20 July 2000 No.104-ФЗ “On the Basic Principles of Organisation of Indigenous Small Peoples of the North, Siberia and Far East of the Russian Federation”, of 24 July 2009 No.209-ФЗ “On Hunt and Preservation of Hunting Resources and on Introduction of Amendments to Certain Legislative Acts of the Russian Federation” etc.

Provisions of the last named Federal law became subject to consideration of the Constitutional Court of the Russian Federation in its Judgement of 28 May 2019 No.21-II.<sup>378</sup> This Judgement resolved the issue of ensuring possibility to lead traditional life and traditional activities for members of the community of indigenous small people by way of determining the special order of hunting (the issue concerned possibility to entrust the hunting duty to one or several members of the community who had the status of hunters). The Constitutional Court in consideration of this case gave particular attention to the importance of preservation of traditional lifestyle, culture and history for indigenous small peoples.

In particular, the Constitutional Court noted that among indigenous small peoples of the Russian Federation the peoples of the North, Siberia and Far East of the Russian Federation occupy a special place. This is conditioned by geographical and climate properties of their traditional area of living which is mainly the land territory of the Arctic zone of the Russian Federation. This in turn conditioned the traditional basis of their lifestyle: having occupations such as hunting, fishing and deer farming, since agriculture is not in conformity with this traditional lifestyle and often impossible at all due to environmental conditions.

The Constitutional Court stressed that the federal legislator is obliged to regulate the rights of individuals belonging to indigenous small peoples of the North, Siberia and Far East of the Russian Federation, connected to their traditional lifestyle, economic activities and crafts, particularly the rights connected to

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378 Judgement of the Constitutional Court of the Russian Federation of 28 May 2019 No. 21-II “In the case on the review of constitutionality of Article 19 of the Federal Law ‘On Hunting and on the Preservation of Hunting Resources and on Introduction of Amendments to Certain Legislative acts of the Russian Federation’ in connection with the complaint of Russian citizen G.K. Schukin.”

environmental exploitation (hunting, fishing, etc.), taking into account special properties of their sustainment and social organisation, and guaranteeing preservation of the fundamentals of their identity.

## 2. Amendments in 2020

Finally, with regard to constitutional provisions concerned with rights and freedoms and placed outside Chapter 2 of the Constitution, we should mention the amendments introduced to the Constitution in the summer 2020 upon the all-Russian vote.<sup>379</sup> The Constitution was supplemented by a significant set of additional guarantees of socio-economic and cultural rights closely connected to rights and freedoms provided for in Chapter 2.

Thus, the additions to constitutional regulation of the functions and powers of public authorities determine not only the subject of state activity, but also its target orientation. For example,

- children are identified as the most important priority of the state policy of Russia (Article 67<sup>1</sup>, part 4);
- important and specific parameters of labour and social guarantees have been determined: according to the Constitution, the minimum wage is not less than the subsistence minimum of the working-age population as a whole in the Russian Federation; the indexation of pensions at least once a year in accordance with the federal law, the indexation of social benefits and other social benefits in accordance with the federal law (Article 75, parts 5-7);
- the responsibilities of the state include not only the usual health care issues, but also the creation of conditions for a healthy lifestyle, creation of a culture of a responsible attitude of citizens to their health (Article 72, part 1, item g));
- creation of conditions for decent upbringing of children in a family and for fulfilling by children of legal age of their obligation to take care of parents are provided for (Article 72, part 1, item g<sup>1</sup>).

The powers of the Government of the Russian Federation are additionally established (Article 114), in particular, including the adoption of measures:

- on social integration of disabled people, creating an accessible

<sup>379</sup> See detailed analysis in: V. Sivitskiy Development of organisation and functioning of public authorities in Russia: amendments to the Constitution in 2020 // Bulletin of the Eurasian Association of the Bodies of Constitutional Supervision. 2(82). Nur-Sultan, 2020. [В.Сивицкий Совершенствование организации и функционирования публичной власти в России: изменения Конституции в 2020 году // Вестник Евразийской ассоциации органов конституционного контроля. Выпуск 2 (82). Нур-Султан, 2020].

- environment for them;
- to support civil society institutions, including non-profit organisations, and volunteer activities;
- on the implementation of the principles of social partnership;
- on the education in the sphere of ecological culture.

In accordance with the new Article 75<sup>1</sup> of the Constitution within the state conditions are created for sustainable economic growth of the country and increase of prosperity of citizens, for mutual trust between the state and the citizens; protection of citizens' dignity and respect for a working man shall be guaranteed; balance between rights and obligations of citizen, social partnership, economic, political and social solidarity shall be ensured. Thereby, the multi-faceted principles of social solidarity are established as an overarching principle of the work of public authorities in Russia.

### **3. Relationship to Chapter 2 of the Constitution**

The content of the Constitution is of supreme legal force (i.e. there is no hierarchy for its provisions). Nevertheless, the provisions concerning the human and civil rights and freedoms provided for outside Chapter 2 "Human and Civil Rights and Freedoms" determine primarily the manner of ensuring rights and freedoms, as well as principles for their realisation.

The considered provisions can be conditionally called "complementary" within the framework of a systematic interpretation by the Constitutional Court of the Russian Federation of the rights and freedoms established by Chapter 2 of the Constitution. Establishment of powers of the state authorities (the examples provided point to the Government of the Russian Federation) is of separate importance, as well as establishing different jurisdiction of the Russian Federation and its constituent entities. These provisions in principle may become subject of separate evaluation both from the point of view of considering the obligations of the state and if there is a dispute regarding competence. At the same time, if such provisions are introduced to the text of the Constitution of the Russian Federation in the form of a draft Law on Amendment to the Constitution, they can become subject to *ex ante* review by the Constitutional Court of the Russian Federation for their concordance with provisions of Chapter 2 of the Constitution.

### **C. Concretization of constitutional rights**

Norms of the Constitution of the Russian Federation have direct effect, i.e. as a



general rule—they do not require legislative concretisation provisions.

The set of rights enshrined by Articles 47-51 related to the sphere of criminal proceedings and guarantees of rights of the accused in commission of a crime are in fact effected directly (in certain cases the constitutional provisions are reproduced in the legislation). This is true for presumption of innocence, right to legal assistance, prohibition to use evidence obtained in violation of law, possibility to establish situations where giving evidence as witness is not obligatory. An individual also has the right to refuse to give evidence against his or her spouse or close relatives with reference to Article 51 of the Constitution.

Moreover, the practice of the Constitutional Court pointed out that where there is a lacuna in law, the constitutional provisions are to be applied directly. For example, in its Ruling of 18 September 2014 No. 1828-O<sup>380</sup> the Constitutional Court referred to the direct application of the Constitution of the Russian Federation in the case of a legal lacuna in the issues of judicial appeal against a remand centre or penitentiary facility official's decision or action (omission).

At the same time the constitutional text is highly abstract, and therefore the current legislation concretises, one way or another, virtually all human and civil rights and obligations listed therein. Constitutional basis for this includes vesting the regulation of human and civil rights and freedoms into jurisdiction of the Russian Federation (Article 71), and establishing basic criteria for limitation of human and civil rights and freedoms (Article 55).

## 1. Case study: The right to life

An example of concretising in constitutional provisions, legislation and constitutional jurisprudence can be drawn from the right to life.

Article 20 (part 1) of the Constitution enshrines the absolute human right to life: “everyone shall have the right to life”. This right is not subject to limitation under any circumstances, as confirmed by contents of Article 56 of the Constitution (establishing possibility to limit certain rights and freedoms in a state of emergency).

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<sup>380</sup> Decision of the Constitutional Court of the Russian Federation of 18 September 2014 No. 1828-O “Upon complaint of the citizen Zubilevich Alesya Igorevna on violation of her constitutional rights by Article 84 of the Criminal Code of the Russian Federation, Act of the state Duma of the Federal Assembly of the Russian Federation of 2 July 2013 No. 2559-6 ГД “On Declaring Amnesty”, and the Act of the state Duma of the Federal Assembly of the Russian Federation of 2 July 2013 No. 2562-6 ГД “On the order of application of the Act of the state Duma of the Federal Assembly of the Russian Federation of 2 July 2013 No. 2559-6 ГД ‘On Declaring Amnesty’.”



And yet, Article 20 (part 2) of the Constitution further details this right by way of regulating capital punishment: “Capital punishment until its complete abolition may be established by federal law as an exclusive form of punishment for particularly grave crimes against life, and the accused shall be granted the right to have his case examined by a court with the participation of a jury”. These provisions establish the aim for legislative regulation: abolition of capital punishment, as well as exclusive instances of using this punishment until its complete abolition.

It follows that there are, at first sight, several avenues to detail the right to life: protection of this right from encroachment from private parties and the state, as well as establishing parameters for capital punishment by way of regulation of jury trial.

These avenues are followed by criminal legislation: the Criminal Code of the Russian Federation establishes punishment for murder (i.e. deprivation of life), and defines capital punishment; the Code of Criminal Procedure regulates procedural aspects of a trial with participation of jury.

The Constitutional Court of the Russian Federation gave much consideration to this issue, and its decisions excluded the possibility to apply capital punishment.

In its Judgement of 2 February 1999 no. 3-P<sup>381</sup> the Constitutional Court of the Russian Federation, acting within the subject matter of the case, on the basis of necessity to secure throughout the territory of Russia equal right of citizens to have their case considered by a court with participation of jury, found that from entering of the said Judgement into force until adoption of a relevant federal law securing within all the territory of Russian Federation the right to be tried by a court with participation of jury for every person accused in committing a crime that according to law can be punished by death penalty (capital punishment) as an exclusive form of punishment, such punishment cannot be imposed irrespective of whether a certain case is considered by a court with participation of jury, by a panel of three judges or by court composed of a judge and two lay judges (“peoples assessors”).

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381 Judgement of the Constitutional Court of the Russian Federation of 2 February 1999 No. 3-II “In the case concerning the review of the constitutionality of certain provisions of Article 41 and Section 3, Article 42 of the Criminal Procedure Code of the RSFSR, Subsections 1 and 2 of the Decree of the Supreme Soviet of the Russian Federation ‘On the Procedure of Entry into Force of the Law of the Russian Federation ‘On Amendments to the Law of the RSFSR ‘On the Judicial System of the RSFSR’, the Criminal Procedure Code of the RSFSR, the Criminal Code of the RSFSR, and the Administrative Offences Code of the RSFSR’ of 16 July 1993 in connection with a request of the Moscow City Court and complaints of a number of individuals.”

In this Judgement the Constitutional Court invoked procedural grounds to forbid imposition of capital punishment: namely, due to the lack of uniform availability of jury trials, even if jury trial does not exist in some parts of Russian territory. Nevertheless, over time the legal potential of this ground became exhausted since courts with jury participation were created on all the territory of the Russian Federation by 1 January 2010.

In this regard the Constitutional Court received a request from the Supreme Court of Russia, which asked for official clarification of provisions of Judgement of 2 February 1999 related to the moratorium imposed on capital punishment. The request was based on the assumption that after jury courts were introduced on all the territory of Russia the judges may ponder possibility of imposition of capital punishment. In other words, the question was raised whether the prohibition of capital punishment that was established by the Constitutional Court Judgement continued to exist after 1 January 2010.

The Constitutional Court responded to the Supreme Court request by clarifying the order of execution of its Judgement of 2 February 1999 no. 3-P in the context of trends as regards capital punishment connected to the international obligations of the Russian Federation as regards the moratorium imposed on it. In its Decision of 19 November 2009 no 1344-O-R<sup>382</sup> the Constitutional Court held that in the Russian Federation, due to a lengthy moratorium on the imposition and execution of capital punishment, stable guarantees of the right not to be subjected to capital punishment had evolved; therefore a legitimate constitutional legal regime has developed, which promotes an irreversible process towards complete abolition of capital punishment as an exclusive punishment foreseen only temporarily (according to the Constitution – “until its complete abolition”) and possible only for an interim period, i.e. until the achievement of the goal foreseen by Article 20 (Section 2) of the Constitution of the Russian Federation; therefore the execution of the said Judgement in part related to introduction of jury court in all the territory of the Russian Federation does not open the possibility to impose capital punishment, even if it is based on the guilty verdict rendered by a jury.

At the same time the Constitutional Court of the Russian Federation noted that the Russian Federation is bound by requirements of Article 18 of the Vienna

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382 Decision of the Constitutional Court of the Russian Federation of 19 November 2009 No. 1344-O-P “On clarification of item 5 of the operative part of the Judgement of the Constitutional Court of the Russian Federation of 2 February 1999 No. 3-II ‘In the case concerning the review of the constitutionality of certain provisions of Article 41 and Section 3, Article 42 of the Criminal Procedure Code of the RSFSR, Subsections 1 and 2 of the Decree of the Supreme Soviet of the Russian Federation “On the Procedure of Entry into Force of the Law of the Russian Federation ‘On Amendments to the Law of the RSFSR ‘On the Judicial System of the RSFSR’, the Criminal Procedure Code of the RSFSR, the Criminal Code of the RSFSR, and the Administrative Offences Code of the RSFSR’ of 16 July 1993.”

Convention on the Law of Treaties not to take actions that would deprive Protocol no. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms (signed but not ratified by Russia) of its object and aims; this obligation is imposed on the state as a whole and can be realised in any form on the basis of separation of powers, and the coherent functioning and cooperation of public state authorities.

Impossibility to impose capital punishment and its non-execution are equally compliant with Article 18 of the Vienna Convention on the Law of Treaties. Therefore, the obligations of the Russian Federation after signing of Protocol no. 6 were discharged at first by replacing capital punishment with other punishment (unconnected with deprivation of life), which was done individually by issuing Presidential pardons (item “c”, Article 89 of the Constitution of the Russian Federation), and further – by the Constitutional Court’s judgement on the prohibition to impose capital punishment, as rendered in the Judgement of the Constitutional Court of the Russian Federation of 2 February no. 3-P.

## **2. Implementation**

For some rights the Constitution foresees the necessity to establish a mechanism of their realisation in the legislation. For example, Article 39 (part 1) establishes that everyone shall be guaranteed social security for old age, in case of illness, disability and loss of the bread-winner, for the bringing up of children and in other cases specified by law.

In principle, implementation of all constitutional rights is secured by their detailing in current legislation. It is based on relevant special laws, e.g. as regards the right to travel freely and freely to choose the place of temporary or permanent residence (Article 27, part 1) – Law of the Russian Federation of 25 June 1993 No.5242-I “On the Right of the Citizens of the Russian Federation to Freely Travel and Choose the Place of Temporary or Permanent Residence Within the Russian Federation”; as regards the right to freedom of conscience and religion – Federal Law of 26 September 1997 No. 125-Φ3 “On the Freedom of Conscience and Religious Communities”; as regards the rights to elect and to be elected in state and municipal authorities and to take part in a referendum – Federal Law of 12 June 2002 No.67-Φ3 “On the Basic Guarantees of Electoral Rights and the Right to Take Part in Referendum of the Citizens of the Russian Federation” etc.

## D. Historical background and development

The title of Chapter 2 of the Constitution “Human and Civil Rights and Freedoms” aims not to reflect its whole content, but makes an emphasis on its core. It is aimed *inter alia* to reflect the main milestones of the constitutional legal development of the Russian Federation as compared to the Soviet period. The choice of this title was not “automatic”, it was not inherited from the Basic Law previously in force (the relevant section was entitled “The state and Individual”) or from one of the drafts of the Constitution (the draft presented on 2 March 1992 that was used as basis for drafting the Constitution used the title “Basic Human and Civil Rights, Freedoms and Obligations.”)<sup>383</sup>

The list of rights and freedoms enumerated in Chapter 2 of the Constitution represents development and concretisation of the basis of the constitutional system of the Russian Federation.

Placement of this Chapter within the structure of the Constitution can be seen as demonstrating development of the provisions of the “Constitution (Basic Law) of the Russian Federation – Russia” adopted by the Supreme Council of the Russian Soviet Federative Socialist Republic (the RSFSR) on 12 April 1978. The structure of this Basic Law for the first time in the history of constitutions of the USSR period underlined the importance of human rights, which were placed into Section II “The state and Individual” (Chapters 5 “Human and Civil Rights and Freedoms” and 6 “Obligations of Citizens of the Russian Federation”). Section I “The Basis of the Social System and Policy of the Russian Federation” defined the basics of political, economic, social, cultural and external policy systems of the Russian Federation.

Changing of contents of the first chapters of the Constitution as compared to the previous basic laws underlines the evolution of approaches of the state to interaction with citizens. Guaranteed individual rights and freedoms that is implied by defining Russia as a state under the rule of law makes an individual an “equal partner” of the state, makes it possible to produce legal claims towards the state.<sup>384</sup>

383 Creation of the Constitution of the Russian Federation. Constitutional Commission: verbatim records, materials, documents (1990-1993): in 6 vol., vol. 3: 1992. Book 1 (January – June 1992) / ed. O.G. Rummyantsev – M. Wolters Kluwer, 2008 – p. 83. ISBN 978-5-466-00341-3 [Из истории создания Конституции Российской Федерации. Конституционная комиссия: стенограммы, материалы, документы (1990-1993 гг.): в 6 т. Т. 3: 1992 год. Книга первая (январь – июнь 1992 года) / под общ. ред. О.Г.Румянцева. – М.: Волтерс Клувер, 2008].

384 Commentary to the Constitution of the Russian Federation / ed. Valery D. Zorkin – 2nd edition, revised. – Moscow: Norma: Infra-M, 2011 – p.52. ISBN 978-5-91768-218-1 [Комментарий к Конституции Российской Федерации / под ред. В.Д.Зорькина. – 2-е изд. пересмотр. – М.: Норма: Инфра-М, 2011].

The Constitution of the Russian Federation of 1993 was drafted in difficult conditions representing the dismantling of the previously existing socialistic scheme, a period when a state with relatively short but exceptionally complicated history came to an end.

Transfer from planned economy to market economy was reflected in the constitutional provisions declaring full protection of the right to private property, and it was but one of the fundamental changes. The list of human and civil rights and freedoms was not radically changed, but its meaning and place in the legal system and approaches reflected therein were renewed completely. The outstanding value of the Constitution is that it strengthened the stability of state structures and at the same time left a space for freedom within them.<sup>385</sup>

Chapter 2 of the Constitution is fundamental to the Russian legal system, and as such it cannot be amended without adoption of a new Constitution. Despite significant changes introduced to the Constitution (including those made in 2020) these provisions remained unchanged since the day of adoption.

## **II. Classification and content**

### **A. Enumerated constitutional rights**

#### **1. Categories of rights**

The order of enumeration of rights and freedoms in the Constitution does not establish their hierarchy, but reflects the concept of the legal status of individual that is embraced by the state. Personal rights are listed first (Articles 20-29), then political rights and after that – socio-economic and cultural rights. This order mirrors the one accepted by the Universal Declaration of Human Rights, adopted by the UN General Assembly in 1948.

Before listing the rights and freedoms, the Constitution defines benchmarks for their evaluation. In particular it is stated that in the Russian Federation human and civil rights and freedoms shall be recognised and guaranteed according to the universally recognised principles and norms of international law; that basic

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<sup>385</sup> V. Zorkin, *Legal Path of Russia* – 2 edition – M.: Norma, 2019 – p.13-14. The cited work represents deep analysis of the Russian constitutional system's creation and evolution both from historical and strictly legal points of view. It has been translated into English.

human rights and freedoms shall be inalienable and shall be enjoyed by everyone from birth; and that their exercise must not violate the rights and freedoms of other people (Article 17); that human and civil rights and freedoms shall have direct force, and they shall determine the meaning, content and implementation of laws, the functioning of legislative and executive authority and of local self-government, and shall be secured by justice (Article 18); that all persons shall be equal before the law and the court, and that the equality of human and civil rights and freedoms shall be guaranteed regardless of sex, race, nationality, language, origin, material and official status, place of residence, attitude to religion, convictions, membership of public associations, or of other circumstances (Article 19). The latter provisions also state directly, that men and women shall enjoy equal rights and freedoms and equal opportunities to exercise them.

#### a) Personal and civil rights

Articles 20-29 of the Constitution are devoted to personal human and civil rights and freedoms. These rights belong to *everyone* irrespective of citizenship, and encompass “natural” rights necessary to safeguard life, freedoms, dignity of human as a person. They include the right to life and conditions for application of capital punishment (Article 20); right to dignity (obligation of the state to protect human dignity), prohibition of being subjected to torture, violence, or other severe or humiliating treatment or punishment, or being subjected to medical, scientific or other experiments without voluntary consent (Article 21); right to freedom and personal inviolability, admissibility of deprivation of liberty (in the form of arrest, detention or custody) only for 48 hours without a court order (Article 22); right to inviolability of private life, personal and family privacy, and protection of honour and good name, to privacy of correspondence, of telephone conversations and of postal, telegraph and other communications and permissibility of limitation of the right to privacy of correspondence only on the basis of a court order (Article 23); prohibition to collect, keep, use and disseminate information about the private life of a person without a person’s consent, and obligation of state government bodies and local self-government bodies and their officials to provide everyone with access to documents and materials directly affecting his (her) rights and freedoms, unless otherwise envisaged by law (Article 24); inviolability of home and possibility to enter one’s home without his or her consent only in cases established by law or on the basis of court order (Article 25); right of everyone to determine and declare his or her nationality, to use native language and freely choose the language of communication, upbringing, education and creative work (Article 26); freedom of travel and choice of temporary or permanent residence, the right of everyone to freely leave the Russian Federation, and the right of Russian Federation citizens to freely return thereto (Article 27); freedom of conscience

and religion (Article 28); freedom of thought and speech, and prohibition of propaganda or agitation which arouses social, racial, national or religious hatred and hostility (Article 29).<sup>386</sup>

#### b) Political rights

Articles 30-33 of the Constitution enshrine the basic political rights. These rights are by nature connected to citizenship of the Russian Federation, including creation of trade unions for protection of their interests (Article 30). This right is described as collective.

Apart from this provision the relevant articles of the Constitution of the Russian Federation establish that the citizens of the Russian Federation have the following rights: to assemble peacefully, without weapons, hold rallies, mass meetings and demonstrations, marches and pickets (Article 31); to participate in managing state affairs both directly and through their representatives, to elect and be elected to state government bodies and local self-government bodies, as well as to participate in referendums, to enjoy equal access to state service, to participate in administering justice (Article 32); to appeal in person and make individual and collective appeals to state bodies and local self-government bodies (Article 33).

#### c) Socio-economic and cultural rights

Articles 34-44 of the Constitution of the Russian Federation establish socio-economic and cultural rights aimed to ensuring physical, material, spiritual and other socially important needs of a person. These rights in general are afforded to everyone irrespective of citizenship. The important difference from the USSR period is that the current Constitution includes the right to free labour (Article 37, part 1), whereas, for example, the *obligation* to work was envisaged in Article 12 of the Constitution of the USSR of 1936, which was placed in Chapter I – “Social Order”. The *right* to labour was foreseen only in Chapter X “Main rights and Obligations of Citizens” (Article 118) of the 1936 USSR Constitution. As regards the latter it should also be noted that the early Soviet constitutions defined the right to labour as the right to receive guaranteed work, the labour to be paid in accordance to its amount and quality, no less than the minimum amount established by the state. The Basic Law of the RSFSR by the end of the Soviet era established the right to freely choose or consent to work, and to freely use his or her labour skills choosing the profession and occupation. The modern Constitution

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<sup>386</sup> This provision was described in detail in the previous Research study of the AACC Secretariat for Research and Development, see: Freedom of Expression: Experience of AACC Members, pp. 502-549 (URL: <http://www.aaccsr.org/contentsFileDownload.do?cntntsNo=1204&fileSeCode=185001&fileSn=1>).



of Russia underlines the freedom of labour, and envisages that everyone shall have the right freely to use his (her) labour skills and to choose the type of activity and occupation (Article 37). The same Article provides that compulsory labour shall be forbidden; that everyone shall have the right to work in conditions which meet safety and hygiene requirements, and to receive remuneration for labour without any discrimination whatsoever and not below the minimum wage established by federal law, as well as the right of protection against unemployment; the right of individual and collective labour disputes shall be recognized; that everyone shall have the right to rest, including, days of rest and public holidays.

The current Constitution also establishes that everyone shall have the right to use freely his (her) abilities and property for entrepreneurial and other economic activity not prohibited by law, but economic activity aimed at monopolisation and unfair competition shall not be permitted (Article 34); the right of private property shall be protected by law, everyone shall have the right to have property and to possess, use and dispose of it both individually and jointly with other persons, nobody may be deprived of property except under a court order, and that forced alienation of property for state requirements may take place only subject to prior and equal compensation, also the right of inheritance shall be guaranteed (Article 35); citizens and their associations shall have the right to possess land as private property, possession, utilisation and disposal of land and other natural resources shall be exercised by the owners freely provided that this is not detrimental to the environment and does not violate the rights and lawful interests of other people (Article 36). No less important are other socio-economic and cultural rights: maternity, childhood and family shall be protected by the state (Article 38); everyone shall be guaranteed social security for old age, in case of illness, disability and loss of the bread-winner, for the bringing up of children and in other cases specified by law (Article 39); everyone shall have the right to a home. Nobody may be arbitrarily deprived of his (her) home (Article 40); everyone shall have the right to health protection and medical care, and that medical care in state and municipal health institutions shall be rendered to citizens free of charge (Article 41); everyone shall have the right to education, general access and free pre-school, secondary and secondary vocational education in state and municipal educational institutions and at enterprises shall be guaranteed, everyone shall have the right to receive on a competitive basis free higher education in state and municipal educational institutions and at enterprises, basic general education shall be compulsory (Article 43); everyone shall be guaranteed the freedom of literary, artistic, scientific, technical and other types of creative activity and teaching, and intellectual property shall be protected by law, also everyone shall have the right to participate in cultural life and use cultural establishments, and the right of access to cultural valuables (Article 44). The Constitution also established the



right sometimes perceived as belonging to the newest generation of rights, that is, the right to a favourable environment. According to Article 42, everyone shall have the right to a favourable environment, reliable information on the state of the environment and compensation for damage caused to his (her) health and property by violations of environmental laws.

#### d) Rights of legal protection

Articles 45-56 can be called a catalogue of rights of legal protection: they guarantee state and in particular judicial protection of human and civil rights and freedoms, possibility to protect one's rights by any means not prohibited by law, challenge actions (omission) and decisions of state and municipal authorities, and guarantee possibility to apply to interstate bodies for protection of human rights if internal legal remedies have been exhausted (Articles 45 and 46); everyone's right to have his or her case heard in the court and by the judge within whose competence the case is placed by law and the right of an accused to have his (her) case examined by a court with the participation of a jury in the cases envisaged by federal law (Article 47); right to qualified legal assistance, and the right of any person detained, taken into custody or accused of committing a crime shall have the right to use the assistance of a lawyer (counsel for the defence) from the moment of being detained, placed in custody or accused (Article 48); presumption of innocence (Article 49); prohibition of being convicted twice for one and the same crime, prohibition to use evidence received through violating federal law in administering justice, right to appeal against the verdict to a higher court in accordance with the procedure established by federal law, as well as to request pardon or mitigation of the punishment (Article 50); right not to testify against him- or herself, or one's spouse or close relatives (Article 51); protection by law of the rights of victims of crimes and abuses of office, including provision to the victims with access to justice and compensation for damage sustained (Article 52); prohibition of retroactive force of the law introducing or increasing liability (Article 54).

## **2. Other provisions**

Article 55 can be viewed as finalising the list of basic human and civil rights and freedoms. It establishes that the enumeration in the Constitution of the Russian Federation of the basic rights and freedoms should not be interpreted as a denial or diminution of other universally recognized human and civil rights and freedoms; prohibits adoption of laws abolishing or diminishing human and civil rights and freedoms; and states that human and civil rights and freedoms may be limited by federal law only to the extent necessary for the protection of the basis of the

constitutional order, morality, health, rights and lawful interests of other people, and for ensuring the defence of the country and the security of the state. Article 56 establishes the possibility and scope of limitation of rights in a state of emergency.

Articles 57-59 establish constitutional obligations: payment of legally established taxes and levies, preservation of nature and environment, and defence of the Fatherland (the latter being duty and obligation of a citizen of the Russian Federation).

Chapter 2 ends with a catalogue of guarantees of exercise of rights: it concerns provisions on full legal capacity of a citizen of Russia from the age of 18 (Article 60); prohibition of deportation and extradition of Russian citizens from Russia (Article 61); possibility to hold dual citizenship and equality of rights of Russian and foreign citizens unless further specified by federal laws and international treaties (Article 62); and finally on the possibility to grant political asylum and limitations for extradition of foreign citizens to third states (Article 63).

### **3. Structure of provisions**

The internal structure of constitutional norms is rather diverse. Often, the first part of the relevant Article names the essence of a certain right (freedom). Subsequent parts of an Article contain more detailed provisions clarifying certain aspects of the right, establishing criteria for its exercise and limitation.

For example, part 1 of Article 22 recognises the right of everyone to freedom and personal inviolability, and part 2 clarifies that arrest, detention and keeping in custody is possible only under a court decision, and that without a court decision such arrest is possible only for 48 hours. The right to a home stated by part 1 of Article 40 is clarified in parts 2 and 3 of this Article by provisions encouraging housing construction, creation of conditions for the exercise of the right to a home, affording living premises free of charge or for an acceptable fee for low-income citizens or other categories of citizens listed in federal law from state, municipal and other housing funds under the norms provided for by law. The right to education is envisaged by part 1 of Article 43, parts 2-5 of this Article in more detail consider pre-school, basic general, secondary professional and higher education. Right to court protection afforded to everyone by part 1 of Article 46 is clarified in part 2 of this Article by the possibility to challenge in court the actions (omission) of state authorities, municipal authorities, associations and officials; and part 3 of this Article defines the right to apply to interstate bodies for protection of human rights if internal legal remedies are exhausted.

Clarifications or additional guarantees can be established by different articles of the Constitution related to the same right. Thus, part 3 of Article 37 establishes the right to receive remuneration for labour without any discrimination whatsoever and not below the minimum wage established by federal law. Part 5 of Article 75 as amended in 2020 guarantees minimal wage in the amount of no less than subsistence rate for able-bodied general population throughout the Russian Federation.

#### 4. Rights holders

##### a) Foreign citizens and stateless persons

The Constitution establishes a general rule as regards equality of rights and obligations of citizens of the Russian Federation and foreign citizens, as well as stateless persons (Article 62, part 3). Immediate application of this constitutional provision in certain cases allowed overcoming insufficient clarity of legislation. One of the notable examples of this is acceptance for consideration of the constitutional complaint of the stateless person Yakhya Dashti Gafur, and delivering a Judgement of 17 February 1998 No.6-II upon this application.<sup>387</sup> Dealing with the admissibility of this complaint the Constitutional Court of the Russian Federation underlined that there was no direct indication that stateless persons can apply to the Constitutional Court in the Federal Constitutional Law “On the Constitutional Court of the Russian Federation” (as in force at the moment of consideration). Nevertheless, “the possibility of protection of rights and freedoms by way of constitutional justice must be ensured to everyone, including foreign citizens and stateless persons, if the law violates their rights guaranteed by the Constitution of the Russian Federation”. The merits of the complaint also was connected to the possibility to extend to foreign citizens (stateless persons) subject to administrative expulsion, the constitutional provisions prohibiting the apprehension (arrest, detention) without a court decision for more than 48 hours. The Constitutional Court recognised the relevant provisions of the Law of the USSR “On the Legal Status of Foreign Citizens in the USSR” that implied possibility of such apprehension without a court decision, as contradicting the Constitution.

Certain constitutional provisions are devoted directly to ensuring rights of foreign citizens. An example of this would be Article 63, establishing possibility to

<sup>387</sup> Judgement of the Constitutional Court of the Russian Federation of 17 February 1998 No. 6-II “In the case concerning the review of constitutionality of provision of Article 31, part 2 of the Law of the USSR of 24 June 1981 “On the Legal Status of Foreign Citizens in the USSR” in connection with the complaint of Yakhya Dashti Gafur.”

obtain political asylum in Russia and prohibition to extradite the persons who are persecuted for political convictions, or action (omission) that are not recognised as criminal in Russia.

### b) Groups and collective entities

The constitutional provisions also recognise the rights of different associations of citizens or subjects of collective rights. These include: the right to create a trade union and the right to collective labour dispute (Article 30, part 1; Article 37, part 4); right of an association of citizens to own land (Article 36, part 1); right of republics as a special type of constituent entities of the Russian Federation to establish their own national language in addition to the Russian language (Article 68, part 2); rights of indigenous small peoples in accordance with universally recognised principles and norms of international law and international treaties of the Russian Federation (Article 69, part 1); guarantees of cultural identity of all peoples and ethnic communities of the Russian Federation (Article 69, part 2).

The Constitutional Court of the Russian Federation recognises a legal person as an association of citizens, and therefore the Constitution affords it the same rights and freedoms (insofar as applicable to a legal person), and the same protection as guaranteed to a citizen (Judgement of 26 November 2012 No. 28-II).<sup>388</sup>

## **B. Unenumerated constitutional rights**

The Constitution contains no special provision foreseeing “unenumerated” constitutional rights. The lack of such a special provision is apparently rather common for civil law systems, even when taking into account that different constitutional systems presently tend to accept global standards of human rights.

### **1. Legal principles**

Part 1 of Article 55 of the Constitution underlines that enumeration in the Constitution of the basic rights and freedoms should not be interpreted as a denial or diminution of other universally recognised human and civil rights and freedoms. Taken in conjunction with the powers of the Constitutional Court of the Russian Federation to perform official interpretation of the Constitution, this does

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<sup>388</sup> Judgement of the Constitutional Court of the Russian Federation of 26 November 2012 No.28-II “In the case concerning the review of constitutionality of provisions of article 16.2, part 1 and 27.11, part 2 of the Code on Administrative Offences of the Russian Federation in connection with the complaint of the limited liability company “Avesta.”

not exclude revealing the contents of the constitutional text, possibly including legal principles that flow from it but are not established directly therein.

In this context it should be noted that the Constitutional Court participates in the development of the constitutional legal doctrine for the protection of human rights by way of formulation of the principles of legal regulation of social relations arising from the Constitution. Such principles include the principle of maintaining citizen's trust in the law and actions of the state; the principle of legal certainty and reasonable stability of legal regulation; and the principle of predictability of legislative policy.<sup>389</sup>

These principles effectively supplement constitutional legal mechanisms of protection of human rights and freedoms.

For example, in the Judgement of 14 November 2018 No. 41-II<sup>390</sup> the provision of the Federal Law "On Education in the Russian Federation" that established qualification requirements for nursery teachers in pre-school educational institutions, was recognised as not conformant with the Constitution. This provision was used to terminate employment contracts with nursery teachers of pre-school institutions that were accepted for work before the law came into force, successfully performed their pedagogical duties, and were recognised by qualification boards as being up to their jobs. The Constitutional Court pointed out *inter alia* to the violation by application of the challenged norm in the current legal framework of the right of the applicant to labour, as well as of the principle of maintaining citizen's trust in the law and actions of the state.

In the Judgement of 27 March 2018 No.13-II<sup>391</sup> it was directly mentioned that the principle of maintaining citizen's trust in the law and actions of the state extends not only to the rights directly enumerated in the Constitution of the Russian Federation, but also to the rights acquired under legislation. Therefore empowering the legislator of a constituent entity of the Russian Federation to introduce and terminate additional measures of social support does not mean that it possesses unlimited discretion and is allowed to arbitrarily refuse to discharge previously taken public obligations. On the contrary, it should take all possible

389 V. Zorkin op. cit. p. 125.

390 Judgement of the Constitutional Court of the Russian Federation of 14 November 2018 No. 41-II "In the case on the review of constitutionality of Article 46 of the Federal Law "On Education in the Russian Federation" in connection with a complaint of I.V. Seregina."

391 Judgement of the Constitutional Court of the Russian Federation of 27 March 2018 No. 13-II "In the case on the review of constitutionality of Item 3 of Article 1 of the Law of the Stavropol Territory "On Recognition as Having Lost Force of Individual Provisions of Legislative Acts of the Stavropol Territory" in connection with a complaint of M.S. Kolesnikova."

efforts to keep them, and balance constitutionally important values, as well as public and private interests. If due to budgetary issues of the constituent entity of the Russian Federation it appears objectively impossible, it should at least mitigate as far as possible the negative consequences for persons who had expectations reasonably based on the legislation as regards obtaining relevant measures of social support. Another approach not only would be in contravention to the nature of a social welfare state, but also would be at variance with the requirement flowing from Articles 2 and 18 of the Constitution, which is to ensure recognition, observance and protection of human and civil rights and freedoms that determine the meaning, content and implementation of laws.

## 2. Legal reality

The principles developed by the Constitutional Court can ultimately find their reflection in the text of the Constitution itself. Thus, the new Article 75<sup>1</sup> of the Constitution establishes that in the Russian Federation conditions shall be created for mutual trust between the state and the citizens.

The factors of legal reality affect clarification (and possibly extension) of contents of constitutional rights. This potentially can lead to establishment of “unenumerated” rights. These factors include constitutionalising of rights and freedoms (i.e. extension of constitutional law and constitutional judicial practice to spheres that previously were considered to be beyond public legal regulation), as well as more visible formation of the newest generation of human rights and freedoms over time (information rights, ecological, reproductive etc.).

When the Constitutional Court encounters such situations it gives interpretations on the basis of the Constitution’s provisions, previously developed legal positions and existing practice of application of a law.

Thus, in the constitutional complaint resolved by the Judgement of 13 January 2020 No.1-II<sup>392</sup> the applicant complained that the Federal Law “On the Foundations of Healthcare in the Russian Federation” lacked provisions allowing her to receive copies of medical documents of her late husband. The Constitutional Court confirmed unconstitutional uncertainty of the challenged provisions. They did not establish after the death of a patient any legal regime of access to information of his or her health and medical documentation for close relatives, family members

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392 Judgement of the Constitutional Court of the Russian Federation of 13 January 2020 No. 1-II/2020 “In the case on the review of constitutionality of Article 13, Sections 2 and 3; Article 19, Section 5, para. 5; and Article 19, Section 1 of the Federal Law “On the Foundations of Healthcare in the Russian Federation” in connection with the complaint of R.D. Svechnikova.”

or other trusted persons, as well as any regulation of the scope of information to be disclosed, forms or timeframe for its submission. These shortcomings of the regulation were at variance with the common approach foreseen by the Federal Law “On the Foundations of Healthcare in the Russian Federation” regarding the necessity to disclose health information, if a negative outcome of the illness is foreseen, to the person’s close relatives or trusted persons (if there is no direct prohibition or instruction from the patient in this regard). As a result, the challenged regulation did not ensure adequate balance between guarantees of protection of personal secrets and personal data of a deceased, that are based on constitutional requirements of respect of private life, and necessity to disclose medical secrets in certain cases – both for observance by the state’s obligation to protect right to life in the aspect of investigating into the death of a patient, and in the context of the protection of rights and lawful interests of living members of the family. Considering applicable constitutional provisions of personal dignity, right to protection of personal information, right to medical help, right to protection, the Constitutional Court concluded that the Constitution allows possibility for establishing a special legal regime in respect of the information constituting medical secrets. This regime may include limiting free access to such information for citizens, given the guarantees of protection of private life, honour and dignity of the deceased and good memories of him or her, as well as the protection of rights and lawful interest of the relatives, cannot be excluded from the sphere of general (public) interest in a state where humans, and their rights and freedoms are of supreme value.

Another type of such revealing of the Constitution’s provisions is the interpretation of obligations directly established therein through the corresponding individual rights. For example, the Constitution directly states that human dignity is protected by the state, and nothing can be a ground to diminish it (Article 21, part 1). In its rulings the Constitutional Courts interpreted these provisions essentially as an individual right, stating particularly that international recognition and constitutional entrenchment of the category “personal dignity” must produce normative effect on the whole system of legal regulation and the practice of law-enforcement in the Russian Federation. Thus, in its Judgement of 8 April 2021 No.11-Π the Constitutional Court stated: “among other rights and freedoms that are effected directly, determine the meaning, contents and application of laws, the functioning of legislative and executive authority and of local self-government, and are guaranteed by justice, the *right to protection of personal dignity*, as well as the right to freedom and personal inviolability belong to everyone from birth and comprise the fundamental basis of freedom, justice and all the intrinsic human rights, represent a most important social value, without which one cannot imagine democratic legal structure of a country, and therefore these rights imply



increased level of guarantees <...> from the part of state <...>. Non-taking of timely measures to disclose and prevent violation of rights and freedoms where subsequently they cannot be repaired would mean diminishing of honour and dignity of person, not only by the culprit who committed the unlawful action, but also by the state itself <...>". These fundamental approaches, along with the other conclusions in the said Judgement conditioned a number of concrete instructions given therein to law-enforcement authorities, and recognised the challenged norm of criminal law as not being in conformity with the Constitution (the case concerned inadequate mechanism of criminal legal protection from so called domestic violence).

Therefore, the Constitution affords the constitutional supervisory authority discretion upon disclosing on the basis of its plain text the principles or rules that can be somewhat conventionally described as "unenumerated rights". At that, in such cases the Constitutional Court does not "invent" new rights, but adapts to concrete situations the constitutional text in force. Thus, it would be unsubstantiated to state the existence of "unenumerated rights" in a strict sense.

## C. Protection and limitation

### 1. State obligations

It follows immediately from the Constitution's provisions that the state is generally obliged to create effective mechanisms of legal protection contributing to the exercise of constitutional rights. Recognition, observance and protection of human rights are the obligations of the state in accordance with Article 2 of the Constitution. By obliging to recognise human rights, the Constitution imposes a general obligation on the state to legally establish these rights, which in turn exist before and outside the state itself; as well as to ensure the reproduction of international standards for human rights' protection in the legislation.<sup>393</sup> Observance of human rights encompasses the obligation of the state to transform these rights into legal norms, to establish legal mechanisms for the exercise of these rights, but also taking efforts to ensure real guarantees for exercising these rights and social goods implied therein. Therefore not only rights that are subject to direct judicial protection are significant – such as the right to labour or to social welfare; but also constitutional provisions that are "declarative" or "programmatic".

<sup>393</sup> Commentary to the Constitution of the Russian Federation / ed. Valery D. Zorkin – 2nd edition, revised. – Moscow: Norma: Infra-M, 2011 – p. 67.



In this regard one should note the new provision introduced to the Constitution in 2020. Article 75<sup>1</sup> establishes that in the Russian Federation conditions shall be created for sustainable development of the economic growth of the country and increase of prosperity of citizens, for mutual trust between the state and the citizens; and that the protection of citizens' dignity and respect for a working man shall be guaranteed; and the balance between rights and obligations of citizens, social partnership, economic, political and social solidarity shall be ensured.

A number of constitutional provisions establish obligation of the state that can further be discharged *inter alia* by adoption of adequate legal regulation. Thus, Article 52 of the Constitution establishes that the rights of victims of crimes and of abuses of office shall be protected by law, and that the state shall provide the victims with access to justice and compensation for damage sustained. These provisions are detailed in civil legislation, for example, Articles 1069-1070 of the Civil Code of the Russian Federation detail the right to compensation for unlawful actions of state authorities and their officials, as well as the right to compensation for damage sustained as the result of unlawful, but non-intentional<sup>394</sup> actions of state authorities and officials, such as unlawful sentencing and imposing criminal or administrative liability, deprivation of freedom and such.

In some cases, the Constitution details the relevant obligations ensuring realisation of constitutional rights of citizens, by way of imposing them on law enforcement authorities. Thus, Article 24, part 2 provides that state government bodies and local self-government bodies and their officials shall be obliged to provide everyone with access to documents and materials directly affecting his (her) rights and freedoms, unless otherwise envisaged by law.

## 2. Limitation of rights

In guaranteeing human and civil rights and freedoms the state at the same time has the right to establish their limitations in the federal law, to the extent necessary for the protection of the basis of the constitutional order, morality, health, rights and lawful interests of other people, and for ensuring the defence of the country and the security of the state (Article 55, part 3 of the Constitution). Another constitutional foundation for limitation of rights and freedoms is established by Article 56, part 1 of the Constitution. This provision establishes that in the conditions of a state of emergency, in order to ensure the safety of citizens and the

<sup>394</sup> Civil Code of the Russian Federation uses term “not guilty” actions, which can be roughly understood as “non-intentional”, “non-criminal”, “not subject to administrative liability” actions, such as non-observance of reasonable time requirement for civil or criminal trial, imposition of criminal or administrative liability by mistake etc. The term “non-intentional” is used for the sake of clarity.

protection of the constitutional order and in accordance with federal constitutional law, certain restrictions may be imposed on human rights and freedoms with an indication of their limits and the period for which they have effect. Part 3 of this Article lists the rights that are not subject to limitation in a state of emergency.

These provisions provide a constitutional foundation for implementation by the Constitutional Court of the test of proportionality (balance)<sup>395</sup> of limitation of rights. On the basis of analysis of the Court's legal positions, application of this test can be generally described by the following stages: whether the challenged regulation establishing limitation of rights was adopted in the form of law; whether it is directed to protection of constitutional values; whether balance is ensured between the limited rights and protected values; whether the limitation meets the requirements of necessity and reasonableness.

### **3. Limitation of public authority**

The Constitution not only provides for limitations of the citizen's rights, but also serves as a method of limiting the state and state authority, as it provides for obligations and prohibitions for both citizens and state authorities and officials, local self-government authorities, non-governmental associations, etc.

On the other hand, the constitutional conditions for limitation of rights follow from the principle enshrined in Article 17 (part 3): the exercise of human and civil rights and freedoms must not violate the rights and freedoms of other people.

These provisions, together with other constitutional provisions, foresee several "levels of protection" where limitation of constitutional rights is justified: the necessity to adopt a federal law, possibility of judicial supervision over any decision of an executive authority or official regarding limitation of a right, as well as possibility of constitutional supervision over provision of a normative act foreseeing limitation of a right.

In certain cases the criteria and conditions for limiting a certain right can be provided directly by the relevant constitutional provision. For example, Article 32 (part 1) of the Constitution establishes a right of citizens to participate in managing state affairs through their representatives, and part 3 of the same Article establishes exclusions from this right: citizens who are recognized as incapable

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<sup>395</sup> The Russian wording is "соразмерность" [sorazmernost]; this test can be described as a specific form of the proportionality test, but it is not a strict proportionality test. See also: Constitutional Review at AACC Members, pp. 384-386 (URL: <http://www.aaccsrd.org/content/FileDownload.do?cntntsNo=881&fileSeCode=185001&fileSn=1>).

by a court, and citizens who are kept in places of imprisonment under a court sentence, shall not have the right to elect and be elected.

### **III. Interpretation**

#### **A. Rights in diverse contexts**

The catalogue of fundamental rights established in the Constitution represents a result of democratic developments that took place in the late 1980s and early 1990s, and also reflected in such basic documents as the Declaration of Fundamental Human and Civil Rights and Freedoms approved by the decision of the Supreme Council of the RSFSR on 22 November 1991 No. 1920-I, and amendments to the Constitution of the RSFSR of 1978. These acts predated the adoption of the Constitution of 1993 that absorbed the main achievements of democracy and human and civil rights and freedoms of the relevant period. The 1993 catalogue of fundamental human rights fundamentally differs from the catalogue of rights provided for by the Soviet constitutions. Accordingly it can be considered original for the Russian Federation, reflecting the result of the struggle of democratic institutions and citizens for their rights.

Therefore, historical context of development and adoption of the national catalogue of human rights found its reflection in the structure of the Constitution itself. The provisions asserting (in the same vein as the Preamble of the Constitution) the rich history of Russia and historical succession were also reflected in the updated text of the Constitution. Thus, Article 67<sup>1</sup> (parts 2 and 3) points out that the Russian Federation, united by a thousand years of history, preserving the memory of the ancestors who conveyed to us ideals and belief in God, as well as continuity of development of the Russian state, recognises the unanimity of the state that was established historically; and that the Russian Federation honours the memory of the defenders of the Fatherland, ensures protection of historical truth.

Some provisions reflected in the catalogue of fundamental human rights (Chapter 2 of the Constitution) can be perceived as especially important in terms of guarantees against repeating the negative experience of the past. For example, the impossibility to deport a Russian citizen abroad (part 1 of Article 61 of the Constitution) acquired constitutional level already in 1992 (with introduction of amendments to the 1978 Constitution (Basic Law) of the Russian Federation –

Russia). Legal scholars note that the Soviet experience was taken into account, comprising deportation of citizens criticising the ruling regime (a widely known example is the deportation of A.I. Solzhenitsyn in 1974), or disguised deportation (a certain person was allowed to travel abroad, and while he or she was abroad a decision would be issued to terminate citizenship and to prohibit the return home).<sup>396</sup>

Certain rulings of the Constitutional Court directly concerned the events taking place during the period of the USSR. Thus, the Judgement of 10 December 2019 No. 39-II<sup>397</sup> concerned *inter alia* evaluation of provisions of the Law of the Russian Federation of 18 October 1991 No. 1761-I “On Rehabilitation of Victims of Political Repressions”. This law is a special normative legal act aimed at realisation of provisions of Articles 52 and 53 of the Constitution imposing an obligation on the state to protect the rights of victims of crimes and of abuses of office. The Constitutional Court noted that the federal legislator adopting this law proceeded from the recognition that over the years of Soviet rule millions of people became victims of arbitrary actions of a totalitarian state, were subjected to persecution for political and religious beliefs, upon social, national and other criteria; and Russia as a democratic state under the rule of law condemns prolonged terror and mass persecutions of the people as incompatible with the idea of law and justice.

This Judgement revealed that the regulation (including the challenged provisions of the Law of the Russian Federation “On Rehabilitation of Victims of Political Repressions”) was unclear as regards the system governing the exercise of the right of children – whose rehabilitated parents had lost their living quarters resulting from repressions, and who were therefore born in prisons, exile, deportation or in special settlement – to return to their former places of residence. This created obstacles for full reparation of damage sustained in the amount recognised by the state, and created doubts as regards the possibility to achieve constitutionally important goals as proclaimed by the Law of the Russian Federation “On Rehabilitation of Victims of Political Repressions”. The federal legislation did not define the scope of discretion of the constituent entities of the Russian Federation as regards regulating issues of record of the described persons and their provision with living premises. As a result, in the territory of the Russian Federation equal conditions were not ensured for exercise by these persons of

<sup>396</sup> Commentary to the Constitution of the Russian Federation, op. cit., p. 503.

<sup>397</sup> Judgement of the Constitutional Court of the Russian Federation of 10 December 2019 No. 39-II “In the case on the review of constitutionality of Article 13 of the Law of the Russian Federation “On Rehabilitation of Victims of Political Repressions” and Article 7, paras. 3 and 5; Article 8, Section 1, para. 1; Article 8, Section 2 of the Law of the City of Moscow “On Securing the Housing Rights of the Inhabitants of the City of Moscow” in connection with complaints of A.L. Meissner, E.S. Mikhaylova and E.B. Shasheva”.

guarantees established by the Law.

This Judgement revealed that the regulation (including the challenged provisions of the Law of the Russian Federation “On Rehabilitation of Victims of Political Repressions”) was unclear as regards the system governing the exercise of the right of children – whose rehabilitated parents had lost their living quarters resulting from repressions, and were therefore born in prisons, exile, or deportation – to special settlement and return to their former places of residence.”

## **B. Impact of international norms**

After the dissolution of the Union of Soviet Socialist Republics in December 1991, the Russian Federation fully accepted the international obligations of the USSR. Therefore, international treaties in force that were concluded by the USSR are included in the legal system of the Russian Federation, since in their regard the Russian Federation continues to hold international rights and obligations of the USSR as its legal successor. The status of legal successor of the USSR with regard to participation in international organisations was underlined upon introduction of amendments to the Constitution of the Russian Federation in 2020 (part 1 of Article 67<sup>1</sup>).

In the Russian legal system international treaties have a leading role (comparable to the Constitution) in the protection of human rights and fundamental freedoms.

In accordance with the Constitution (part 1 of Article 1, Article 2, and part 1 of Article 17) human rights in the Russian Federation are recognised and guaranteed in accordance with universally recognised principles and norms of international law. Universally recognised principles and norms of international law and international treaties of the Russian Federation have priority in the system of national legislation (part 4 of Article 15 of the Constitution).

However, the Constitution dominates the hierarchy of the national legal system, and therefore in the event of collision between international law norms and the Constitution, the latter has undisputed supreme legal force pursuant to Article 15 (part 1).

### **1. Norms at the universal level**

The Universal Declaration of Human Rights of 1948, adopted in the form of a Resolution of the United Nations General Assembly, is advisory in nature,

and is not a compulsory legal act *per se*. At the same time its provisions are seen as reflecting fundamentals of international customary law, and as such acquire obligatory force. Main provisions of this Declaration are reflected in the Constitution.

The International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) of 1966 (and the protocols thereto) are international treaties, and impose certain obligations on states which adopted (ratified) them. Those include ensuring access of citizens of relevant states to supranational structures. The Russian Federation participates in these covenants, and rulings of the Constitutional Court can contain references to their provisions.

The Russian Federation participates also in the International Convention on the Elimination of all Forms of Racial Discrimination of 1966, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1984, Convention on the Elimination of All Forms of Discrimination against Women of 1979, Convention on the Rights of the Child of 1989, Convention on the Rights of Persons with Disabilities of 2006, Conventions of the International Labour Organisation (ILO),<sup>398</sup> including Forced Labour Convention of 1930; Freedom of Association and Protection of the Right to Organise Convention of 1948; Right to Organise and Collective Bargaining Convention of 1949; Equal Remuneration Convention of 1951; Abolition of Forced Labour Convention of 1957; Discrimination (Employment and Occupation) Convention of 1958; Minimum Age Convention of 1973 (No. 138); Worst Forms of Child Labour Convention of 1999; Labour Inspection Convention of 1947; Employment Policy Convention of 1964; Tripartite Consultation (International Labour Standards) Convention of 1976 and many others.

## 2. Norms at the regional level

Among international instruments at the regional level, the European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950 (hereinafter – the Convention) takes a special place. The Convention was ratified by the Russian Federation by the Federal Law of 30 March 1998 No. 54-Φ3 and entered into force for the Russian Federation on 5 May 1998. By

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<sup>398</sup> As regards the ILO conventions the Constitutional Court of the Russian Federation in its case-law gave important clarifications as regards their implementation. For example, the Judgement of the Constitutional Court of the Russian Federation of 25 October 2018 No. 38-II “In the case on the review of constitutionality of Section 1 of Article 127 and Section 1 of Article 392 of the Labour Code of the Russian Federation in connection with complaints of M.V. Danilov, K.V. Kondakov and others” concerned interpretation by the courts of the ILO Holidays with Pay Convention of 1970 in part related to provision of holidays.

virtue of Article 15 (part 4) of the Constitution the Convention is included into the national legal system as an international treaty taking priority over internal legislation. Therefore, and under the provisions of the Federal Law on ratification of the Convention, the Russian Federation accepts compulsory jurisdiction of the European Court of Human Rights (the ECtHR) as regards the issues of interpretation and application of the Convention, including the obligation to abide by the final judgements of the ECtHR delivered in the cases where Russia was one of the parties. At that, under the norms of the Constitution (Articles 15 and 17) provisions of the Convention in practice act as a supranational mechanism of human rights protection foreseen by the Constitution.

Provisions of international treaties over time may transform into the instrument of constitutional legal regulation as the result of activity of the Constitutional Court. Thus, the Constitutional Court *de facto* eliminated the reservations made by Russia upon ratification of the Convention as regards the temporary availability of non-judicial arrest, detention and keeping in custody under the previously existing Code of Criminal Procedure and Disciplinary Code of the Armed Forces of the Russian Federation. The legislator fulfilled the relevant decisions by way of amending these normative acts. As stated above, along the lines of Protocol No. 6 to the Convention as regards elimination of capital punishment (despite non-ratification of the relevant Protocol by Russia) and the Protocol No. 13 as regards unconditional abolition of capital punishment (despite this Protocol neither being signed nor ratified by Russia) the Constitutional Court confirmed the impossibility to carrying out the death penalty, including under the guilty verdict rendered by jury trial.

### **3. Reference to international norms**

Statement of reasons of the Constitutional Court judgements may contain references to a variety of international acts and instruments, acts of the United Nations, its bodies and agencies, regional and international treaties to which the Russian Federation is a party, or which contain universally recognised principles and norms of international law, historical documents, acts of international organisations to which Russia is not a party, international conference documents, provisions of the Convention for the Protection of Human Rights and Fundamental Freedoms and jurisprudence of the ECtHR, etc.

Many rulings of the Constitutional Court briefly mention the existence of relevant practice in a number of countries without citing specific case-law. At that, during the preparation of the judgement text, foreign practices as regards certain issues brought before the Constitutional Court are often specially researched. As seen



from the examples above, the Constitutional Court judgements and decisions often contain references to international legal norms.

The Constitutional Court had examined the legal force of international law acts and compared it to the legal force of the Constitution of the Russian Federation. As a result it developed several legal positions confirming supremacy of the Russian Constitution within the territory of Russia, as well as the powers of the Constitutional Court to evaluate the possibility of execution of judgements of an international human rights body from the perspective of the Constitution's provisions. This power subsequently was reflected both in the Federal Constitutional Law "On the Constitutional Court of the Russian Federation" (Chapter XIII<sup>1</sup>) and the Constitution itself (Article 125, part 5<sup>1</sup>, item b)).

#### 4. Relationship with the ECtHR

Practice of application of the above-mentioned power clearly demonstrates the commitment to international legal obligations and readiness to search for acceptable solutions even in extremely complex situations. For example, an outstanding example of a serious collision is the issue of lack of the right to vote for convicts sentenced by court to deprivation of liberty (Article 32 (part 3) of the Constitution). In its Judgement on 19 April 2016 No. 12-II<sup>399</sup> the Constitutional Court examined the issue of possibility to execute the judgement of the ECtHR in the case *Anchugov and Gladkov v. Russia* under the Constitution of the Russian Federation. This Judgement of the ECtHR required elimination of the full prohibition for such persons to vote, and stated the necessity of differentiated approach to this matter despite direct requirements of the Constitution.

The Constitutional Court, in particular, excluded the possibility to execute the judgement of the ECtHR in the part requiring introduction of amendments to Article 32 of the Constitution since this provision is impossible to change without adoption of a new Constitution. Nevertheless it did not exclude resolving of this issue by way of optimisation of the system of criminal punishments, including by way of transferring certain regimes of serving court sentence to alternative punishments connected with limiting personal freedom of convicts without restricting their electoral rights, as well as through relevant law enforcement practice.

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399 Judgement of the Constitutional Court of the Russian Federation of 19 April 2016 No. 12-II "In the case concerning the resolution of the question of the possibility to execute in accordance with the Constitution of the Russian Federation the Judgement of the European Court of Human Rights of 4th July, 2013 in the case of *Anchugov and Gladkov v. Russia* in connection with the request of the Ministry of Justice of the Russian Federation".



In September 2019 on the 1355th meeting of the Committee of Ministers of the Council of Europe (CMCE) on the matter of execution of judgements of the ECtHR the judgements *Anchugov and Gladkov v. Russia* and similarly *Isakov and others v. Russia* were recognised as executed.

Upon analysing the measures adopted by the Russian authorities, the Secretariat of the CMCE evaluated the approach outlined by the Constitutional Court of the Russian Federation in its Judgement of 19 April 2016 No. 12-II encompassing possibility of partial execution of *Anchugov and Gladkov* judgement as harmonising provisions of the Constitution and the Convention (in their interpretation by the ECtHR).

A well-known example of mutual influence of case-law of the Constitutional Court and the ECtHR is the case of *A. Khoroshenko*. In 2015, in its judgement *Khoroshenko v. Russia* the ECtHR established violation of Article 8 of the Convention due to violation of the right of the applicant to respect his family life in connection with application of excessively strict conditions of serving his sentence for 15 years (with regard to prohibition of visits) in a special regime correctional colony. The Judgement of the Constitutional Court of 15 November 2016 No.24-II<sup>400</sup> was delivered upon complaints of applicants one of which also served a prison sentence. This Judgement recognised unconstitutional the norms of the Code of Execution of Criminal Sentences insofar as they excluded possibility to grant long visits to persons sentenced to life imprisonment during the first 10 years of serving their sentence. Along with that the Constitutional Court determined the manner of execution of this Judgement up until introduction of amendments to legal regulation, thereby there was no necessity to review judicial acts in respect of the applicants, including A. Khoroshenko. Legislative amendments corresponding to legal positions of the Constitutional Court and the ECtHR had been introduced to the Code of Execution of Criminal Sentences by Federal Law of 16 October 2017 No. 292-Φ3.

The case-law of the Constitutional Court of the Russian Federation demonstrates examples of reference to the ECtHR practice in respect of foreign countries. For example, in 2016 the Constitutional Court examined the issue of the right of the state to correct the mistake made upon granting the pension for length of service which led to its full cancellation for a person to whom the pension was granted

400 Judgement of the Constitutional Court of the Russian Federation of 15 November 2016 No. 24-II “In the case concerning the review of constitutionality of Item “b” of Section 3 of Article 125 and Section 3 of Article 127 of the Criminal Executive Code of the Russian Federation in connection with the request of the Vologda Regional Court and the complaint of N.V. Korolev and V.V. Koroleva”.

without necessary grounds (Judgement of 14 January 2016 No.1-II).<sup>401</sup> Reasoning of this Judgement cited the position developed by the ECtHR in the judgement of 15 September 2009 in *Moscal v. Poland*. The relevant position concerned the right of the state to correct mistakes made by authorities in affording social benefit payments, and establishing fair balance between requirements of general interest and the burden placed on the person who benefitted from this payment, if the authorities themselves were responsible for the mistake. The Constitutional Court further elaborated this position with regard to national legislation in the light of provisions of the Constitution of the Russian Federation. In particular, the Constitutional Court pointed to the necessity to build trust into actions of state authorities, leading to the necessity to ensure confidence (possibility to rely on) in the correctness of a decision made by the authorities empowered by the state. Such a decision in turn must be based not only on the strict following of the legislative directions, but also on an attentive and responsible approach to the assessment of factual circumstances connected by law regarding the presence of the relevant social right (in the concrete case it was the right to pension). The relevant documents must also be furnished with all diligence. This position was developed in the said Judgement and further reproduced in other rulings of the Constitutional Court. The relevant changes, aimed at ensuring protection of rights of the pensioners, were introduced through legislation by Federal Law of 3 April 2017 No. 63-Φ3.

Similarity of legal principles reflected in international and regional treaties for the protection of human rights, and the Constitution of the Russian Federation, can be seen in similar or identical conclusions of the ECtHR and the Constitutional Court of the Russian Federation in the cases concerning similar legal issues.

Thus, in June 2019 the ECtHR adopted the judgement *Blyudik v. Russia* establishing violation *inter alia* of Article 5 § 5 of the Convention due to placing the applicant's daughter K. in a special closed education-mentoring centre (essentially the centre for juvenile offenders) in breach of requirements established by the national legislation, and lack of possibility to obtain compensation for the damage inflicted thereby. The ECtHR noted that the decision to place K. into the special institution was quashed by the Supreme Court of the Russian Federation upon supervisory review, but pointed out that in fact K. was held in this centre for six months. The ECtHR concluded that the Russian legislation did not provide the

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401 Judgement of the Constitutional Court of the Russian Federation of 14 January 2016 No. 1-II "In the case concerning the review of constitutionality of Section 1 of Article 13 of the Law of the Russian Federation "On Pension Security of Persons Having Done Military Service, Service in Bodies of Internal Affairs, the state Anti-Fire Service, Bodies for Control of the Turnover of Drugs and Psychotropic Substances, Establishments and Bodies of the Criminal Executive System and Their Families" in connection with the complaint of S.V. Ivanov".

applicant or his daughter with the possibility to obtain compensation payment for unlawful placement in the centre since the Civil Code provisions (Articles 1070 and 1100) provided that the damage must be compensated independently of guilt of the state authority only in cases of unlawful deprivation of liberty (in a criminal law sense), unlawful bringing to criminal liability, unlawful application of restraining measure in the form of detention or undertaking not to leave, unlawful imposition of administrative liability in the form of administrative arrest.

On 29 November 2019 the Constitutional Court adopted the Judgement No. 38-II<sup>402</sup> dealing essentially with the same issue. The Judgement offered constitutional legal interpretation of provisions of Article 1070, item 1 and Article 1100, paragraph three of the Civil Code of Russia as providing for possibility to obtain compensation of damages (including moral harm) irrespective of guilt of law enforcement or court officials for placing a minor in a centre for temporary detention of juvenile offenders.

Despite the lack of references to the judgement of the ECtHR the Constitutional Court based its conclusions on the same understanding as regards the obligation of the state to offer compensation for unlawful deprivation of liberty (even if it took place without connection to illegal intentional acts of a state authority).

On 8 April 2021 the ECtHR published its decision in the case of *D.A. v. Russia*, whereby the application was declared inadmissible since the applicant ceased to be the victim of violation. As stated in the ECtHR decision, after the Judgement of the Constitutional Court the judicial acts in respect of D.A. were quashed due to new circumstances; her case was considered anew and the violation was recognised with granting the compensation claim. The amount of compensation was recognised to be comparable to that afforded by the ECtHR case law. The application was recognised as inadmissible as the applicant has lost the victim status.

## C. Current issues

Many of the current challenges regarding interpretation of fundamental human rights and freedoms enshrined in the Constitution of the Russian Federation were described above. Some examples include issues related to the implementation of

402 Judgement of the Constitutional Court of the Russian Federation of 29 November 2019 No. 38-II “In the case on the review of constitutionality of Articles 1070 and 1100 of the Civil Code of the Russian Federation and Article 22 of the Federal Law “On the Foundations of the System for the Prevention of Child Neglect and Juvenile Delinquency” in connection with the complaint of A.”

the judgements of international courts and their interpretation in harmony with the Constitution; emergence of the new generation of rights and related problems of their regulation; and expansion of constitutional review to spheres previously deemed to be outside its reach.

Another most recent challenge however is related to the unprecedented situation of the Covid-19 pandemic. Throughout the last year this issue in one form or another became the subject of consideration of nearly every high court in the world.

A number of events devoted to discussion of the measures taken by states to protect their citizens during the pandemic were rather similar in different countries.<sup>403</sup> They included social distancing, “lockdown”, necessity to use individual protective means etc. Such measures to counter the pandemic were taken in Russia, both at the federal and regional level.

One of the normative acts of constituent entities of the Russian Federation (the Governor of the Moscow region) became subject to consideration of the Constitutional Court in its Judgement of 25 December No. 49-II.<sup>404</sup>

In March 2020 the Governor obliged citizens not to leave their places of residence or otherwise face administrative sanctions (certain exceptions were, of course, foreseen). At the time of introduction of these measures, the federal law described only in general terms the power of the state authorities of constituent entities of the Russian Federation to prevent and avert emergencies and to take necessary sanitary and anti-epidemic measures. The power to establish the concrete rules of behaviour under so called “state of high alert” or emergency situation was clearly established only during some days or weeks after the challenged norms entered into force.

Since the challenged provisions established certain limitations and were introduced before the relevant powers were granted to constituent entities of the Russian Federation, this raised doubts as regards their constitutionality. When considering this situation in a “legal vacuum” from a purely formalist position,

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403 See e.g.: Constitutional Justice in Asia. “Restriction of Human Rights and Freedoms in Health Emergencies: the Example of Covid-19”. Online 8th Summer School of the AACC, 7-8 September 2020, Ankara. Printed in December, 2020.

404 Judgement of 25 December 2020 No. 49-II “In the case on the review of constitutionality of Para. 5, subpara. 3 of the Governor of the Moscow Region Decree “On the Introduction in the Moscow Region of a High Alert Regime for the Authorities and Forces of the Moscow Regional Emergency Prevention and Response System and some Measures to Prevent the Spread of a New Coronavirus Infection (COVID-2019) on the Territory of the Moscow Region” in connection with the request of the Protvinsky City Court of the Moscow Region”.

it would not be excluded that the contested regulation does not comply with the Constitution by virtue of the mere fact of the absence of the power of the executive authority of the constituent entity of the Russian Federation to introduce it. However, the Constitutional Court was to take into account the exceptional situation that had developed in the real world.

The Court concluded that during the pandemic every level of state authority was obliged to perform the constitutional duty of protection of life and health of citizens. Every authority deployed efforts to minimise harm to these values by regulatory means. At that there was a common understanding of their necessity between regional and federal authorities. In this exceptional situation the Constitutional Court accepted that pre-emptive regulation of the Governor of the Moscow region did not contradict the Constitution.

The Court stressed that the choice of legal means aimed at protection of life and health of citizens in situations related to the spread of diseases would normally fall under jurisdiction of legislative authorities. Nevertheless, it noted that the lack of regulation adequate to the emergency situations threatening life and health of citizens (given that such threat was immediate and real) cannot justify omission of measures aimed at prevention and reduction of deaths or serious illness. Such omission would lead to the state ignoring its most important constitutional obligation (to recognize, observe and protect the rights and freedoms of man), merely because of a strictly formalistic interpretation of the constitutional principle of the supreme force of law. This in turn would not take into account that interests of protection of life and health of citizens in certain circumstances can prevail over the value of preserving the normal legal regime (taking into account that the limited right, i.e. the right to free movement, is not absolute in nature).

The Constitutional Court also stressed that law-enforcement authorities are capable of ensuring proportionality of implementation of the measures of administrative liability. The courts must take into account all the circumstances justifying the need for a citizen to leave his or her place of residence (stay). Otherwise a court decision would be arbitrary and the persons concerned would be limited in their ability to protect their own health and the health of their close persons, as well as other constitutional values.

Thus, the challenged provisions – taking into account the concrete circumstances – were recognised as conforming to the constitutional provisions, given the important aim of the challenged provisions (prevention of harm to life and health of citizens), proportionality of the limitations introduced and their objective necessity, as well as wide possibilities for law-enforcement authorities (first of all

the courts) to exclude any arbitrary and unreasonable application of the measures of administrative liability for the breach of rules established by the challenged provisions.

The fundamental human and civil rights and freedoms are clearly established in the Constitution of the Russian Federation and are not subject to change. Nevertheless, new developments conditioned by social progress, legislative changes, advancement of technology and occurrences outside human control may change perception of these rights and require constitutional interpretation fine-tuned to current challenges. The Constitutional Court approaches these situations on the basis of the Constitution's provisions, its own previously developed legal positions and existing practice of application of a law to establish balance between public and private interests, citizen and the state, society and individual. Above all, these efforts are aimed to preserve and protect the very essence of the Constitution and the values enshrined therein.

## **Annex 1: List of cited legal provisions**

### **1) Constitutional provisions**

Constitution of the Russian Federation adopted by popular vote on 12 December 1993 with amendments approved by all-Russian vote on 1 July 2020

- ***Preamble***
- ***Chapter 1***
  - Article 2
  - Article 6
  - Article 7
  - Article 8
  - Article 9
  - Article 13
  - Article 14
  - Article 15
- ***Chapter 2***, Articles 17 – 64
- ***Chapter 3***
  - Article 67<sup>1</sup> \*

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\* A footnote numerical near the article number is a feature of Russian legal drafting. Such numbers marks that an article was inserted between two existing articles and the footnote number is added to avoid changing the

- Article 69
- Article 71
- Article 72
- Article 75
- Article 75<sup>1</sup>
- **Chapter 4**
  - Article 89
- **Chapter 6**
  - Article 114
- **Chapter 7**
  - Article 125
- **Chapter 9**, Articles 134 – 137

Law of the Russian Federation on amendment to the Constitution of the Russian Federation\*\* of 14 March 2020 No. 1- ΦΚ3 “On Enhancement of Regulation of Certain Issues concerning Organisation and Functioning of Public Authority”

## 2) Legislative provisions

### Federal Constitutional Law:

Federal Constitutional Law of 21 July 1994 no. 1-ΦΚ3 “On the Constitutional Court of the Russian Federation”

### Codified legislation:

Civil Code of the Russian Federation (part two) of 26 January 1996 No. 14-Φ3

- Article 1069
- Article 1070
- Article 1100

Criminal Code of the Russian Federation of 13 June 1996 No. 63-Φ3

Code of Execution of Criminal Sentences of the Russian Federation of 8 January 1997 No.1-Φ3

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numeration of all the articles throughout the law. This numeration is sometimes represented by a number placed after the period mark (e.g. 75.1), but official publications use footnote numbers. Hence, this method is used throughout the fact file.

\*\* Amendments to the Constitution of the Russian Federation are adopted in the form of the Law of the Russian Federation on amendment to the Constitution of the Russian Federation. This is a special form of law different from “the Law of the Russian Federation” mentioned elsewhere.

Code of Criminal Procedure of the Russian Federation of 18 December 2001 No.174-Φ3

Federal laws:

Federal Law of 26 September 1997 No. 125-Φ3 “On the Freedom of Conscience and Religious Communities”

Federal Law of 30 March 1998 No. 54-Φ3 “On ratification of the Convention for the Protection of Human Rights and Fundamental Freedoms and Protocols Thereto”

Federal Law of 30 April 1999 No. 82-Φ3 “On Guarantees of the Rights of Indigenous Small Peoples in the Russian Federation”

Federal Law of 20 July 2000 No. 104-Φ3 “On the Basic Principles of Organisation of Indigenous Small Peoples of the North, Siberia and Far East of the Russian Federation”

Federal Law of 12 June 2002 No. 67-Φ3 “On the Basic Guarantees of Electoral Rights and the Right to Take Part in Referendum of the citizens of the Russian Federation”

Federal Law of 24 July 2009 No. 209-Φ3 “On Hunt and Preservation of Hunting Resources and on Introduction of Amendments to Certain Legislative Acts of the Russian Federation”

Federal Law of 21 November 2011 No. 323-Φ3 “On the Foundations of Healthcare in the Russian Federation”

Federal Law of 29 December 2012 No. 273-Φ3 “On Education in the Russian Federation”

Laws of the Russian Federation (adopted before the Constitution of the Russian Federation, they have the same legal force as federal laws):

Law of the Russian Federation of 18 October 1991 No. 1761-I “On Rehabilitation of Victims of Political Repressions”

Law of the Russian Federation of 12 February 1993 No. 4468-I “On Pension Security of Persons Having Done Military Service, Service in Bodies of Internal



Affairs, the state Anti-Fire Service, Bodies for Control of the Turnover of Drugs and Psychotropic Substances, Establishments and Bodies of the Criminal Executive System and Their Families”

Law of the Russian Federation of 25 June 1993 No. 5242-I “On the Right of the Citizens of the Russian Federation to Freely Travel and Choose the Place of Temporary or Permanent Residence Within the Russian Federation”

### **3) International provisions**

#### Universal instrument:

Universal Declaration of Human Rights, adopted by Resolution of the UN General Assembly on 10 December 1948

#### Universal instruments (treaties):

ILO Forced Labour Convention, 1930

ILO Labour Inspection Convention, 1947

ILO Freedom of Association and Protection of the Right to Organise Convention, 1948

ILO Right to Organise and Collective Bargaining Convention, 1949

ILO Equal Remuneration Convention, 1951

ILO Abolition of Forced Labour Convention, 1957

ILO Discrimination (Employment and Occupation) Convention, 1958

ILO Employment Policy Convention, 1964

International Covenant on Civil and Political Rights, 1966

International Covenant on Economic, Social and Cultural Rights, 1966

International Convention on the Elimination of all Forms of Racial Discrimination, 1966

Vienna Convention on the Law of Treaties, 1969

- Article 18

ILO Minimum Age Convention, 1973

ILO Tripartite Consultation (International Labour Standards) Convention, 1976

Convention on the Elimination of All Forms of Discrimination against Women, 1979

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984

Convention on the Rights of the Child, 1989

ILO Worst Forms of Child Labour Convention, 1999

Convention on the Rights of Persons with Disabilities, 2006

Regional instruments:

Convention for the Protection of Human Rights and Fundamental Freedoms, 1950

- Article 5
- Article 8
- Protocol no. 6
- Protocol no. 13

#### **4) Other**

Secondary legislation (bylaws):

Disciplinary Code of the Armed Forces of the Russian Federation, approved by the Decree of the President of the Russian Federation of 14 December 1993 No. 2140

Legal acts of the USSR:

Constitution (Basic Law) of the Union of Soviet Socialist Republics, adopted by the Decree of Extraordinary VIII Congress of Soviets on 5 December 1936

- Chapter I – “Social Order”, Article 12
- Chapter X – “Main rights and Obligations of Citizens”, Article 118

Code of Criminal Procedure of the Russian Soviet Federative Republic, approved by the Supreme Council of the RSFSR on 27 October 1960

Constitution (Basic Law) of the Russian Federation – Russia, adopted by the Supreme Council of the RSFSR on 12 April 1978

- Section I “The Basis of the Social System and Policy of the Russian Federation”
- Section II “the state and Individual”
- Chapter 5 “Human and Civil Rights and Freedoms”
- Chapter 6 “Obligations of Citizens of the Russian Federation”

Law of the USSR of 24 June 1981 No. 5152-X “On the Legal Status of Foreign Citizens in the USSR”

Declaration of Fundamental Human and Civil Rights and Freedoms, approved by the decision of the Supreme Council of the RSFSR on 22 November 1991 No. 1920-I, and amendments to the Constitution of the RSFSR of 1978

## **Annex 2: List of cited cases**

### ***Judgements of the Constitutional Court of the Russian Federation\****

- Judgement of the Constitutional Court of the Russian Federation of 17 February 1998 No.6-II “In the case concerning the review of constitutionality of provision of Article 31, part 2 of the Law of the USSR of 24 June 1981 ‘On the Legal Status of Foreign Citizens in the USSR’ in connection with the complaint of Yakhya Dashti Gafur”

See full text translation at:

<http://www.ksrf.ru/en/Decision/Judgements/Documents/1998%20February%2017%206-P.pdf>

- Judgement of the Constitutional Court of the Russian Federation of 2 February 1999 No.3-II “In the case concerning the review of the constitutionality of certain provisions of Article 41 and Section 3, Article 42 of the Criminal Procedure Code of the RSFSR, Subsections 1 and 2 of the Decree of the Supreme Soviet of the Russian Federation ‘On the Procedure of Entry into Force of the Law of the

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\* Where applicable, URL links to resumes or full translations of relevant judgements are provided.

Russian Federation ‘On Amendments to the Law of the RSFSR ‘On the Judicial System of the RSFSR’, the Criminal Procedure Code of the RSFSR, the Criminal Code of the RSFSR, and the Administrative Offences Code of the RSFSR’ of 16 July 1993 in connection with a request of the Moscow City Court and complaints of a number of individuals”

See full text translation at:

<http://www.ksrf.ru/en/Decision/Judgements/Documents/1999%20February%202%203-P.pdf>

- Decision of the Constitutional Court of the Russian Federation of 19 November 2009 No. 1344-O-P “On clarification of item 5 of the operative part of the Judgement of the Constitutional Court of the Russian Federation of 2 February 1999 No. 3-II ‘In the case concerning the review of the constitutionality of certain provisions of Article 41 and Section 3, Article 42 of the Criminal Procedure Code of the RSFSR, Subsections 1 and 2 of the Decree of the Supreme Soviet of the Russian Federation ‘On the Procedure of Entry into Force of the Law of the Russian Federation ‘On Amendments to the Law of the RSFSR ‘On the Judicial System of the RSFSR’, the Criminal Procedure Code of the RSFSR, the Criminal Code of the RSFSR, and the Administrative Offences Code of the RSFSR’ of 16 July 1993”
- Judgement of the Constitutional Court of the Russian Federation of 26 November 2012 No.28-II “In the case concerning the review of constitutionality of provisions of article 16.2, part 1 and 27.11, part 2 of the Code on Administrative Offences of the Russian Federation in connection with the complaint of the limited liability company *Avesta*”  
See URL: <http://www.ksrf.ru/en/Decision/Judgements/Documents/Resume26112012.pdf>
- Judgement of the Constitutional Court of the Russian Federation of 14 January 2016 No.1-II “In the case concerning the review of constitutionality of Section 1 of Article 13 of the Law of the Russian Federation ‘On Pension Security of Persons Having Done Military Service, Service in Bodies of Internal Affairs, the state Anti-Fire Service, Bodies for Control of the Turnover of Drugs and Psychotropic Substances, Establishments and Bodies of the Criminal Executive System and Their Families’ in connection with the complaint of S.V. Ivanov”  
See URL: <http://www.ksrf.ru/en/Decision/Judgements/Documents/Resume14012016.pdf>
- Judgement of the Constitutional Court of the Russian Federation of 19 April 2016 No.12-II “In the case concerning the resolution of the question of

the possibility to execute in accordance with the Constitution of the Russian Federation the Judgement of the European Court of Human Rights of 4th July, 2013 in the case of *Anchugov and Gladkov v. Russia* in connection with the request of the Ministry of Justice of the Russian Federation”

See URL: <http://www.ksrf.ru/en/Decision/Judgements/Documents/Resume19042016.pdf>

- Judgement of the Constitutional Court of the Russian Federation of 15 November 2016 No.24-II “In the case concerning the review of constitutionality of Item “b” of Section 3 of Article 125 and Section 3 of Article 127 of the Criminal Executive Code of the Russian Federation in connection with the request of the Vologda Regional Court and the complaint of N.V.Korolev and V.V.Koroleva”

See URL: <http://www.ksrf.ru/en/Decision/Judgements/Documents/Resume15112016.pdf>

- Judgement of the Constitutional Court of the Russian Federation of 27 March 2018 No.13-II “In the case on the review of constitutionality of Item 3 of Article 1 of the Law of the Stavropol Territory ‘On Recognition as Having Lost Force of Individual Provisions of Legislative Acts of the Stavropol Territory’ in connection with a complaint of M.S.Kolesnikova”

See URL: <http://www.ksrf.ru/en/Decision/Judgements/Documents/Resume27032018.pdf>

- Judgement of the Constitutional Court of the Russian Federation of 25 October 2018 No.38-II “In the case on the review of constitutionality of Section 1 of Article 127 and Section 1 of Article 392 of the Labour Code of the Russian Federation in connection with complaints of M.V.Danilov, K.V.Kondakov and others”

See URL: <http://www.ksrf.ru/en/Decision/Judgements/Documents/Resume25102018.pdf>

- Judgement of the Constitutional Court of the Russian Federation of 14 November 2018 No.41-II “In the case on the review of constitutionality of Article 46 of the Federal Law ‘On Education in the Russian Federation’ in connection with a complaint of I.V.Seregina”

See URL: <http://www.ksrf.ru/en/Decision/Judgements/Documents/Resume14112018.pdf>

- Judgement of the Constitutional Court of the Russian Federation of 28 May 2019 No.21-II “In the case on the review of constitutionality of Article 19 of the Federal Law ‘On Hunting and on the Preservation of Hunting Resources

and on Introduction of Amendments to Certain Legislative Acts of the Russian Federation’ in connection with the complaint of Russian citizen G.K. Schukin”

See URL: <http://www.ksrf.ru/en/Decision/Judgements/Documents/Resume28052019.pdf>

- Judgement of the Constitutional Court of the Russian Federation of 29 November 2019 No.38-II “In the case on the review of constitutionality of Articles 1070 and 1100 of the Civil Code of the Russian Federation and Article 22 of the Federal Law ‘On the Foundations of the System for the Prevention of Child Neglect and Juvenile Delinquency’ in connection with the complaint of A”

See URL: <http://www.ksrf.ru/en/Decision/Judgements/Documents/Resume29112019.pdf>

- Judgement of the Constitutional Court of the Russian Federation of 10 December 2019 No.39-II “In the case on the review of constitutionality of Article 13 of the Law of the Russian Federation ‘On Rehabilitation of Victims of Political Repressions’ and Article 7, paras. 3 and 5; Article 8, Section 1, para. 1; Article 8, Section 2 of the Law of the City of Moscow ‘On Securing the Housing Rights of the Inhabitants of the City of Moscow’ in connection with complaints of A.L. Meissner, E.S. Mikhaylova and E.B. Shasheva”

See URL: <http://www.ksrf.ru/en/Decision/Judgements/Documents/Resume10122019.pdf>

- Judgement of the Constitutional Court of the Russian Federation of 13 January 2020 No.1-II/2020 “In the case on the review of constitutionality of Article 13, Sections 2 and 3; Article 19, Section 5, para. 5; and Article 19, Section 1 of the Federal Law ‘On the Foundations of Healthcare in the Russian Federation’ in connection with the complaint of R.D. Svechnikova”

See URL: <http://www.ksrf.ru/en/Decision/Judgements/Documents/Resume13012020.pdf>

- Judgement of the Constitutional Court of the Russian Federation of 30 June 2020 No.31-II “In the case of review of constitutionality of provisions of Article 164, item 1, sub-item 12 and item 3, and Article 165, item 14 of the Tax Code of the Russian Federation in connection with the complaint of *Gazprom Neft Trading GmbH*”

See URL: <http://www.ksrf.ru/en/Decision/Judgements/Documents/Resume30062020.pdf>

- Judgement of 15 July 2020 No.36-II “In the case on the review of constitutionality of Articles 15,16, Article 151, Section 1, Articles 1069 and 1070 of the Civil Code of the Russian Federation, Article 61 of the Civil Procedure

Code of the Russian Federation, Article 24.7, Sections 1,2 and 3, Articles 28.1 and 28.2 of the Code of Administrative Offences of the Russian Federation and Article 13 of the Federal Law ‘On the Police’ in connection with complaints of R.A. Loginov and R.N. Sharafutdinov”

See URL: <http://www.ksrf.ru/en/Decision/Judgements/Documents/Resume15072020.pdf>

- Judgement of 25 December 2020 No. 49-II “In the case on the review of constitutionality of Para. 5, subpara. 3 of the Governor of the Moscow Region Decree ‘On the Introduction in the Moscow Region of a High Alert Regime for the Authorities and Forces of the Moscow Regional Emergency Prevention and Response System and some Measures to Prevent the Spread of a New Coronavirus Infection (COVID-2019) on the Territory of the Moscow Region’ in connection with the request of the Protvinsky City Court of the Moscow Region”

See URL: <http://www.ksrf.ru/en/Decision/Judgements/Documents/Resume25122020.pdf>

- Judgement of 13 April 2021 No.13-II “In the case on the review of constitutionality of Article 24, paragraph 2 of part 1; Article 24, part 2; Article 249, part 3 and Article 254, paragraph 2 of the Code of Criminal Procedure of the Russian Federation in connection with the complaint of A.I.Tikhomolova”

See URL: <http://www.ksrf.ru/en/Decision/Judgements/Documents/Resume13042021.pdf>

### ***Decisions (inadmissibility decisions) of the Constitutional Court of the Russian Federation***

- Decision of the Constitutional Court of the Russian Federation of 17 July 2014 No.1567-O “Upon the request of the group of deputies of the state Duma of the Federal Assembly of the Russian Federation as regards verification of constitutionality of a number of provisions of the Law of the Russian Federation on Amendment to the Constitution of the Russian Federation ‘On the Supreme Court of the Russian Federation and the Public Prosecution Service of the Russian Federation’”

- Decision of the Constitutional Court of the Russian Federation of 9 July 2020 No.1644-O “Upon complaint of citizen Igor Aleksandrovich Suvorov as regards violation of his constitutional rights by Article 328, part one, of the Criminal Code of the Russian Federation, and Article 13, item 4 of the Federal Law ‘On Alternative Civilian Service’”

- Decision of the Constitutional Court of the Russian Federation of 18 September 2014 No.1828-O “Upon complaint of the citizen Zubilevich Alesya Igorevna on violation of her constitutional rights by Article 84 of the Criminal Code of the Russian Federation, Act of the state Duma of the Federal Assembly of the Russian Federation of 2 July 2013 No. 2559-6 ГД ‘On Declaring Amnesty’, and the Act of the state Duma of the Federal Assembly of the Russian Federation of 2 July 2013 No. 2562-6 ГД ‘On the order of application of the Act of the state Duma of the Federal Assembly of the Russian Federation of 2 July 2013 No. 2559-6 ГД ‘On Declaring Amnesty’ ”



# 14. Tajikistan

## Constitutional Court

### *Overview*

Constitutional rights, liberties and duties are contained in Chapter 2 of the Constitution, entitled “Rights, liberties, basic duties of individuals and citizens”. In accordance with the Constitution of the Republic of Tajikistan the rights and liberties of man and citizen can be divided into personal, political, economic, social and cultural rights. In the Republic of Tajikistan, all human and civil rights and freedoms are enshrined in the Constitution and normative legal acts. Within the context of international human rights law, the Republic of Tajikistan has ratified seven of the nine core UN human rights treaties. Regarding historical or cultural contexts of particular relevance to constitutional rights, It has to be noted that the Constitution of the Republic of Tajikistan includes the provisions that were contained in the Declaration of Cyrus the Great (539 B.C.), such as religious liberty and inviolability of property rights. The emergence of ideas about human rights and freedoms, including freedom of conscience and religion, can also be found in the Zoroastrian legal system and its main source - the holy book of Zoroastrianism “Avesta”. In terms of the recent Covid-19 pandemic, the Decree of the President of the Republic of Tajikistan from June 5, 2020, №1544 “On prevention of the impact of infectious diseases COVID-19 on the socio-economic spheres of the Republic of Tajikistan” has provided significant tax and credit benefits, benefits and compensations totalling more than 50 million somoni.

### *Outline*

#### **I. Rights in the Constitution**

- A. Constitutional bill of rights
- B. Rights elsewhere in the Constitution
- C. Concretization of constitutional rights
- D. Historical background and development

#### **II. Classification and content**

- A. Enumerated constitutional rights
- B. Unenumerated constitutional rights
- C. Protection and limitation

#### **III. Interpretation and current issues**

- A. Rights in diverse contexts
- B. Impact of international norms
- C. Current issues

#### **Annex: List of cited legal provisions**

## **I. Rights in the Constitution**

### **A. Constitutional bill of rights**

In the Constitution of the Republic of Tajikistan special attention is paid to the rights and liberties of the man and citizens.

In order to recognize, treat and protect the rights and liberties of the man and citizens accordingly, a separate Chapter 2 “Rights, liberties, basic duties of individuals and citizens” was included in the Constitution, which comprises 34 articles or one third of the Constitution’s total articles. 29 articles out of 34 are devoted only to guarantee of the rights and liberties of the man and citizens.

In Chapter 2 of the Constitution five groups of the rights and liberties of the man and citizens are guaranteed, including individual (natural), political, economic, social and cultural rights.

In the Republic of Tajikistan, the rights and liberties of man and citizens are given priority, which are emphasized in Article 5 and Chapter 2 of the Constitution of the Republic of Tajikistan.

Regarding basic duties of man and citizens mentioned in the title name of Chapter 2 of the Constitution of the Republic of Tajikistan it has to be noted that in the case of existence of rights along with the duties, one has to control their right balance.

Therefore, in the title name of Chapter 2 the word “rights” comes first, then “liberties” and lastly “basic duties” of man and citizens in order to keep the balance.

Along with rights and liberties, the Constitution of the Republic of Tajikistan determines the basic duties of man and citizen.

As mentioned above, the basic duties of man and citizen are set out in Articles 42, 43, 44 and 45, Chapter 2 of the Constitution of the Republic of Tajikistan. Article 43 sets out duties for citizens and the other articles contain duties that are for everyone.

These duties are set to ensure the balance and implementation of the constitutional rights of citizens.

## **B. Rights elsewhere in the Constitution**

Besides Chapter 2 of the Constitution of the Republic of Tajikistan the rights and liberties of man are guaranteed in the preamble and Article 5.

In the preamble of the Constitution of the Republic of Tajikistan the rights of man are considered as a supreme value, which means that human rights are guaranteed and highly valued.

In Article 5 of the Constitution of the Republic of Tajikistan human rights are considered as a supreme value and natural rights such as life, honor, dignity and other natural rights are recognized as inviolable.

Listing human rights in the preamble and Article 5 of the Constitution of the Republic of Tajikistan once again demonstrate the fact that man and his rights and liberty is in the center of the state's focus.

Another fact that strengthens the abovementioned rights is that Article 5 is contained in Chapter 1 of the Constitution, which is named "The fundamentals of the constitutional system". This means that one of the main bases of the constitutional structure of the Republic of Tajikistan is the natural rights of humans.

Of course, all the provisions of the Constitution of the Republic of Tajikistan are directly applicable, and the provisions of Article 5, Chapter 1 of the Constitution are of special importance for a democratic state based on the rule of law.

Besides the rights and liberties, the Constitution of the Republic of Tajikistan lists the basic duties of individuals and citizens as well.

As we mentioned above, basic duties of the individuals and citizens are listed in Articles 42, 43, 44 and 45 of Chapter 2 of Constitution.

For example, Article 42 of the Constitution of the Republic of Tajikistan stipulates that "In Tajikistan everyone shall be obliged to follow the Constitution and the laws and recognize the rights, liberties, dignity and honor of others."

This provision of the Constitution shows that each person has to respect others' rights in order that his rights are implemented. All people shall act in accordance with the law.

### **C. Concretization of constitutional rights**

Since its inception the Constitution of the Republic of Tajikistan guarantees the rights and liberties of man and citizens and secures its implementation and protection.

Nevertheless, for regulating new relations that appeared in the society, including rights, liberties and duties of man and citizens, the protection of the constitutional structure, state security and the population's health, the Constitution of the Republic of Tajikistan was amended by referendum on September 26, 1999, June 22, 2003 and June 22, 2016.

As a result, a set of provisions from international treaties have been included in the Constitution.

In Tajikistan for duly implementing constitutional rights of man and citizens, related laws are adopted for widely regulating relevant relations.

### **D. Historical background and development**

Chapter 2 of the Constitution of the Republic of Tajikistan begins with the list of individual rights and liberties. Compared to the previous constitution it contains a longer list of rights, liberties and guarantees.

The newly adopted Constitution of the Republic of Tajikistan of 1994, along with expanding the list of rights and liberties of individuals also shows their guarantees. However, these guarantees are not provided with details regarding implementation. Chapter 2 of this Constitution differs from the previous constitution in terms of list of rights, liberties and basic duties of citizens. Chapter 2 of the new Constitution consists of 34 articles but in the old constitution Chapter 2 included 37 articles. They are similar in terms of meaning but the volume of some provisions are short. For example, in the old constitution 3 articles (Articles 32, 33, 34) are devoted to citizens' equality but in the new Constitution only 1 article (17). For the first time in the constitutional practice of Tajikistan the new Constitution regulates the status of human rights in emergency cases (Articles 46, 47). Considering all these provisions, the current Constitution differs from the Tajik Soviet constitution by its meaning and significance.

It has to be noted that the Constitution of the Republic of Tajikistan includes the provisions that have been contained in the Declaration of Cyrus the Great (539

B.C.) more than one thousand years ago such as religious liberty and inviolability of property rights.

Due to the historical necessity, progress of human life, along with the continuation of legal reforms in Tajikistan, the Constitution was amended three times, i.e. in 1999, 2003 and 2016, in order to bring the norms of the Constitution in line with modern requirements, improve it and create the emergence of new democratic phenomena.

As a result of the 2003 amendments, man and his rights and freedoms were proclaimed supreme (Article 5), referendums and elections were recognized as the highest form of direct expression of peoples' power (Article 6), political parties were recognized as an element of the political system, and the rights and liberties of man and citizens were recognized as the purpose, meaning and implementation of laws, the activity of the legislature, the executive and local authorities, local self-government bodies, the right of each person to a trial in a competent court (Article 19) was declared independent and impartial, the democratic foundations of political parties were strengthened, the promotion of social, racial, national, religious and linguistic hatred was banned, the right of the individual to free medical care and the role of the state in improving the environment, the development of mass sports and tourism were concretized, the right of the individual to free basic general education in public educational institutions and in primary, vocational, secondary and higher education was strengthened.

## **II. Classification and content**

### **A. Enumerated constitutional rights**

The rights, liberties and basic duties of man and citizens on the basis of the Constitution of Tajikistan of 1994 can be classified as follows: 1) individual rights and freedoms; 2) political rights and freedoms; 3) social and economic rights and freedoms; 4) the main duties of a man and a citizen; 5) the rights, liberties and basic duties of man and citizen in an emergency 6) guarantees of the rights and liberties of man and citizen.

In accordance with the Constitution of the Republic of Tajikistan the rights and liberties of man and citizen can also be divided into personal, political, economic, social and cultural rights and freedoms depending on the main areas of walks of life.

In Tajikistan, the freedoms and rights of the individual are sacred, and dignity, honor, and other natural human rights are inviolable.

The Constitution of the Republic of Tajikistan stipulates that foreigners and persons without citizenship enjoy the declared rights and freedoms and have the same duties and responsibilities as citizens of Tajikistan, except for cases provided by law (Article 16). They are equal, including before the law and the courts, and their personal integrity, housing and judicial protection are guaranteed. Almost all individual, social, economic and cultural rights of citizens of Tajikistan extend to foreigners. At the same time, however, they do not have the right to vote and to be elected to public office, to participate in referendums, and some other political rights. The tasks of protecting the Motherland, protecting the interests of the state, strengthening its independence, security and defense capabilities are the sacred duties of the citizens of Tajikistan. Many other basic responsibilities extend to foreigners and persons without citizenship on an equal footing with citizens of Tajikistan.

According to the Constitution of the Republic of Tajikistan, the state may grant political asylum to foreign citizens who have been subjected to human rights violations (Article 16).

According to the requirements of Article 28 of the Criminal Code, citizens have the right to unite. A citizen has the right to participate in the formation of political parties, trade unions and other public associations, to join and leave them voluntarily.

The second section of the Constitution of the Republic of Tajikistan begins with the list of individual rights and freedoms. It has increased the number of rights and freedoms of this group compared to the old constitutions and increased their guarantees. The influence of international norms on human rights on the national legislation of Tajikistan is clearly felt in the constitutional regulation of individual rights and freedoms.

It should be noted that the basis of individual rights and freedoms begins with the preamble and the first chapter of the Constitution. The preamble to the Constitution states that the people of Tajikistan “consider the liberty and rights of the individual sacred” and will adopt and declare this Constitution. The first article declares the social nature of Tajikistan and its main goal is to “create decent living conditions and free development for everyone.

According to Article 5 of the Constitution of the Republic of Tajikistan, man, his

rights and freedoms are of the highest value. Life, honor, dignity and other natural human rights are inviolable.

The peculiarity of the individual rights and freedoms enshrined in the Constitution is that most of them are assigned to an individual, that is, to each person, and they are not related to citizenship. They belong to everyone from the day of birth and they are inviolable. This group consists of the rights and freedoms intended for the protection of life, liberty, honor, human dignity and other natural rights related to his private life.

## **B. Unenumerated constitutional rights**

In the Republic of Tajikistan, all human and civil rights and freedoms are enshrined in the Constitution and normative legal acts.

In accordance with the requirements of Article 14 of the Constitution, human and civil rights and freedoms are protected by the Constitution, laws of the republic and international legal acts recognized by Tajikistan.

The rights and freedoms of man and citizen are exercised directly. They determine the purpose, content and implementation of laws, the activities of the legislature, the executive, local authorities and self-government bodies, and are ensured through the judiciary.

There are some rights in the Republic of Tajikistan that are not enshrined in the Constitution, but their regulation refers to other laws.

For example, in accordance with Article 27 of the Constitution of the Republic of Tajikistan, the procedure for conducting elections is regulated by constitutional laws and laws. Referendums are conducted in accordance with the relevant constitutional law.

The current Constitution of the Republic of Tajikistan of 1994 contains some norms that were not reflected in the previous Constitution.

According to the Constitution of the Republic of Tajikistan (Article 12), the basis of the economy of Tajikistan is formed by various forms of ownership. The state guarantees free economic activity, entrepreneurship, equality and legal protection of all forms of property, including private property. According to the previous Constitution of 1978 (Article 10), the basis of the economic system of

the state was only socialist property in the form of state property and collective and cooperative ownership, and guarantees of other forms of property, including private property, were almost forgotten.

Also, in the 1994 Constitution, along with other state features of Tajikistan, it declared its unity. These features were not specifically mentioned in the previous constitutions of the country.

### **C. Protection and limitation**

Article 5 of the Constitution of the Republic of Tajikistan states that the state recognizes, observes and protects the rights and freedoms of man and citizen.

The state shall create conditions for the proper respect of rights and freedoms. The state guarantees rights and freedoms, and in case of violation the offender will be prosecuted. A mechanism for the protection of rights and freedoms is established through the judiciary and other law enforcement agencies. The protection of human rights and freedoms in Tajikistan has both domestic and international tools.

In the Republic of Tajikistan, all human and civil rights are protected by the Constitution. In accordance with Part 1 of Article 14 of the Constitution, the rights and freedoms of man and citizen are protected by the Constitution, laws of the republic and international legal acts recognized by Tajikistan.

According to Part 3 of Article 14 of the Constitution, the restriction of human and civil rights and freedoms may be allowed only for the purpose of ensuring the rights and freedoms of others, public order, protection of the constitutional order, national security, national defense, public morality and public health and territorial integrity of the republic.

In accordance with the requirements of Article 47, during a state of emergency, the rights and freedoms provided for in Articles 16, 17, 18, 19, 20, 22, 25, 28 of the Constitution shall not be restricted.



### **III. Interpretation and current issues**

#### **A. Rights in diverse contexts**

The Declaration of Cyrus the Great is the first independent and humanitarian legal act that enshrines fundamental human rights, such as the right to life, housing, the right to freedom of movement, the right to freedom of conscience, and so on. This document was adopted much earlier than the Magna Carta of 1215, which is generally considered to be the first source of strengthening human rights and freedoms. In this regard, it can be said that the strengthening of human rights and natural freedoms in the normative documents and giving them a positive character was completed for the first time in the states of Eastern civilization.

The difference between the two documents is in the freedom of religion. The Declaration explicitly states that any person may or may not worship any religion. But in the Charter this privilege is given only to the church.

The emergence of ideas about human rights and freedoms, including freedom of conscience and religion, can also be found in the Zoroastrian legal system and its main source - the holy book of Zoroastrianism "Avesta". Freedom of conscience and religion was enshrined in the Declaration of Cyrus the Great, the founder of the Achaemenid dynasty, which ruled from 559 to 530 BC.

When Cyrus the Great entered Babylon in 539 B.C., he adopted a special declaration on the freedom of conscience, known as the Declaration of Cyrus the Great, which gave the people of Babylon the freedom to follow their gods.

Analysis of the Declaration of Cyrus the Great makes it possible to distinguish three main groups of rights and freedoms granted by Cyrus to the people of Babylonia: 1) equality regardless of race, religion and language; 2) freedom from slavery; and 3) religious tolerance.

#### **B. Impact of international norms**

In accordance with the procedure provided in Article 10 of the Constitution, international legal acts ratified by Tajikistan form an integral part of the country's legal system. If the laws of the country do not comply with the recognized international legal acts, the norms of the international acts shall apply.

The universally recognized principles and norms of international law in the field of human rights are directly applicable and do not require a mechanism of implementation (adaptation), that is there is no need to strengthen them through national legislation.

The Republic of Tajikistan is a member of multilateral international agreements signed at the UN, CIS and other international organizations, and has also signed bilateral agreements with individual countries. For example, the Republic of Tajikistan is a member of the UN Convention on Civil and Political Rights, the Convention on Economic, Social and Cultural Rights, the Universal Declaration of Human Rights, the Convention on the Rights of Persons with Disabilities, the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination against Women, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Convention on the Rights of the Child, and other relevant treaties. All these agreements have been ratified by the Parliament of the Republic of Tajikistan.

In the modern context of Tajikistan, the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social, and Cultural Rights are the defining principles of the state's human rights obligations and are reflected in various provisions of the Constitution.

In accordance with the third part of Article 10 of the Constitution, "International legal acts recognized by Tajikistan are an integral part of the legal system of the country. If the laws of the country do not comply with the recognized international legal acts, the norms of the international acts shall apply."

The legal system of Tajikistan is governed by the norms of the legislation of Tajikistan. In case of violation of human and civil rights and freedoms, priority is given to international acts.

No judgements of the Constitutional Court of Tajikistan have been issued on human and civil rights and freedoms.

A number of acts (resolutions, conclusions, or definitions) of the Constitutional Court have been adopted on human and civil rights and freedoms. For example, the Constitutional Court, in its first decision of 26 March 1996, recognized a Decree of the Presidium of the Supreme Council of the Republic of Tajikistan

of 15 November 1993, № 134 “On Suspension of Articles 6, 28, 48, 49, 53, 531, 85, 90, 92, 92 97, 2211 and 2212 of the Criminal Procedure Code of the Republic of Tajikistan”, which prohibits the person in custody, his or her defense lawyer or legal representative, from appealing to a court on the merits of an arrest or extension of detention, as unconstitutional and invalidated.

Similarly, several other acts of the Constitutional Court have been adopted, during their developing process relevant provisions of international laws, such as the Universal Declaration of Human Rights, the International Covenant on Political and Civil Rights, and others have been applied.

In the Republic of Tajikistan, on the basis of the Convention on the Rights of the Child, an authorized body has been established to carry out its activities in accordance with the Law of the Republic of Tajikistan “On the Protection of the Rights of the Child”. The authorized state body is the Ombudsman for the Rights of the Child in the Republic of Tajikistan.

Also, on the basis of the Convention on the Elimination of All Forms of Discrimination against Women, the Republic of Tajikistan’s laws “On Prevention of Domestic Violence” and “On State Guarantees of Equality between Men and Women and Equal Opportunities for Their Implementation” were adopted.

## **C. Current issues**

In accordance with the Decree of the President of the Republic of Tajikistan from June 5, 2020, №1544 “On prevention of the impact of infectious diseases COVID-19 on the socio-economic spheres of the Republic of Tajikistan”, significant tax and credit benefits, benefits and compensations totalling more than 50 million somoni, have been provided.

## **Annex: List of cited legal provisions**

### **1) Constitutional provisions**

*The Constitution of the Republic of Tajikistan of November 6, 1994*

- Article 5
- Article 10

- Article 12
- Article 14
- Article 16

## **2) Legislative provisions**

*Law of the Republic of Tajikistan “On Protection of the Rights of the Child”  
March 18, 2015*

- Article 5
- Article 6
- Article 17

*Law of the Republic of Tajikistan “On Prevention of Domestic Violence” March  
19, 2013*

- Article 3

*Law of the Republic of Tajikistan “On state guarantees of equal rights for men  
and women and equal opportunities for their implementation” March 1, 2005*

- Article 2

## **3) International provisions**

*Universal Declaration of Human Rights (1948)*

- Article 21

*International Covenant on Civil and Political Rights (1966)*

- Article 25

*International Covenant on Economic, Social and Cultural Rights (1966)*

- Article 17

# 15. Thailand

## Constitutional Court

### Overview

Constitutional rights and liberties are found in Chapter III of the Constitution, entitled “Rights and Liberties of the Thai People.” These provisions on constitutional rights and liberties illustrated in Chapter III can be classified into two categories. The first group concerns the general provisions on the rights and liberties. The second group relates to the certain provisions of each recognized right and liberty. Constitutional rights can also be found elsewhere in the Constitution. Also, according to section 25, paragraph one, the provision recognized both the rights and liberties prescribed *lex scripta* as the constitutional provisions and the rights and liberties to perform any act which is not prohibited or restricted by the Constitution or other laws. Consequently, according to this provision, the unenumerated constitutional rights and liberties are constitutionally guaranteed and will be protected by the Constitution. In terms of international human rights law, the Kingdom of Thailand has ratified seven of the nine core UN human rights treaties. Regarding particular historical or cultural contexts relevant to rights adjudication, these include the freedom of religion and the constitutional provisions on the King of Thailand. Current issues in constitutional rights adjudication include public health and abortion. Also, a recent ruling confirmed that the constitutional rights of a Thai citizen regarding the habitation in the Kingdom, the prohibition on expulsion of a Thai citizen from the Kingdom, and the entry into the Kingdom of a Thai citizen are absolute rights.

### Outline

#### I. Rights in the Constitution

- A. Constitutional bill of rights
- B. Rights elsewhere in the Constitution
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- D. Historical background and development

#### II. Classification and content

- A. Enumerated constitutional rights
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#### III. Interpretation and current issues

- A. Rights in diverse contexts
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- C. Current issues

#### Annex 1: List of cited legal provisions

#### Annex 2: List of cited cases

## **I. Rights in the Constitution**

### **A. Constitutional bill of rights**

There is a specific part of the present Constitution of the Kingdom of Thailand B.E. 2560 (2017) which comprehensively lists constitutional rights. This is because it is a internationally recognized principle of constitutionalism, that the protection of the rights and liberties of the people is adhered to and is attached with importance. This, therefore, requires the recognition of such an adherence and importance in the Constitution which is the supreme law of the state. In addition, the provision on the recognition of the rights and liberties of the people is also a main element of the constitution in the democratic state. Accordingly, the constitutional chapter on the matter is stipulated as a specific part of the Constitution of the Kingdom of Thailand, namely, Chapter III “Rights and Liberties of the Thai People.” It is located as one of the first three chapters of the Constitution out of the total number of sixteen chapters stipulated in the Constitution. The entire provisions stated in Chapter III consist of twenty five sections.

It is for the purpose of the integrity and the systematically interrelated classification of each provision in the chapter, that the 2017 Constitution does not state the title or heading of each individual provision. There is only the title of each chapter as well as the specific chapter on the rights and liberties, i.e. Chapter III “Rights and Liberties of the Thai People.” Nonetheless, the constitutional rights and liberties illustrated in Chapter III can be classified into two categories. The first group concerns the general provisions on the rights and liberties. The second group relates to the certain provisions of each recognized right and liberty.

As for the first group: the general provisions of rights and liberties, the substances of each section can be summarized as follows; section 25: general provision on the constitutional recognition of rights and liberties of the Thai people; section 26: the constitutional criteria for enacting law resulting in the restriction of the rights or liberties of a person; section 27: the recognition of the equality before law, the equality between people regardless of any ground of differences.

As regards the second group: the certain provisions of each recognized right and liberty, the substances of each section can be summarized as follows; section 28: the right to life and the security of person; section 29: the recognition of the principle regarding legally criminal punishment; section 30: constitutional prohibition on forced labour; section 31: the liberty to profess a religion; section

32: the right of privacy, dignity, reputation and family; section 33: the liberty of dwelling; section 34: the liberty to express opinions, make speeches, write, print, publicize and express by other means, academic freedom; section 35: the liberty of a media professional; section 36: the liberty of communication; section 37: the right to property and succession; section 38: the liberty of travel and the liberty of choosing his or her residence; section 39: constitutional prohibition on the deportation or forbidding from entering the Kingdom by a Thai citizen, and the revocation of Thai nationality acquired by birth; section 40: the liberty to engage in an occupation; section 41: the right to be informed and have access to public data or information in the possession of a state agency; section 42: the liberty to unite and form an association, co-operative, union, organization, community, or any other group; section 43: the right regarding the cultural matters and the natural resources; section 44: the liberty to assemble peacefully; section 45: the liberty to unite and form a political party under the democratic regime of government with the King as Head of State; section 46: the rights of a consumer; section 47: the right to receive public health services; section 48: the rights of a mother during the period prior to and after giving birth; and, section 49: the restriction on exercising the rights or liberties to overthrow the democratic regime of government with the King as Head of State.

The constitutional rights also contain constitutional duties of individuals or groups. Such duties are specially stated in a specific chapter of the 2017 Constitution, i.e. Chapter IV “Duties of the Thai People.” This chapter contains only one provision, namely, section 50 which has equal legal status to other constitutional provisions. Consisting of ten subparagraphs, the provision stipulates the duties in parallel with the rights and liberties stated in the previous chapter. An example can be provided by section 50(6); this subparagraph states that a person shall have a duty to respect and not to violate the rights and liberties of other persons. According to the duty provided in this subparagraph, it relates to a provision of section 25 paragraph one in Chapter III “Rights and Liberties of the Thai People” which prescribes that a person shall enjoy the rights and liberties to perform any act which is not prohibited or restricted by the Constitution or other laws insofar as the exercise of such rights or liberties does not violate the rights or liberties of other persons.

As for the details of the aforementioned subparagraphs stated under section 50, they can be categorized into two groups: the first one concerns the fundamental duties of the Thai people and the second group concerns the innovative duties relating to the contemporary state of the Thai society. On the subject of the first group, these categories can be illustrated by the examples as follows; subparagraph one: the duty to protect and uphold the nation, the religion, the

King, the democratic regime of government with the King as Head of State; subparagraph two: the duty to defend the country; subparagraph three: the duty to strictly observe the law; as well as subparagraph six: the duty to respect and not to violate the rights and liberties of other persons. As regards the second group, these categories can be illustrated by the examples as follows; subparagraph two: the duty to cooperate in preventing and mitigating disasters; subparagraph four: the duty to enroll in compulsory education; subparagraph six: the duty to not to commit any act which may cause disharmony or hatred in society; subparagraph seven: the duty to participate in the political activities, in particular, the duty to freely exercise his or her right to vote in an election or referendum; and subparagraph eight: the duty to cooperate and support the conservation and protection of the environment, natural resources, biodiversity, and cultural heritage.

## **B. Rights elsewhere in the Constitution**

The 2017 Constitution prescribes the constitutional rights of individuals and groups not only in the specific Chapter III mentioned above but also in other chapters of the Constitution.

The provisions of several chapters emphasize the significance of the rights and liberties of the Thai people as illustrated by the following examples: Chapter I “General Provisions”: section 4 recognizing the protection of human dignity, rights, liberties and equality of the people; Chapter V “Duties of the State”: a progressive provision of section 51 recognizing the right of the people and the community to follow up and urge the state to perform the duty of the state as prescribed in this Chapter; Chapter VII “the National Assembly”: section 95 recognizing the right to vote at an election for a person whose qualifications meet the constitutional requirement as stated by this provision, section 97 stipulating the right to stand for election of Members of the House of Representatives for a person whose qualifications meet the constitutional requirement as stated by this provision, section 133(3) recognizing the right to submit a petition to introduce a bill by persons having the right to vote of not less than ten thousand in number; Chapter XI “Constitutional Court”: section 213 recognizing the right to submit a petition to the Constitutional Court by a person whose rights or liberties guaranteed by the Constitution are violated for a decision on whether such act is contrary to or inconsistent with the Constitution; and, Chapter XV “Amendment to the Constitution”: section 256(1) recognizing the right of the people under the conditions prescribed by the Constitution on proposing for the constitutional amendment and subparagraph eight recognizing the right to cast vote in the referendum in case that the draft Constitution Amendment is an amendment to



the specific provision of the chapters as stated precisely by this subparagraph, e.g. Chapter I General Provisions or Chapter II The King.

The nature and characteristics of these rights listed elsewhere in the Constitution are of exact equivalent status to those rights listed in the “bill of rights.” According to section 25 paragraph three of the 2017 Constitution, the provision states that “Any person, whose rights or liberties protected under the Constitution are violated, can invoke the provisions of the Constitution to exercise his or her right to bring a lawsuit or to defend himself or herself in the Court.” Consequently, the constitutional rights both listed in “Chapter III: Rights and Liberties of the Thai People” – a chapter of the present Thai Constitution that prescribes the rights and liberties specifically, and those rights stipulated elsewhere in the Constitution take the positions of the equivalent status on their nature, content, and status. This is because whenever the infringement of the recognized rights and liberties of any person protected under the Constitution occurs, that person always enjoys the same right to bring a lawsuit or to defend himself or herself in the Court that has the jurisdiction on the matter notwithstanding that the infringed rights and liberties are prescribed in which chapter of the Constitution.

The constitutional text also lists constitutional duties of individuals. The provisions regarding the duties of the individuals and groups are stipulated in both Chapter III “Rights and Liberties of Thai People” and the specific chapter on duties: Chapter IV “Duties of the Thai People” of the 2017 Constitution.

As regards Chapter III “Rights and Liberties of the Thai People”, the provisions concerning the rights and liberties in relation to the duties of individuals can be exemplified by sections as follows. Section 31 on the full liberty to profess a religion, the provision states that in enjoying the liberty, a person shall have a duty to exercise such full liberty without performing any adverse effect to the duties of the Thai people, neither shall it endanger the safety of the state, nor shall it be contrary to public order or good morals. Section 34, paragraph two, the provision stipulates that, in exercising of academic freedom, the performance of such freedom shall not be contrary to the duties of the Thai people or good morals, and shall respect and not obstruct the different views of another person.

On the subject of Chapter IV “Duties of the Thai People”, the chapter states the duties for the Thai people as previously elaborately delivered. In this connection, a good example regarding the relationship between the constitutional duty and right can be illustrated by the duty on exercising the right to vote in an election or a referendum stated in section 50 subparagraph seven, since the provision states that voting in an election or a referendum is one of the duty of the Thai people.

Consequently, section 95 paragraph three prescribes that in case a voter fails to perform such duty without notification of a reasonable cause, he or she can be restricted on certain rights as provided by section 35 of the Organic Act on the Election of Members of the House of Representatives B.E. 2560 (2017), e.g. the restriction as provided by subparagraph two of the said provision stating that such person shall be subject to the restriction of the right to candidacy in an election into a post of a member of the House of Representatives or a member of a local assembly or a local administrator or candidacy in the selection into a post of a senator, etc.

### **C. Concretization of constitutional rights**

The following discusses the concretization of constitutional rights by the legislature and the case of recognizing concrete rights as statutory rights.

The constitutional rights have not required further elaboration on their implementation. According to the precedent set by the Constitutional Court in the Ruling No. 3/2552 dated 18<sup>th</sup> March B.E. 2552 (2009), the Court laid down the decision, being able to be summarized as that in case the Constitution has the intention to provide immediate effect upon the rights and liberties recognized under the Constitution without the need for a implementing legislation, consequently, those constitutional rights and liberties should have been effective without any further execution. In this connection, with regard to the present 2017 Constitution, the intention on the recognition of the rights and liberties is affirmed in section 25, paragraph two, stating that “Any right or liberty stipulated by the Constitution to be as provided by law, or to be in accordance with the rules and procedures prescribed by law, can be exercised by a person or community, despite the absence of such law, in accordance with the spirit of the Constitution.” As a result of this provision, it is obvious that by the intention of the current Constitution, the recognized constitutional rights and duties shall be enforced without any requirement on further execution regarding the implementation. This is also in accordance with the principle of the Constitutional Court as the Legislators.

### **D. Historical background and development**

#### **1. The constitutional recognition of the rights and liberties of the people**

Since the Kingdom of Thailand converted its regime of government to the

democratic regime in 1932, the Constitutions of the Kingdom of Thailand have recognized the rights and liberties of the people through the prescription of those rights and liberties into the constitutional provisions. The details elaborate as follows.

a) The Constitution of the Kingdom of Siam<sup>405</sup> B.E. 2475 (1932)

The pioneer constitution that recognized rights and liberties as the constitutional rights was the first permanent constitution: the Constitution of the Kingdom of Siam B.E. 2475 (1932). Stated in a specific part of the Constitution: “Chapter II Rights and Liberties of the Siamese People”, the chapter contained three provisions recognizing for the first time the fundamentally constitutional rights, e.g. the equality of a person before law; the absolute liberty to profess a religion; the absolute liberty and security in person, the right to dwelling, the right to property, the right to freedom of expression, and the right of peaceful assembly.

b) The Constitution of the Kingdom of Thailand B.E. 2489 (1946), the Constitution of the Kingdom of Thailand B.E. 2492 (1949), the Constitution of the Kingdom of Thailand B.E. 2534 (1991)

Subsequent to the first Constitution, the Constitution of the Kingdom of Thailand was revised in 1946 and 1949 resulting in the further prescription of the rights and liberties to the constitution. Promulgated in 1946, the Constitution of the Kingdom of Thailand B.E. 2489 (1946) added many new fundamental rights, e.g. the right to education, the liberty to form the political party, and the right to legal remedies. Afterwards, three years later, the more progressive constitution on the recognition of the rights and liberties were promulgated - the Constitution of the Kingdom of Thailand B.E. 2492 (1949). According to the 1949 Constitution, the provisions on the rights and liberties were not only stated the types of the recognized rights and liberties, they also elaborately prescribed the detail of the rights and liberties in each separated individual section. This could be counted as the landmark progressive recognition of the constitutional rights in Thai modern history and it also was the prototype for the successive Thai constitutions, e.g. the Constitution of the Kingdom of Thailand B.E. 2534 (1991). In this connection, according to the 1991 Constitution, the Constitutional Council was conferred the authority to review the constitutionality of law.

c) The Constitution of the Kingdom of Thailand B.E. 2540 (1997)

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405 Siam is the former official name of the Kingdom of Thailand.

Another significant turning point of the recognition of constitutional rights and liberties in Thai history was the promulgation of the so-called people's constitution in 1997: the Constitution of the Kingdom of Thailand B.E. 2540 (1997). As drafted by the indirect representatives of the people and the representatives from many stakeholders, the Constitution stipulated numbers of rights and liberties regarding both the recognized civil and political matters as stated in the former Constitutions and many newly economic and social matters, e.g. the right to conserve or restore their customs, local knowledge, arts or good culture of their community and of the nation, the equal right to receive standard public health service, or the right to get access to public information in possession of a state agency, etc. In this regard, the most progressive part of this Constitution was section 26 which stated that all state authorities, in exercising powers, regard should have been made to human dignity, rights and liberties in accordance with the provisions of this Constitution. Moreover, section 27 also prescribed that rights and liberties recognized by the Constitution expressly, by implication, or by decisions of the Constitutional Court should have been protected and directly binding on the National Assembly, the Council of Ministers, Courts and other state organs in enacting, applying and interpreting laws. In addition, section 28 recognized that a person could have invoked human dignity or exercised his or her rights and liberties insofar as it was not in violation of rights and liberties of other persons or contrary to this Constitution or good morals. Consequently, a person whose rights and liberties recognized by this Constitution were violated could have invoked the provisions of this Constitution to bring a lawsuit or to defend himself or herself in the court. As for section 29, the provision provided the criteria and conditions for the restriction of rights and liberties of a person recognized by the Constitution, i.e. in general, the restriction of such rights and liberties should have not been imposed except by virtue of provisions of the law specifically enacted for the purpose determined by this Constitution and only to the extent of necessity and not affected the essential substances of such rights and liberties. The said law should have been of general application and not intended to apply to any particular case or person, as well as should have mentioned the provision of the Constitution authorizing the enactment of such law. In this connection, the aforementioned criteria and conditions should have applied *mutatis mutandis* to rules or regulations issued by virtue of the provisions of such law. Additionally, the most outstandingly important feature of this Constitution was Chapter VIII "the Courts", Part 2 "Constitutional Court." This Part of Chapter VIII was the first time in the Thai history that the Constitutional Court was officially established as the independent court exercising judicial power and having the authority to be the guardian of the Constitution as well as having the jurisdiction to adjudicate the constitutional cases.

d) The Constitution of the Kingdom of Thailand B.E. 2550 (2007) and the present Constitution of the Kingdom of Thailand B.E. 2560 (2017)

In between 2007 and 2017, the two new Constitutions were promulgated respectively: the Constitution of the Kingdom of Thailand B.E. 2550 (2007) and the Constitution of the Kingdom of Thailand B.E. 2560 (2017) - the latter instrument is the present Constitution which is a result of the national reformation. According to the 2017 Constitution, all those rights and liberties recognized in the previous Constitutions have been stated in Chapter III as mentioned above. Additionally, the most important and progressive feature of this instrument is the advancement of section 25 paragraph one which recognized the performance of rights and liberties in the boarder sense and positive way. It is due to the fact that the Constitution does not only provide the rights and liberties as stated in the provisions, it also empowers the Thai people to exercise the rights or liberties which are not prohibited or restricted by the Constitution or other laws insofar as the performance of those rights and liberties does not affect or endanger the security of the state or public order or good morals, and does not violate the rights or liberties of others.

## **2. The major or minor changes of the constitutional text**

The constitutional text can be clarified through the way of interpreting the Constitution by the Constitutional Court, a court exercising judicial power, specializing on the reviewing and adjudication of the constitutional matter. This can be demonstrated by the Constitutional Court's Ruling No. 3/2552 dated 18th March B.E. 2552 (2009) which has been mentioned above. According to the aforementioned Ruling, the case concerned the fact that the local administrative agencies jointly operated the solid waste disposal system construction project by the way of committing unlawful acts since the project failed to arrange for a public hearing of the people residing in the area of the construction site. This was due to the fact that section 56 paragraph two of the 1997 Constitution, which was enforced at the time of carrying out the project, stated that any project or activity which may seriously affect the quality of the environment shall not be permitted, unless its impacts on the quality of the environment have been studied and evaluated as well as obtained opinions from an independent organization provided by the Constitution prior to the operation of such project or activity. In addition, section 59 of the 1997 Constitution of the Kingdom of Thailand also guaranteed the right of a person to express his or her opinions to the concerned agencies through hearing procedure, as provided by law, prior to the approval on any project or activity which may affect the quality of the environment, health and sanitary conditions, the quality of life or any other material interest. Therefore,

it is due to the lacking of the appropriate procedure provided by law, the case was submitted to the Administrative Court of First Instance. However, that Court dismissed the plaintiff because the relevant law on the matter, which was effective at time, namely, the Promotion and Preservation of National Environmental Quality Act B.E. 2535 (1992), did not provide the requirement of an environmental impact analysis report on the questioned solid waste disposal system project. Moreover, the Rule of the Office of the Prime Minister on Public Consultation by Means of Public Hearing B.E. 2539 did not impose the duty upon the state agencies on arranging public hearings to the matter. Rather, it was left to the relevant authorities' discretion for projects as provided by the Rule. Consequently, the Administrative Court of First Instance was not able to intervene in the exercise of discretion to review suitability on behalf of a state official in the Executive Branch, thus, it dismissed the plaintiff. Therefore, the case was submitted to the Supreme Administrative Court. Subsequently, the said Court submitted the case to the Constitutional Court for a request on the issue of the constitutionality of the Promotion and Preservation of National Environmental Quality Act B.E. 2535 (1992).

In this regard, since at the time of the adjudication by the Constitutional Court, the 2007 Constitution was promulgated, thus, the Court applied the provisions of the 2007 Constitution to the case. The Court found that the 2007 Constitution intended the rights and liberties as recognized under the Constitution to have immediate effect upon the promulgation of the Constitution without the need for a preceding implementing legislation. Therefore, in this case, a project or activity which appeared that it could cause a serious impact on a community's environmental quality, natural resources and the health of persons or a community, the person or community would have the right to file a plaintiff in the Administrative Court in order to request such Court to give a judgment or order the relevant agencies or the private entity concerned to conduct a study and assessment of environmental quality and the people's health or to arrange for a public consultation or to seek the opinion of an independent organ in the environmental or health fields and a higher education institution administering education on the environment or natural resources or health, prior to the operation of the project or activity.

By virtue of the aforementioned Ruling of the Constitutional Court, the Ruling itself did not modify constitutional text but it clarified the constitutional text through the interpretation of the Constitution for the purpose of effectively protecting the rights and liberties of the people and the community as to the spirit of the Constitution. Significantly, it can be concluded that the precedent set in the Ruling of the Constitutional Court results in paving the way to the higher level of protecting rights and liberties in the present Constitution. According to the

present Constitution of the Kingdom of Thailand B.E. 2560 (2017), section 25 paragraph two recognized that any right or liberty stipulated by the Constitution which requires to be provided by law, or to be in accordance with the rules and procedures prescribed by law, can be exercised by a person or community in accordance with the spirit of the Constitution, despite the absence of such law. Moreover, section 25 paragraph three also recognized the right of a person whose rights or liberties protected under the Constitution are violated to invoke the provisions of the Constitution for a lawsuit or to defend himself or herself in the Court. Therefore, the people and the community can enjoy the rights and liberties guaranteed by the Constitution precisely without any further legal condition or any further requirement.

## **II. Classification and content**

### **A. Enumerated constitutional rights**

#### **1. Structure of enumerated constitutional rights**

According to the Purpose and the Annotation on the Individual Provision of the 2017 Constitution provided by the Secretariat of the House of the Representatives, it could be concluded that the provisions regarding the constitutional rights and liberties stipulated in the present 2017 Constitution are classified by the substantial importance of the content of each provision.

Firstly, stated in section 4 of Chapter I “General Provisions”, is the general recognition on the protection of human dignity, rights, liberties and equality of the people. This is the most significant provision on the matter since it is the universal recognition of constitutional rights and liberties as well as human dignity and the equality to all, both the Thai people and the foreigners staying in the Kingdom; consequently, it is stipulated in the first chapter.

While, as regards the specific constitutional provisions on the rights and liberties, as in the earlier elaborations, the provisions are stated in Chapter III “Rights and Liberties of the Thai People.” The classification of the provisions was positioned through the level of the importance of the rights and liberties. Accordingly, the section commences with the provisions on the general criteria for the recognition and protection of rights and liberties. There could be demonstrated by section 25 which was stated to guarantee both the rights and liberties stated



in the Constitution and the rights and liberties to perform any act which is not prohibited or restricted by the Constitution and other laws, and section 26 which set a criteria for the enactment of a law resulting in the restriction of rights or liberties of a person that shall be in accordance with the conditions provided by the Constitution or shall not be contrary to the rule of law or affect human dignity, etc. Afterwards, the chapter mentions the provisions on the individual rights and liberties of the Thai people ranging from the first level of rights and liberties which are those concerned with the rights and liberties that shall be recognized fully without any condition, e.g. section 28: the right to life and the security of person. The following provisions are related to the second level of the rights and liberties, which are those capable of being limited under the stated condition, to illustrate, section 32: the right of privacy, dignity, and reputation; or section 34: the liberties to express opinions, make speech, write etc. Lastly, the third level which also relates to the rights and liberties being capable of limitation are, for instance: section 37: the right to property and succession; or section 41: the right to be informed and have access to public data or information in the possession of a state agency.

On the subject of the socio-economic rights, as Thailand is a party to the International Covenant on Economic, Social and Cultural Rights (ICESCR), therefore, the Constitution protects such rights and liberties through several provisions in Chapter III. The illustration of the respective provisions of Chapter III can be demonstrated by the following sections: section 40 recognizes the liberty to engage in an occupation; section 43 guarantees the right regarding the cultural matters and the natural resources, namely, subparagraph one of this section recognizing the rights of a person and a community to conserve, revive or promote wisdom, arts, culture, tradition and good customs at both local and national levels. While the second subparagraph of the said section recognizes the rights of a person and a community to manage, maintain and utilize natural resources, environment and biodiversity; section 47 guarantees the right to receive public health services. In addition, Chapter V of the Constitution “Duties of the State” also guarantees the socio-economic rights recognized in Chapter III by imposing the relevant duties upon the state. Stipulated in section 54, the Constitution imposes the duty on the state on ensuring that every child receives quality free-of-charge education for twelve years. While, section 55 imposes the duty on the state to ensure that the people receive efficient public health services universally. In addition, section 56, the provision also imposes the duty on the state to ensure that the basic utility services which are essential for the subsistence of the people be provided in a comprehensive manner in accordance with sustainable development. In this connection, for the purpose of making certain that the people can gain benefit from the state as stated in Chapter V, section 51 of the



Constitution provides the right to the people along with the community to follow up and urge the state to perform such act, as well as to take legal proceedings against a relevant state agency in order to have the state providing such benefit in accordance with the rules and procedures provided by law.

## **2. Rights holders**

The 2017 Constitution guarantees the rights and liberties of a person, including the juristic person, and the community in both Chapter I “General Provisions” and the specific chapter on the rights and liberties of Chapter III along with the rights guaranteed in other chapters of the Constitution.

### a) General provision

In the first place of Chapter I “General Provisions”, prescribed in section 4 paragraph one, the 2017 Constitution guarantees the universal protection of human dignity, rights, liberties and equality to all people. Consequently, Thai people, the community, and any person living under Thai jurisdiction can enjoy this constitutional recognition.

### b) Chapter III “Rights and Liberties of the Thai People”

On the subject of the rights and liberties specifically stipulated in Chapter III “Rights and Liberties of the Thai People”, such rights and liberties belong to both a person, including the juristic person, and the community as well. As illustrated in section 25, the general recognition of general provision on the constitutional rights and liberties, the Constitution guarantees the rights and liberties to both a person and the community. The examples of the rights and liberties of an individual person can be illustrated by section 28 of the Constitution which guarantees the right and liberty of a person in his or her life. While as regards the community, the case can be demonstrated by section 43 subparagraphs one and two which stipulate that a person and a community shall have the cultural right, e.g. to conserve or promote arts, culture, and good customs at both local and national levels as well as the nature-related right, e.g. to manage, maintain, and utilise natural resources in a balanced and sustainable manner.

### c) Other chapters

Additionally, in other chapters of the Constitution, the provisions also provide the constitutional rights and liberties to a person, including the juristic person, and the community. To illustrate, section 97 guarantees the right of a qualified

person to stand for election of members of the House of Representatives. Section 213 provides the right to a person whose rights or liberties guaranteed by the Constitution are violated to submit a petition to the Constitutional Court for a decision on whether such act is contrary to or inconsistent with the Constitution.

### **3. Content of enumerated constitutional rights**

The provisions of the rights and liberties prescribed in the Thai Constitution combines both the short form and the long one.

As regards the provisions on the rights and liberties of the Thai people as stated in the specific Chapter III “Rights and Liberties of the Thai People”, the substances of sections comprise both types of provisions. The chapter commences with the long form provisions which regard the universal principles of protection on the constitutional rights and liberties, i.e. section 25 to section 27. These three provisions are stipulated in long form for the purpose of clarification of the overall constitutional principles on the protection of rights and liberties. A good example can be illustrated by section 27 which states the principle of equality before the law and being protected equally under the law, including that the unjust discrimination against any grounds of differences, e.g. race, gender, disability, physical or health condition, personal status, economic and social standing, shall not be permitted.

As for the short form provisions, this category concerns the provisions relating to each certain constitutional right and liberty, as deliberated above. The detail of each provision regards the substance of the certain recognized right and liberty along with the ground for limitations, criteria, or conditions which the state can impose through law. The example of the short form provision can be demonstrated by section 28 regarding the right to life and the security of person. The section guarantees such a right and liberty to a person with the condition relating to the arrest and detention of a person, namely, such an action shall not be permitted, except by an order or a warrant issued by the Court or on other grounds as provided by law. Moreover, search of a person or any act affecting the right or liberty in life or person shall not be permitted except on the grounds as provided by law.

As regards the provisions of rights and liberties stated in other chapters of the Constitution, the form of these provisions is a short one. The provisions aim at stating the substances of the recognized rights and liberties, while the relevant procedures are prescribed in the relevant Acts. The illustration of the provisions in this type is section 213: this provision recognizes that a person whose rights

or liberties guaranteed by the Constitution are violated shall have the right to submit a petition to the Constitutional Court for a decision. In this regard, the procedures and conditions for submitting the petition are stated in the Organic Act on Procedures of the Constitutional Court B.E. 2561 (2018).

## **B. Unenumerated constitutional rights**

### **1. The recognition and content of unenumerated constitutional rights**

According to section 25, paragraph one, of the 2017 Constitution, the provision recognized both the rights and liberties prescribed *lex scripta* as the constitutional provisions and the rights and liberties to perform any act which is not prohibited or restricted by the Constitution or other laws. Consequently, according to the provision of section 25 paragraph one, the unenumerated constitutional rights and liberties are constitutionally guaranteed and will be protected by the Constitution likewise insofar as the exercise of such rights or liberties does not affect or endanger the security of the state or public order or good morals, and does not violate the rights or liberties of other persons.

Additionally, section 5, paragraph two, Chapter I “General Provisions”, of the Constitution also recognizes that in case there is not any constitutional provision being applicable to any case, the performance of an act or a decision shall be made in accordance with the constitutional conventions of Thailand under the democratic regime of government with the King as Head of State. In this regard, according to section 5 paragraph two as prescribed in Chapter I “General Provisions” of the Constitution, therefore, this provision is also applicable to the issue of rights and liberties. In this connection, as regards any rights and liberties which was recognized by the previous Constitutions of the Kingdom of Thailand continuously, even though those rights and liberties are not prescribed explicitly in the present Constitution, rather, they could be counted as unenumerated constitutional rights and liberties likewise since they are a part of the constitutional conventions of Thailand under the democratic regime of government with the King as Head of State by virtue of this provision.

### **2. Grounds and conditions for helping the recognition of unenumerated constitutional rights**

According to the Constitutional Court’s Ruling, the Constitutional Court ruled to set a precedent resulting in helping the recognition of unenumerated constitutional rights in several Rulings. This can be demonstrated by the Constitutional Court’s

Ruling No. 3/2559 (2016) dated 1st June B.E. 2559 (2016), the Constitutional Court's Ruling No. 18-22/2555 (2012) dated 13th July B.E. 2555 (2012), and the Constitutional Court's Ruling No. 4/2564 (2021) dated 11th March B.E. 2564 (2021).

As regards the Constitutional Court's Ruling No. 3/2559 (2016) dated 1st June B.E. 2559 (2016), the substantial point of this Ruling concerned the Act on Offences Relating to the Submission of Bids to Government Agencies B.E. 2542 (1999), Section 9, provided a legal presumption of a defendants' guilt, the defendant being a managing partner, a managing director, an executive officer, or an authorized person in the operation of a business of a juristic person, or a person with any involvement as a person responsible for the operation of the juristic person on certain relevant matters. By virtue of this provision, the prosecution did not have to prove whether or not the act or intent of those people related to or involved in such guilt under the Act. The only proof needed was that there was an offender under this Act which was committed for the benefit of the juristic person's business and that the defendant was a person holding the position in such a juristic person or being a person responsible for the juristic person's operations on such matter. The presumption was not merely that the managing partner, the managing director, the executive officer, or the authorized person in the operations of such juristic person, or the person responsible for the juristic person's operations on such matter was a joint principal offender with such juristic person, but there was also a presumption of being a joint principal offender with "any person" who committed an offence for the benefit of such juristic person. Thus, the provision of section 9 of the Act dealt with the issue of constitutionality. Nonetheless, at the time of adjudicating this case, the effective constitution was the Constitution of the Kingdom of Thailand (Interim) B.E. 2557 (2014) which did not classify each certain constitutional right as stated in the permanent constitutions. Consequently, according to this Interim Constitution, there was not the provision on the criminal law right providing the presumption of innocence as stipulated in section 29, paragraph two, of the present Constitution of the Kingdom of Thailand. Accordingly, the Constitutional Court ruled that section 9 of the Act was unconstitutional. In ruling so, the Court applied the rule of law and section 4 of the Interim Constitution, which recognized and protected human dignity, rights, liberties and equality previously enjoyed by the Thai people with the protection under Thailand's constitutional convention of the democratic regime of government with the King as Head of State, and the Thai existing international obligations shall also be protected under this Constitution.

On the subject of the Constitutional Court's Ruling No. 18-22/2555 (2012) dated 13th July B.E. 2555 (2012), and the Constitutional Court's Ruling No.

4/2564 (2021) dated 11th March B.E. 2564 (2021), by virtue of these Rulings, the Constitutional Court guarantees that it is the right and power of the people that form the direct source of the Constitution's origin or the right and power to constitute the Constitution. Even this right and power are not prescribed explicitly as a constitutional provision; however, they firmly belong to the people due to the fact that Thai people are the holders of sovereign powers. Therefore, in case of a constitutional amendment by way of rewriting the entire Constitution, even the amendment is within the power of the National Assembly, however, as the Constitution was obtained from a referendum of the people, it should therefore be conferred to the people as holders of the power to establish a Constitution to vote in a referendum on whether or not it is expedient to promulgate a new Constitution.

As a result of the precedent set by the aforementioned Rulings, it can be concluded that the Court affirmed the recognition of unenumerated constitutional rights regarding the issue of the presumption of innocence and the issue of the power to amend the Constitution by way of rewriting the entire instrument belonging to the Thai people as the holders of the power to establish a Constitution (*Pouvoir Constituant*).

### **3. Unenumerated basic rights recognized through jurisprudence**

The substantial issue of the Constitutional Court's Ruling No. 3/2559 (2016) dated 1st June B.E. 2559 (2016) originated from the defendant in the case on trial of the Supreme Court raising an objection regarding the Act on Offences Relating to the Submission of Bids to Government Agencies B.E. 2542 (1999), section 9, that it was contrary to or inconsistent with the 2014 Interim Constitution. Therefore, the Supreme Court referred the case to the Constitutional Court. The defendant objected that section 9 of the Act was a legal presumption of the defendant's guilt without first requiring proof of any act or intent. The provision extrapolated an offence committed by others as a condition for presuming the defendant's guilt and criminal liability. The provision was therefore a presumption of guilt of a suspect or defendant in a criminal case by virtue of a person's status as a condition not a presumption of facts constituting certain elements of an offence. In these regards, the Constitutional Court ruled that the Act on Offences Relating to the Submission of Bids to Government Agencies B.E. 2542 (1999), section 9, provided a legal presumption of a defendants' guilt, the defendant being a managing partner, a managing director, an executive officer, or an authorized person in the operation of a business of a juristic person, or a person with any involvement as a person responsible for the operation of the juristic person on certain relevant matters. By virtue of this provision, the prosecution did not have to prove whether or not

the act or intent of those people related to or involved in such guilt under the Act. The provision in such section was therefore a presumption of guilt of a suspect or defendant in a criminal case by relying on the status of a person as a condition and not a presumption of facts constituting an element of an offence. Consequently, the presumption was contrary to the rule of law which stated that the prosecution in a criminal case had the burden of proving a defendant's guilt with respect to all elements of an offence. Furthermore, the provisions of such section draws a person into the criminal procedure as a suspect or defendant, which could result in a restriction of such person's rights and liberties, e.g. arrest or detention, without reasonable preliminary evidence that such person had committed or had any intent relating to the alleged offence. Accordingly, the Constitutional Court ruled that section 9 of the Act was unconstitutional. In ruling so, the Court applied the rule of law and section 4 of the Interim Constitution, which recognized and protected human dignity, rights, liberties and equality previously enjoyed by the Thai people with the protection under Thailand's constitutional convention of the democratic regime of government with the King as Head of State, and the Thai existing international obligations shall also be protected under this Constitution.

As for the Constitutional Court's Ruling No. 18-22/2555 (2012) dated 13th July B.E. 2555 (2012), the case related to the requests submitted to the Constitutional Court for the ruling on the issue concerning the amendment of the 2007 Constitution by way of rewriting the entire instrument. In this regard, the Constitutional Court ruled that the power to constitute the highest political body or the power to establish a Constitution (*Pouvoir Constituant*) was the power of the people which formed the direct source of the Constitution's origin. The people's powers were above the Constitution establishing the legal system as well as all bodies exercising political and administrative powers. Since the established bodies possessed only the authority granted by the Constitution and were subject to the Constitution, it was not possible for those bodies to exercise the authority delegated by the Constitution to amend it in the same manner as a regular legislative amendment. Moreover, the promulgation of the 2007 Constitution underwent a process which acquired an approval vote in a direct referendum of the people who were the holders of sovereign powers. Therefore, as the Constitution was obtained from a referendum of the people, it should therefore be conferred to the people, as holders of the power to establish a Constitution, to vote in a referendum on whether or not it is expedient to promulgate a new Constitution.

In addition to the Ruling No. 18-22/2555 (2012) dated 13th July B.E. 2555 (2012), the Constitutional Court also affirmed the aforementioned precedent in the latest request on the same issue, i.e. the Constitutional Court's Ruling No. 4/2564 (2021) dated 11th March B.E. 2564 (2021). The Court maintained that the power

to establish a Constitution (*Pouvoir Constituant*) was the power of the people as the holders of sovereign powers. Therefore, in case of amending the Constitution by way of rewriting the entire instrument, the referendum was required to be provided in order to ask the people on whether or not it was expedient to promulgate a new Constitution. Moreover, following the amendment of the Constitution was done, another referendum was also required in order to ask the people on whether or not the approval to the new draft Constitution is given.

According to the aforementioned Rulings, it could be concluded that the unenumerated constitutional rights regarding the issue of the presumption of innocence and the issue of the power to establish a Constitution (*Pouvoir Constituant*) and the constitutional amendment to the entire body of the Constitution belongs to the people as the holders of the sovereign power.

## **C. Protection and limitation**

### **1. Constitutional provisions for protection of fundamental rights**

The 2017 Constitution prescribes the provision on the duties of the state on protecting the rights and liberties of the people in several chapters, to illustrate, the provisions stated in the Chapter III “Rights and Liberties of the Thai People” and the specific chapter regarding the matter, i.e. Chapter V “Duties of the State.”

As for Chapter III “Rights and Liberties of the Thai People”, the Constitution prescribes general criteria for the state regarding the enactment of a law resulting in the restriction of rights or liberties of a person. Stated in section 26 paragraph one, the state has the duty to enact law resulting in the restriction of rights or liberties of a person in accordance with the conditions provided by the Constitution. In case where the Constitution does not provide the conditions thereon, such law shall meet the following requirement: it shall not be contrary to the rule of law, not unreasonably impose burden on or restrict the rights or liberties of a person, and not affect the human dignity of a person. In this connection, the justification and necessity for the restriction of the rights and liberties shall also be specified. Additionally, other provisions of Chapter III also prescribe the criteria for the state on restriction or affecting the performance of the rights and liberties recognized in this chapter. The illustration can be seen in section 34 regarding the liberty to express opinions, make speeches, write, print, publicize and express by other means. The provision states a duty to the state relating to the restriction of such liberty that the limitation to this liberty shall not be imposed, except by virtue of the provisions of law specifically enacted for the purpose of maintaining the



security of the state, protecting the rights or liberties of other persons, maintaining public order or good morals, or protecting the health of the people.

Specifically, Chapter V of the Constitution prescribes the duties of the state regarding the protection of the people's rights and liberties as recognized by Chapter III in various sections. The purpose of these provisions aims at implementing the rights and liberties recognized in Chapter III. Examples can be illustrated by the following provisions of Chapter V in relation to the rights and liberties of the people stated in Chapter III of the Constitution. Section 55 of Chapter V of the Constitution imposes a duty on the state to ensure that the people receive efficient public health services universally. This is in accordance with section 47 of Chapter III which recognizes the right to receive public health services. While, section 57(1) of Chapter V imposes duty on the state to promote the cultural rights in parallel with section 43 of Chapter III which is the provision stating the rights of the people regarding the conservation, the revival of local wisdom, arts, culture, traditions and good customs at both local and national levels. In the meantime, section 57(2) also states a duty to the state regarding the nature-related rights in parallel with section 43(2) which is the provision stating the rights of the people regarding the conservation, the maintenance, the restoration, or the arrangement of the utilization of natural resources, environment and biodiversity. Moreover, section 59 of Chapter V imposes a duty upon the state to disclose any public data or information in the possession of a state agency. This is in accordance with right of the people to be informed and have access to public data or information in the possession of a state agency as stipulated in section 41 of Chapter III. Additionally, section 61 of Chapter V also imposes a duty to the state to provide efficient measures or mechanisms to protect and safeguard the rights of consumers in various aspects in order to protect the rights of a consumer as stipulated in section 46 of Chapter III.

## **2. Constitutional provisions for restriction of fundamental rights**

According to the constitutional provisions on the rights and liberties stated in the 2017 Constitution, it could be concluded that the supreme spirit of the Constitution is not to stipulate on the limitation of rights and liberties, in contrast, its ultimate purpose is to recognize and guarantee the rights and liberties of the Thai people and the community in the positive and broader sense as illustrated in section 4 and section 25 paragraph one, as already elaborated earlier. As a result, there is no constitutional provision prescribing the limitation of rights and liberties in general. There are only the prescription of the criteria for exercising the recognized constitutional rights and liberties in the Constitution, e.g. the last sentence of section 25 paragraph one states the condition for performing any



act which is not prohibited or restricted by the Constitution or other laws that the people can exercise such rights and liberties insofar as they do not affect or endanger the security of the state or public order or good morals, and does not violate the rights or liberties of other persons.

Nonetheless, as regards certain rights and liberties stated in the Constitution, the supreme instrument also prescribes the criteria and conditions for exercising of such certain rights and liberties in each constitutional provision relating to that right and liberty. This case is therefore not the general limitation provision applied to all constitutional rights. In this regard, the limitation of each certain right and liberty shall be done through the enactment of the ordinary legislation by the National Assembly for the purpose of such limitation on ground of the criteria and conditions provided by the Constitution. This can be illustrated by section 40 of the 2017 Constitution which recognizes the liberty to engage in an occupation. The provision states that as for the restriction of this liberty, it shall not be imposed, except by virtue of a provision of law enacted for the purpose of maintaining the security or economy of the country, protecting fair competition, preventing or eliminating barriers or monopoly, protecting consumers, regulating the engagement of occupation only to the extent of necessity, or for other public interest. In this connection, section 26, paragraph one, of the Constitution also prescribes the criteria for the enactment of a law resulting in the restriction of rights or liberties of a person, such an enactment of law shall be in accordance with the conditions provided by the Constitution. In the case where the Constitution does not provide the conditions thereon, such law shall not be contrary to the rule of law, shall not unreasonably impose burden on or restrict the rights or liberties of a person and shall not affect the human dignity of a person, and the justification and necessity for the restriction of the rights and liberties shall also be specified.

### **III. Interpretation and current issues**

#### **A. Rights in diverse contexts**

##### **1. The constitutional provisions reflecting particular historical or cultural contexts**

The constitutional provision reflecting the historical and cultural context of the Kingdom of Thailand can be illustrated by section 2 and section 7 of the

2017 Constitution. As for section 2, the provision states that “Thailand adopts a democratic regime of government with the King as Head of State.” While section 7 states that “The King is a Buddhist and Upholder of religions.” The historical background of these mentioned provisions trace back to the ancient era of Thai history.

Since the Sukhothai period, recognized as the beginning era of the Kingdom of Thailand, to the present time, spanning approx. 800 years, the country is ruled by the monarch continuously. Most importantly, the first constitution – the 1932 Constitution – was bestowed to the people of Thailand by H.M. King Prajadhipok, the brother to the grandfather of the present King. By virtue of the deliberated fact, every Constitution of the Kingdom of Thailand, since the first instrument to the present one, has prescribed the provision containing the substantial detail as to section 2 of the 2017 Constitution in order to recognize and affirm that the regime of government with the King as Head of State is part of the Kingdom.

In addition to the regime of government, the Monarch also has had a significant role relating to the religion and the liberty to profess a religion in Thailand. Since the ancient time, as recorded by the national chronicle, every reign of Thai King is Buddhist with the position as the main Patron for Buddhism. Every Monarch supports Buddhism through the contribution and to the temples, monks, and the education on the Tripitaka canon and the Buddhist code of monastic discipline. Moreover, as regards other religions, the Monarch also upholds every religion that the people observe – not only Thai citizens but also the foreigners. Consequently, section 7 of the 2017 Constitution has been prescribed to affirm the royal practice on the matter. In this connection, section 31 of the Constitution, which is the provision on the recognition of the full liberty to profess a religion as well as the liberty to exercise or practice a form of worship in accordance with his or her religious principles, is also stated on the basis of the royal practice on upholding every religion as well. Consequently, a person, no matter what religion, can equally enjoy full liberty to profess a religion, and shall equally enjoy the liberty to exercise or practice a form of worship in accordance with his or her religious principles.

## **2. The key judgments on constitutional rights in which the distinct historical or cultural contexts played an important role**

The Constitutional Court’s key Rulings on constitutional rights relating to the historical context can be illustrated by the following rulings: the Constitutional Court’s Ruling No. 6/2543 dated 29<sup>th</sup> February B.E. 2543 (2000) and the Constitutional Court’s Ruling No. 3/2562 dated 7<sup>th</sup> March B.E. 2562 (2019).

The main issue of these two Rulings concerns the question regarding the duty to exercise constitutional rights on political matters by the Monarch and the high-ranking members of the Royal Household. In this regard, the Constitutional Court ruled the case through considering the Thai convention of the regime of government with the King as Head of State which has been continuously adhered by the Kingdom of Thailand since the first establishment of the democratic regime under the reign of King Prajadhipok in 1932.

According to these two key Rulings, the Constitutional Court referred to the Royal Letter No. 1/60 dated 14<sup>th</sup> November B.E. 2475 (1932) which His Majesty King Prajadhipok, the Monarch who bestowed the first Constitution to the people of Thailand, expressed his opinion that members of the Royal Household who were ranked “*Mom Chao*” upwards should be above politics. As a consequence, the 1932 Constitution and the subsequent Constitutions, including section 6 of the present Constitution, recognized the special status of the Institution of Kingship under the democratic regime with the King as Head of State that the King was above politics and was enthroned in a position of revered worship and should not be violated. No person should have exposed the King to any sort of accusation or action. The mentioned constitutional provision is in accordance with the principle that the King reigns but does not rule, which is the constitutional principle being recognized in the parliamentary democracy by civilized nations with the King as Head of State. In addition, on the subject of the sovereign power, every Thai Constitution states that this power belonged to the Thai people and the King as Head of State exercised such power through the powers exercising sovereignty as stipulated by the Constitution. Consequently, as the exerciser of the sovereign power, therefore, the Monarch is above politics and maintains political impartiality. Thus, if the King, Queen, Heir to the Throne or members of the Royal Household, who are in line with the succession to the Throne under the Palace Law on Succession, B.E. 2467 (1924), and maintain close connections with the King, are under a duty to exercise constitutional rights on political matters, e.g. voting rights, this would create a contrariness or inconsistency with the principles of maintaining a position above politics and of political impartiality.

As a result, by virtue of these two key Rulings, the King, Queen, Heir to the Throne or the high-ranking members of the Royal Household are not under a duty to exercise constitutional rights on political matters.

## **B. Accession to international human rights treaties and protection of constitutional rights**

### **1. The international and regional human rights treaties of Thai accession or ratification**

Thailand has attached importance to the international commitment on the human rights obligations. Consequently, Thailand has acceded to and ratified the international instruments on human rights at the international and regional levels.

As for the international level, Thailand has adopted and acceded to many instruments on Human Rights. This ranges from the adoption of the Universal Declaration of Human Rights 1948 to the accession to seven UN Human Rights treaties and two relevant protocols. The details are as follows:<sup>406</sup>

1. Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), the date of accession: 9 Aug 1985;
2. Convention on the Rights of the Child (CRC), the date of accession: 27 Mar 1992;
  - 2.1 Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict (CRC-OP-AC), the date of accession: 27 Feb 2006;
  - 2.2 Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography (CRC-OP-SC), the date of accession: 11 Jan 2006;
3. International Covenant on Civil and Political Rights (ICCPR), the date of accession: 29 Oct 1996;
4. International Covenant on Economic, Social and Cultural Rights (ICESCR), the date of accession, 5 Sep 1999;
5. International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), the date of accession, 28 Jan 2003;
6. Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment (CAT), the date of accession: 2 Oct 2007;

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<sup>406</sup> The Office of the High Commissioner for Human Rights (OHCHR), Ratification Status for Thailand [Online] Retrieved from [https://tbinternet.ohchr.org/\\_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=172&Lang=EN](https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=172&Lang=EN) [10 May 2021].

7. Convention on the Rights of Persons with Disabilities (CRPD), the date of accession: 29 Jul 2008.

In addition to the UN conventions on human rights, Thailand is also a party to various international conventions on the right of labour by the International Labour Organization (ILO), a Specialized Agency of the UN responsible particularly with the matter. Thailand ratified nineteen of the ILO's Conventions and one Protocol, of which eighteen of those are still in force. The details of ratification could be illustrated by the following examples: Forced Labour Convention, 1930 (No. 29), the date of ratification: 26 Feb 1969; Employment Policy Convention, 1964 (No. 122), the date of ratification: 26 Feb 1969; including the conventions on the maritime and fishing matters, i.e. Maritime Labour Convention, 2006, the date of ratification: 7 Jun 2016; and Work in Fishing Convention, 2007 (No. 188), the date of ratification: 30 Jan 2019.<sup>407</sup>

As regards the regional level, Thailand as a member of the Association of Southeast Asian Nations (ASEAN) adopted the ASEAN Human Rights Declaration (AHRD). The achievement resulting from this instrument was further enhanced with the establishment of the ASEAN Intergovernmental Commission on Human Rights (AICHR): an overarching institution with overall responsibility for the promotion and protection of human rights in ASEAN.

## **2. The legal status of the acceded/ratified treaties or adopted declarations in Thai domestic legal system**

In case of being a party to the treaty or the international instrument requiring the implementation of the obligation to be in Thai domestic law, section 178 paragraph two of the 2017 Constitution states that “any treaty which requires the enactment of an Act for implementation, and other treaties. In this regard, the National Assembly shall complete its consideration within sixty days as from the date of receipt of such matter. As a result of the term “which requires the enactment of an Act for implementation”, this illustrates that the treaty or convention or any other so-called international instrument having international legal binding effect, which required by the criteria and conditions provided by Thai law to enact an Act for implementation, shall not be effective as domestic law immediately after the ratification or accession. They shall be effective on that manner subsequent to the implementation as Thai law. By virtue of this term of section 178, paragraph two, it is obvious that Thailand applies the principle

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<sup>407</sup> The International Labour Organization (ILO), Ratifications for Thailand [Online] Retrieved from [https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11200:0::NO::P11200\\_COUNTRY\\_ID:102843](https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11200:0::NO::P11200_COUNTRY_ID:102843) [10 May 2021].

of dualism. Consequently, the internationally legal commitment which Thailand had given consent to be bound, by the ratification or accession, shall be enforced as a domestic law following the National Assembly implementing it to be Thai legislation. Nonetheless, the international obligations are still binding Thailand in accordance with international law. In addition, as for the issue relating to the international obligation on human rights, the Constitutions of the Kingdom of Thailand recognized the principle of rule of law and the protection of human rights enshrined in various provisions as mentioned in the above elaborations. As a result, the government of the Kingdom of Thailand and the state's authorities have attached themselves to human rights doctrines as recognized in the international community. Thus, the commissions of any act which will be contrary to or inconsistent with the rule of law or the protection of human rights are prohibited constitutionally.

Nonetheless, in case there is effective Thai domestic law on the international obligation or in case such an international obligation concerns the administrative measure, the government can implement such an obligation through the effective law conferring the authority. In this event, the government is able to implement such an obligation immediately.

### **3. The key jurisprudence on constitutional rights regarding the significant use of international human rights norms**

The Constitutional Court referred to the constitutional provisions along with the international obligations in the international instruments on human rights to which Thailand is a party and has been implemented into Thai law to adjudicate cases in several Rulings. To be illustrated, the Constitutional Court's Ruling No. 12/2555 (2012) dated 28<sup>th</sup> March B.E. 2555 (2012) and the Constitutional Court's Ruling No. 15/2555 (2012) dated 13<sup>th</sup> June B.E. 2555 (2012).

According to the Constitutional Court's Ruling No. 12/2555 (2012) dated 28<sup>th</sup> March B.E. 2555 (2012), the case concerned the question regarding the principle of the presumption of innocence and the constitutionality of a provision of the Direct Sales and Direct Marketing Act B.E. 2545 (2002). The Constitutional Court adjudicated the case through the application of the 2007 Constitution which was enforced at the time and the citation of the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights to which Thailand is a party. Conclusively, the Constitutional Court found as follows. Section 39,

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\* According to the present 2017 Constitution, the provision on the principle of the presumption of innocence is prescribed in section 29 paragraph two with the same substance to section 39 paragraph two of the 2007 Constitution.

paragraph two, of the 2007 Constitution, provided that, in a criminal case, there should be a presumption that a suspect or defendant was innocent.\* This provision was intended to protect the rights of a suspect or defendant in a criminal case by presuming that the suspect or defendant was innocent until a final conviction. This presumption of innocence of a suspect or defendant in a criminal case as provided under section 39 paragraph two was derived from human rights as found in the Universal Declaration of Human Rights, Article 11. Consequently, this principle also constituted an aspect of the rule of law recognized by civilized nations and found internationally in both the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, to which Thailand is a party and bound under the obligations stated therein. This fundamental principle, according to which all persons are not regarded as criminal offenders, formed the core of the international criminal justice system, as a safeguard for the rights and liberties of a person in relation to criminal liability. The state protected all persons from criminal penalty until proven by evidence that a person was an offender. As regards the Direct Sales and Direct Marketing Act B.E. 2545 (2002), a penalty was provided in section 54, i.e. in the case where an offender liable to a penalty under this Act was a juristic person, the managing director, manager or person responsible for the operations of such juristic person should also be liable to the penalty prescribed by law for an offence prescribed under this Act, except where it could be proven that he/she was not involved in the commission of the offence by the juristic person. Consequently, section 54 of the Act was a presumption by law which resulted in a presumption of the defendant's guilt. This means a wrongful act of another person was applied as a condition for presuming the defendant's guilt and criminal liability by relying on the status of a person, not a presumption of fact constituting certain elements of the offence after the plaintiff had proven a certain act concerning the defendant's alleged wrongdoing. The case was therefore a presumption from the very beginning that a person in the said position also committed the offence and the burden of proving innocence was shifted to these positions. In this connection, the Constitutional Court held that the provision which presumed criminal wrongdoing of the suspect and defendant without any fact or intent relating to the offence was therefore inconsistent with the rule of law and contrary to or inconsistent with section 39 paragraph two of the Constitution.

As regards the Constitutional Court's Ruling No. 15/2555 (2012) dated 13<sup>th</sup> June B.E. 2555 (2012), the case concerned the constitutionality of section 26 paragraph one (10) of the Judicial Officials of the Courts of Justice Administration Act B.E. 2543 (2000) which provided that a selective examination candidate, knowledge examination candidate or special selection candidate for recruitment as a judicial official and appointment as an assistant judge must have the qualifications and not have the disqualifications "...having physical or mental attributes unfit for a



judicial official...”. This was due to the fact that, considering the said provision of such an Act in conjunction with the 2007 Constitution, it was found that the constitutional provision regarding the prohibition on discrimination also stated the term “disability” in order to protect this group of people from unjust discrimination against a person on the basis of a difference relating to a disability. Therefore, the aforementioned terms of such an Act “...having physical or mental attributes unfit for a judicial official...” raised the question relating to such unjust discrimination. In this connection, the Constitutional Court held that section 26 paragraph one (10) of the Judicial Officials of the Courts of Justice Administration Act B.E. 2543 (2000) prescribed the qualifications and disqualifications which had the characteristics of an unjust discrimination against persons with disabilities at the application stage. This amounted to a disentitlement of persons with disabilities from the initial stage. Persons with disabilities would be deprived of an opportunity to sit the qualifying examinations on an equal standing with others generally, as well as the opportunity to actually show knowledge and competence relating to such post. Thus, this section, in particular, the term stating the disqualifications on “...having a physical or mental attribute unfit for a judicial official...” was contrary to or inconsistent with the Constitution. In addition, the Constitutional Court also referred to the international obligation to which Thailand is bound, i.e. the United Nations Convention on the Rights of Persons with Disabilities (CRPD). It is Article 27(a) of this Convention which prohibits discrimination on the basis of disability with regard to all matters concerning all forms of employment, including conditions of recruitment, hiring and employment, continuance of employment, career advancement and safe and healthy working conditions, and (g), which imposed an obligation to employ disabled person in the public sector. Therefore, the aforementioned provision of the said Act also resulted in the inconsistency with the rights of persons with disabilities pursuant to the United Nations Convention on the Rights of Persons with Disabilities.

According to the two mentioned Constitutional Court’s Rulings, these are the significant examples concerning the citation of international human rights norm to which Thailand is bound through being a party to the international instruments as stated above. Furthermore, these obligations were also implemented to be part of the Thai constitutional provisions as illustrated by both the former Constitutions of the Kingdom of Thailand and the present one as cited in other parts to this Fact File.

#### **4. The international human rights norms and the recognition of unenumerated constitutional rights**

The recognition of the unenumerated constitutional rights relating to the



international human rights norms can be demonstrated by section 4 of the 2014 Interim Constitution. It was due to that fact that, at the time, the nation was during the reforming state; accordingly, the 2014 Interim Constitution was promulgated and enforced particularly for the event. In this regard, even the Interim Constitution did not prescribe a specific chapter on the rights and liberties of the people as stated in the permanent constitutions, nonetheless, section 4 of this Constitution, which was the provision on the rights and liberties of the Thai people, recognized the matter on the same level as the former Constitutions as well as in accordance with the existing international obligations by which Thailand is bound. Section 4 reads “Subject to the provisions of this Constitution, human dignity, rights, liberties and equality previously enjoyed by the Thai people with the protection under Thailand’s constitutional convention of the democratic regime of government with the King as Head of state and Thailand’s existing international obligations shall be protected under this Constitution.” Accordingly, as a result of the 2014 Interim Constitution’s section 4, the unenumerated constitutional rights relating to the international human rights norms to which Thailand is bound as a party are consequently recognized through this provision as a basis of the rights and liberties for the Thai people.

### **C. Current issues**

The adjudication of the Constitutional Court on the constitutional rights regarding the current issue of the society which led to significant result can be exemplified by the Constitutional Court’s Ruling No. 4/2563 (2020) dated 19<sup>th</sup> February B.E. 2563 (2020). This case concerned the issue of public health along with problems concerning ethics and morality in relation to the constitutionality of section 301 of the Criminal Code which imposed the offences on the abortion.

The issue of abortion had been raised for debate in Thai society for a long time. Some said the commission of such an offence was required to be a criminal offence since it concerned the morality. While others suggested that it should have not been imposed as a criminal offence because the pregnant mother had the absolute rights and liberties in life and body of a person as recognized and prescribed in both the former Thai Constitutions and section 28 of the present 2017 Constitution. In this connection, the Constitutional Court considered the issue and held as follows. The offence of abortion embedded an intent and legal morality to protect the fetus, recognizing the importance and value of human life pending birth. However, the roots of society were not dependent only upon the realization of value of human life, but also on other important factors which comprised roots of society. If the only intent was to protect the fetus without

consideration for the protection of the pregnant mother which pre-existed the fetus' rights, such an approach could prejudice the woman resulting in unfairness and encroachment or restriction of a woman's bodily rights to perform or omit an act on one's life and body, being a natural right fundamental to human dignity that was characteristic of one's rights and liberties, insofar that such action did not interfere or impinge upon the rights or liberties of another person. Thus, this provision restricted rights or liberties of a woman in excess of necessity. Consequently, section 301 of the Criminal Code affected the rights and liberties in life and body of a woman in excess of necessity; it was not consistent with the rule of proportionality, and restricted rights and liberties under section 28 of the Constitution. Accordingly, the Constitutional Court ruled that such a provision of the Criminal Code which had been in force for 60 years caused problems of illegal abortions in society resulting in harm to the lives and bodies of a large number of women. Therefore, the criminal provision on the abortion should have been revised in line with current circumstances. The relevant agencies should take actions to revise such provisions of law.

As a result of the mentioned Ruling, the National Assembly agreed, on 25 January, 2021, to amend section 301 of the Criminal Code by the way in accordance with the consideration of the Constitutional Court. In this connection, according to the amended provision of section 301, the penalty for the abortion after twelve weeks of pregnancy shall be liable to a term of imprisonment not exceeding six months or a fine not exceeding ten thousand baht, or both. The new provision was set a condition of twelve weeks-period of pregnancy, while, the previous one did not mention such period. Consequently, the abortion before the period shall not be considered a criminal offence. In addition, the imprisonment was reduced from not exceeding three years to be not exceeding six months. The present provision on abortion has been effective since 7 February, 2021.

In addition to the Constitutional Court's Ruling No. 4/2563 (2020) dated 19<sup>th</sup> February B.E. 2563 (2020), the Constitutional Court also adjudicated a case regarding the prohibition on expulsion of a Thai citizen from the Kingdom or the prohibition on restricting of a Thai citizen from entering into the Kingdom which are the rights recognized by the 2017 Constitution, section 39, paragraph one, Chapter III "Rights and Liberties of the Thai People." Such a case was the Constitutional Court's Ruling No. 7/2563 (2020) dated 27<sup>th</sup> May B.E. 2563 (2020) which the Court found as follows. Section 39 paragraph one of the Constitution was a provision which protected the rights and liberties of a Thai national from expulsion from the Kingdom or from prohibition on entry into the Kingdom. This was an absolute right. Nationality served as a tool to indicate membership or citizenship of a state, which exhibited ties or political loyalty to a state, as well

as created a legal relationship between the host state and the individual holding nationality of such state. The acquisition or renunciation of nationality was determined exclusively by the state. A person who had acquired Thai nationality enjoyed protection under the Constitution and laws. Such person had the civil right to reside in the Kingdom, whilst the state could not expel a person having Thai nationality from the Kingdom. Therefore, a person having Thai nationality could not be deprived of the unfettered right to enter the Kingdom, being a fundamental right recognized by the Constitution.

As a result, the Constitutional Court's Ruling No. 7/2563 (2020) dated 27<sup>th</sup> May B.E. 2563 (2020) confirmed that the fundamentally constitutional rights of a Thai citizen regarding the habitation in the Kingdom, the prohibition on expulsion a Thai citizen from the Kingdom, and the entry into the Kingdom of a Thai citizen are the absolute rights. These rights of a Thai citizen are recognized and protected by the Constitution in whatever situation.

## **Annex 1: List of cited legal provisions**

### **1) Constitutional provisions**

*The Constitution of the Kingdom of Thailand B.E. 2540 (1997)*

Chapter III "Rights and Liberties of the Thai People"

- section 26
- section 27
- section 28
- section 29
- section 56 paragraph two
- section 59

*The Constitution of the Kingdom of Thailand B.E. 2550 (2007)*

Chapter III "Rights and Liberties of the Thai People"

- section 39 paragraph two

*The Constitution of the Kingdom of Thailand (Interim) B.E. 2557 (2014)*

- section 4

*The Constitution of the Kingdom of Thailand B.E. 2560 (2017)*

Chapter I "General Provisions"

- section 2
- section 4

Chapter II “The King”

- section 6
- section 7

Chapter III “Rights and Liberties of the Thai People”

- section 25
- section 26
- section 27
- section 29
- section 30
- section 31
- section 32
- section 33
- section 34
- section 35
- section 36
- section 37
- section 38
- section 39
- section 40
- section 41
- section 42
- section 43
- section 44
- section 45
- section 46
- section 47
- section 48
- section 49

Chapter IV “Duties of the Thai People”

- section 50

Chapter V “Duties of the State”

- section 51
- section 55
- section 57(1), (2)
- section 59
- section 61

Chapter VII “the National Assembly”

- section 95
- section 97

- section 133(3)

Chapter VIII “the Council of Ministers”

- section 178 paragraph two

Chapter XI “Constitutional Court”

- section 213

Chapter XV “Amendment to the Constitution”

- section 256

## **2) Legislative provisions**

The Criminal Code (the latest amendment: 7 February, 2021)

- section 301

The Act on Offences Relating to the Submission of Bids to Government Agencies  
B.E. 2542 (1999)

- section 9

The Judicial Officials of the Courts of Justice Administration Act B.E. 2543  
(2000) (the latest amendment: 21 November, 2018)

- section 26 paragraph one (10)

The Direct Sales and Direct Marketing Act B.E. 2545 (2002) (the latest  
amendment: 17 May, 2017)

- section 54

The Organic Act on the Election of Members of the House of Representatives  
B.E. 2560 (2017)

- section 35

## **3) International provisions**

The Universal Declaration of Human Rights 1948 (the year of adoption: 1948)

- Article 11

The United Nations Convention on the Rights of Persons with Disabilities  
(CRPD) (the date of accession: 29 Jul 2008)

- Article 27(a) and (g)

## **Annex 2: List of cited cases**

The Election Commission requested for a Constitutional Court ruling on the scope of application of section 68 (the Constitution of the Kingdom of Thailand, B.E. 2540 (1997)) [the Constitutional Court's Ruling No. 6/2543 dated 29th February B.E. 2543 (2000)]

The Supreme Administrative Court referred the objection of plaintiffs (Mr. Paiboon Kongkerd and others totaling 211 persons) to the Constitutional Court for a ruling on whether or not section 46 paragraph one of the Promotion and Preservation of National Environmental Quality Act B.E. 2535 (1992) was contrary to or inconsistent with section 56 paragraph two and section 59 of the Constitution of the Kingdom of Thailand B.E. 2540 (1997) [the Constitutional Court in the Ruling No. 3/2552 dated 18th March B.E. 2552 (2009)]

Whether or not section 54 of the Direct Sales and Direct Marketing Act B.E. 2545 (2002) was contrary to or inconsistent with section 39 paragraph two and section 40(5) in conjunction with section 30 of the Constitution (the Constitution of the Kingdom of Thailand B.E. 2550 (2007)) [the Constitutional Court's Ruling No. 12/2555 (2012) dated 28th March B.E. 2555 (2012)]

The Ombudsman requested the Constitutional Court for a ruling under section 245(1) of the Constitution on whether or not section 26 paragraph one (10) of the Judicial Officials of the Courts of Justice Administration Act B.E. 2543 (2000) presented a question of constitutionality under section 30 of the Constitution (the Constitution of the Kingdom of Thailand B.E. 2550 (2007)) [the Constitutional Court's Ruling No. 15/2555 (2012) dated 13th June B.E. 2555 (2012)]

Request for a Constitutional Court Ruling under Section 68 of the Constitution (the Constitution of the Kingdom of Thailand B.E. 2550 (2007)) [the Constitutional Court's Ruling No. 18-22/2555 (2012) dated 13th July B.E. 2555 (2012)]

The Election Commission applied for a Constitutional Court ruling to dissolve Thai Raksa Chart Party [the Constitutional Court's Ruling No. 3/2562 dated 7th March B.E. 2562 (2019)]

Miss Srisamai Chueachat (applicant) requested for a Constitutional Court ruling under section 213 of the Constitution (the Constitution of the Kingdom of Thailand B.E. 2560 (2017)) [the Constitutional Court's Ruling No. 4/2563 (2020) dated 19th February B.E. 2563 (2020)]

Mr. Witteveen Tjibbe Ulysses Michael, or Tjibbe Ulysses Michael Witteveen (applicant) requested for a Constitutional Court Ruling under section 213 of the Constitution. [the Constitutional Court's Ruling No. 7/2563 (2020) dated 27th May B.E. 2563 (2020)]

The President of the National Assembly requested for a Constitutional Court ruling under section 210 paragraph one (2) of the Constitution regarding the issue of the duty and authority on proposing the draft constitutional amendment by members of the National Assembly under section 256(1) of the Constitution (the Constitution of the Kingdom of Thailand B.E. 2560) [the Constitutional Court's Ruling No. 4/2564 (2021) dated 11th March B.E. 2564 (2021)]

# 16. Turkey

## Constitutional Court

### *Overview*

*Part Two* of the Constitution, which is entitled “*Fundamental Rights and Duties*”, under Articles 17-74 of the Constitution, constitutes the Turkish “Bill of Rights”. These rights and freedoms include not only individual’s fundamental rights and duties, but also social and economic rights and duties, as well as political rights and duties. However, there are other “rights” of individuals enshrined in other sections of the Constitution, especially regarding the principle of equality and non-discrimination, the independence and impartiality of the judicial power. When the text of the Constitution is thoroughly examined, it appears that the list of constitutional rights is divided into three separate groups of rights and freedoms, which follows a specific order beginning with the core individual’s rights and freedoms, followed by social and economic rights and then political rights. It is possible to recognize some unenumerated rights by the Constitutional Court through its decisions by inferring from other specific fundamental freedoms and rights enshrined in Articles in the Constitution. With the constitutional amendment of 2010, the right of individual application to the Court was introduced for the very first time in the Turkish legal system. Key contexts for the interpretation of constitutional rights include the principle of the “state of law” and the principle of secularism. Also, Turkey has ratified eight of the nine core UN human rights treaties, and is subject to the European Convention on Human Rights.

### *Outline*

#### **I. Rights in the Constitution**

- A. Constitutional bill of rights
- B. Rights elsewhere in the Constitution
- C. Concretization of constitutional rights
- D. Historical background and development

#### **II. Classification and content**

- A. Enumerated constitutional rights
- B. Unenumerated constitutional rights
- C. Protection and limitation

#### **III. Interpretation**

- A. Rights in diverse contexts
- B. Impact of international norms

#### **Annex 1: List of cited legal provisions**

#### **Annex 2: List of cited cases**



# **I. Rights in the Constitution**

## **A. Constitutional bill of rights**

### **1. List of constitutional rights and its location within the Constitution**

The Preamble of the Constitution of the Republic of Turkey (also known as “the Constitution of 1982”, as it was adopted by a popular referendum in 1982, hereinafter “the Constitution”), which “*shall form an integral part of the Constitution*” as per Article 176 § 1 of the Constitution, stipulates that “*Every Turkish citizen has an innate right and power, to lead an honourable life to improve his/her material and spiritual wellbeing (...), through the exercise of the fundamental rights and freedoms set forth in this Constitution, in conformity with the requirements of equality and social justice.*” Article 12 § 1 of the Constitution further provides that “*Everyone possesses inherent fundamental rights and freedoms, which are inviolable and inalienable.*”

These “*fundamental rights and freedoms*” are comprehensively listed in *Part Two* of the Constitution, which is entitled “*Fundamental Rights and Duties*”, under Articles 17-74 of the Constitution (i.e. a total of 58 articles), constituting the Turkish “Bill of Rights”. These rights and freedoms include not only individual’s fundamental rights and duties (Articles 17-40), but also social and economic rights and duties (Articles 41-65) as well as political rights and duties (Articles 66-74). However, there are other “rights” of individuals enshrined in other sections of the Constitution, especially regarding the principle of equality and non-discrimination (Article 10), the independence and impartiality of the judicial power (Articles 9 and 138-145) and any other rights (see below, Part B).

### **2. Official heading of list of constitutional rights**

As indicated above, *Part Two* of the Constitution is entitled “*Fundamental Rights and Duties*” and is divided into four chapters, which are respectively entitled as follows: “*General Provisions*”; “*Rights and Duties of the Individual*”; “*Social and Economic Rights and Duties*”; and “*Political Rights and Duties*”.

The list of constitutional rights has its own official heading and each of the rights and freedoms enshrined by the Constitution have also their own headings. In this regard, Article 176 § 2 of the Constitution outlines that “*The headings of articles merely indicate the subject matter of the provisions, their order, and the interplay between them. These headings shall not be regarded as a part of the wording of*

*the Constitution*”, on the contrary to the Preamble of the Constitution (Article 176 § 1).

### **3. List of constitutional rights containing constitutional duties of individuals or groups**

Article 12 § 2 of the Constitution provides that *“The fundamental rights and freedoms also comprise the duties and responsibilities of the individual to the society, his/her family, and other individuals.”* Accordingly, in the Turkish Constitution, the title of the list of rights also includes the wording of “duties”, as mentioned above. These constitutional duties are of equal status with the listed constitutional rights. However, as some constitutional rights are listed in other sections of the Constitution, the duties related thereto are listed together with those rights in the Constitution. For instance, Article 24 § 2 reads as *“Acts of worship, religious rites and ceremonies shall be conducted freely, as long as they do not violate the provisions of Article 14”*, Article 34 § 2 as *“The right to hold meetings and demonstration marches shall be restricted only by law on the grounds of national security, public order, prevention of commission of crime, protection of public health and public morals or the rights and freedoms of others”*, Article 35 § 3 as *“The exercise of the right to property shall not contravene public interest.”*

## **B. Rights elsewhere in the Constitution**

### **1. Other constitutional rights listed elsewhere in the Constitution**

Apart from constitutional rights being grouped together in *Part Two* of the Constitution, there are also other “rights” of individuals enshrined in other sections of the Constitution. These are, firstly, the rights pertaining to the “equality before the law”, protected in Article 10 of the Constitution, set forth in *Part One*, entitled *“General Principles”*, which provides that *“Everyone is equal before the law without distinction as to language, race, colour, sex, political opinion, philosophical belief, religion and sect, or any such grounds.”* With the amendment of 2004, an additional paragraph was added to this provision, which stipulates that *“Men and women have equal rights. The State has the obligation to ensure that this equality exists in practice.”* With the amendment of 2010, a sentence added to this paragraph also ensures that *“Measures taken for this purpose shall not be interpreted as contrary to the principle of equality.”* Also, with the amendment of 2010, another paragraph added to Article 10 of the Constitution further provides that *“Measures to be taken for children, the elderly, disabled people, widows and orphans of martyrs as well as for the invalid and veterans shall not be considered as violation of the principle of equality.”*, so that positive discrimination towards

disadvantaged and vulnerable groups (women, children, elderly, disabled people, widows and orphans of martyrs, invalid and veterans) is currently guaranteed by the Constitution. In fact, State organs and administrative authorities are obliged to act in compliance with the principle of equality before the law in all their proceedings.

Secondly, the independence and impartiality of the judicial power are afforded protection in many constitutional provisions, as set forth in different parts of the Constitution. For instance, Article 9 of the Constitution, as amended on 16 April 2017 by Law no. 6771, provides that “*Judicial power shall be exercised by independent and impartial courts on behalf of the Turkish Nation*”. Other constitutional provisions pertaining to the independence and impartiality of the judicial power can be found under *Part Three, Chapter Three* of the Constitution, entitled “*Judicial Power*” (Articles 138-145) and which provide, among many others, the “independence of the courts” (Article 138), and the “security of tenure of judges and prosecutors” (Article 139). The rights to judicial due process such as the “publicity of hearings and the necessity of justification of verdicts”, including the “right to a prompt decision” and “at minimum cost” (Article 141) or the “formation of courts” (Article 142) are also listed in this part. However, the right to a fair trial defined in *Part Two* of the Constitution as the “freedom to claim rights” and the “principle of natural judge”, is enshrined in Articles 36 and 37 of the Constitution, and the “right to a prompt access to the competent authorities” and the “right to compensation for unlawful acts by public officials” are guaranteed under Article 40 of the Constitution.

Thirdly, the “right to vote, to stand for elections and to engage in political activities” as well as the rights and duties of political parties are listed under *Part Two, Chapter Four* of the Constitution; however, “parliamentary immunity” or “loss of membership” are enshrined in other sections of the Constitution, namely in *Part Three, Chapter One*, entitled “*Legislative Power*”. In the same vein, the “right to enter public service” is listed in *Part Two, Chapter Four*; however, the rights and duties of public servants are listed in *Part Three, Chapter Two*, entitled “*The Executive Power*”, except for their “right to conclude collective agreements”, guaranteed in Article 53, under *Part Two, Chapter Three* of the Constitution, which was introduced by the amendment of 2010 (Paragraph added on September 12, 2010; Act no. 5982). *Part Three, Chapter Two* of the Constitution also embodies provisions related to the rights and duties of the institutions of higher education and their higher bodies (Articles 130-132); the Radio and Television Supreme Council, institutions of radio and television, and public affiliated news agencies (Article 133); the Atatürk High Institution of Culture, Language and History (Article 134); the professional organizations having the character of

public institutions and their higher bodies (Article 135); and the Presidency of Religious Affairs (Article 136).

Lastly, *Part Four, Chapter Two* of the Constitution, entitled “*Economic Provisions*”, places positive obligations on the State for the protection of forest villagers (Article 170) and different economic actors (consumers, tradespeople and artisans; see, Articles 172 and 173) and for the “*development of cooperativism, which primarily aims at increase in production and protection of consumers*” (Article 171).

## **2. Nature and characteristics of these rights listed elsewhere in the Constitution**

Article 11 of the Constitution provides the supremacy and binding force of the Constitution “*upon legislative, executive and judicial organs, and administrative authorities and other institutions and individuals*”, without any distinction between its provisions. In addition, according to Article 12 of the Constitution entitled “*Nature of fundamental rights and freedoms*”, all fundamental rights and freedoms enshrined in the Constitution are “inviolable” and “inalienable”.

When the said two provisions are read together, it is obviously clear that the rights enshrined in other sections of the Constitution have the same nature and characteristics as the rights listed in the “bill of rights”. They are of exact equivalent status in terms of the nature of their content and legal status. As seen above, some rights listed in the “bill of rights” (such as the right to a fair trial) are also specified in other sections of the Constitution, or some rights which are not listed in the “bill of rights”, but are still considered as such, having the same nature and characteristics of the rights listed in the “bill of rights” (such as the equality before the law) can be alleged together or separately in a constitutional adjudication process.

## **3. Constitutional rights listed elsewhere in the Constitution containing constitutional duties of individuals and/or groups**

As indicated above, constitutional rights listed in other sections of the Constitution contain also duties of individuals and/or groups listed in the same section. With regards to the duties, there is no difference between the duties listed together with the “bill of rights” and the duties listed together with the constitutional rights listed in other sections of the Constitution, as per Article 12 § 2 of the Constitution provides that “*The fundamental rights and freedoms also comprise the duties and responsibilities of the individual to the society, his/her family, and other*

*individuals.”*

## C. Concretization of constitutional rights

There are constitutional rights requiring further elaboration on their implementation. The 1982 Constitution is a casuistic, rights-based constitutional text, as it defines the scope and the content of the constitutional rights and the extent of their protection in a very detailed manner. However, for most of these rights, the Constitution stipulates that they require further elaboration on their implementation through the law [legal texts or specific legislation] to ensure their effectiveness. This is particularly true for almost fifty constitutional rights enshrined in the “bill of rights” and other sections in the Constitution. Expressions such as “*shall be defined by law*”, “*regulated by law*”, “*prescribed by law*”, or “*laid down in law*” can be found in many constitutional provisions pertaining to fundamental rights and freedoms listed in the “bill of rights” or other sections in the Constitution, as indicated below.

### 1. Rights listed in the constitutional bill of rights

Firstly, Article 20 § 3 of the Constitution (Paragraph added on September 12, 2010; Act no. 5982) safeguarding the “right to request the protection of personal data” provides that “*the principles and procedures regarding the protection of personal data shall be laid down in law.*”

In addition, Article 26 of the Constitution safeguarding the “freedom of expression and dissemination of thought” provides that “*the formalities, conditions and procedures to be applied in exercising the freedom of expression and dissemination of thought shall be prescribed by law.*” Likewise, Article 29 of the Constitution safeguarding the “right to publish periodicals and non-periodicals” stipulates that “*the principles regarding the publication, the conditions of publication and the financial resources of periodicals, and the profession of journalism shall be regulated by law. The law shall not impose any political, economic, financial, and technical conditions obstructing or making difficult the free dissemination of news, thoughts, or opinions.*” Similar provisions can also be found in Article 31 of the Constitution safeguarding the “right to use mass media and means of communication other than the press owned by public corporations”, in Article 33 safeguarding the “freedom of association” and in Article 34 safeguarding the “right to hold meetings and demonstration marches”, providing that the conditions and procedures of the exercise of these rights should be regulated by law.

Besides, in Article 38 of the Constitution, it is provided that *“penalties, and security measures in lieu of penalties, shall be prescribed only by law”*, and in Article 40, it is stipulated that *“Damages incurred to any person through unlawful treatment by public officials shall be compensated for by the State as per the law.”*

Moreover, constitutional provisions regarding social and economic rights also include such aforementioned expressions. For instance, Article 42 of the Constitution safeguarding the “right of education” stipulates that *“the scope of this right shall be defined and regulated by the law”* and also that *“the principles governing the functioning of private primary and secondary schools shall be regulated by law”*. Article 56 safeguarding the “right to live in a healthy and balanced environment” prescribes that *“In order to establish widespread health services, general health insurance may be introduced by law.”* Besides, Article 61 § 3 enshrining the “right of State assistance to, and other rights and benefits of the elderly” stipulates that this right *“shall be regulated by law”*.

Regarding in particular the provisions on labour’s rights, firstly, Article 51 of the Constitution safeguarding the “right to form unions” provides that *“the formalities, conditions and procedures to be applied in exercising this right shall be prescribed by law”*. Secondly, Article 53 of the Constitution on the “right of collective agreement” stipulates that *“the scope of and the exceptions to this right, the persons to benefit from and the form, procedure and entry into force of collective agreement (...) shall be laid down in law”*. Thirdly, Article 54 of the Constitution safeguarding the “right to strike and lockout” provides that *“the procedures and conditions governing the exercise of this right and the employer’s recourse to a lockout, the scope of, and the exceptions to them shall be regulated by law”* and also that *“the circumstances and workplaces in which strikes and lockouts may be prohibited or postponed shall be regulated by law”*.

Furthermore, constitutional provisions regarding political rights also contain such aforementioned expressions. For instance, Article 66 of the Constitution enshrining the “right to Turkish citizenship” provides that *“citizenship can be acquired under the conditions stipulated by law and shall be forfeited only in cases determined by law”*. Article 67 of the Constitution safeguarding the “right to vote, to stand for elections and to engage in political activities” provides that *“in conformity with the conditions set forth in the law, citizens have the right to vote, to stand for elections, to engage in political activities independently or in a political party, and to take part in a referendum”*, and that *“the law determines applicable measures for Turkish citizens abroad to exercise their right to vote”*. Article 74 of the Constitution on the “right to petition, right to information and appeal to the Ombudsperson” stipulates that *“the way of exercising these*



*rights shall be laid down in law*". According to Article 72 of the Constitution, *"the manner in which the national service shall be performed, or considered as performed, either in the armed forces or in public service, shall be regulated by law"*. Also, pursuant to Article 73 of the Constitution, *"taxes, fees, duties, and other such financial obligations shall be imposed, amended, or revoked by law"*.

Lastly, with regard to political rights, according to Article 68 of the Constitution, *"political parties shall be formed without prior permission, and shall pursue their activities in accordance with the provisions set forth in the Constitution and laws."* Pursuant to the same provision, *"membership of the teaching staff and of students at higher education to political parties"* and *"the principles regarding aid to political parties, as well as collection of dues and donations"* are also *"regulated by law"*. Pursuant to Article 69 of the Constitution, *"the activities, internal regulations and operation of political parties shall be in line with democratic principles. The application of these principles is regulated by law. (...)* (As amended on October 3, 2001; Act no. 4709) *The foundation and activities of political parties, their supervision and dissolution, or their deprivation of state aid wholly or in part as well as the election expenditures and procedures of the political parties and candidates, are regulated by law in accordance with the above-mentioned principles."*

## **2. Rights listed elsewhere in the Constitution**

Provisions regarding other rights enshrined in other sections of the Constitution contain also similar expressions. For instance, Article 128 of the Constitution provides that; *"The qualifications, appointments, duties and powers, rights and responsibilities, salaries and allowances of public servants and other public officials, and other matters related to their status shall be regulated by law. (Sentence added by September 12, 2010; Act no. 5982) However, provisions on collective agreement concerning financial and social rights are reserved."*, and, also that; *"The procedure and principles governing the training of high rank administrators shall be specially regulated by law."* Pursuant to Article 129 of the Constitution, *"public servants and other public officials are obliged to carry out their duties with loyalty to the Constitution and the laws"* and *"compensation suits concerning damages arising from faults committed by public servants and other public officials in the exercise of their duties shall be filed only against the administration in accordance with the procedure and conditions prescribed by law, as long as the compensation is resorted to them"*.

On the other hand, the Constitution also contains elaborate provisions regarding constitutional public institutions and organisations such as higher education

institutions and their higher bodies (Articles 130-132), the Radio and Television Supreme Council, institutions of radio and television, and public affiliated news agencies (Article 133), the Atatürk High Institution of Culture, Language and History (Article 134), professional organizations having the characteristics of public institutions and their higher bodies (Article 135), and also the Presidency of Religious Affairs (Article 136), which should be all *established and regulated by law* pursuant to the relevant constitutional provisions.

In the same vein, regarding in particular the provisions on the judicial power, first, Article 140 of the Constitution provides that “*The qualifications, appointment, rights and duties, salaries and allowances of judges and public prosecutors, their promotion, temporary or permanent change in their posts or place of duties, the initiation of disciplinary proceedings against them and the imposition of disciplinary penalties, the conduct of investigation concerning them and the subsequent decision to prosecute them on account of offences committed in connection with, or in the course of, their duties, the conviction for offences or instances of incompetence requiring their dismissal from the profession, their in-service training, and other matters relating to their personnel status shall be regulated by law in accordance with the principles of the independence of the courts and the security of tenure of judges. Judges and public prosecutors shall serve until they are over the age of sixty-five. The mandatory retirement age, promotion and retirement of military judges shall be prescribed by law. Judges and public prosecutors shall not assume any official or private occupation other than those prescribed by law.*” Secondly, as set forth in Article 141, “*special provisions regarding the trial of minors shall be laid down in the law*”. Finally, as per Article 142, “*the formation, duties and powers, functioning and trial procedures of the courts shall be regulated by law*”.

### 3. Further observations

In addition to these constitutional provisions, Article 177 of the Constitution set forth under *Part Seven*, entitled “*Final Provisions*”, sets out that the Constitution shall come into force in its entirety on its adoption by referendum and its publication in the Official Gazette, “*subject to the following exceptions and the provisions relating to entry into force of these exceptions*”:

“a) *The provisions of Part Two, Chapter II relating to personal liberty and security, the press and publication, and the right and freedom of assembly.*

*The provisions of Chapter III relating to labour, collective labour agreements, the right to strike, and lockout.*



*These provisions shall come into force when the relevant laws are promulgated, or when the existing laws are amended, and in any case, at the latest, when the Grand National Assembly of Turkey assumes its functions. ...*

*b) The provisions of Part Two relating to political parties and the right to engage in political activities shall come into force on the promulgation of the new Political Parties Act, which is to be prepared in accordance with these provisions.*

*The provisions on right to vote and to stand for elections shall come into force on the promulgation of the Elections Act also to be prepared in accordance with these provisions. (...)"*

In the Explanatory Note to the Constitution, it is indicated that provisions regarding the entry into force of newly adopted constitutions are envisaged in a way different than that of the provisions on entry into force of other laws. This difference is essentially due to the fact that the effective implementation of some constitutional provisions further needs the enactment of laws based on these provisions. In the same vein, the implementation of institutions and organs established by the new constitution depends on the adoption of such legal provisions.

Accordingly, the laws in question have been promulgated and are still in effect or have been amended several times mostly so as to comply with international and European standards (for example, Law no. 2911 on Meetings and Demonstrations, which was adopted on 6 October 1983 or Law no. 2820 on Political Parties, adopted on 24 April 1983). Consequently, this latest provision and all the above-mentioned provisions show that the 1982 Constitution attaches a great importance to the concretization of the constitutional rights it enshrines.

## **D. Historical background and development**

### **1. Relevant historical background and processes regarding the inclusion of explicit rights provisions in the Constitution**

With a history dating back to sixty years, the Turkish Constitutional Court (hereinafter, "the Court") has accumulated a considerable experience in the field of constitutional justice in its broad sense. Originally established by the 1961 Constitution, replaced by the 1982 Constitution that is still in force today, the Court is one of the oldest constitutional courts established in Europe after World War II, holding the fifth rank among the constitutional courts in Europe by the

date of its establishment.

#### a) Before the 1961 Constitution

The first marks of constitutionalism appeared during the first half of the 19<sup>th</sup> century in the Ottoman Empire. *Kanun-ı Esasi* (Ottoman Basic Law) was the first written constitution of Turkish history, which was adopted on 23 December 1876. It founded the first parliament of the country and enshrined individual rights and liberties.

The earliest versions of Turkish Constitutions, namely *Kanun-ı Esasi*, the Constitutions of 1921 and 1924, did not embody any provisions envisaging a constitutional review mechanism. It is not surprising in view of the fact that the European model of constitutional adjudication has developed after World War II.

However, there were some provisions in the *Kanun-ı Esasi* which bear hints of constitutionality review. For instance, Article 115 of the *Kanun-ı Esasi* adopted the principle of the supremacy of constitution by stating “*No provision of the Constitution can, under any pretext whatsoever, be suspended or neglected.*” Similarly, Article 64 thereof prescribed not a legal but a political review of constitutionality by stating “*The Senate examines the bills or budget transmitted to it by the Chamber of Deputies. If in the course of the examination of a bill, the Senate finds a provision contrary to the sovereign rights of the Sultan, the liberty, the Constitution, the territorial integrity of the Empire, the internal security of the country, the interests of the defense of the country, or to the morality, it rejects the bill definitively by a vote assigning its reasons; or it returns the bill, accompanied by its observations, to the Chamber of Deputies, seeking its amendment or modification in the light of those observations.*”

The 1921 Constitution was the founding Constitution of the Republic without any referral to the constitutional adjudication. In the subsequent Constitution of 1924, the supremacy of the constitution was explicitly recognized in Article 103, which stipulated that: “*None of the provisions of this Constitution may be arbitrarily modified on any pretext; neither may the enforcement of any provision be suspended. No law shall be in contradiction to the Constitution.*” However, the 1924 Constitution did not introduce any mechanism of constitutionality review.

#### b) The 1961 Constitution

The 1961 Constitution, passed by the Constituent Assembly on 27 May 1961 and adopted by the Turkish people in the referendum of 9 July 1961, was “*the*

*source of many structural changes in both the administrative and judicial fields. Among the most important innovations [was] the formation of a high court responsible for reviewing the constitutionality of laws and internal regulations of the parliament*<sup>408</sup> (non-official translation of the original text), according to Prof. Kemal Fikret Arik.

Indeed, the 1961 Constitution was the fundamental text establishing the Turkish Constitutional Court. It was modelled on the European model of *posteriori* constitutional review. The power to review the constitutionality of laws was endowed solely with the Constitutional Court by the 1961 Constitution under Article 145 and subsequent articles thereof. Moreover, by Article 8 of the 1961 Constitution stating “*Laws shall not be in conflict with the Constitution. The provisions of the Constitution shall be fundamental legal principles binding the legislative, executive and judicial organs, administrative authorities and individuals*”, the superiority and binding force of the Constitution was emphasized once again.

The Court started operating in April 1962 following the enactment of the Law no. 44 on the Establishment and Rules of Procedures of the Constitutional Court. At that time, only a few countries in Europe (Austria, Germany and Italy) had constitutional adjudication mechanisms. Therefore, the Turkish Constitutional Court is one of the constitutional courts with a long history in Europe, which was a considerable development in terms of the rule of law.

### c) The 1982 Constitution

The 1982 Constitution was passed on 18 October 1982 by the Consultative Assembly and approved by a popular referendum on 7 November 1982. It then entered into force on 9 November 1982 through its publication in the Official Gazette in accordance with Article 177 (Law no. 2709 of 18 October 1982 on the Constitution of the Republic of Turkey published in the Official Gazette bis no. 17863 and dated 9 November 1982, hereinafter “the Law no. 2709”). It has since been amended many times, *inter alia*, by the Constitutional Laws of 2001, 2004, 2007, 2010 and 2017, in pursuit of greater democracy and enhanced protection of fundamental rights and freedoms.

The system of constitutional review established by the 1961 Constitution was preserved in the 1982 Constitution with minor changes. In the 1982 Constitution,

408 See Arik K. Fikret, La Cour constitutionnelle turque, *Revue internationale de droit comparé*, Volume 14 N° 2, April-June 1962, Pages 401-412, <https://doi.org/10.3406/ridc.1962.13364>; also available at [https://www.persee.fr/doc/ridc\\_0035-3337\\_1962\\_num\\_14\\_2\\_13364](https://www.persee.fr/doc/ridc_0035-3337_1962_num_14_2_13364)

the Constitutional Court, being one of the highest constitutional organs, is on a par with the Grand National Assembly and the Executive and designated as the first judicial organ among “*the High Courts*”. Articles 146-153 of the 1982 Constitution set forth in detail the composition, powers and duties, working methods of the Constitutional Court and other aspects of the constitutionality review. The Constitutional Court carried out its duties until 2011 according to the Law no. 2949 (dated 10 November 1983).

Since the composition, powers and structure of the Court were changed considerably by the constitutional amendments in 2010, a new law was enacted in 2011. The new Law on Establishment and Rules of Procedures of the Constitutional Court (Law no. 6216, adopted on 30 March 2011) stipulates its organization, structure, proceedings and disciplinary proceedings. The Law no. 6216 vests in the Plenary of the Court the authority to regulate its internal rules. Therefore, by-laws on the organization and procedure of the Constitutional Court are established by the Internal Regulation of the Court.

## **2. Constitutional rights subjected to major or minor changes since the original promulgation of the Constitution**

Since its adoption in 1982, the Turkish Constitution has been amended nineteen times, three of them through a referendum (2007, 2010 and 2017), one of them partly through referendum (1987). Some of these changes are indicated below:

### a) Major and minor changes until 2000

On 17 May 1987, with the Law no. 3361, the voting age was reduced from 21 to 19, the number of MPs raised from 400 to 450, and the ban on political leaders and politicians from involvement in political activities imposed by the military junta following the military coup d'état of September 12, 1980, was lifted.

On 8 July 1993, with the Law no. 3913, first private radio and televisions were allowed.

On 23 July 1995, with the Law no. 4121, the voting age was reduced from 19 to 18 and the number of MPs raised from 450 to 550. Yet, with the constitutional amendment of 2017, this number has been raised to 600 (Article 75 § 2).

On 18 June 1999, with the Law no. 4388, the appointment of civilian judges to State Security Courts in place of military judges was ensured. On 13 August 1999, with the Law no. 4446, privatization was incorporated for the first time

into the Constitution (paragraphs 3 and 4 were added to Article 47 safeguarding nationalization and, since 1999, privatization).

#### b) Major and minor changes in the 2000s

Between 2001 and 2004, major amendments have been made to the Constitution in accordance with the European Union (EU) acquis and the European Convention on Human Rights (hereinafter, “the ECHR”), within the framework of the harmonization of the Turkish legislation with the European standards, in view of Turkey’s full membership to the EU.

In this regard, with the Law no. 4709 adopted on 3 October 2001, the Preamble was amended. Besides, Article 13 of the Constitution enabling the restriction of fundamental rights and freedoms was also modified so that the general limitation grounds of fundamental rights and freedoms, which were prescribed in the Constitution before the amendment of 2001, were annulled and only specific limitation grounds “*mentioned in the relevant articles of the Constitution*” should be applied in conformity “*to the letter and spirit of the Constitution, the requirements of the democratic order of the society and the secular republic and the principle of proportionality.*” In the same vein, Article 14 of the Constitution safeguarding the prohibition of abuse of rights was also amended to be in conformity with Article 17 of the ECHR. In this regard, the similarity in the drafting of these two provisions is striking.

Other provisions of the Constitution on constitutional rights were also amended with the Law no. 4709, especially those not only concerning the right to personal liberty and security, the intimacy of private life, the inviolability of domicile, the freedom of communication, the freedoms of expression and of the press, the freedoms of peaceful assembly and of association, but also those concerning social and political rights and duties. As a result, the new Turkish Civil Code no. 4721 was adopted on 22 November 2001, which is still in force, in line with these constitutional amendments.

Even if the death penalty has not been executed in Turkey since 1984, Turkey abolished the penalty for peace time offences in 2002 and for all offences in 2004, with the Law no. 5170 adopted on 7 May 2004. The death penalty was replaced by aggravated life imprisonment. Article 15 of the Constitution on suspension of the exercise of fundamental rights and freedoms and Article 38 of the Constitution on principles relating to offenses and penalties were amended, accordingly. These amendments were followed by the signature and ratification by Turkey of Protocol no. 6 to the ECHR concerning the abolition of the death penalty and Protocol no.

13 to the ECHR concerning the abolition of the death penalty in all circumstances, respectively in 2003 and in 2004 (Protocol no. 13 was ratified in 2006).

In 2004, with the Law no. 5170, other major amendments were made to the Constitution, especially with regard to Article 90. A new sentence was added to paragraph 5 of Article 90 proclaiming and recognizing the supremacy of international human rights treaties and stipulating that “*In the case of a conflict between international agreements, duly put into effect, concerning fundamental rights and freedoms and the laws due to differences in provisions on the same matter, the provisions of international agreements shall prevail.*” Moreover, State Security Courts were abolished and replaced by competent Assize Courts. Accordingly, Article 143 of the Constitution was repealed. As indicated above, with the 2004 amendment, the principle of equality between men and women was introduced in the Constitution, which is now enshrined in Article 10 thereof. New laws were enacted in line with these constitutional amendments, especially in the field of criminal law, including Turkish Criminal Code no. 5237, Criminal Procedure Code no. 5271, Law no. 5275 on Enforcement of the Punishments and Security Measures, which are the products of modern criminal policy and have been in force since 2005, as well as in the other fields such as the Press Law no. 5187 adopted on 9 June 2004 and published in the Official Gazette on 26 June 2004.

No major amendments were made to the Constitution until 2007. For instance, on 21 June 2005, with the Law no. 5370, changes on the election of Radio and Television Supreme Council’s members and on 29 October 2005, with the Law no. 5428, changes on budget laws were made respectively. On 13 October 2006, with the Law no. 5551, the age of candidacy was reduced from 30 to 25 (yet, with the constitutional amendment of 2017, the age limit was reduced to 18). On 31 May 2007, with the Law no. 5678, Parliamentary term was reduced from 5 to 4 and the President would be elected with popular vote.

#### c) Major changes to the Turkish constitutional justice system with recent constitutional amendments of 2010 and 2017

In the last decade, the Constitution has undergone major changes that have radically altered not only the functioning of the constitutional justice system in Turkey, but also the political and judicial system of the country. These amendments are rightly considered a revolutionary step in Turkey’s constitutional history.

First, with the constitutional amendment of 2010 (Law no. 5982 of 7 May 2010 amending certain provisions of the Law no. 2709 and approved by popular

referendum on 12 September 2010), the right of individual application to the Court was introduced for the very first time in the Turkish legal system, following the German or Spanish models. It entered into force on 23 September 2012. In other words, since that date, the Court is the competent authority to examine and decide on individual applications concerning alleged violations of fundamental rights and freedoms protected under the Constitution.

Undoubtedly, the individual application mechanism is a means of ensuring the effective protection of the fundamental rights and freedoms at the national level. Through this mechanism, each individual has a new domestic remedy in Turkey whereby he could raise his allegations of any violation of fundamental rights and freedoms. Pursuant to Article 35 § 1 of the ECHR, this new domestic remedy before the Constitutional Court has been considered as an effective remedy to be exhausted before lodging an application with the European Court of Human Rights (see among many others, *Hasan Uzun v. Turkey* (dec.), no. 10755/13, §§ 25-27, 30 April 2013; *Koçintar v. Turkey* (dec.), no. 77429/12, § 41, 1 July 2014; *Kaya and Others v. Turkey* (dec.), no. 9342/16, 20 March 2018).

Following the 2010 amendment, the powers, composition and structure of the Constitutional Court were modified accordingly. In particular, Article 149 of the Constitution - as modified by this amendment - provides that the organization of the Constitutional Court and the rules of procedure applicable before the Plenary and the Sections as well as disciplinary matters concerning the President, Vice-Presidents and Members of the Court shall be regulated by law. On the other hand, still according to the same provision, the principles of operation, the organization of the Sections and of the Commissions (newly formed ones charged exclusively with examining the admissibility of individual applications lodged through individual application mechanism), as well as the distribution of their tasks, are determined by the Internal Regulations of the Court adopted in application of the law establishing the Constitutional Court.

Therefore, in accordance with the provisions of Article 149 of the Constitution as amended, a new law - replacing the previous Law no. 2949 mentioned above - was adopted on 30 March 2011, entitled “Law on the Establishment and the Rules of Procedure of the Constitutional Court” (hereinafter, “Law no. 6216”). The said law was published in the Official Gazette no. 27894 on April 3, 2011, and the provisions of this law therefore entered into force on the date of its publication, save for those relating to individual application, which entered into force on September 23, 2012, in accordance with Article 76 of the afore-mentioned Law no. 6216.



This law thus specifies the new rules of operation and procedure of the Turkish Constitutional Court, including the individual application procedure. Subsequently, the Rules of Procedure of the Court (published in the Official Gazette no. 28351, dated 12 July 2012) adopted pursuant to the Law no. 6216 sets forth the modalities of the Court's functioning. However, it should be noted that some of the provisions of Law no. 6216 were amended or repealed by Article 209 of Decree no. 703 of 2 July 2018, in order to comply with the changes introduced by the 2017 constitutional amendment.

With the 2010 amendment, some provisions of the Constitution regarding constitutional rights have also been amended. A new paragraph was added to Article 20 of the Constitution safeguarding the "right to request the protection of personal data". The phrase "*and children's rights*" was added to Article 41 by Article 4 of Law no. 5982, the phrase "*and collective agreement*" was added to Article 53 by Article 6 of Law no. 5982 and also the phrase "*right to information and appeal to the Ombudsperson*" was added to Article 74 by Article 18 of Law no. 5982.

A minor amendment to Article 59 of the Constitution, on the permissible means for challenging "decisions of sport federations relating to administration and discipline of sportive activities," was made in March 2011 (with the Law no. 6214).

Then, with the constitutional amendment of 2017 (Law no. 6771 of 21 January 2017 amending certain provisions of the Law no. 2709 and approved by popular referendum on 16 April 2017, hereinafter the "Law no. 6771"), several other important changes were made to the Constitution, which can be summarised as follows:

- Firstly, the political form of government was transformed from a parliamentary to a presidential system. As a result, the Court's jurisdiction was extended to the review of the constitutionality of presidential decrees. According to Article 148 § 1 of the Constitution, this review concerns both form and substance;
- Secondly, in addition to being "*independent*", the judiciary has been defined as "*impartial*", the latter qualification having been added to the text of the Constitution (Article 9) by Article 1 of Law no. 6771 mentioned above;
- Thirdly, the military justice system was abolished. According to the second paragraph added to Article 142 with the Law no. 6771, "*No military courts shall be established other than military disciplinary courts. However, in state of war,*



*military courts having the jurisdiction to try offences committed by military personnel in relation to their duties may be established.”* The High Military Court of Appeals and the High Military Administrative Court were abolished, too. Hence, Justices will no longer be appointed from those Courts.

- Lastly, as the military courts were abolished, the number of Justices was reduced from seventeen to fifteen, and the quorum for the Plenary altered to ten.

As a consequence, the effect of these changes has therefore been a real paradigm shift, which can be seen in the Court’s decisions and judgments on individual application. In its judgments, the Court has adopted an approach based primarily on fundamental rights, which has made it possible to broaden the scope of fundamental rights and freedoms and to strengthen the standards of protection of these rights.

## **II. Classification and content**

### **A. Enumerated constitutional rights**

#### **1. Classification of enumerated constitutional rights**

When the text of the Constitution is thoroughly examined, it appears that the list of constitutional rights is divided into three separate groups of rights and freedoms, which follows a specific order beginning with the core individual’s rights and freedoms (*Part two, Chapter Two*), followed by social and economic rights (*Part Two, Chapter Three*) and then political rights (*Part Two, Chapter Four*).

The first group of the constitutional rights contains not only *non-derogable rights* (*absolute*) - pursuant to Article 15 of the Constitution - such as “the right to life and human dignity” (Article 17), “the prohibition of torture or cruel, inhuman or degrading treatment or punishment” (Article 17), “the freedom of conscience and religion” (Article 24), “the freedom of thought and opinion” (Article 25), “the prohibition of retroactive application of criminal offences and penalties” and “the right to be presumed innocent until proven guilty” (both guaranteed under Article 38), but also *derogable rights* such as “the right to liberty and security” (Article 19), “the right to private and family life” (Article 20), “the right to request the protection of personal data” (Article 20), “the freedom of communication”

(Article 22), “the freedoms of expression and of the press” (Articles 26 and 28-32), “the freedom of science and the arts” (Article 27), “the freedoms of assembly and association” (Articles 33-34), “the right to property” (Article 35), “the right to a fair trial”<sup>409</sup> (Articles 36, 37, 39, 40, 125, 138, 139, 140, 141, 142, 154 and 155).

With regard to the second and third groups of the constitutional rights as indicated above, they both contain only *derogable rights*, including social, cultural and economic rights such as “the right to protection of family, and children’s rights” (Article 41), “the right of education” (Article 42), “the right to work” (Articles 48-49), “the right to form unions” (Article 51), “the right to conclude collective labour agreements” (Article 53), “the right to live in a healthy and balanced environment” (Article 56), “the right to protection of the historical, cultural and natural assets and wealth” (Article 63), “the right to protection of arts and artists” (Article 54), and all related political rights (Articles 66-74).

As seen above, the constitutional bill of rights contains the so-called “first, second and third generation rights”. There is no hierarchy between these rights and freedoms, as they are interdependent and interrelated. As a matter of fact, in its previous judgments, the Constitutional Court indicated that all articles of the Constitution are of the same effect and value, that in practice, it is not possible to prioritize one over the other and that sometimes one of the two Constitutional rules which are applied together by necessity can constitute the border of the other (CC, E.2011/134, K.2012/83, 24/5/2012).

## 2. Holders of constitutional rights

Rights’ holders are individual natural persons and legal persons (when applicable). Every citizen and foreigner legally resident in Turkey shall equally benefit of these rights, “*without distinction as to language, race, colour, sex, political opinion, philosophical belief, religion and sect, or any such grounds*” as per Article 10 of the Constitution, except for those which are exclusively reserved for Turkish citizens (i.e. “prohibition of deportation of citizens and deprivation of their right of entry into the homeland” (Article 23 § 5); “right to vote, to stand for election and to engage in political activities” (Article 67); “right to form political parties” (Article 68); “right to enter public service” (Article 70); and “right and duty of performing national service” (Article 72)).

Besides, Article 16 of the Constitution provides that “*The fundamental*

<sup>409</sup> As indicated above, the “right to a fair trial” is protected in the “bill of rights” and enshrined in other sections under the Constitution.

*rights and freedoms in respect to aliens may be restricted by law compatible with international law.*” In this regard, the Law no. 6458 on Foreigners and International Protection, which was adopted on 4 April 2013, regulates the principles and procedures with regard to foreigners’ entry into, stay in, and exit from Turkey, and the scope and implementation of the protection to be provided for foreigners who seek protection from Turkey. In particular, the international “principle of non-refoulement” is now enshrined in Article 4 of the Law no. 6458 which provides that “*No one within the scope of this Law shall be returned to a place where he or she may be subjected to torture, inhuman or degrading punishment or treatment or, where his/her life or freedom would be threatened on account of his/her race, religion, nationality, membership of a particular social group or political opinion.*” The Turkish Constitutional Court takes into consideration this provision when examining the applications of foreigners.

Classes are considered irrelevant in legal terms as it is explicitly stipulated in Article 10 that “*No privilege shall be granted to any individual, family, group or class.*” However, depending on the nature of the right in question, natural persons as a group, or also legal persons, may enjoy certain constitutional rights. The Constitution affirms the right of workers to form labor unions “without obtaining permission” and “to possess the right to become a member of a union and to freely withdraw from membership” (Article 51). Articles 53 and 54 endorse the right of workers to bargain collectively and to strike, respectively. With the constitutional amendment of 2010, public servants and other public employees have also the right to conclude collective agreements (Article 53).

### **3. Structure of constitutional rights**

The text of the 1982 Constitution consists of a mixture of short as well as long provisions of constitutional rights. Short provisions are mainly those containing brief statements on the scope and/or the extent of the constitutional rights and duties and/or the obligations of the State (Articles 5, 9, 18, 25, 27, 30, 31, 32, 35, 36, 37, 39, 40, 41, 43, 44, 45, 48, 49, 50, 55, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 70, 71, 72, 73, 128, 132, 136, 137, 138, 139, 141, 142, 144, 150, 151, 158, 167, 168, 171, 172, 173), whereas long provisions contain elaborate definitions and grounds for limitations of fundamental rights and freedoms in question (Articles 10, 17, 19, 20, 21, 22, 23, 24, 26, 28, 29, 33, 34, 38, 42, 46, 47, 51, 53, 54, 56, 67, 68, 69, 74, 125, 129, 130, 131, 133, 134, 135, 140, 146, 148, 152, 153, 154, 155, 159, 160, 169, 170, 174).

## B. Unenumerated constitutional rights

### 1. Recognition of unenumerated constitutional rights

It is possible to recognize some rights as unenumerated by the Constitutional Court through its decisions by inferring from other specific fundamental freedoms and rights enshrined in Articles in the Constitution.

Rights which can be considered as unenumerated rights are below.

- Right to review of a judgment
- Principle of not to be tried or punished twice for the same offence (ne bis in idem)

These rights are inferred from Article 36 of the Constitution by the Court under the right to a fair trial which is enshrined therein as an explicit right.

There are no specific conditions for recognition of unenumerated constitutional rights. For the cases regarding this issue see below.

### 2. Right to review of a judgment

The Constitutional Court concluded in its decision no. E.2018/71, K.2018/118, dated 27/12/2018, that the right to review of a judgment is safeguarded within the scope of the freedom to claim rights under Article 36 of the Constitution.<sup>410</sup>

#### ***Erkan Sancaklı, no. 2017/23602, 3 June 2020***<sup>411</sup>

The Court found no violation of the right to review of a judgment enshrined in Article 36 of the Constitution as the denial of the applicant's right to appeal against the administrative fine had been proportionate. As a matter of fact, the related right is not absolute and may be subject to certain limitations. The remedy of appeal is not applicable to the administrative fines imposed due to minor offences, in view of the public interest in decreasing the workload of the judiciary.

#### ***Mahir Şahap Bostan, no. 2017/19906, 2 June 2020***<sup>412</sup>

The Court found no violation of the right to review of a judgment enshrined in Article 36 of the Constitution as the denial of the applicant's right to appeal

<sup>410</sup> CC, E.2018/71, K.2018/118, 27/12/2018.

<sup>411</sup> *Erkan Sancaklı, no. 2017/23602, 3/6/2020.*

<sup>412</sup> *Mahir Şahap Bostan, no. 2017/19906, 2/6/2020.*

against the administrative fine had constituted a proportionate interference since it served the public interest.

### **3. Principle of not to be tried or punished twice for the same offence (ne bis in idem)**

**Ünal Gökpınar [Plenary], no. 2018/9115, 27 March 2019**<sup>413</sup>

The Court found no violation of the principle of not to be tried or punished twice for the same offence since the imposition of tax penalty at the end of the administrative proceedings as well as a sentence at the end of the criminal proceedings, with a view to achieving different aims and legal interests, did not fall foul of the said principle.

## **C. Protection and limitation**

### **1. Constitutional provisions explicitly stipulating the state's obligations in the protection of rights**

The fundamental rights and freedoms enshrined in the Constitution can be enforced against the State, which has the obligation to respect, protect and fulfil them. Indeed, Article 5 of the Constitution, set forth under *Part One* entitled “*General Principles*”, sets out the fundamental aims and duties of the State, which can be read as follows:

*“The fundamental aims and duties of the State are to safeguard the independence and integrity of the Turkish Nation, the indivisibility of the country, the Republic and democracy, to ensure the welfare, peace, and happiness of the individual and society; to strive for the removal of political, economic, and social obstacles which restrict the fundamental rights and freedoms of the individual in a manner incompatible with the principles of justice and of the social state governed by rule of law; and to provide the conditions required for the development of the individual’s material and spiritual existence.”*

Moreover, Article 11 of the Constitution, also set forth under *Part One* of the Constitution, explicitly stipulates the supremacy and binding force of the Constitution whose provisions are directly binding on all institutions of the State (legislative, executive and judicial organs, and administrative authorities and other institutions) as well as individuals.

<sup>413</sup> *Ünal Gökpınar [Plenary], no. 2018/9115, 27/3/2019.*

In addition, other constitutional provisions set forth under the “bill of rights” (namely under *Part Two* of the Constitution) or in other sections of the Constitution also explicitly stipulates the State’s obligations in the protection of rights. In this regard, Article 40 entitled “*Protection of fundamental rights and freedoms*” provides, at the outset, that in case of any violation of their fundamental rights and freedoms, individuals have “*the right to request prompt access to the competent authorities*”, and that “*the State is obliged to indicate in its proceedings the legal remedies and authorities the persons concerned should apply to as well as the time limits of the applications.*” More specifically, Article 125 § 1 of the Constitution enshrines the right to recourse to judicial review against all actions and acts of the administration, including “*all decisions taken by the Supreme Military Council regarding expulsion from the armed forces, except acts regarding promotion and retirement due to lack of tenure.*” (Sentence added on September 12, 2010; Law No. 5982) (As amended on April 16, 2017; Law No. 6771).

## **2. General limitation provision that is applied to all constitutional rights or specific limitation provisions**

Since the constitutional amendment of 2001, there has been no general limitation provision in the Constitution that is applied to all constitutional rights. In fact, Article 13 of the Constitution entitled “*Restriction of fundamental rights and freedoms*” reads as follows:

*“Fundamental rights and freedoms may be restricted only by law and in conformity with the reasons mentioned in the relevant articles of the Constitution without infringing upon their essence. These restrictions shall not be contrary to the letter and spirit of the Constitution and the requirements of the democratic order of the society and the secular republic and the principle of proportionality.”*

As it can be inferred from this article, there are specific limitation provisions<sup>414</sup> which are listed under each of the rights and freedoms enshrined in the Constitution, if any. However, even though no reason for restriction is included in the article regulating a given right, such rights may be restricted relying on the rules covered under other articles of the Constitution (CC, E.2010/83, K.2012/169, 1/11/2012).

<sup>414</sup> These restriction grounds, as explicitly stipulated in the relevant constitutional provisions, are as follows: the protection of “the basic characteristics of the Republic”, “the indivisible integrity of the State with its territory and nation”, “the fundamental principles of the Republic”, the grounds of “national security”, “public order”, “public safety”, or “prevention of commission of crime”, the protection of “public health”, “public morals” or “public interest”, the protection of “the rights and freedoms of others”, or “the reputation or rights and private and family life of others”, the protection of “professional secrets as prescribed by law”, or “withholding information duly classified as a state secret”, or “ensuring the proper functioning of the judiciary”.

### **III. Interpretation**

#### **A. Rights in diverse contexts**

##### **1. Constitutional provisions which directly or indirectly reflect any particular historical or cultural contexts, and which have impacted, or could impact, the interpretation of constitutional rights**

###### **a) Principle of State of Law**

Article 2 of the Constitution states that the Republic of Turkey is a state of law. The state of law is a state, whose acts and actions are in accordance with the law, based on human rights, protecting and strengthening these rights and freedoms, establishing and developing a fair legal order in every field, avoiding situations and attitudes contrary to the Constitution, being bound by the superior rules of law, and being an open state subject to judicial review.

The Constitutional Court applies this principle, *inter alia*, in its examination. For instance, in a judgment of the Court<sup>415</sup> in the individual application, it is stated as;

*“While it is mentioned in subparagraph (b) of paragraph (1) of Article 5 of the European Convention on Human Rights that a decision rendered by the Court in accordance with the law is not complied with, Article 19 of the Constitution does not explicitly include a criterion that the court decision should be rendered in accordance with the law. However, this situation should not constitute an obstacle to the interpretation of the regulations in Article 19 of the Constitution in accordance with the Convention. Moreover, in a state of law, it is a requirement of the Constitution that court decisions comply with the law. Because acceptance of the opposite may lead to an interpretation that the Constitution allows individuals to be detained for non-compliance with unlawful decisions, such an interpretation cannot be accepted in a state of law. In this case, whether the court decision was given in accordance with the law should be reviewed within the framework of the criterion of the legality of the detention. In this respect, if the court decision that is alleged to have not been complied with is unlawful, the detention will also become unlawful.”*

###### **b) The principle of secularism**

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415 *Mustafa Karaca* [Plenary], no: 2020/15967, 20/5/2021.



On 5 February 1937, with the Law no. 3115 amending certain provisions of the Constitution of 1924, the principle of secularism (*laiklik*) received for the very first time constitutional status under Article 2 of the 1924 Constitution in order to “better reflect modern Turkey’s adherence to a strict separation of state and religion.”

Today, this principle is reflected in the 1982 Constitution, according to which the state is a republic (Article 1), and its characteristics are that it is a “*democratic, secular and social state governed by the rule of law; bearing in mind the concepts of public peace, national solidarity and justice; respecting human rights; loyal to the nationalism of Atatürk, and based on the fundamental tenets set forth in the Preamble*” (Article 2). The Preamble also establishes the principle of secularism, stating that there should be “*no interference whatsoever of sacred religious feelings in state affairs and politics.*” According to Article 4 of the Constitution, the provision establishing the form of the state as a republic (Article 1) and the provision that marks the state’s characteristics (Article 2) may not be amended and their amendment may not be proposed.

Other constitutional provisions regarding the principle of secularism can be found in Article 14 which states that “*none of the rights and freedoms embodied in the Constitution shall be exercised with the aim of (...) endangering the existence of the (...) secular order of the Turkish Republic*”; in the last paragraph of Article 24 providing that “*No one shall be allowed to exploit or abuse religion or religious feelings, or things held sacred by religion, in any manner whatsoever, for the purpose of personal or political influence, or for even partially basing the fundamental, social, economic, political, and legal order of the state on religious tenets*”; in Article 42 stating that “*training and education shall be conducted along the lines of the principles and reforms of Atatürk, on the basis of contemporary science and educational methods, under the supervision and control of the state*” and “*the freedom of training and education does not relieve the individual from loyalty to the Constitution*”; and also in Article 58 stipulating that “*The State shall take measures to ensure the education and development of the youth to whom our independence and Republic are entrusted, in the light of positive science, in line with the principles and reforms of Atatürk, and in opposition to ideas aiming at the destruction of the indivisible integrity of the State with its territory and nation.*”

## **2. Key judgments on constitutional rights in which the distinct historical or cultural contexts played an important role**

The headscarf issue had been a major human rights issue in Turkey until recently,



due to the strict/narrow judicial interpretation of the principle of secularism stipulated in the provisions of the Constitution.

In 1988, a provision was incorporated into the Law no. 2547 on Higher Education, which read as *“It is obligatory to wear a modern outfit and to have a modern appearance in the higher education institutions, classrooms, laboratories, clinics, polyclinics and corridors thereof. It is free to cover the neck and the hair with a covering or veil due to the religious faith”*. This provision was annulled by the Court with the justification that *“in a secular state, the legal regulations cannot be made according to the religious rules”* (see CC, E.1989/1, K.1989/12, 7/3/1989).

After the annulment decision, in 1990, a provision was incorporated into Law no. 2574, which provided for *“it is free to wear any attire and outfit in the higher education institutions on the condition that they are not in contrary to the laws in force”*. The request for the annulment of the regulation was dismissed, but in the justification of the decision of the Court, it was determined that the *“freedom” “does not involve the covering of the neck and hair with the veil due to the religious faith and the religious clothes”* (see CC, E.1990/36, K.1991/8, 9/4/1991).

In June 2008, the Court annulled the amendments made to the Constitution regarding the principle of equality (Article 10) and the right to education (Article 42), which had been enacted by the Parliament in order to abolish the headscarf ban in universities.

In the decision, the Constitutional Court ruled that the amendments were unconstitutional because they infringed on the constitutional provision mandating a secular state (see CC, E. 2008/16, K. 2008/116, 05/06/2008).

The Court referred to other constitutional provisions from which one can understand the constitutional principle of secularism. The Court found that the constitution-maker considered the country's conditions and chose to prohibit the use of religion, religious feelings, and matters considered sacred to gain political interest or influence, considering this necessary for the protection of the principle of secularism. The Court held that the disputed amendments ignored the basic obligations that reflected the meaning and core of Article 24 § 5 of the Constitution.

Considering its previous decisions, the Court concluded that the amendments to Articles 10 and 42 of the Constitution were clearly contrary to the principle of secularism and gave rise to the infringement of others' rights and breach of public order. Since the amendments indirectly changed the basic characteristics

of the republic, as provided in Article 2 of the Constitution, rendering them non-functional, they were contrary to the prohibition found in Article 4 of the Constitution which does not allow amendments or the proposal of amendments regarding certain constitutional provisions as indicated above; hence, it was impossible to accept that the conditions provided in Article 148 § 2 had been fulfilled. For the foregoing reasons, the Court held that Articles 1 and 2 of the amendments were contrary to Articles 2, 4, and 148 of the Constitution and, therefore, must be annulled.<sup>416</sup>

In order to resolve the relation between a headscarf and secularism, it is necessary to be reminded of some principles put forward in another recent decision of the Court, in which the relation between secularism and the freedom of religion and conscience was evaluated (see CC, E.2012/65, K.2012/128, 20/9/2012):

*“Secularism is one of the fundamental principles that has been included in our constitutions since 1937. The concept of secularism is stipulated in the Preamble and Articles 2, 13, 14, 68, 81, 103, 136 and 174 of the Constitution. In the aforementioned articles, secularism is regulated as a political principle that determines the position of the state against the religious faiths. In other words, secularism is a feature of the state, not the individual or society.*

*When the historical development of secularism is examined, it is seen that the concept has two different interpretations and practices depending on the differences in the approach towards the phenomenon of religion. Of these, the religion according to the strict secularism understanding is a phenomenon, which is only present in the conscience of the individual and which must certainly not be reflected in the social and public space by going beyond this. More flexible or libertarian interpretation of the secularism is inspired by the determination that the religion is a social phenomenon in addition to its individual dimension. This secularism understanding does not confine the religion into the inner world of the individual, perceives it as an important element of the individual and collective identity, and allows for its social visibility. In a secular political system, the individual preferences in the religious subjects and the lifestyle that they shape are outside the intervention, but under the protection of the state. In this respect, the principle of secularism is the guarantee of the freedom of religion and conscience.*

*The religions and faiths affect the lifestyles, identities of the members thereof and their relations with other individuals. It is a historical and sociological reality*

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416 Yaniv Roznai, Serkan Yolcu, An unconstitutional constitutional amendment—The Turkish perspective: A comment on the Turkish Constitutional Court’s headscarf decision, *International Journal of Constitutional Law*, Volume 10, Issue 1, January 2012, Pages 175–207, available at <https://doi.org/10.1093/icon/mos007>.

*that the societies vary in terms of the religion and faith, that there are different religions, faiths or disbeliefs in the society. For this reason, one of the main aims of the democratic and secular state is to establish political orders, where the individuals will live together in peace with the faiths they have, by protecting the social diversity.*

*Secularism is a constitutional principle which ensures the impartiality of the state against the religions and faiths, determines the legal position of the state against the religions and faiths, duties and authorities and limits thereof. The secular state is the state which does not have an official religion, which treats the religions and faiths equally, establishes a legal order where the individual may freely learn and live their religious faiths in peace, guarantees the freedom of religion and conscience. The separation of the state and the religion is a requirement of the freedom of religion and conscience and is also necessary for the protection of the religion against the political interventions and the maintenance of the independence.*

*Those who have different religious faiths or those who do not have any faith are under the protection of the secular state. As a matter of fact, according to the definition made in the justification of Article 2 of the Constitution, "The Republic of Turkey is a democratic, secular and social state governed by rule of law, within the notions of public peace, national solidarity and justice, respecting human rights, loyal to the nationalism of Atatürk, and based on the fundamental tenets set forth in the preamble." The state is obliged to take the necessary measures in order to prepare the environment, where the freedom of religion and conscience can materialize.*

*In this sense, the secularism encumbers the state with the negative and positive liabilities. The negative liability entails that the state does not adopt a religion or faith in an official manner and that it does not intervene in the freedom of religion and conscience of the individuals unless there is force majeure. The positive liability brings about the duty of the state to remove the barriers in front of the freedom of religion and conscience, to provide an appropriate environment where the individuals can live as they believe and the opportunities required therefor. The source of the positive liability that the secularism encumbers on the state is Articles 5 and 24 of the Constitution. According to Article 5 of the Constitution, one of the fundamental aims and duties of the State is "to work in order to remove political, economic and social barriers restricting the fundamental rights and freedoms of the individual in a way which does not accord with the principles of social state of law and justice and to prepare the conditions required for the development of the material and spiritual existence of individuals."*

In 2014, in an important judgment rendered in the individual application of *Tuğba Arslan* (no: 2014/256, 25/6/2014), the Court holding a Plenary session, decided that Article 10 of the Constitution, in conjunction with Article 24 of the Constitution, was violated. In this significant case, the applicant, who was a lawyer, demanded to participate in a hearing with her headscarf as she wore it in her daily life. The judge of the first instance court did not permit her to participate in the hearing by referring to the judgments of the Constitutional Court and of the European Court of Human Rights (hereinafter, “the ECtHR”) “*as to the fact that a headscarf is a strong religious symbol and political symbol that is against secularism.*” The applicant then filed an individual complaint with the Constitutional Court.

In its decision, the Court noted, at the outset, that according to Article 13 of the Constitution, it was a prerequisite that there must exist a law for the limitation of fundamental rights. Nevertheless, there is no legal limitation as to the fact that the attorneys will attend the hearings “their heads uncovered”. The ECtHR’s judgment *Leyla Şahin v. Turkey*, no. 44774/98, 29/6/2004, and the judgments of the Constitutional Court dated 1989 and 1991, on which the ECtHR judgment was based and which became the basis of the practice as regards the attire and outfit of the students in Turkey, may not be accepted as the rules that meet the “condition of lawfulness” stipulated in the relevant provision of Article 13 of the Constitution as to the fact that the fundamental rights and freedoms may only be limited by law.

In the present case, at the hearing where the applicant attended in the capacity of the attorney, it is understood that the intervention in the freedom of religion and conscience, which was made through the fact that the first instance court did not hold and postponed the hearing because she wore a headscarf and that it granted a period to the client of the applicant in order to hire a new attorney, does not meet the condition of lawfulness.

As it was determined that the intervention did not meet the condition of lawfulness, it was not considered necessary to separately evaluate whether the criteria such as being covered by one of the legitimate aims, which were to be existing in the presence of an intervention in the freedom of religion and conscience as prescribed in Article 13 of the Constitution (see §§ 78-80), and not being in contrary to the requirements of the democratic order of the society, were complied with. For the aforementioned reasons, the Court decided that the applicant’s freedom of religion and conscience guaranteed by Article 24 of the Constitution was violated.

The Court further noted that it was indisputable that secularism was an

indispensable principle and was necessary for the protection of the democratic system in Turkey as specified in the Constitutional Court's decision dated 7 March 1989 (see CC, E.1989/1, K.1989/12, 7/3/1989). Nevertheless, the freedom of religion and conscience is also one of the foundations of democratic societies, and the pluralistic secularism understanding is the guarantee for the freedom of religion and conscience since it allows for social visibility and prevents any interference with the individual preferences in religious subjects and ensures their protection by the State.

One of the main aims of the democratic and secular state is to establish political orders, where the individuals will live together in peace with the faiths they have, by protecting social diversity. In the societies, where the pluralistic secularism understanding is accepted, there is an opportunity of ensuring peaceful coexistence of the people, whose faiths, thoughts and lifestyles that are in conflict with each other, and of securing a pluralistic environment in the society, where all types of faiths can express themselves. Seeing pluralism and social diversity as an element that threatens social unity without considering these opportunities leads to a monolithic society understanding that does not accord with democracy.

In order to state that the justification of secularism has a reasonable basis, it is necessary to show that a headscarf, which the applicant claimed to be wearing as a religious requirement, is aggressive or intervenes in the faiths of the others, is oppressive, provocative, has an aim of imposing its own faith by force or disrupts the social functioning and causes some disorders and irregularities.

In the present case, while no reasonable and objective basis was shown for the prevention of the applicant from attending the hearing by wearing a headscarf required by her religious faiths, no claim as to the fact that a headscarf prevented the others from exercising their rights and freedoms and was the source of the social conflicts and tensions, and no data based on the substantial facts could be put forward. Consequently, an attorney, who wore a headscarf, was put in a disadvantageous situation when compared to those who did not wear a headscarf, by preventing her from attending the hearings. The Court concluded that the prevention of the lawyer from attending the hearing due to wearing a headscarf violated the freedom of religion and conscience (Article 24) as well as the prohibition of discrimination (Article 10).

## **B. Impact of international norms**

### **1. International and regional human rights treaties ratified by Turkey**

a) At the universal level

Turkey is party to the so-called “*Universal Bill of Rights*”, consisting of:

- The 1948 Universal Declaration of Human Rights signed on 6 April 1949 (published in the Official Gazette numbered 7217 and dated 27 May 1949);
- The 1966 International Covenant on Civil and Political Rights (ICCPR) signed on 15 August 2000 and ratified on 4 June 2003 -with the Ratification Act No. 4868 (published in the Official Gazette numbered 25142 and dated 18 June 2003). Turkey is also party to the 1966 Optional Protocol to the ICCPR signed on 3 February 2004 and ratified on 1 March 2006 -with the Ratification Act No. 5468; as well as to the 1989 Second Optional Protocol to the ICCPR aiming at the abolition of the death penalty, signed on 6 April 2004 and ratified on 28 October 2005 -with the Ratification Act No. 5415. However, the ICCPR entered into force on 23 December 2003, in accordance to its Article 49, and its Optional Protocol was effective from 24 October 2006; and,
- The 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR) signed on 15 August 2000 and ratified on 4 June 2003 with the Ratification Act No. 4867 (also published in the Official Gazette numbered 25142 and dated 18 June 2003). However, the ICESCR entered into force on 23 December 2003, in accordance to its Article 27. Turkey is not a party to the 2008 Optional Protocol to the ICESCR.

All these instruments played an important role in the drafting of the 1982 Constitution. In other words, it was largely inspired by these international instruments. The similarities and parallelism between these instruments and the 1982 Constitution are striking.

Other United Nations (UN) human rights treaties specific to a particular subject (i.e. Convention on the Prevention and Punishment of the Crime to Genocide (The 1948 Genocide Convention), Convention Relating to the Status of Refugees (The 1951 Refugee Convention), International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)) or to a particular category of persons (i.e. Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), Convention on the Rights of the Child (CRC), International Convention on Protection of the Rights of All Migrant



Workers and Members of Their Families (ICMRW), Convention on the Rights of Persons with Disabilities (CRPD)) have also been signed and/or ratified by Turkey, as indicated in a chronological order below:

- On 23 March 1950, Turkey acceded to the 1948 Genocide Convention, with the Ratification Act No. 5630, published in the Official Gazette numbered 7469 and dated 29 March 1950, with its official Turkish translation. With regard to Turkey, it entered into force on 31 July 1951;
- On 24 August 1951, Turkey signed the 1951 Refugee Convention and ratified it on 29 August 1961, with the Ratification Act No. 359, published in the Official Gazette No. 10898 and dated 5 September 1961, with a reservation clause to the effect that no provision of this Convention may be interpreted as granting to refugees greater rights than those accorded to Turkish citizens in Turkey, and a declaration made under section B of Article 1 according to which Turkey applies the Convention only to persons who have become refugees as a result of events occurring in Europe before 1951. Turkey is also party to the 1967 Protocol to the Refugee Convention that entered into force on 31 July 1968. The instrument of accession stipulates that the Government of Turkey maintains the provisions of the declaration made under section B of Article 1 of the 1951 Refugee Convention, and also the reservation clause made upon its ratification;
- On 13 October 1972, Turkey signed the ICERD, which was ratified on 3 April 2002 with the Ratification Act No. 4750 (published in the Official Gazette numbered 24721 and dated 9 April 2002). However, it entered into force on 16 October 2002;
- On 11 June 1985, Turkey ratified the CEDAW -with the Ratification Act No. 3232 (published in the Official Gazette numbered 18792 and dated 25 June 1985). However, pursuant to Article 27 of the CEDAW, it entered into force on 19 January 1986. Turkey is also party to the 1999 Optional Protocol to the CEDAW signed on 8 September 2000 and ratified on 30 July 2002 -with the Ratification Act No. 4770 (published in the Official Gazette numbered 24834 and dated 2 August 2002). However, it took effect on 29 January 2003;
- On 25 January 1988, Turkey signed the CAT, which was ratified on 21 April 1988 with the Ratification Act No. 3441 (published in the Official Gazette numbered 19799 and dated 29 April 1988). However,

it entered into force on 1 September 1988. Turkey is also party to the 2002 Additional Protocol to the CAT, signed on 14 September 2005 and ratified on 23 February 2011, with the Ratification Act No. 6167. However, it took effect on 27 October 2011;

- On 14 September 1990, Turkey signed the CRC, which was ratified with the Ratification Act No. 4058 on 9 December 1994 (published in the Official Gazette numbered 22138 and dated 11 December 1994). However, it entered into force on 4 May 1995. Turkey is also party to the Optional Protocols to the CRC on the involvement of children in armed conflict (2000) and on the sale of children, child prostitution and child pornography (2000) which respectively entered into force -with regard to Turkey- on 4 June 2004 and 19 September 2002, as well as to the 2011 Optional Protocol to the CRC on communications procedure, which entered into force on 26 March 2018;
- On 13 January 1999, Turkey signed the ICMRW and ratified it on 26 April 2001, with the Ratification Act No. 4662, with certain declarations and reservations regarding the acquisition of immovable property by foreigners, the right to form trade unions in Turkey, and as to the recognition of the competence of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families at a later date;
- On 30 March 2007, Turkey signed the CRPD and ratified it on 3 December 2008 with the Ratification Act No. 5825, without any reservation, which entered into force on 28 October 2009. Turkey is also party to the Optional Protocol to the CRPD, signed on 28 September 2009 and ratified on 3 December 2014, with the Ratification Act No. 6574.

Turkey is not a party to the International Convention for the Protection of All Persons from Enforced Disappearance (CPED).

The Geneva Conventions of 1949 constitute one of the main sources of international humanitarian law. Turkey has signed the four Geneva Conventions on 12 August 1949, the date when they were opened for signature, and has been party to these Conventions since 1954.

Turkey is not party to:



- The Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I), 8 June 1977;
- The Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of non-international armed conflicts (Protocol II), 8 June 1977.

Turkey is signatory, but not party to the Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the Adoption of an Additional Distinctive Emblem (Protocol III), 8 December 2005.

In addition to the Geneva Conventions of 1949, Turkey is also party to the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (1954) and the First Protocol to the Convention (1954), as well as several international conventions prohibiting or restricting the development, stockpiling or use of various weapons, among other multilateral treaties.

#### b) At the regional level

At the regional level, the most important regional instrument, to which Turkey is a party since 1954, is the ECHR, signed in Rome, under the auspices of the Council of Europe, on 4 November 1950, with entry into force on 3 September 1953. Turkey recognized the right to individual application to the ECtHR in 1987 and the compulsory jurisdiction of this Court in 1990.

Turkey has also signed and ratified almost all additional protocols to the ECHR, except for the Protocol No. 4, securing certain rights and fundamental freedoms not included in the ECHR (no deprivation of liberty for non-fulfilment of contractual obligations, right to liberty of movement and freedom to choose one's residence, prohibition of a State's expulsion of a national, prohibition of collective expulsion of aliens) and Protocol No. 12 providing for a general prohibition of discrimination, respectively signed on 19 October 1992 and 18 April 2001 but still not ratified by Turkey.

As indicated above, Turkey is party to Protocols No. 6 and 13 to the ECHR on the abolition of the death sentence. Protocol No. 7 to the ECHR extending the list of rights protected under the ECHR and its Protocols No. 1, 4 and 6 (right of aliens to procedural guarantees in the event of expulsion from the territory of a State, right of a person convicted of a criminal offence to have the conviction of sentence reviewed by a higher tribunal, right to compensation in the event of a

miscarriage of justice, right not to be tried or punished in criminal proceedings for an offence for which one has already been acquitted or convicted (*ne bis in idem*), equality of rights and responsibilities as between spouses) was signed on 14 March 1983, ratified on 2 May 2016 and entered into force on 1 August 2016.

Other important Council of Europe's human rights treaties have been signed and/or ratified by Turkey up to date, concerning various human rights issues (see, among many others, the European Convention on the Suppression of Terrorism (1977); the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (1981) and its Additional Protocol with regard to Automatic Processing of Personal Data, regarding supervisory authorities and transborder data flows (2001); the European Social Charter (revised) (1996); the Convention on the Transfer of Sentenced Persons (1983) and its Additional Protocol (1997); the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (1987) and its Additional Protocols Nos. 1 and 2 (1993); the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (1990); the Protocol amending the European Convention on the Suppression of Terrorism (2003); the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (2005); the Council of Europe Convention on the Prevention of Terrorism (2005) and its Additional Protocol (2015)).

## **2. Legal status of these ratified treaties in the domestic legal system**

According to Article 90 of the Constitution, international agreements duly put into effect have the force of law. No appeal to the Constitutional Court shall be made with regard to these agreements, on the grounds that they are unconstitutional.

As indicated above, with the 2004 amendment, a sentence has been added to the fifth paragraph of Article 90 which stipulates the supremacy of international agreements concerning fundamental rights and freedoms in case of a conflict between the provisions of the laws and these agreements on the same matter.

Therefore, since the 2004 amendment, there is a dual status of treaties in the Constitution, depending on their scope and content: the international treaties – other than those related to human rights – are at the same level as ordinary legislation; whereas the international treaties on human rights are above the ordinary legislation.

### 3. Constitutional rights cases which have made significant use of international human rights norms

In dealing with constitutional rights cases, the Constitutional Court not only applies and develops domestic standards of review, but also takes into account international legal obligations. The Court refers systematically to the international and European human rights instruments such as the ECHR and the ECtHR's judgments when adjudicating the individual applications brought before its jurisdiction, in conformity with the Constitution.

In fact, with the constitutional amendment of 2010, a new paragraph was added to Article 148 of the Constitution which provides that everyone may apply to the Constitutional Court on the grounds that one of the fundamental rights and freedoms under joint protection of the Constitution and the ECHR and its additional protocols, to which Turkey is a party, has been violated by public authorities, after having exhausted the ordinary legal remedies. Similar provisions are provided for in the Law no. 6216 (Article 45 § 1).

According to these provisions, in order for the merits of an individual application that is lodged with the Constitutional Court to be examined, the right, which is claimed to have been intervened in by public force, must fall within the common field of protection of the Constitution and the ECHR (see, *Onurhan Solmaz* (dec.), App. No: 2012/1049, 26/3/2013, § 18). Otherwise, it would be declared inadmissible as being incompatible *ratione materiae* with the provisions of the Constitution.

Recently, the principle of “*right to be forgotten*” has been provided, which has received attention with the *Google Spain SL and Google Inc. v Agencia Española de Protección de Datos (AEPD) and Mario Costeja González*<sup>417</sup> decision of 13 May 2014 rendered by the Court of Justice of the European Union and acknowledged domestically as it has been implemented by the Court (see, *N.B.B. [PA]*, App. No: 2013/5653, 3/3/2016; and, *C.K. [PA]* (dec.), App. No: 2014/19685, 15/3/2018)).

417 See <https://eur-lex.europa.eu/legal-content/EN/TEXT/PDF/?uri=CELEX:62012CJ0131&from=EN>

## **Annex 1: List of cited legal provisions**

### **1) Constitutional provisions**

#### **a) *Kanun-ı Esasi* (Ottoman Basic Law) of 1876**

- Article 65
- Article 115

#### **b) Constitution of the Republic of Turkey of 1924**

- Article 2
- Article 103

#### **c) Constitution of the Republic of Turkey of 1961**

- Article 8
- Article 145 and subsequent articles

#### **d) Constitution of the Republic of Turkey of 1982 (last amended on 16 April 2017)**

- Article 1
- Article 2
- Article 4
- Article 5
- Article 9
- Article 10
- Article 11
- Article 12
- Article 13
- Article 14
- Article 16
- Articles 17-74
- Article 125
- Articles 128-129
- Articles 130-137
- Articles 138-145
- Articles 146-153
- Articles 170-173
- Article 177

### **2) Legislative provisions**

#### **a) Constitutional amendment laws**

Law no. 3115 Amending Certain Provisions of the Constitution of the Republic of Turkey of 1924 (dated 5 February 1937)

Law no. 3361 Amending Articles 67, 75 and 175 and Repealing Provisional Article 4 of the Law no. 2709 dated 7/11/1982 on the Constitution of the Republic of Turkey (dated 17 May 1987)

Law no. 3913 Amending Article 133 of the Law no. 2709 dated 7/11/1982 on the Constitution of the Republic of Turkey (dated 8 July 1993)

Law no. 4121 Amending the Preamble and Certain Provisions of the Law no. 2709 dated 7/11/1982 on the Constitution of the Republic of Turkey (dated 23 July 1995)

Law no. 4388 Amending Article 143 of the Constitution of the Republic of Turkey (dated 18 June 1999)

Law no. 4446 Amending Certain Provisions of the Constitution of the Republic of Turkey (dated 13 August 1999)

Law no. 4709 Amending Certain Provisions of the Constitution of the Republic of Turkey (dated 3 October 2001)

Law no. 5170 Amending Certain Provisions of the Constitution of the Republic of Turkey (dated 7 May 2004)

Law no. 5370 Amending One Provision of the Constitution of the Republic of Turkey (dated 21 June 2005)

Law no. 5428 Amending Certain Provisions of the Constitution of the Republic of Turkey (dated 29 October 2005)

Law no. 5551 Amending One Provision of the Constitution of the Republic of Turkey (dated 13 October 2006)

Law no. 5678 Amending Certain Provisions of the Constitution of the Republic of Turkey (dated 31 May 2007)

Law no. 5982 Amending Certain Provisions of the Constitution of the Republic of Turkey (dated 7 May 2010)

Law no. 6214 Amending the Constitution of the Republic of Turkey (dated 17 March 2011)

Law no. 6771 Amending the Constitution of the Republic of Turkey (dated 21 January 2017)

b) Ordinary laws

Law no. 44 on Establishment and Rules of Procedures of the Constitutional Court (repealed)

Law no. 2709 on the Constitution of the Republic of Turkey (dated 18 October 1982)

Law no. 2820 on Political Parties (dated 24 April 1983)

Law no. 2911 on Meetings and Demonstrations (dated 6 October 1983)

Law no. 2949 on Establishment and Rules of Procedures of the Constitutional Court (dated 10 November 1983) (repealed)

Turkish Civil Code no. 4721 (dated 22 November 2001)

Press Law no. 5187 (dated 9 June 2004)

Turkish Criminal Code no. 5237 (dated 26 September 2004)

Criminal Procedure Code no. 5271 (dated 4 December 2004)

Law on Enforcement of the Punishments and Security Measures no. 5275 (dated 13 December 2004)

Law no. 6212 on Establishment and Rules of Procedures of the Constitutional Court (dated 30 March 2011) (as amended by Article 209 of Decree no. 703 Amending Certain Laws and Decrees for the Purposes of Compliance with the Amendments to the Constitution dated 2 July 2018)

**3) International provisions**

a) At universal level

Universal Declaration of Human Rights (signed on 6 April 1949)

Convention on the Prevention and Punishment of the Crime to Genocide (acceded on 23 March 1950)

Convention Relating to the Status of Refugees (ratified on 29 August 1961)

1967 Protocol to the Convention Relating to the Status of Refugees (entered into force on 31 July 1968)

Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) (ratified on 11 June 1985)

- Article 27

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) (ratified on 21 April 1988)

Convention on the Rights of the Child (CRC) (ratified on 9 December 1994)

International Convention on Protection of the Rights of All Migrant Workers and Members of Their Families (ICMRW) (ratified on 26 April 2001)

International Convention on the Elimination of All Forms of Racial Discrimination (ratified on 3 April 2002)

1999 Optional Protocol to the CEDAW (ratified on 30 July 2002)

Optional Protocols to the CRC on the sale of children, child prostitution and child pornography (2000) (entered into force on 19 September 2002)

International Covenant on Civil and Political Rights (ICCPR) (ratified on 4 June 2003)

- Article 49

International Covenant on Economic, Social and Cultural Rights (ICESCR) (ratified on 4 June 2003)

- Article 27

Optional Protocols to the CRC on the involvement of children in armed conflict (2000) (entered into force on 4 June 2004)

1989 Second Optional Protocol to the ICCPR aiming at the abolition of the death penalty (ratified on 28 October 2005)

1966 Optional Protocol to the ICCPR (ratified on 1<sup>st</sup> March 2006)

Convention on the Rights of Persons with Disabilities (CRPD) (ratified on 3 December 2008)

2002 Additional Protocol to the CAT (ratified on 23 February 2011)

Optional Protocol to the CRPD (ratified on 3 December 2014)

2011 Optional Protocol to the CRC on communications procedure (entered into force on 26 March 2018)

b) At European level

European Convention on Human Rights (1950) and its additional protocols (except Protocols Nos. 4 and 12 to the Convention)

European Convention on the Suppression of Terrorism (1977)

Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (1981)

Convention on the Transfer of Sentenced Persons (1983)

European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (1987)

Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (1990)

Protocol No. 1 to the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (1993)

Protocol No. 2 to the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (1993)

European Social Charter (revised) (1996)



Additional Protocol to the Convention on the Transfer of Sentenced Persons (1997)

Additional Protocol to the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data regarding supervisory authorities and transborder data flows (2001)

Protocol amending the European Convention on the Suppression of Terrorism (2003)

Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (2005)

Council of Europe Convention on the Prevention of Terrorism (2005) and its Additional Protocol (2015)

## **Annex 2: List of cited cases**

### **1) Constitutional Court of the Republic of Turkey**

#### **a) Constitutionality review**

CC, E.1989/1, K.1989/12, 7/3/1989

CC, E.1990/36, K.1991/8, 9/4/1991

CC, E.2008/16, K.2008/116, 5/6/2008

CC, E.2011/134, K.2012/83, 24/5/2012

CC, E.2012/65, K.2012/128, 20/9/2012

CC, E.2010/83, K.2012/169, 1/11/2012

#### **b) Individual application**

*Onurhan Solmaz* (dec.), no. 2012/1049, 26/3/2013, § 18

*Tuğba Arslan*, no. 2014/256, 25/6/2014

*N.B.B.* [Plenary], no. 2013/5653, 3/3/2016

*C.K.* [Plenary] (dec.), no. 2014/19685, 15/3/2018

*Ünal Gökpınar* [Plenary], no. 2018/9115, 27/3/2019

*Erkan Sancaklı*, no. 2017/23602, 3/6/2020

*Mahir Şahap Bostan*, no. 2017/19906, 2/6/2020

*Mustafa Karaca* [Plenary], no. 2020/15967, 20/5/2021

## **2) European Court of Human Rights**

*Leyla Şahin v. Turkey*, no. 44774/98, 29/6/2004

*Hasan Uzun v. Turkey* (dec.), no. 10755/13, §§ 25-27, 30/4/2013

*Koçintar v. Turkey* (dec.), no. 77429/12, § 41, 1/7/2014

*Kaya and Others v. Turkey* (dec.), no. 9342/16, 20/3/2018

# 17. Uzbekistan

## Constitutional Court

### *Overview*

Part Two of the Constitution is devoted to the fundamental rights, freedoms and duties of a person and a citizen (Articles 18-52). This section consists of seven Chapters. The Constitution divides human rights into personal rights and freedoms, political rights, and economic and social rights. This categorization of rights is reflected through the existence of separate Chapters within Part Two of the Constitution. Personal rights are found in Chapter VII, political rights in Chapter VIII, and economic and social rights in Chapter IX. Various other rights can be found in other provisions of the Constitution. In terms of unlisted constitutional rights, these could be protected via legislation. For example, the Law “On Guarantees of the Rights of the Child” (January 7, 2008) lists a number of rights of the child. Regarding international human rights law, Uzbekistan has ratified six of the nine core UN human rights treaties. Relevant historical context includes Uzbekistan being a post-Soviet republic. During the Soviet era, it faced the phenomenon of the dominance of one Marxist-Leninist ideology being ranked as the official state ideology. Today, Uzbekistan prohibits the establishment of any one ideology as a state ideology, which means that no ideology can be constitutionally entrenched.

### *Outline*

#### **I. Rights in the Constitution**

- A. Constitutional provisions on human rights
- B. Rights enshrined in other provisions of the Constitution
- C. Concrete definition of constitutional rights
- D. Historical background and development

#### **II. Classification and content**

- A. Listed constitutional rights
- B. Unlisted constitutional rights
- C. Protection and limitation

#### **III. Interpretation and current issues**

- A. Diversity in Asia and fundamental rights
- B. Accession to international human rights treaties and the protection of constitutional rights

#### **Annex: List of legal acts**

## **I. Rights in the Constitution**

The Constitution of the Republic of Uzbekistan was adopted on December 8, 1992. The Constitution consists of a Preamble, 6 Parts, 26 Chapters, and divided into 128 Articles.

**Part One. Fundamental Principles.** This section consists of 4 Chapters (from Articles 1 to 17). This section reflects the state sovereignty, the people's rule, the supremacy of the Constitution and the law, as well as foreign policy.

**Part Two. Basic Human and Civil Rights, Freedoms and Duties.** This section consists of 7 Chapters (from Articles 18-52). Apart from general provisions, this section reflects citizenship, personal rights and freedoms, political rights, economic and social rights, guarantees of human rights and freedoms, and the duties of citizens.

**Part Three. Society and Personality.** This section consists of 4 Chapters (from Articles 53 to 67). This section reflects the society's economic foundations, public associations, family and the mass media.

**Part Four. Administrative-Territorial and State Structure.** This section consists of 2 Chapters (from Articles 68 to 75). This section reflects the administrative-territorial structure of the Republic of Uzbekistan and the Republic of Karakalpakstan.

**Part Five. Organization of State Power.** This section consists of 9 Chapters (from Articles 76 to 126) and deals with the activities of the supreme representative body of the Republic of Uzbekistan – the Oliy Majlis of the Republic of Uzbekistan, the President of the Republic of Uzbekistan, the Cabinet of Ministers; with the fundamentals of the local government, the judiciary, the electoral system; with the prosecutor's office, finance and credit, defense and security.

**Part Six. The Procedure for Amending the Constitution.** This final section consists of 2 Articles (from Articles 127 to 128). This section describes the procedure for introducing changes and amendments to the Constitution.

## **A. Constitutional provisions on human rights**

Part Two is devoted to the fundamental rights, freedoms and duties of a person and a citizen (Articles 18-52). This section consists of the following structural parts: Chapter V (General Provisions), Chapter VI (Citizenship); Chapter VII (Personal Rights and Freedoms); Chapter VIII (Political Rights); Chapter IX (Economic and Social Rights); Chapter X (Guarantees of Human Rights and Freedoms); and Chapter XI (Duties of Citizens).

The constitutional norms listed in Chapter VII (Personal Rights and Freedoms) provide for the right to life (Article 24); the right to liberty and personal security (Article 25); the presumption of innocence (Article 26); the right to protection from interference with one's honor and home (Article 27); the right to free movement (Article 28); the right to freedom of thought, speech and belief (Article 29); the right to familiarize oneself with documents affecting one's rights and interests (Article 30); the right to freedom of conscience (Article 31).

The constitutional norms, listed in Chapter VIII (Political Rights) provide for the right to participate in the management of the society and the state affairs (Article 32); the right to carry out public activity in the form of rallies, meetings and demonstrations (Article 33); the right to join trade unions, political parties and other public associations, and to participate in mass movements (Article 34); and the right to appeal to state bodies (Article 35).

The constitutional norms, listed in Chapter IX (Economic and Social Rights) provide for the right to property (Article 36); the right to work (Article 37); the right to rest (Article 38); the right to social security (Article 39); the right to qualified medical care (Article 40); the right to education (Article 41); and the right to use the achievements of culture and spirituality (Article 42).

In addition, the Constitution of the Republic of Uzbekistan contains norms on guarantees of human rights and freedoms (Articles 43-46). Articles 43 and 44 of the Constitution determine that the state ensures the rights and freedoms of the citizens, and their judicial protection. Article 45 of the Constitution establishes that the rights of minors, disabled and lonely elderly people are under the protection of the state, and Article 46 stipulates that women and men have equal rights.

The Constitution also contains provisions on the citizens' duties (Articles 47-52). Citizens are obliged to observe the Constitution and laws, and to respect the rights, freedoms, honor and dignity of other people (Article 48). It is the duty of

citizens to protect the historical, spiritual and cultural heritage of the people of Uzbekistan, and cultural monuments are protected by the state (Article 49). Also, there is the obligation to take care of the natural environment (Article 50), and the obligation to pay taxes and local fees established by law (Article 52).

## **B. Rights enshrined in other provisions of the Constitution**

Constitutional rights are not only included in the provisions of Part Two, but there are other provisions on human and citizen rights.

### **1. Protection of the rights of foreign citizens (Article 23)**

Foreign citizens and stateless persons in the territory of the Republic of Uzbekistan are provided with rights and freedoms in accordance with international law.

### **2. Freedom of economic activity (Articles 53 and 54)**

The state guarantees freedom of economic activity, entrepreneurship and labor, based on the priority of consumer rights, equality and legal protection of all forms of ownership.

Private property, along with other forms of property, is inviolable and protected by the state. The owner can be deprived of it only in cases and in the manner prescribed by law.

The owner, at his/her own discretion, possesses, uses, and disposes of the property belonging to him/her. The use of property should not harm the ecological environment, violate the rights and legally protected interests of citizens, legal entities and the state.

### **3. Guarantees for the activities of public associations (Article 58)**

The state ensures the observance of the rights and legitimate interests of public associations, creates equal legal opportunities for them to participate in public life. Interference of state bodies and officials in the activities of public associations, as well as interference of public associations in the activities of state bodies and officials is not allowed.

#### **4. Family protection (Articles 63-66)**

The family has the right to the protection of society and the state. Marriage is based on the free consent and equality of the parties. Parents are obliged to support and educate their children until they come of age.

The state ensures the maintenance, upbringing and education of orphans and children deprived of parental care, encourages charitable activities in relation to them.

Children are equal before the law, regardless of the origin and civil status of their parents. Motherhood and childhood are protected by the state.

Parents are obliged to support and educate their children until they come of age.

Able-bodied adult children are obliged to take care of their parents.

#### **5. Right to judicial protection (Articles 115 and 116)**

Legal proceedings in the Republic of Uzbekistan are conducted in the Uzbek, Karakalpak languages or in the language of the majority of the population of the area. Persons participating in court proceedings, who do not know the language in which it is being conducted, shall have the right to be fully acquainted with the materials of the case, participate in judicial actions through an interpreter, as well as the right to appear in court in their native language.

The accused is guaranteed the right to defense.

The right to professional legal assistance is guaranteed at any stage of the investigation and legal proceedings.

#### **6. Electoral rights (Article 117)**

Citizens have the right to elect and be elected to representative bodies of state power. Each voter has one vote. The right to vote, and the equality and freedom of will are guaranteed by law.

Human rights are guaranteed by the Constitution of the Republic of Uzbekistan, the Civil Code (December 21, 1995), the Electoral Code (June 25, 2019), and the laws “On Appeals of Individuals and Legal Entities” (September 11, 2017) and “On Freedom of Conscience and Religious Organizations” (July 5, 2021), and

other laws.

Human and civil rights listed in other provisions of the Constitution have equal legal importance in terms of their content.

### **C. Concrete definition of constitutional rights**

The Constitution determines the right of citizens to participate in the management of state affairs, which implies their equal access to public service.

The Law “On the Openness of The Activities of Public Authorities and Management” (May 6, 2014) provides for access of individuals and legal entities to information about vacant jobs, employment conditions and requirements for candidates for filling vacant jobs in government bodies.

The right of citizens to participate in the management of state affairs is also exercised by means of public control. The Constitution establishes that public control over the state bodies’ activities is the citizens’ basic political right and obliges the state to create the necessary conditions for its effective implementation. The Law “On Public Control” was adopted on April 12, 2018 with the purpose to regulate the issues of exercising public control over the activities of state bodies.

The Law “On Appeals of Individuals and Legal Entities” defines such guarantees for the exercise of the right to appeal, as state bodies’ compliance with the requirements of the Constitution and the laws of the Republic of Uzbekistan when considering appeals, taking measures for their full, objective and timely consideration, restoration of violated rights, freedoms, etc. One of the guarantees is the establishment of a ban on the persecution of an individual, his/her representative, their family members, in connection with their appeals to state bodies in order to protect their rights and interests, as well as expressing their opinions and criticism in appeals.

### **D. Historical background and development**

Before gaining state independence, Uzbekistan has had three constitutions (1927, 1937, 1978).

The first Constitution of the Republic of Uzbekistan as a sovereign independent state was adopted on December 8, 1992.



Since 1992, the Constitution was amended twelve times. The most important amendment made to the Constitution of the Republic of Uzbekistan was in connection with the transition to a two-chamber parliament following a nationwide referendum on January 27, 2002. In particular, an amendment was made to Article 97 of the Constitution. This article previously provided that the President, who resigned on expiry of the term, holds the office of a member of the Constitutional Court during good behavior. As a result of a referendum held on January 27, 2002 on the transition to a two-chamber parliamentary system, Article 97 of the Constitution was amended, according to which the President, who resigned on expiry of the term, holds office of a Senate member during good behavior.

## **II. Classification and content**

### **A. Listed constitutional rights**

The Constitution of the Republic of Uzbekistan enshrines the fundamental rights, freedoms and duties of a person and a citizen. The Constitution divides human rights into:

- Personal rights and freedoms (Chapter VII)
- Political rights (Chapter VIII)
- Economic and social rights (Chapter IX)

This approach is based on the classification of human rights in the International Bill of Human Rights (Universal Declaration of Human Rights, International Covenant on Civil and Political Rights, International Covenant on Economic, Social and Cultural Rights).

The Constitution uses the term “personal rights” instead of “civil rights”, and cultural rights are included in “social rights”. Thus, the Constitution of the Republic of Uzbekistan contains personal, political, economic, social, and cultural rights of a person and citizen.

The list of human rights, as shown by the Constitution’s headings of the relevant section (“Fundamental Rights, Freedoms and Duties of Man and Citizen”), applies to both any person and citizens of Uzbekistan. The text of the Constitution uses the words “everyone”, “every person”, “for all” to denote human rights regardless

of citizenship, and the word “citizens” denotes the rights belonging only to citizens of Uzbekistan.

## **B. Unlisted constitutional rights**

The Constitution does not provide for the rights of the child as a separate article. At the same time, the Constitution establishes that the rights of minors, disabled and lonely elderly people are protected by the state (Article 45). Children are equal before the law, regardless of the origin and civil status of their parents. Motherhood and childhood are protected by the state (Article 65).

The Law “On Guarantees of the Rights of the Child” (January 7, 2008) provides for the following rights of the child:

- Children born in and out of wedlock enjoy equal and comprehensive protection.
- Every child from the moment of birth has the right to last name, first name, patronymic, nationality and citizenship, as well as the right to preserve them.
- The child has the right to be protected from abuse by parents and guardians.
- Every child has the right to live and be raised in a family, to know the parents, to live with them and to take care of them.
- Every child has the right to be protected from illegal movement and non-return from abroad.
- Every child has the right to housing.
- Every child has the right to rest and leisure that is appropriate for his/her age, health and needs.
- Every child has the right to health care.
- Every child has the right to education.
- Socially vulnerable children have the same rights as other children to participate in public life.

## **C. Protection and limitation**

### **1. Constitutional norms for the protection of fundamental rights**

The Constitution provides for norms on guarantees of human rights and freedoms (Articles 43-46). The state guarantees everyone judicial protection of his/her

rights and freedoms, the right to appeal in court against illegal actions of state bodies, officials, and public associations.

The constitutional provisions on the protection of human rights are governed by the norms of the Code of Administrative Procedure, the Civil Procedure Code, the Criminal Procedure Code, and the Economic Procedure Code.

## **2. Constitutional norms on the limitation of fundamental rights**

Certain constitutional provisions contain restrictions on human rights. For example, everyone has the right to seek, receive and disseminate any information, with the exception of information directed against the existing constitutional order and other restrictions provided for by law (Article 29).

Such restrictions are provided for in the laws “On Guarantees and Freedom of Access to Information” and “On the Principles and Guarantees of Freedom of Information”. For example, the Law “On the Principles and Guarantees of Freedom of Information” provides that access to information can be limited only in accordance with the law and in order to protect human rights and freedoms, the foundations of the constitutional order, moral values of society, spiritual, cultural and scientific potential, and to ensure security of the country.

Article 57 of the Constitution prohibits the creation and operation of political parties and other public associations that aim for the following: violently changing the constitutional order; opposing the sovereignty and integrity of the republic’s security, and the constitutional rights and freedoms of its citizens; propagandizing war, social, national, racial and religious enmity; endangering the well-being and morality of the people; as well as creating paramilitary associations and political parties on ethnic and religious grounds. At the same time, the state does not interfere in ideological polemics and theoretical discussions. Freedom of scientific and creative thought is an important guarantee for the existence of civil society.

### **III. Interpretation and current issues**

#### **A. Diversity in Asia and fundamental rights**

Article 12 of the Constitution establishes the measure and principles of political and ideological diversity in Uzbekistan and fixes them as one of the main characteristics of democracy. Such a ban is one of the main guarantees against a totalitarian regime in which ideological diversity is not allowed. Under a totalitarian regime, the Constitution is enshrined as the only ideology obligatory for all.

Uzbekistan, like other post-Soviet republics, faced the phenomenon of the dominance of one Marxist-Leninist ideology, ranked as the official state ideology. The prohibition to establish any one ideology as a state ideology means that no ideology can be constitutionally entrenched.

#### **B. Accession to international human rights treaties and the protection of constitutional rights**

The Constitution of Uzbekistan gives international law an important place in the country's legal system. The Preamble to the Constitution proclaims the priority of the generally recognized norms of international law. The Law "On International Treaties of the Republic of Uzbekistan" dated February 6, 2019 establishes that international treaties of the Republic of Uzbekistan, along with generally recognized principles and norms of international law, are an integral part of the legal system of the Republic of Uzbekistan. If an international treaty of the Republic of Uzbekistan establishes rules other than those provided for by the laws of the Republic of Uzbekistan, then the rules of the international treaty shall be applied.

Uzbekistan is a party to more than seventy international documents on human rights, including six of the nine main UN conventions in the field of human rights, as well as four optional protocols. After the ratification of these conventions, a number of legislative acts and organizational measures were adopted in Uzbekistan, taking into account the recommendations of the UN human rights treaty bodies.

The Constitution entrusts the Constitutional Court with determining the compliance of the Constitution of the Republic of Uzbekistan with interstate

contractual and other obligations of the Republic of Uzbekistan.

The Constitutional Court also determines the constitutional compliance of the constitutional laws, and of the laws on the ratification of international treaties of Uzbekistan before they are signed by the President.

## **Annex: List of legal acts**

### **1) The Constitution of the Republic of Uzbekistan**

Preamble, Articles 17, 18-52, 58, 64-66, 116-117.

### **2) Legislative acts**

Administrative Procedure Code (January 25, 2018)

Civil Code (December 21, 1995)

Code of Civil Procedure (January 22, 2018)

Code of Criminal Procedure (September 22, 1994)

Economic Procedural Code (January 24, 2018)

Electoral Code (June 25, 2019)

Law “On Appeals of Individuals and Legal Entities” (September 11, 2017)

Law “On Freedom of Conscience and Religious Organizations” (July 5, 2021)

Law “On Guarantees and Freedom of Access to Information” (April 24, 1997)

Law “On the Principles and Guarantees of Freedom of Information” (December 12, 2002)

Law “On Guarantees of the Rights of the Child” (January 7, 2008)

Law “On Public Control” (April 12, 2018)

Law “On the Openness of the Activities of Public Authorities and Administration”  
(May 6, 2014)

### **3) International norms**

Universal Declaration of Human Rights

International Covenant on Civil and Political Rights

International Covenant on Economic, Social and Cultural Rights

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**Edited by**  
Fabian Duessel  
Sora Kang  
Hyunkyoung Lee  
Jaecun Park

**Fact Files drafted by**  
AACC Members

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## Constitutional Rights and AACC Members

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