Association of Asian Constitutional Courts and Equivalent Institutions

The Constitutional Court of Mongolia

IMPLEMENTATION OF CONSTITUTIONAL REVIEW

CHALLENGES AND DEVELOPMENT TRENDS

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IMPLEMENTATION OF CONSTITUTIONAL REVIEW
CHALLENGES AND DEVELOPMENT TRENDS

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FOREWORD

The Constitution of Mongolia created a new institution called the Constitutional Tsets (court) of Mongolia, which protects democratic values, human rights, and freedoms, implements the separation of state power principle, and monitors whether the highest state institutions are working within the framework of the Constitution.

At the time of commemorating its 30th anniversary, the Constitutional Tsets (court) of Mongolia is delighted to preside over the Association of Asian Constitutional Courts and Equivalent institutions in 2021-2023.

The objectives of the Association of Asian Constitutional Courts and Equivalent institutions shall be to promote the protection of human rights, the guarantee of democracy, the implementation of the rule of law, the independence of Constitutional courts and equivalent institutions, and the cooperation and exchange of experiences and information among members.

During the presidency of the Asian Association, the Constitutional Tsets (court) of Mongolia supports the development of cooperation on certain constitutional issues, maintenance of regular relations, and exchange of experience, methods, and information in the field of constitutional law and adjudication.

In this context, it's a pleasure to share the knowledge and experience of Justices, employees, scholars, and researchers of the Constitutional review bodies of the members of the Association by publishing and introducing to you the compilation of scientific articles on the topic "Implementation of Constitutional Review: Challenges and Development Trends".

FOREWORD

This compilation includes articles written in English and Russian, the official working languages of the Association, and I am confident that this work will contribute to the development of a scientific, cognitive, and practical understanding of Constitutionalism, which is the heritage of mankind.

I would like to extend my sincere gratitude to the Constitutional courts' Justices, employees, scholars, and researchers who shared their valuable knowledge and experiences.

Chinbat Namjil

Chief Justice of the Constitutional Court of Mongolia,

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GUARANTEE OF JUDICIAL PROTECTION AND PRINCIPLE OF EFFECTIVENESS IN THE PRACTICE OF THE CONSTITUTIONAL COURT OF THE REPUBLIC OF AZERBAIJAN

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The Article is devoted to the analysis of the principle of effectiveness, which is one of the governing principles in the framework of constitutional control in the Republic of Azerbaijan. First of all, it is emphasized that the idea of the effectiveness of constitutional rights and freedoms is the basis of several legal positions formed by the constitutional court. Further, the various methods of interpretation used in the application of the principle of effectiveness in constitutional control are discussed.

It is also shown that in the practice of the Constitutional Court of the Republic of Azerbaijan, the principle of effectiveness has been applied mainly in connection with the provision of judicial protection of the rights and freedoms of everyone enshrined in the Constitution. Based on the content of a number of decisions adopted by the Plenum of the Constitutional Court at different times, the position of the constitutional review body on this right is announced.

Based on the research, the importance of the application of the principle of effectiveness in the practice of the Constitutional Court in terms of protection of human rights and freedoms was shown.

The Constitution of the Republic of Azerbaijan, like the constitutions of other democratic states adopted in the second half of the 20th century, is characterized by the establishment of broad catalogue of human rights. At the same time, many constitutional provisions on human rights are reflected in a short and abstract form. However, this did not weaken the capacity to defend those rights, but rather led to their broader protection in certain cases as a result of the interpretation of the constitutional courts.

In this regard, it should be noted that the Constitutional Court of the Republic of Azerbaijan, like the bodies of constitutional justice of other countries, has developed their scope based on the idea of effective implementation of several constitutional rights.

The Constitutional Court, applying the principle of efficiency, gives maximum meaning to the constitutional provisions. This meaning does not go beyond the content of the text of a particular norm, as well as itscontent taken systematically with other constitutional norms. One of the important aspects of the approach is that in some cases it is not enough for the state to prohibit certain unconstitutional actions in order to comply with the Constitution; the state must also take positive steps to protect the rights guaranteed by the Basic Law.

The application of teleological interpretation together with the principle of efficiency allows the Constitutional Court to focus on the "real situation of a person.". This principle leads to judicial activism and a broad interpretation of the text of the Constitution. This principle, when used to interpret the procedural guarantees of the Constitution, including the right to judicial protection, results in real and effective protection of human rights.

In the practice of the Constitutional Court, the principle of effectiveness is applied mainly in connection with the ensuring of judicial protection of the rights and freedoms of individual enshrined in Part I of Article 60 of the Constitution.

The Constitutional Court, in its several decisions, pointed to the dual character of this right, noting that this right is one of fundamental rights and freedoms of man and citizen, as well as a guarantee of other rights and freedoms enshrined in the Constitution. The right to judicial protection also provides for an administration of justice capable to effectively restore violated rights and freedoms (Decisions of the Constitutional Court Plenum

concerning the complaint of E. Hakimovof November 3, 2008, and the Interpretation of Article 420 of the Civil Procedure Code of the Republic of Azerbaijan of February 28, 2012).

In its Decision of December 13, 2010, on the interpretation of Article 71.1 of the Criminal Code of the Republic of Azerbaijan, the Plenum of the Constitutional Court noted that administration of justice is one of the most effective means of human rights protection. It is no coincidence that a court is considered to be the main guarantor of human rights protection. Therefore, the ineffectiveness of judicial protection may adversely affect the effectiveness of other constitutional rights.

As for the content of the right to judicial protection, it should be noted that the Constitutional Court held that it includes, first, the right to access to a court. As already mentioned, this was possible based on the principle of efficiency. In its decision of April 23, 2004, the Constitutional Court noted, citing the European Court of Human Rights case law, that one of the elements of the right to a fair trial is the right of the person to access to a court. Given the exceptions provided for in the legislation, the lack of a person's access to a court makes the right to a fair trial meaningless.

In the practice of the Constitutional Court, special attention is drawn to the right to access to a court. According to the Court, the violation of this right makes the exercise of the right to judicial protection insignificant. This right, interpreted in terms of the state governed by the rule of law, implies that the parties to the case have an effective and real opportunity to defend their rights by providing them with open and transparent access to judicial remedies.

The Constitutional Court, based on the principle of effectiveness, has established another important element of the right to judicial protection - the right to enforce judicial acts that have entered into force. Thus, based on the idea of effective and real administration of justice, the Plenum of the Constitutional Courtin its decision of February 3, 2005, on complaint of N.F. Nurulov and Z.Z.Nurulova ruled that execution of judicial acts is within the scope of the right to judicial protection. The Decision of May 22, 2015, on the interpretation of some provisions of Article 231.1 of the Civil Procedure Code states that prolonged non-initiation of enforcement actions for one or another reason leads to the non-restoration of violated rights, as a result of which the exercise of the right to judicial protection is ineffective

and the decision taken is insignificant.

The Constitutional Court also determined that the legislature has a positive obligation to ensure the relevant constitutional value. Although the legislature is free to choose the enforcement model of court decisions subject to constitutional norms and principles, the Constitutional Court emphasized that the model chosen by the legislature in this area should be effective. Otherwise, the court decision will not be enforced in time and in correct manner.

The issue of positive obligation had also been impacted in the Decision of May 20, 2011, on the Interpretation of certain provisions of Article 92.12 of the Criminal Procedure Code. The Constitutional Court, considering the need to ensure the right of the suspected or the accused persons to receive high-quality legal assistance as an important tool for the effective administration of justice, held that the prosecution authorities by taking into account the specific circumstances of the case (the character of the crime and degree of its public danger, the severity of the possible punishment, the complexity of the case, etc.) shall appoint a defence counsel for the suspect or the accused, even in cases that are not specified in Article 92.3 of the Criminal Procedure Code.

According to the legal position stated in the Decision of July 15, 2011, on the interpretation of Article 26 and Article 96 of the Criminal Procedure Code, one of such cases is the fact suspect or accused knows the state language of the Republic of Azerbaijan but is unable to read the procedural documents written in this language in the Latin alphabet.

The principle of effectiveness also influenced the Constitutional Court's legal opinion on the mandatory participation of a lawyer in civil proceedings described in the Decision of June 11,2002, on Article 67 and Article 423 of the Civil Procedure Code.

In accordance with the above-mentioned articles of the Civil Procedure Code, persons participating in the court of cassation, additional cassation, re-examination of the case due to newly revealed circumstances, may take part in the judicial process only with the help of a lawyer. The Constitutional Court ruled that in the case of a petition of a person requesting the appointment of a public lawyer due to financial insolvency, the court should consider the requirements of Articles 60 and 61 of the Constitution and ensure their right to legal assistance at the state expense.

Thus, the application of the principle of effectiveness in the practice of the Constitutional Court has facilitated the development of the content of the right to judicial protection, the imposition of certain positive obligations on the relevant state authorities for the real implementation of this right and, consequently, broaden possibilities of human rights protection.

FEATURES OF CONSTITUTIONAL SUPERVISION IN THE REPUBLIC OF AZERBAIJAN

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The Article is fully dedicated to the activities and authorities of the Constitutional Court of the Republic of Azerbaijan. The Article covers the matters related to the Constitutional Court's role in democratic and legal statehood.

Moreover, the Article discusses the role of the legal position of the Constitutional Court in strengthening justice and humanism principles as well as the significance of this legal position in the improvement of the national legislation. The Article also addresses the significance of the legal position of the Constitutional Court as the more precise instrument for constitutional and legal regulation.

The Article describes the significance of the Constitutional Court's activities in the protection of constitutional rights and freedoms as well as the promotion of democratic values.

It also discusses the law-making function of the Constitutional Court and its impact on the legal arrangements.

The Constitutional Court of the Republic of Azerbaijan is a special state body acting in the same manner as a constitutional review body of other countries, performing the functions of constitutional justice and at the same time having the power to verify the compliance of laws, decisions and other normative legal acts with the Constitution and laws of the Republic of Azerbaijan.

The Constitutional Court is included in the Chapter "Judicial Power" of the Constitution of the Republic of Azerbaijan and thus emphasizes the affiliation of the Constitutional Court to the judicial system, which is an independent branch of state power. However, it can be argued that the Constitutional Court is a supervisory body with a special state structure.

The Constitutional Court is the only constitutional review body whose powers and activities are directly provided for in the Constitution.

In accordance with Article 130 of the Constitution of the Republic of Azerbaijan, the issue of verification of compliance of laws, decisions and other normative legal acts with the Constitution and laws of the Republic of Azerbaijan shall be carried out by the Constitutional Court.

From this point of view, several conclusions can be drawn:

1. This norm envisages the active influence of the Constitutional Court on the law-making process and, first of all, on the result - the adopted normative legal acts;

2. Response to the revealed shortcomings, contradictions with the Constitution and all other normative legal acts are possible only in a form consistent with the functions of the Constitutional Court;

3. Due to the fact that the Constitutional Court is a state body exercising a special supervisory function to ensure the supremacy of the Constitution and ensuring the compliance of all normative legal acts with the Constitution, the legal position of the Constitutional Court is decisive in considering such disputes.

In addition, it should be noted that Constitutional Court, when examining the constitutionality of a disputed normative act, may, by its decision, indicate that another law with a higher legal force than the proposed normative act is unconstitutional.

In the practice of the Constitutional Court, it has been repeatedly observed that some articles of a normative legal act have been proposed to be examined and similar norms exist in other normative legal acts. In such cases, the Constitutional Court have the right to verify its compliance with the Constitution and adopt a relevant decision.

In a number of its decisions, the Plenum of Constitutional Court stressed the importance of the legislator's adherence to the principle of legal certainty when adopting normative legal acts regulating any public relations.

The Plenum of Constitutional Court has repeatedly emphasized that the principle of legal certainty, among other requirements, provides for clarity and certainty of the current legal situation in the most general sense.

In addition, in a number of decisions, the Plenum of Constitutional Court noted that the principle of legal certainty is one of the key aspects of the rule of law. It is very important that each law or any of its provisions meet the principle of legal certainty, and one of the main conditions for ensuring this is that the legal norms are unambiguous and clear.

Of course, this approach, in turn, should reassure everyone that it will protect their rights and freedoms, and that law enforcement will be able to predict their actions.

Conversely, the uncertainty of the content of a legal norm can lead to a violation of the rule of law, equality before the law and the courts, which should be the basis of any normative legal act, allowing for unrestricted consideration in the application of the law.

Based on the above, it can be concluded that the Constitutional Court forms the general principles of normative legal acts adopted by state bodies, i.e. it has a significant impact on the application of law.

Moreover, the decisions of the Constitutional Court are a source of law. When the Constitutional Court "removes" a normative act (individual provisions) from the legal system on the grounds that it is unconstitutional, it acts as a "law regulator".

The Constitutional Court, by exercising its authority to verify the constitutionality of normative legal acts, which is one of its main powers, first of all, ensures the supremacy of the Constitution. If the Constitutional

Court determines that the examined norm or any part of it does not comply with the Constitution or an act having a higher legal force, it shall declare it invalid. Thus, the provision of this normative legal act loses its legal force and cannot be applied in the territory of the Republic of Azerbaijan. The important point here is that the norm examined by the Constitutional Court is evaluated not in terms of expediency, but in terms of compliance with the spirit and letter, philosophy and principles of the Constitution. Thus, the provision of a normative legal act that is inconsistent with the Constitution is removed from the national legislative system. In this case, the Constitutional Court performs the function that in the theory of constitutional law so-called as "negative legislator".

The Constitutional Court, paying great attention to the international practice of interpretation of law (especially human rights norms), makes constant references in its decisions to international law, in particular to the case-law of the European Court. Such references not only enrich the position of the court and serve to justify it, but also in some cases directly determine the formation of the legal position itself. Therefore, taking into account the fact that the judgements of the Strasbourg Court, to which reference is made in the decisions of the Constitutional Court on specific legal relations, will be useful and interesting for national enforcers, as well as for all readers, these decisions are stored in the texts.

It should also be noted that in each case, the Constitutional Court not only analyzes the Constitution, but it is also based on international legal instruments - international treaties on civil and political rights, economic, social and cultural rights, the Universal Declaration of Human Rights, the European Convention for the Protection of Human Rights and Fundamental Freedoms and the UN materials.

All decisions adopted by the Constitutional Court during its activity are based only on the norms of the Constitution, international law, judicial precedents, as well as judgements adopted by the European Court.

An analysis of the activities of the Constitutional Court shows that the Constitutional Court, occupying a worthy place among other state bodies, successfully and dynamically develops the state legal system through its activities.

It should be noted that the activities of the institute of constitutional control and the specialized body that implements it are of great interest for

research. The activity of the Constitutional Court in Azerbaijan and the experience of such bodies in foreign countries show that the existence of such a body is an important guarantee for the implementation of democratic reforms and the principle of separation of powers.

Based on the above, the tasks of constitutional control are to ensure strict and unswerving adherence to constitutional norms; Identification and elimination of contradictions in the Constitution itself; prevention of inconsistencies of normative legal acts with the Constitution of the Republic of Azerbaijan; the application of measures of constitutional responsibility.

The fulfillment of these responsibilities is closely linked to the observance and implementation of the provisions of Constitution. For this reason, the activity of the Constitutional Court is based on the fact that the Constitution is a key element of the entire legal system.

Thus, constitutional control as a necessary element of the functioning of a democratic state is of particular importance in determining the lines of contact with the legislative, executive and judicial authorities.

The worthy political successor of the National Leader, Head of State, President Ilham Aliyev's extensive and consistent activities to strengthen the rule of law in the country and create compromise and consensus based on the recognition of universal values in society have made our young independent republic important among influential states. From this point of view, the human rights sphere of our Constitution - the improvement of the legislation, the rules for amending the Constitution, control and inspection measures (parliament, government, public, prosecutorial control), defense measures, accountability measures increasingly penetrate all walks of life, all segments of society become the basis of legal stability of coexistence and activity.

The President of the Republic of Azerbaijan, Mr. Ilham Aliyev, in his address to the participants of the International Conference dedicated to the 20th Anniversary of the Constitution of the Republic of Azerbaijan, noted that "During the 20 years of the Constitution, a great deal of experience has been gained in the implementation of its provisions. The concepts reflected in this document have been developed and numerous normative legal acts have been adopted to promote a strong social state, a competitive economy and effective protection of human rights. The Constitutional Court of the Republic of Azerbaijan plays an important role

in ensuring the supremacy of constitutional provisions and their evolution. As a supreme body of constitutional justice, the Constitutional Court contributes to the development of the legal system of our country, forms a positive experience in legal regulation, implements the Constitution and implements the Constitution directly".

Thus, over the past years, the Constitutional Court has actively participated in the process of building a democratic, legal, secular state in our country, by its decisions made a valuable contribution to the respect and esteem of the Constitution and laws of the Republic of Azerbaijan, the strengthening of such principles as justice, freedom and humanism, the development of democracy and legal culture, the implementation of ideas of constitutionalism.

Undoubtedly, this activity is carried out within the framework of the processes of creation, development and democratization initiated by National Leader Heydar Aliyev in Azerbaijan and successfully continued under the leadership of his worthy successor, President Ilham Aliyev. Today, along with the reforms carried out in all spheres in our country under the leadership of President Ilham Aliyev, a qualitatively new stage of democratic and legal reforms is taking place. The protection and strengthening of the achieved national solidarity, ensuring the development of all spheres of state life, consistent steps towards democratic achievements are the priorities of the policy of the country's leader.

JUDICIAL REVIEW IN THE INDIAN CONTEXT

Rajesh Kumar Goel

Registrar of the Supreme Court of India

The power of the judiciary to review the decisions of the legislature and executive has found a place in the canonical texts of most modern nation-states, even those without a written constitution. In modern constitutional democracies, this power of the judiciary is most often defined as 'constitutional review', a term seldom used in the Indian context. Although judicial review includes a long tradition of administrative review, the concept of judicial review contemplated in this article – as it exists in India – refers to evaluating State action (be it legislative or executive) against the ideals and standards of the Constitution. Judicial review has been closely studied over the past two centuries, and many across the political spectrum have concluded that it is an inalienable institution. This article intends to trace the history of judicial review, expound on its implementation in India and its interplay with the existing constitutional framework, and demonstrate its relevance in contemporary society.

Judicial Review – A Historical Perspective

Many historians trace the origin of constitutional judicial review (referred to as 'judicial review' through this paper) to the assertion of the fourth Chief Justice of the United States of America, Chief Justice John Marshall. His opinion in the case of *Marbury v. Madison* (1803)[1] is widely regarded as the point of origin for the doctrine of judicial review. The US Supreme Court delivered a clear finding that the power of judicial review vests within the Court. Chief Justice Marshall held: "Certainly all those who have framed the written Constitution contemplate them as forming the fundamental and paramount law of the nations, and consequently, the theory of every such government must be that an act of the legislature, repugnant

[1] Marbury v. Madison, 1 Cranch (5 U.S.) 137 (1803).

to the Constitution is void"[2]. This was the first instance that a Court had found an act of Congress to be unconstitutional. Even though this was just the beginning of the debate, Chief Justice Marshall had set the stage for the Constitutional Court to be a coequal part of the State machinery.

One author[3] also argues that the earliest signs of the recognition of the concept of judicial review emanates from the seminal decision in the *Rookes*[4] case, a British labor and tort law case. As per the Statute of Sewers 1531[5], the Commissioner of Sewers had the authority to carry out repairs to the riverbanks and to charge the adjacent landowners for such repairs. However, the Commissioner of Sewers levied charges only on one person for the repair of riverbanks, but numerous landowners benefited from the work as they were equally vulnerable to floods. The Commissioners were given broad discretion as to who should be charged with the payment, although all those in the relevant area could be liable to contribute. The Court found the Commissioners' action to be unlawful, since the 'commissioners ought to tax all who are in danger of being damaged by the not repairing equally, and not him who has the land next adjoining to the river only'[6].

Before we go deeper into our analysis of the doctrine, an important question one must ask is whether a State's actions can be left unchecked or not. History has shown that there has always been a need for an *umpire* to solve issues of federalism[7]. It was long argued that there was an increasing requirement to keep a check on the decisions of the executive/State as society made an institutional move away from the divine right to rule and towards the social contract tradition that shaped the current nation state. It must be noted that this was not an easy or clear-cut journey and that the idea of judicial review is still contentious, even after decades of continuous development.

The origins of judicial review can also be explained as a response to State action that strips away inalienable human rights. This response has

[2] ibid.

[3] Paul Craig, 'Proportionality and Judicial Review : A UK Historical perspective', New Zealand Law Review, p. 265, 2010 , Oxford Legal Studies Research Paper No. 5/2011, Available at SSRN: https://ssrn.com/abstract=1756271.

[4] (1598) 5 Co. Rep. 99b.

[5] Statute of Sewers 1531, 23 Henry 8, c. 5.

[6] ibid.

[7] Calabresi SG, The History and Growth of Judicial Review, vol 1 (Oxford University Press 2021).

been termed as the "*rights from wrongs hypothesis"*[8]. Whether it is racial slavery and segregation in the USA, the Holocaust in Nazi Germany, or the colonisation faced by many countries in the global south – they all led to a strong response from the judiciary.

Although the idea of the written constitution dates back to 1789, it took over a century for most "modern democracies" to adopt the same. Through the period between 1789 and 1945, many a country had adopted written constitutions, but it was only after the Second World War that the judicial review of the constitutionality of legislative action became a cornerstone of a modern democracy[9]. The horrors of Nazi Germany were a stark reminder to all that unchecked legislative and executive action can lead to countries losing sight of their constitutional principles. This cautious approach was built upon the existing practice of judicial enforcement of the Bill of Rights in America with appropriate checks and balances.

Chief Justice Marshall can be given credit for establishing 'departmentalism' in a federal structure[10]. Each branch of the State has a constitutional right and duty to act on its own best interpretation of the Constitution, but this interpretation needs appropriate checks and balances[11]. This was done by establishing the responsibility of the Courts to assess the actions of other departments of the State in relation to their action's constitutionality. The concept of departmentalism was further developed into the much stronger and strict form of separation of powers we know today.

Several years since its inception, India's Supreme Court has taken on the role of both 'umpire' and 'defender' – an active participant in safeguarding the rights and protections guaranteed by the Constitution. Further, the Indian judiciary has also been vastly inspired by the aforementioned "rights and wrongs hypothesis"[12].

As a country with a colonial past and consequently a citizenry familiar with systemic oppression, the Constitution of India envisions an egalitarian society, an idea which has been deftly woven into the very

[8] Dershowitz AM, Rights from Wrongs: A Secular Theory of the Origin of Rights (Basic Books 2005).
[9] Calabresi (n7).
[10] Tushnet M, "Alternative Forms of Judicial Review" (2003) 101 Michigan Law Review 2781.
[11] ibid.
[12] Calabresi(n7).

fabric of India's constitutional morality. There are various instances where the Indian Supreme Court has tackled unchecked legislative and executive power and kept the nation on the path towards achieving the vision of our Constitutional Assembly. This proactive role of the Supreme Court has allowed the institution to grow and become one that has the nation's trust; trust that the Court will right the wrongs that exist in society and act as a guardian of the Constitution and its values[13].

Judicial Review in India

The concept of Judicial review in the Indian legal system finds its place in the principles laid down by the Constitution of India. As we have seen in the previous section, the concept of judicial review is one that has been shaped by not only the evolution of law, but also the changing nature of State power and responsibility and how the two interact. The advent of judicial review – in spirit – predates the framing and making of the Constitution of India and also has its explicit sanction[14], tracing its origins to the United States as well as common law jurisdictions.

The principle of judicial review spread across the common law world[15], through the royal prerogative of The Judicial Committee of the Privy Council. Interestingly, prior to the creation of the Privy Council in 1833, the decisions of the British Courts in India were appealable to the King in Council. Since The Judicial Committee of the Privy Council was the representative of the Crown, the judicial review it established and practiced was oriented towards federalism.

One of the first cases establishing the principle of judicial review in pre-independence Indian courts, was the case of *Emperor v. Burah*[16] decided by the Calcutta High Court. The Government of India Act, 1858 and Indian Council Act, 1861 had imposed several restrictions on the powers of Governor General in Council, whereby proscriptions of certain provisions of some statutes could be evaded from, and such actions were always beyond judicial review. The Calcutta High Court held that an aggrieved party, had a right to challenge the legitimacy of any legislative act which would have been enacted by the Governor General in Council

[13] Ely JH (n12).

[14] M.P.Jain, Indian Constitutional Law, (5thedn, LexisNexis, 2009).

[15] Steven GowCalabresi, 'The History and Growth of Judicial Review', Volume 1: G20 Common law countries and Israel, New York, Oxford University Press, 2021.

[16] Emperor v. Burah ILR Calcutta, 63 (1877).

exercising his power granted to him by the Imperial Parliament. Thus, it was the case where the High Court and Privy Council upheld the view that Indian courts had power of judicial review and laid the foundation stone for the evolution of judicial review in the country.

As mentioned, it was both the Judicial Committee of the Privy Council and the Indian Court that adopted the view that the courts were in inherent possession of the power of judicial review, with certain caveats. This view was further reaffirmed in a slew of decisions before the Government of India Act of 1935 came into operation. By the Government of India Act of 1935, a federal system was introduced and the experiment of judicial review took a new approach under the Constitution of 1950. Considering it now emanated from the Constitution itself, judicial review assumed an important role in the Indian legal system and is an integral tool in the judiciary's arsenal which facilitates effective dispensation of justice.

The evolution of judicial review in the post-independence era, is inextricably linked with the struggle against British colonial rule. The very principles and ideals that State action is to be evaluated against are shaped by the nation's hard-fought battle for freedom. The Constituent Assembly, which debated and deliberated the formulation of the Constitution of India, has ensured that judicial review finds an unequivocal place of prominence in the Constitution.

The doctrine of judicial review was firmly established in Articles 13, 32, 131-136, 143, 226, 145, 246, 251, 254 and 372 of the Constitution of India. Article 13(2) states that any laws made contravening of the Fundamental rights as per the Constitution of India shall be void, and therefore it falls upon the constitutional courts to interpret whether a statute is in violation of fundamental rights and thus, void. Moreover, Article 372 envisages judicial review of the legislations that pre-date the Constitution itself. Article 372 ensures the continuation of laws that existed prior to the adoption of the Constitution, while explicitly granting constitutional functionaries the ability to review such laws. The access to constitutional courts, seeking remedies, and judicial review is also enshrined in articles 32, 226 and 136.

Over the past seven decades, Indian Courts have done their part in ensuring that the constitutional ethos is preserved and the constitutional spirit is allowed to flourish. The Courts have drawn on such power of

judicial review and invalidated several laws that are not in consonance with constitutional principles. The Courts have examined legislations and executive decisions on the basis of this rubric of constitutionality, declaring legislative and executive action as unlawful. The importance of this function – serving as a check against government action by drawing on the immense power of the Constitution and its aspirations – cannot be undermined. After independence, a strong judiciary assists the other arms of the government in establishing a new nation with a robust constitutional culture. It must be a culture that educates the newly independent country that the legal system cannot be violated for political ends.

The Role of the Supreme Court and the Scope of Judicial Review

The Supreme Court of India has time and again held that the role of the courts is not to be omnipresent but only to scrutinize State action when absolutely necessary and when the prescription of law is blatantly disregarded. The scope of review and factors for consideration differ depending on the nature of power being exercised: whether it is statutory power, administrative power, or quasi-judicial power.

In administrative actions, the power is to be exercised when the decision shocks the conscience of the courts for defying established standards, if it is illegal, if it is illogical, or it suffers from procedural lapses/ impropriety[17]. Illegality is more about the understanding of the law and to ensure that it is applied rightly, whereas the test of logic is more along the lines of rationality and the Wednesbury principles of reasonableness[18]. Such parameters are to be evaluated in light of the facts and circumstances surrounding each case and there are no universal rules for it. While reviewing the actions or decisions, the Court also checks if they are based on relevant considerations or not. The Court has often held itself back from intervening in reviewing decisions but is more proactive in assessing the decision-making process.

Even in statutory or legislative reviews, the aforementioned are important considerations, but such action is most importantly tested against constitutional provisions. While exercising the power of judicial review, the Courts keep in mind several other doctrines – such as the doctrines of legitimate expectation, reasonableness, proportionality, eclipse, etc. –

[17] Jayarajbhai Jayantibhai Patel v. Anilbhai Jayantibhai Patel & Ors.(2006) 8 SCC 200.
[18] Ganesh Bank of Kurundwad Ltd and Ors v. Union of India & Ors. (2006) 10 SCC 645.

which are delved into in subsequent sections of this article. Although self-defined, the Court has struck a fair balance which is required to further the ends of justice.

It is worthwhile to note that with each passing decade,the Supreme Court, through its constitutional jurisprudence, has provided clarity and definition to the power of judicial review as well as assisted in the development of law in the country.

In the 1958 case of *Radhyesham Khare v. State of Madhya Pradesh*[19], the Supreme Court of India, hearing the case in its full strength, was confronted with the question of the scope of judicial review in the Indian context. The background of the case was thus: the petitioner was an elected representative to a local body, who, after an investigation by the executive was removed and another individual was appointed in his stead. The question before the court was whether the executive action for removal of the petitioner could be sustained in light of the principles of natural justice and if such an action was amenable to judicial review. The dissenting opinion of Justice Subbarao in this case had laid down one of the first building blocks in the growth of the doctrine of judicial review. While analysing if the action of the executive was a 'judicial act', he went on to state that unless the doctrine of judicial review is broadly and liberally interpreted, the doctrine would become innocuous and ineffective. He also rejected the argument that the Court ought not to obstruct the smooth working of the administrative machinery.

The Constitution of India provides for amendment of its provisions, allowing it to be a 'living constitution', with the ability to change and adapt as per the continually changing contours of the country and society. Article 368 grants the Parliament of India, to make about constitutional amendments. The beginning of the 1970s show sweeping amendments to the Constitution: the Constitution (Twenty-fourth Amendment) Act came into force on November 5, 1971; the Constitution (Twenty-fifth Amendment) Act came into force on April 20, 1972; and the Constitution (Twenty-ninth Amendment) Act came into force on June 9, 1972. The Twenty-ninth Amendment had added the legislations of the Kerala Land Reforms Act, 1969 and 1971 to the Ninth Schedule of the Constitution, which the petitioners argued diluted the provisions and safeguards provided by the Constitution. The Ninth Schedule, which contains a list of laws that

[19] Radheshyam Khare v. State of Madhya Pradesh AIR 1959 SC 107.

may not be challenged before the Courts, was held to be beyond the scope of any judicial review.

The ceaseless march of the law eventually led to the landmark case of *Kesavananda Bharti v Union of India*[20] which was decided by a bench of 13 judges, the largest yet. The Supreme Court laid down and adopted the 'basic structure doctrine', which held that the certain features of the Constitution and the State were so fundamental that they could not be subject to amendment. In a bid to preserve the country's constitutional ethos, the power of constitutional amendments was held not to be absolute. Mapping the link between democracy and unconstitutional amendments, the power of the Court to hold a law or an amendment as ultra vires can prima facie be seen as a hindrance to democratic machinery of letting, an obstacle in the path of Parliament enacting laws in national interest. However, that is not the case.

It was held that judicial review was at the heart and core of the democratic process, upon which the system of check and balances hinges upon. The Constitution is suprema lex and confers powers on various authorities and defines their powers. The function of judicial review was not carried out with a desire to undermine the legislature, but rather in the manner a duty – cast onto the Courts by the Constitution – is discharged. The Constitution had vested the power of judicial review in the Courts, which would not be deterred from exercising the same, merely because it would affect the underlying politics or social policy. Therefore, even laws placed in the Ninth Schedule would be subject to judicial review and could not violate the fundamental rights contained in Part III of the Constitution, which form a part of the basic structure.

The Supreme Court, in the case of *Minerva Mills v. Union of India*[21] (1980), analysed the constitutional validity of the Sick Textile Undertakings (Nationalization) Act, 1974,through which the petitioner's company was sought to be taken over by the executive. The *Kesavananda Bharti* judgement stated that if laws violating the basic structure were to kept beyond judicial review, Article 13[22] of the Constitution would reduce

[20] Kesavananda Bharti v Union of India (1973) 4 SCC 225.

[21] Minerva Mills v. Union of India (1980) 3 SCC 625.

[22] Article 13: Laws inconsistent with or in derogation of fundamental rights — (1) All laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of this Part, shall, to the extent of such inconsistency, be void.

to a dead letter law. Therefore, judicial review was read to be part of the basic structure doctrine and struck down Clause (4) of Article 368 as it strikes at the balance of power established by the Constitution.

The scope of judicial review beyond legislations and constitutional amendments was tested in *A.K Roy v Union of India* (1982). The President had promulgated an ordinance which allowed for preventive detention of citizens on various grounds. The petitioner, a member of Parliament, was detained on the premise of being a threat to public order. The petitioner challenged this power of the President to promulgate such an ordinance. The Court held that the power of the President to promulgate a law was an executive function, distinct from a legislative power, and could also be subjected to the scrutiny of judicial review.

In light of the increased burden on the Courts and the growing number of active cases, the Parliament amended the Constitution to add Articles 323A and 323B, which established tribunals. Tribunals, as additional adjudicatory bodies, not only assist in reducing the caseload of traditional Courts, but also offer technical expertise in various fields. By the Administrative Tribunals Act, the decisions of such tribunals was kept beyond the scope of judicial review. In the case of *S.P. Sampath Kumar v. Union of India*[23], the Supreme Court held that a law enacted under Article 323A(1) that excludes the High Court's jurisdiction under Articles 226 and 227, without establishing an "effective alternative institutional mechanism or arrangement for judicial review", would be in violation of the basic structure and would thus be subject to judicial review.

The Supreme Court, in the case of *LRS & Ors. v the District Collector, Chittoor District & Ors*[24] has also observed that the administrative decisions of the authorities are subject to judicial review.

Ancillary to the scope demarcated above, the Indian Courts have also established certain doctrines while exercising the power of judicial review. One such doctrine is the Doctrine of Eclipse which, in essence states that any legislation made prior to the Constitution in contravention to the fundamental rights only becomes inactive as opposed to being completely void. Another example is the Doctrine of Severability, which provides that if there is any unconstitutional portion of the statute, only such portion ought to be declared void, without affecting the enforcement

[23] S.P. Sampath Kumar v. Union of India (1987) 1 SCC 124.
[24] LRS & Ors. v the District Collector, Chittoor District & Ors 2019 (4) SCC 500.

of the reminder part.

The Nature of the Limitations of Judicial Review

The primary restriction on judicial review stems from the doctrine of separation of powers. The doctrine of separation of powers forms the scaffolding and essential framework of the very operation of the State and is also the root of the other doctrines mentioned above which delineate the scope of judicial review. For instance, the aforementioned doctrine of severability or separability contained in Article 13, as the name indicates, provides for careful delinking of one portion of a statute from another in order to respect legislative action and intent. The Courts are not entitled to weaponize the tool of judicial review and set aside legislative action wholesale. The extraordinary notion of separating part of a statute – an instrument that is intended to be and nearly always read holistically – finds its origins in the doctrine of separation of powers, in the idea of separate spheres of operation of the arms of the government.

The doctrine of eclipse too is similarly situated – the Court may not *undo* the action of a pre-constitutional legislature, but it is simply eclipsed or lays dormant, with the potential of revival. The doctrine of strict necessity is also in response to much the same stimulus; deciding questions relating to the constitutionality of any particular law may be done only when unavoidable and as discussed, such questions must be narrowly construed. The impulse to respect legislative intent and consequent action is evident from such doctrines, all the while balancing it against the supremacy of constitutional values.

The driving force behind the doctrine of separation of powers is to prevent concentration of power within a single governmental organ. Although judicial review serves as a check and balance against complete separation, its intention is the same[25]: to prevent one arm of the government from prevailing over the other, which is bound to occur if unbridled and unsupervised power is exercised. Judicial review, although seemingly blurring the lines between the roles of the three organs, is essential for a healthy and robust democracy.

The other source of limitation, or rather a circumstance which

[25] Spoorthi Cotha, 'Judicial Review in Times of Crisis: Exploring Constitutional Obligations in Light of Coronavirus' (2020) Available at: https://www.nls.ac.in/wp-content/uploads/2021/04/Spoorthi_Cotha-1.pdf.

warrants imposition of temporary restrictions, is the concern of national security. However, the Supreme Court has clearly indicated in petitions relating to the government's alleged use of Pegasus spyware that national security is not and cannot be a blanket restriction on judicial review[26] – the Court is not rendered a mute spectator at its mere mentioning, and nor is it an easy shield behind which the State can hide to elude responsibility.

Restrictions do not mean rigidity, nor do they indicate deference to any other arm of the government. The notion underlying judicial review is not one of a 'technocratic Court', wherein the Court mechanically decides whether a law is ultra vires the legislature's powers or not. It is one of fluidity and dynamism, where interpretation of the Constitution and its spirit allows for adaptation to our ever-changing circumstances[27]. The idea is to creatively and expansively understand the protections and freedoms guaranteed by the Constitution to hold legislative and executive action to such a standard.

Therefore, the limitations of judicial review, in how they manifest themselves and operate, are not to be cast in a negative light. These limitations themselves are rooted in the Constitution and the very core of how the country functions. They exist to safeguard the rights of the citizenry and promote harmony in governmental functioning.

The restrictions/limitations of judicial review are inherent in its conceptualization. The very thing that gives it power, i.e., the constitution, also abridges it. When the very source of power also establishes the attendant barricades, the limitations must be noted and observed strictly.

Modern Issues and Their Interplay with Judicial Review

Much of the discussion so far has centered around the legitimacy and importance of Judicial Review in India while also acknowledging its restraints. The motivation behind the concept of judicial review is to ensure constitutionality of legislative and executive action and guard against any form of overreach, not to assume the role of another organ of government. The reason the Court may sometimes be seen as overstepping its limits is often chalked up to ineffective executive and legislative action. However, the solution to such a problem is not judicial precedence. The solution

[26] Manohar Lal Sharma v. Union of India, Supreme Court of India, W.P.(Crl.) 314/2021, order dt. 27.10.2021. [49].

[27] S.P.Sathe, Judicial Activism in India – Transgressing Borders and Enforcing Limits 5 (2002).

must rather be found in "restructuring the dysfunctional institutions"[28]. In light of such an argument, examining the exercise of judicial review in extraordinary circumstances is essential to understand its development and contemporary relevance.

The recent exposure to extraordinary circumstances, or what we may call emergencies, has been unprecedented in the challenges it has posed. Governments across the world, judiciaries included, have been called upon to protect their citizens in times of crisis. In these conditions, the doctrine of separation powers – and the concomitant checks and balances it establishes – assumes even more significance, seeing as the demarcation between the organs of the government begins to blur.

Some have assigned a negative connotation of '*judicial activism*' to the approach of the Supreme Court and High Courts in these times of crisis. However, this should in fact be looked at as an opportunity given to the Courts to delineate the powers of the executive and evaluate their actions when the source of their power (i.e, various legislations) do not clearly establish boundaries and limitations. In these circumstances, the Court is also duty-bound to balance and determine the extent of permissible restraint on fundamental rights by reviewing the decisions in the light of its proportionality and reasonableness. Different kinds of crisis situations or emergencies demand different approaches to curb the tension. Thus, the scrutiny and threshold against which they are tested tends to differ. For instance, an emergency situation like war demands a different approach and restraint as compared to a health crisis like the present pandemic[29].

Let us consider two recent and significant crisis situations when basic rights were vulnerable, thereby strongly attracting judicial intervention: *firstly,* the ongoing pandemic and *secondly,* the air pollution in Delhi and the critical condition of air quality.

The sudden fatal spread of Covid-19 led to the announcement of a prolonged nationwide lockdown. The government invoked the Disaster Management Act 2005 ('**DMA'**) and Epidemic Diseases Act 1897 ('**EDA'**). These enactments have very broadly worded provisions which granted wide powers to the government and allowed the government to handle the situation through executive orders. There were severe restrictions on movement and gatherings: people were not allowed to take out their

[28] ibidat 20, 21.
[29] Cotha (n28)

vehicles; there were restricted timings to buy essentials; shortage of basic medical care; preferential system for availing medical care in view of such shortage, etc.

The restrictions imposed to curb spread of Covid-19 had varying impacts on the different classes and sections of society. It naturally affected many fundamental rights of the citizenry, leaving migrant workers as one of the worst-affected groups. It affected religious freedoms, right to free movement and to form associations, right to earn a livelihood and consequently, the right to food and even right to equality in certain instances. Certain limitations directly or indirectly imposed by the State were challenged before the Court through Public Interest Litigations or taken up *suo moto*. If the court does not scrutinize these in the backdrop of well-established principles, it would indeed be a gross violation of the Court's obligations and render both public interest and constitutional values compromised.

The Courts have been very cautious in approaching these cases, keeping in mind the grave nature of the health crisis and the need for restraints. They did not rule against executive orders unless absolutely necessary[30]. The court primarily asked the State for periodic reports and scrutinized the same to ensure that there was some accountability and the actions were not excessive[31]. It also served as a self-reflective process wherein the government was made to explain their measures against their intended objectives[32]. We will now examine some cases where the court reviewed executive orders and granted appropriate reliefs during the pandemic.

The issue of infringement of the right to food during the pandemic was brought before the Delhi High Court, wherein it issued directions for implementing adequate food safety measures and taking steps for ensuring transparency. The Delhi High Court also directed the setting up of a

[30] Alakh Alok Srivastav v. Union of India, Supreme Court, WP (C) no. 468/2020 order dt. 31.3.2020.

[31] Gautam Bhatia, 'Corona Virus and the Constitution: Dialogic Judicial Review in the Supreme Court' (April 28, 2021) available at: https://indconlawphil.wordpress.com/2021/04/28/coronavirus-and-the-constitution-xxxv-dialogic-judicial-review-in-the-supreme-court/.

[32] In Re: Distribution of Essential Supplies and Services During Pandemic, Supreme Court of India, Suo Moto WP (C) no. 3/2021, order dt. 30.4.2021.

grievance redressal system, amongst implementation of other measures[33].

In the case of *Shahshank Deo Sudhi v. Union of India and Ors*[34] the Supreme Court addressed an important issue of access to Covid testing facilities for economically weaker sections. Although the Covid test prices were capped at Rs.4,500, this was still beyond the reach of the lower income groups. Hence, the Supreme Court passed directions to protect these strata of society to ensure equal access to facilities, which is crucial in light of Articles 14 and 21, i.e., the right to equality and right to life, of the Constitution.

The issues faced by stranded migrant workers was also carefully and elaborately considered. The Supreme Court sought reports and explanations from state governments and passed appropriate orders to protect the interests of such migrant workers and their families. After considering the ground realities and keeping in mind humanitarian grounds, reliefs were granted to the migrant workers[35].

While these are just a few illustrative examples, it is successful in indicating the restrictive but protective role of the Indian courts. The executive may often lose sight of the rights of smaller groups or more marginalized communities and other ancillary issues while attempting to resolve larger problems. Thus, the courts assume the role of guardians and hear the marginalized voices to render justice by balancing the interest of both sides.

We now come to the second issue mentioned above – Delhi air pollution reaching hazardous levels. It is another critical issue that forced judicial intervention to protect the life and well-being of affected citizens. The seriousness of the situation was first flagged in *MC Mehta v. Union of India & Ors* through a Public Interest Litigation[36]. In 1998, after giving ample opportunity to the government to remedy the situation and repeatedly directing the authorities to perform their duty, the Supreme Court ordered public transport to be converted to Compressed Natural Gas (**CNG**) in

[33] Delhi Rozi-Roti Adhikar Abhiyan v. Union of India, Delhi High Court, WP (C) No. 2161/ 2017, order dt.27-04-2020.

[34] Shahshank Deo Sudhi v. Union of India and Ors, (2020) 5 SCC 134.

[35] Gautam Bhatia'Corona Virus and the Constitution: Dialogic Judicial Review in Gujrat HC and Karnataka HC' (May 24, 2020) available at: https://indconlawphil.wordpress.com/2020/05/24/coronavirus-and-the-constitution-xxviii-dialogic-judicial-review-in-the-gujarat-and-karnataka-high-courts/.

[36] MC Mehta v. Union of India & Ors, Supreme Court of India, WP (C) No. 13029/1985.

order to safeguard the fundamental right to health under Article 21 of the Constitution. The Court has subsequently issued many directions regarding vehicular pollution to tackle the issue as the other branches have failed to perform their duty in protecting the fundamental right of the population. The need for judicial review and intervention of the Supreme Court was further reaffirmed with the repeated non-compliance by the government to the directions issued by the Court in the interest of public health.

In 2020, another PIL[37] was filed, which again pertained to the issue of Delhi air pollution and public health, but with a slightly different focus. The primary grievance expressed therein was the issue of stubble burning and the lack of effective action by the governments of the three states responsible for it. Considering the seriousness, the Supreme Court appointed a one-man Monitoring Committee to look into the issue. However, this was later kept in abeyance on the promise of the State put in place a legislation to address the issue. The Commission for Air Quality Management in National Capital Region and Adjoining Areas Ordinance, 2021was promulgated on 13.4.2021. However, the issue did not abate as there were no effective measures taken under it. The government simply put in place a framework with no effective implementation. This again highlights the need for judicial review. Despite rigorously demanding accountability from the state and reminding them of their duty to protect and further public health, they have used various evasive techniques and not adequately addressed the crisis. If not for the exercise of judicial review by the courts, the rights of the citizens would be seriously compromised without having many avenues of redressal.

Thus, modern issues facing our country have made the courts assume more responsibility to check the actions of the executive. This has given the courts an opportunity to establish standards of exerting restraints in emergency situations and reminded the authorities that fundamental rights are not easily dispensable even in such circumstances. These help in defining the substantive rights further and lay good precedents which give citizens a strong claim in the future. However, the extremely cautious approach of the court in closely dealing with the facts of surrounding those particular cases ensures that exceptions in emergency situations cannot be exploited in post-emergency situations.

[37] Aditya Dubey &Anr v. Union of India & Ors, Supreme Court of India, WP (C) No. 1135/2020.

The Indian judiciary, through the process of judicial review, tries to act as a bridge between what law *is* and what it *ought to be.* While there is extensive debate with respect to its scope and its implementationwill always face some kind of obstacle, judicial review shall always remain an integral part of democracy and the process of law-making. Regardless of what the development trends of judicial review may be, what resides at the core of this doctrine is the preservation of the separation of powers and the robust functioning of each arm of the government. The judiciary's effective use of this tool is what allows public confidence in the institution to not only endure, but also grow. As Constitutional Courts in rapidly developing countries with vibrant histories, it is our duty to uphold local constitutional values.

THE ROLE OF INDONESIAN CONSTITUTIONAL COURT IN DEVELOPING CONSTITUTIONAL REVIEW DURING COVID-19 PANDEMIC

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ABSTRACT

Indonesia has faced the COVID-19 pandemic since early 2020. This pandemic affects the world in a life-shifting and the Indonesian Constitutional Court's way of providing justice access. In the last 2 (two) years, the state has been facing pandemic handling. The Court has tried to provide many adjustments in enacted regulations that make it easier for Justitiabelen to seek justice in the trial process in the Court. This article will show data concerning how the Indonesian Constitutional Court plays its role in protecting citizens' constitutional rights in the era of COVID-19 pandemics. The method used is juridical normative with a statute approach. We also provide some data on how Court would face the challenges in providing access to justice in the pandemic era. From the analysis carried out, the Indonesian Constitutional Court changed and made several regulations to be adapted to the conditions of the COVID-19 pandemic, especially those related to the application of physical distancing. Even during the Large-Scale Social Restrictions imposed by the Government of Indonesia, the trial process will continue to be carried out by utilizing existing technology. The trial takes place online through an existing application supported by IT personnel. Before entering into the trial process, the Indonesian Constitutional Court had arranged for the application to be submitted online. All of the changes and adjustments have to be done so that The Indonesian 1945 Constitution could be enforced, even during the COVID-19 Pandemics.

Keywords: *Pandemic Impact; Indonesian Constitutional Court, Justice, Technology Implementation*

INTRODUCTION

During the covid-19 pandemic, technology has plays its role in providing society needs in easier way and more efficient system. It is undeniable that the development of technology in the law enforcement system also provides better access to justice for all Indonesia citizens. one of the example from technology development in the legal and law field system is the digitalization of court verdicts and government policies as society guidance. Harvard Law School has even provided a platform that allows people to acces various law cases in the United States of America to be their lesson learnt[1]. There have been a fact that during the covid-19 pandemic there were many violations of human rights and citizen's constitutional rights.

The Constitutional Court of the Republic of Indonesia is an institution that has the authority to uphold the protection of citizens constitutional rights. However, there have been many adjustments and regulation enacted by the Court in order to fulfil access to justice needs of society that is affected by the pandemic. This paper wants to describe how the Indonesian Constitutional Court plays its role in protecting citizens constitutional rights in the pandemic era and how it prepares many instruments to face the challenges.

DISCUSSION

A. The Practice of Protecting Citizens' Constitutional Rights during the Pandemic

The vision of the Indonesian Constitutional Court (from now on, The Court) to uphold the constitution through a modern and reliable judiciary is realized through various Court policies as outlined in the Constitutional Court Regulations for *Justitiabelen* proceedings at the Court. Some of the latest technical regulations which implement the convergence of law and technology in the judicial review process in the Indonesian Constitutional Court are as follows[2]:

1. The Indonesian Constitutional Court Regulation Number 1 of 2021

[1] Bruce Burk, "New Technology and Its Impact on the Practice of Law", https://www.expertinstitute.com/resources/insights/new-technology-and-its-impact-on-the-practice-of-law/, accessed on 25 March 2022.

[2] https://www.mkri.id/index.php?page=web.Regulation&id=3&pages=2&menu=6&status=2.

concerning the Implementation of Remote Trials;

2. The Indonesian Constitutional Court Regulation Number 1 of 2020 concerning the Trial Procedure of the Constitutional Court

In addition, to realize the concrete openness in the trial process of the Constitutional Court, the entire community (including the international community) can watch the live broadcast of the trial according to the schedule on the live streaming channel available on the mkri.id page. Prof Sanders, a legal expert from Bielefeld University, German, once stated in a conference *"we must learn from the Indonesian Constitutional Court in term of technology implementation because times have changed"*[3]. The Indonesian Constitutional Court should be referred as a judicial institution that has implemented technology in the judicial system along with the time, which is a necessity.

The COVID-19 pandemic that has hit almost all countries since the beginning of 2020 has indirectly made the convergence of law and technology realized more sustainably to provide natural justice for all people in the enforcement process. The impact of the implementation of law and technology convergence would be beneficial for society since it opens the broader access to justice, even for the community in the remote area that is miles away from the Court. Automation[4] that is primarily developed nowadays could help practitioners and law experts to be more focused on the analytical work desk that allows that expert to be leading in a particular specialization.

Nowadays, the law cannot be separated from technology convergence. Technology convergence is an integration of some technologies that should face various challenges. Due to some aspects, there hasn't been a clear relation between technology convergence and legislator institutions. Convergence technology could create a new sector

[3] Prof. Dr Anne Sanders, M. Jur., delivered the statement at the "Justice and Court Administration Session, European Group of Public Administration (EGPA) Conference" at Queen's University Belfast, the United Kingdom, on 13 September 2019. This statement was also conveyed by Prof. M. Guntur Hamzah, Secretary-General of the Indonesian Constitutional Court, in a presentation of material in the FGD on the Study of Legal Reform for State Administrative Courts organized by the Center for Legal and Judicial Research and Development of the Supreme Court on 31 May 2021.

[4] Adam Nguyen, "What is the Future of Law as It Converges with Technology", https://www.lawtechnologytoday.org/2015/04/future-of-law-technology/ accessed Juli 2021.

which hasn't been identified by the regulator[5]. This has been a discourse and still much discussed in many countries.

Law enforcement conceptually is a series of efforts to balance values that exists in the norms and regulation to maintain and preserve peace in the life of human beings[6]. Sudikno Mertokusumo stated an adagio *"restitution in integrum"*. It defines law as a balancer in human and society life to restore a situation to its original state. With the law and law enforcement process, the condition where everyone's interest is a clash and protected could be fulfilled. Three bases become a parameter of the law enforcement process, they are[7]:

a) Law certainty (rechtssicherheit);

b) The principle of benefit (zweckmassigkeit);

c) The principle of justice (gerechtigkeit).

From the perspective of law, the Court's existence becomes a consequence of the constitution supremacy principle. According to Hans Kelsen, a specific court must guarantee the conformity of regulations that are lower than the higher regulations. Hans Kelsen stated[8]:

> "The application of the constitutional rules concerning legislation can be effectively guaranteed if an organ other than the legislative body is entrusted with testing whether a law is constitutional and annulling it if – according to the opinion of this organ it is "unconstitutional". There may be a unique organ established for this purpose, for instance, a special court, a so-called "constitutional court"

Normatively, in the General Explanation of The Court Law, the

[5] CSR Report, "Technological Convergence: Regulatory, Digital Privacy, and Data Security Issues", 30 Mei 2019 pg. 10. can be accessed in https://fas.org/sgp/crs/misc/R45746.pdf.

[6] Soerjono Soekanto, Faktor-Faktoryag Mempengaruhi Penegakan Hukum, (Jakarta: Raja Grafindo, 1983), pg. 7.

[7] Sudikno Mertokusumo, Mengenal Hukum, (Yogyakartaa: Liberty, 1999), pg. 145.

[8] Hans Kelsen, General Theory of Law and State, (New York: Russel&Russel, 1961), pg. 157.

function of the Court is to handle certain constitutional cases to maintain the constitution so that it is carried out the responsibility following the will of the people and democratic ideas. Besides, the Court also corrects constitutional experience that was caused by multiinterpretation constitution[9]. That function is implemented through the authority given to the Court as follows: examine, judge, and decide certain cases based on constitutional consideration. It means that every Court Decision is a constitutional interpretation. Based on this background, there are 5 (five) functions attached to the authority of the Court that are the guardian of the constitution, the final interpreter of the constitution, the protector of human rights, the protector of the citizens' constitutional rights, the protector of democracy[10].

Andy Groove stated that *"technology will always win. You can delay technology by legal interference, but technology will flow around legal barriers"*[11]. The intersection and/or adaptation of law in the use of technology has occurred long before the massive digitalization in all aspects of social life. Society 5.0 is a life that demands three aspects, namely comfort, vitality, and high-quality life. Challenges that must be faced in the future due to the increasing use of digital devices in daily life include:

1. Cyber social soft skill;
2. Process understanding;
3. Learning motivation;
4. Ambiguity tolerance;
5. Decision making;
6. Problem solving;

Law enforcement, especially during a pandemic, must at least be able to fulfil 5 (five) factors as follows[12]:

[9] A.Mukhtie Fadjar, Hukum Konstitusidan Mahkamah Konstiitusi, (Jakarta: Sekretariat Jenderaldan Kepaniteraan Mahkamah Konstitusi Republik Indonesia, 2006), pg. 119. InMahkamah Konstitusi, op.cit., pg. 10.

[10] Mahkamah Konstitusi, ibid. pg. 10.

[11] Michael Kanellos, "Andy Grove Coins his Own Law", https://www.cnet.com/culture/andy-grove-coins-his-own-law/.

[12] Azis Ahmad Sodik, "Justitiabellen: PenegakanHukum di InstitusiPengadilandalam-MenghadapiPandemi Covid-19", KhazanahHukum, Vol.2 Nomor 2: pg.63. ISSN : 2715-9698.

a) Law factor;

b) Law enforcement body factor;

c) Supporting facilities and facilities factor;

d) Social community factor;

e) Cultural factor.

There are several common problems related to the fulfilment of access to justice, and they are[13]:

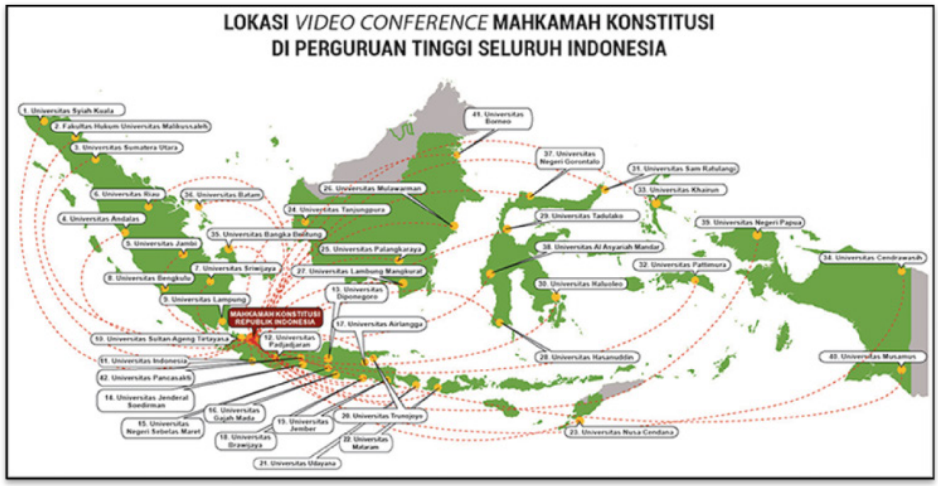
1) problems in the operational system of the justice system (lack of cooperation between law enforcement agencies, ineffective legal aid agencies for poor justice seekers, lack of counselling process before a matter is brought to court and high costs of litigation processes), and

2) structural problems (elitism in the judicial system, legal language that is too complex for the layman to understand, poverty problems that make things complicated and fragile, and low legal awareness among the people themselves) which are undoubtedly interrelated.

The COVID-19 pandemic, which has disrupted the way people's lives have been digitized since the beginning of 2020, has also impacted the process of implementing procedural law at the Constitutional Court. Indeed, long before the COVID-19 pandemic was declared a national disaster and disrupted the order of people's lives, the Constitutional Court had tried to create a digital disruption in the law enforcement process through a remote trial mechanism via video conferencing. There are 42 (forty two)[14] video conferencing facilities provided by the Constitutional Court in collaboration with the Faculty of Law and Higher Education spread across every province of Indonesia. The following is the distribution of the video conference facilities of the Constitutional Court that citizens can use in carrying out the trial process.

[13] Abregu, M., "Barricades or Obstacles: The Challenges of Access to Justice" on RED "Access to "Justice", 2001, https://www.hukumonline.com/berita/baca/lt6014f88bed292/access-to-justice/.

[14] Further information concerning the address and faculty of law that provides the court conferencing video could be accessed from https://www.mkri.id/index.php?page=web.Streaming&menu=10 . this information once published in a journal article Mery Christian Putri, et.al, "Disrupsi Digital dalam Proses penegakanHukumpada masa Pandemi Covid-19", JurnalRechtsvinding Volume 10 Nomor 1 April 2021 https://rechtsvinding.bphn.go.id/ejournal/index.php/jrv/article/view/625/260.



Picture 1.[15] *Video Conference Location of the Constitutional Court of the Republic of Indonesia*

Along with the adjustments that need to be made in the process of law enforcement and services to justice-seeking communities during the pandemic, the Court issues the following provisions:

1. Regulation of the Constitutional Court Number 2 of 2021 concerning Proceedings in Cases of Judicial Review. The provisions in this regulation come into force on April 14, 2021 and revoke the provisions in PMK Number 9 of 2020 concerning Procedures in Cases of Judicial Review;

2. Regulation of the Constitutional Court Number 1 of 2021 concerning the Implementation of Remote Trials. This regulation, which took effect on January 25, 2021, regulates the details of the conduct of trials both online and offline. In principle, the purpose of remote trials is for the smooth running[16] of the trial process and time and cost efficiency for the parties. This regulation complements the guidelines previously regulated in Regulation of the Constitutional Court Number 18 of 2009;

3. Regulation of the Secretary General of the Constitutional Court

[15] This picture could be accessed from https://www.mkri.id/index.php?page=web.Streaming&menu=10 and been also provided in NalomKurniiawan, et.al, Konvergensi Hukumdan Teknologidalam Proses PenegakanHukum di Mahkamah Konstitusi", unpublished Research Report, The Constitutional Court of the Republic of Indonesia.

[16] Article 2 Regulation of the Constitutional Court Number 1 of 2021 concerning the Implementation of Remote Trials.

Number 31 of 2021 concerning Guidelines for Public Service Standards in the Registrar's Office and the Secretariat General of the Constitutional Court. This regulation provides guidelines for public services at the Constitutional Court that are more adapted to the community's needs for digital/online services adapted to public service standards;

4. Circular Letter Number 11 of 2020 concerning Efforts to Prevent the Spread of Corona Virus Disease (COVID-19) within the Constitutional Court. This circular also stipulates that the application can be submitted online, through the digital corner or other electronic media. All data-based public services and systems remain active and can be accessed by the public through the mkri. id page;

5. Circular of the Secretary General of the Constitutional Court Number 30 of 2020 concerning amendments to Circular Letter Number 22 of 2020 concerning the Implementation of Work From Home (WFH) for Constitutional Justices, Ethics Councils, Structural, Functional and Auxiliary Officers of the TNI/POLRI and Outsourcing Employee in the Environment Constitutional Court.

6. Circular Letter Number 11 of 2020[17] concerning Efforts to Prevent the Spread of Corona Virus Disease (COVID-19) within the Constitutional Court. This circular also stipulates that the application can be submitted online, through the digital corner or other electronic media. All data-based public services and systems remain active and can be accessed by the public through the mkri. id page;

7. With regard to the adjustment of employee working hours during the pandemic, the Secretariat General of the Constitutional Court also issues circulars which are periodically issued with reference to the Circular Letter of the Minister for Empowerment of State Apparatus and Bureaucratic Reform.

[17] https://www.mkri.id/public/content/infoumum/regulation/pdf/466_200317100813_TTD.pdf.

B. Indonesian Constitutional Court's Future Challenges To Protect The Constitutional Rights

The COVID-19 virus is spread through social interaction is the main threat to human health[18]. It is a serious disease, without symptoms, attacks the respiratory tract and causes death. Prevention of physical contact as an extraordinary effort that recommended by the World Health Organization (WHO)[19]. Countries face a particular challenge in dealing with public emergencies to uphold democratic values and the rule of law, as legally guaranteed rights associated with democratic constitutional arrangements can hinder effective action[20]. Then, local government responded by closing schools, court offices, sports and cultural venues, implementing work-from home policies and imposing local and provincial movement restriction to prevent its spread[21].

The Court sometimes decided to postpone almost all scheduled hearings. The decision was taken due to the spread of COVID-19, which had entered The Court environment. The implementation of the Level 3 Large Social Restriction policy in DKI Jakarta is due to the increasing spread and transmission of COVID-19, that also experienced by employees and the judges of the Court. The Court needs to take steps to anticipate the wider spread and transmission of COVID-19. One of them is by postponing the scheduled judicial review session. Its implementation will be adjusted to the development of conditions within the Court based on careful consideration of other effects in actual situations. Nevertheless, the Court still held a hearing regarding the dispute over the results of the Regional Head Election. For disputes over election results, the trial was held in a hybrid manner with the application of a rigorous protocol. Public services, application submissions, and other matters concerning case administration are still carried out online. Therefore, employees within The Court generally carry out their duties and functions in complete Work From

[18] Jérôme Adda, "Economic Activity and the Spread of Viral Diseases: Evidence from High Frequency Data," The Quarterly Journal of Economics, Vol. 131 Issue 2 May 2016, pp. 891-941, https://doi.org/10.1093/qje/qjw005.

[19] Joseph J. Amon, "Covid-19 and Detention: Respecting Human Rights," Mental Health and Human Rights Journal, Vol. 22 No. 1 (Special Section) June 2020, pp. 367-370.

[20] Herlambang P. Wiratman, "Does Indonesian COVID-19 Emergency Law Secure Rule of Law and Human Rights ?," Journal of Southeast Asian Human Rights, Vol. 4 (1) (2020), pp. 306-334.

[21] Rebecca Meckelburg, "Indonesia's COVID-19 Emergency: Where the Local is Central," Contemporary Southeast Asia Journal, Vol. 43 No. 1 (April 2021), pp. 31-37.

Home (WFH) under applicable regulations[22].

The Court also guarantees to implement all human rights and fundamental freedoms for persons with disabilities based on equality before and during the pandemic. The Court has held several activities to improve the understanding of the constitutional rights of citizens for the Indonesian Association of Persons with Disabilities online at the Pancasila and Constitutional Education Center, Bogor. Henceforth, the Secretary-General of the Court shall issue a Regulation of the Secretary-General of the Constitutional Court Number 42.1 of 2021 concerning Guidelines for the Implementation of Services for Persons with Disabilities within the Constitutional Court in the context of the protection and fulfilment of the rights of persons with disabilities (in force on December 20, 2021). It is necessary to improve aspects of public services within the Court for them.

Based on the report of the Secretary-General of the Constitutional Court, the performance achievements of the Court in 2021 include the implementation of effective international cooperation relations, the implementation of quality and reliable financial planning and management, the implementation of internal quality control, the performance of procurement services, management, maintenance and equipment of State Property and other public services, the realization of competent and professional Human Resources, the implementation of quality handling of Constitutional Cases, the implementation of constitutional rights education and the Constitutional Court's Procedural Law, as well as the availability of access to data and information on cases and decisions of the Court for the public. In the 2021 Fiscal Year, the Secretariat General of the Constitutional Court has determined 15 (fifteen) program performance indicators from 8 (eight) program targets of 113.15 per cent so that the Court is successful in achieving its performance[23]. The quality handling of Constitutional Cases in 2021 can be seen in the following chart:

[22] Rizky Suryarandika, Covid-19 Buat MK Tunda Sidang Hingga Pekan Depan, February 16nd,2022,https://www.republika.co.id/berita/r7dyl2428/covid19-buat-mk-tunda-sidang-hingga-pekan-depan, accessed on March 25th, 2022.

[23] Mahkamah Konstitusi Republik Indonesia, Laporan Kinerja Sekretariat Jenderal Tahun 2021, (Jakarta: Mahkamah Konstitusi Republik Indonesia, 2022), pg. ii, 19-114, and 118.

Case Stage	Data of SIMPP and SI Annotations		Access Data of Website and SI Annotations	
	Judicial Review	Regional Head Dispute	Judicial Review	Regional Head Dispute
Application Submissions	67	157	67	157
Total of Registration	71	153	71	153
Preliminary Examination Sessions	128	158	128	158
Trial Examination Sessions	161	180	161	180
Decisions Trial	99	151	99	151
Trial Schedule	388	489	388	489
Minutes	388	489	388	489
Summary	57	153	57	153
Trial Summary	71	0	71	0
Annotations	131	0	131	0

Source: The Report of General Secretary of the Constitutional Court of the Republic of Indonesia in 2021

In 2021 there are 121 cases (71 PUU cases registered in 2020 and 50 law cases remaining in 2020), the decisions made by the Court in 2020 are 99 decisions (53 PUU cases registered in 2021, 38 PUU cases registered in 2020, 8 PUU cases were registered in 2019). For the case of Disputes on the Authority of State Institutions (SKLN), there are 3 (three) registered cases which were decided in 2021. In 2021, the most recurring frequency of judicial review was Law Number 7 of 2021 concerning General Elections (9 times) and Law Number 11 of 2020 on Job Creation (8 times)[24].

The Court received 109 cases in 2020 plus the remaining 30 cases in 2019, with 139 cases handled. In 2020, the most recurring frequency of judicial review of Act Number 2 of 2020 concerning Stipulation of Government Regulations in Act Number 1 of 2020 concerning State Financial Policy and Financial System Stability for Handling the Corona Virus Disease 2019 (COVID-19) Pandemic and/or In the Context of Facing Threats That Endanger the National Economy and/or Financial System Stability Become Law (nine times) and Act Number 11 of 2020 concerning Job Creation (eight times)[25].

[24] Ibid., pg. 77-78.
[25] Ibid.

It will be various challenges in the trial at the Constitutional Court regarding the improvement of court service facilities and constitutional case services based on the results of the Survey on the Public Satisfaction Index for Constitutional Case Services in 2021. For the improvement of court services, including free photocopiers and printers, waiting rooms and discussion rooms for advocates equipped with reading materials and television broadcasting trial videos, cafeterias around the courtrooms, availability of translators, and availability of adequate audio equipment for disturbances during the trial. In addition, input opinion on the service of constitutional cases, namely officers are more responsive to respond to requests for information, do not tolerate delays by the parties, the Court's attention to the procedural law of the trial, officers do not smoke in the building, accelerate the certainty of the trial schedule, court officers must be on standby until the end of the trial to resolve problems during the trial, the judge on duty must be in accordance with his background, a copy of the verdict should be given in person, there is an official protocol or procedure for delivering the judgment, and the decision given or emailed immediately after the trial is over[26]. Since its establishment, the Court has submitted a copy of the decision directly to the parties as mandated by the 1945 Constitution and the Constitutional Court Act. It has an official website so that anyone can access the copy as a manifestation of the accountability and accountability of the Court as the perpetrator of judicial power.

Several other developed countries have promoted modern judicial management, such as The International Consortium for Court Excellence with the International Framework of Court Excellence concept. Some of the elements contained in the field of judicial excellence are judicial work resources, court infrastructure and court processes, as well as affordable and easily accessible court services. The implementation of modern judicial management has been applied in several litigation mechanisms in the Constitutional Court. The smart court concept in the Constitutional Court is manifested, among others, through the implementation of technical information technology-based judicial administration such as online application submission, summons of parties and digital court notification, the remote trial system through online and hybrid platform applications (mini-courtroom), document submission including a copy of the decision to the parties via online electronic mail, and the court system and even the electronic minutation of case documents. However, the journey towards

[26] Ibid., p. 75.

accelerating the modernization of an efficient justice system within the Court is still not over[27].

Legislation Related to the Trial and Its Challenges

The COVID-19 pandemic occurred worldwide in December 2019, and then it entered Indonesia on March 2, 2020 [28]. The pandemic has forced the world to adapt to new norms and habits. The duty of legal enforcement related to the pandemic is becoming more complex. Thus, the government has issued various policies to overcome the dangers of COVID-19 and the recovery of the national economy, among others, Act Number 2 of 2020 concerning Stipulation of Government Regulation in Law of Act Number 1 of 2020 concerning State Financial Policy and Financial System Stability for Handling the Corona Virus Disease 2019 (COVID-19) Pandemic and/or In Facing Threats That Endanger the National Economy and/or Financial System Stability Becomes Law (State Gazette of the Republic of Indonesia of 2020 Number 134, Supplement to the State Gazette of the Republic of Indonesia Number 6516). During the pandemic, all of the laws were policies that required extraordinary steps, both at the central and regional levels. Still, some left problems were finally submitted for repeated trials regarding forming laws (formal submissions and norms (material testing) to the Court), including the Job Creation Act[29].

The pandemic caused various changes to human life, including the work system. The work system in the Court applies for Work from Office (WFO) and Work From Home (WFH) by utilizing information technology. The Court Task Force is tasked with preventing the spread of COVID-19 through synergy and coordination between units within the Court and with related agencies[30]. In addition, the Court has the authority to draw up legal procedural and provisions with the Act (UU) in the Regulation of the Constitutional Court (PMK) based on the mandate of Article 24C

[27] Menuju Akselerasi Modernisasi Peradilan Mahkamah Konstitusi, https://mediaindonesia.com/opini/475785/menuju-akselerasi-modernisasi-peradilan-mahkamah-konstitusi, accessed on March 25th, 2022.

[28] Sarah Oktaviani Alam, "Kapan COVID-19 Masuk ke Indonesia? Begini Kronologinya," https://health.detik.com/berita-detikhealth/d-5781536/kapan-covid-19-masuk-ke-indonesia-begini-kronologinya, 29 March 2022.

[29] Ghita Intan, MK Putuskan UU Cipta Kerja Bertentangan dengan UUD 1945, https://www.voaindonesia.com/a/mk-putuskan-uu-cipta-kerja-bertentangan-dengan-uud-1945/6328194.html, accessed on April 11th 2022.

[30] Mahkamah Konstitusi Republik Indonesia, Op.Cit., pg 9.

paragraph (6) of the 1945 Constitution and the Constitutional Court Act. Following the Instruction of the Minister of Home Affairs Number 01 of 2021 and the policy of the Provincial Government of the Special Capital Region of Jakarta, and the Letter of the Secretary-General of the Ministry of Health Number PK.02.01/B.VI/839/2020 regarding the Appeal for Efforts to Prevent the Transmission of COVID-19 in the Workplace on March 5, 2020, including keeping the work area and shared facilities clean and hygienic, providing access to handwashing facilities, providing tissues and masks for employees and guests/customers/visitors who have symptoms of cough/cold, fever; placing health messages in strategic places; Cultivate clean and healthy living behaviours including the rules for washing hands, etc.

In 2020, the Court issued Circular Letters reaching 24 (twenty-four) times a month, an average of 2 to 4 times, containing precautions and appeals related to COVID-19 and its prevention, temporary cessation of all office activities by determining a time limit or until the end of the year. With further notice; regulation of employee attendance, the mechanism of the Work from Home System (Work From Home), handling of suspected COVID-19, regulation of health and cleanliness of the MK environment, and regulation of public services, as well as restrictions on travelling outside the region and/or going home. In 2021 it will reach 10 Circulars, and in 2022 it will get 10 Circulars[31]. The Secretary-General stipulates a Circular in dealing with the implementation of the work system, which is the duty and authority of the Court during the pandemic. Based on the Circular Letter of the Secretary-General of the Court during the pandemic, at most in 2020, as an effort to prevent and overcome pandemics within the Court. For this reason, the Court ensures that every workspace, courtroom and other public spaces is free from viruses/bacteria by spraying disinfectants regularly, maintaining cleanliness, etc.

On 27 April 2017, all employees in the Registrar's Office and the Secretariat General of the Court applied a dynamic archival information system (Sistem In for masi Kearsipan Dinas, from now on SIKD) with the enactment of Circular Letter Number 5 of 2017 concerning the Use of Dynamic Archival Information Systems. To maintain good communication and relations between the Republic of Indonesia and foreign partners amid a pandemic, all developments, notifications, and participation in activities

[31] Mahkamah Konstitusi Republik Indonesia, https://apps.mkri.id/dashboard/sosialisasi/index, accessed on April 8st, 2022.

are intensive via email @mkri. The Ministry of Administrative Reform and Bureaucracy (Kemenpan RB) issued a Circular Letter of the Minister of PANRB Number 19 of 2020 concerning Adjustment of the Work System of State Civil Apparatus in Efforts to Prevent COVID-19 in Government Agencies. The circular letter serves as a guideline for government agencies in carrying out official duties by working at home/place of residence (Work from Home/WFH) for ASN to prevent and minimize the spread of COVID-19, including the Court. The Court has implemented Work at Home (KDR) or known by other names Work From Home (WFH), since 17 March 2020. All employees in the Registrar's Office and the Secretariat General of the Court perform KDR by utilizing information technology. This is stated in the Decree of the Secretary-General of Court Number 97 of 2020 concerning the COVID-19 Handling Task Force at the Constitutional Court[32].

To support constitutional judges, the Court's ICT Team prepares various facilities that are needed at any time in conducting judges' deliberation meetings (RPH) online with the WFH pattern. Meanwhile, to provide support for employees, the Court's ICT Team has also created technological devices that employees can access from their respective homes. The Court has opened access to documents directly connected to the server. Thus, as usual, each employee can carry out their duties using SIKD[33]. The target indicator of public awareness level of case handling policies was developed in 2018 based on 3 (three) systems that provide convenience for the public to access information and case handling procedures, namely systems that support the Online Application Room, Online Consultation Room, and Digital Corner Room in the form of services. Online application through the sim.mkri.id (The Court Electronic Case Handling Information System (SIMPEL)), the Question and Answer Service system, and Contact the Court, which can be accessed through the Court's website, as well as the application of an information and communication technology-based archiving system through the case file management information system (e-Minutasi), case retrieval and case, tracing[34].

[32] Kepaniteraan dan Sekretariat Jenderal Mahkamah Konstitusi, Laporan Tahunan Mahkamah Konstitusi 2020: Menegakkan Supremasi Konstitusi di Masa Pandemi, (Jakarta: Kepaniteraan dan Sekretariat Jenderal Mahkamah Konstitusi, 2021), p. 94-95.

[33] Ibid., pg 112.

[34] Mahkamah Konstitusi Republik Indonesia, Rencana Strategis Mahkamah Konstitusi RI 2020-2024, https://www.mkri.id/public/content/infoumum/rencanastrategis/pdf/Ren-

At the beginning of the COVID-19 pandemic, the Court decided to postpone the trial of all cases. However, the Court's services continue to run by utilizing online or web-based electronic channels on the official website www.mkri.id. The policy prioritizes the health, humanity and safety aspects of all parties. As a result of delaying the trial, legal certainty and justice through decisions expected by justice seekers are hampered. As the thought of William E Gladstone states, "justice delayed is justice denied. Based on the evaluation and analysis of several aspects, the Constitutional Court took steps to return to holding face-to-face trials in the courtroom by implementing strict health protocols for Constitutional Justices, Court employees, and the parties present. In addition, the Court also limited the number of parties who were present in person in the courtroom. Implementing remote (virtual) trials with the help of the latest information technology devices is an option[35]. The Court has been using the remote trial system for approximately 12 years through video conferencing (vicon), which has been regulated in Court Regulation No. 18 of 2009 concerning Guidelines for Submitting Electronic Applications (Electronic Filling) and Remote Trial Examination (Video Conference). Since the implementation of WFH on March 17, 2020, the trial in the Constitutional Court has been temporarily suspended. The Court continued to prepare for the trial through video conference while at the same time using other information and communication technologies based on developments and community needs.

Regarding the enforcement of justice during the pandemic, the Court continues to provide justice, both substantive and procedural justice, as a manifestation of the implementation of Article 24 paragraph (1) of the 1945 Constitution. During the COVID-19 pandemic, the Court has never stopped carrying out the mandate of the Constitution through various facilities and infrastructure provided by the Registrar and Secretariat General of the Constitutional Court for justice seekers. People who submit applications are still served electronically through the Court's website. The Court also guarantees to implement all human rights and fundamental freedoms for persons with disabilities based on the principle of equality before and during the pandemic. the Court has held several activities to improve the understanding of the constitutional rights of citizens for the Indonesian

canaStrategis_152402_renstra%20MK%202020-2024_compressed.pdf, p.39-40.

[35] Mahkamah Konstitusi Republik Indonesia, Arief Hidayat: Persidangan Virtual Pilihan Paling Realistis di Masa Pandemi, https://www.mkri.id/index.php?page=web.Berita&id=16623&menu=2, accessed on April 11st, 2022.

Association of Persons with Disabilities via online at the Pancasila and Constitutional Education Center, Bogor. Henceforth, the Secretary General of the Court shall issue a Regulation of the Secretary General of the Constitutional Court Number 42.1 of 2021 concerning Guidelines for the Implementation of Services for Persons with Disabilities within the Constitutional Court in the context of the protection and fulfillment of the rights of persons with disabilities (in force on December 20, 2021). It is necessary to improve aspects of public services within the Court for them.

C. Conclusion

The COVID-19 pandemic has changed the way of life, including the trial regulation, including the trial system at the Constitutional Court of the Republic of Indonesia. COVID-19 pandemic has forced the Constitutional Court to make various adjustments to the rules regarding the trial so that they are in line with government regulations to suppress the spread of the COVID-19 virus. The Court implemented an online trial via zoom when the government started implementing regulations regarding large-scale social restrictions. To support this, the Court issued The Indonesian Constitutional Court Regulation Number 1 of 2021 concerning the Implementation of Remote Trials and The Indonesian Constitutional Court Regulation Number 1 of 2020 concerning the Trial Procedure of the Constitutional Court so that justice seekers can still optimally fight for their rights. In the conditions of the COVID-19 pandemic, the Court continues to exercise its additional authority to resolve disputes over the results of the 2019 Regional Head Election. All trials are carried out in a hybrid manner, with parties attending online and offline. The Court also guarantees to uphold human rights protections especially for persons with disabilities based on the principle of equality with Regulation of the Secretary General of the Constitutional Court Number 42.1 of 2021.

The online trial is also supported by collaboration on video conferencing with various Law Faculties in Indonesia. The existence of this video conference makes remote hearings easier to carry out and facilitates access for the public to take part in the trial. In addition, the Court also enables the submission through applications so that the applicants can submit them online through the provided application.

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OMNIBUS BILLS: UNORTHODOX LAWMAKING PROCESS AND RESPONSE FROM COURT

Intan Permata Putri

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1. Introduction

Joko Widodo's administration has emphasized the simplification of statutes and other legal products (Statutory Deregulation). Statutory Deregulation process resulted in Act Number 11 in 2020 "Cipta Kerja" (Act 11/2020). Act 11/2020 is a law proposed by the government for a program to accelerate investment, encourage jobs creation, and improve the economy, by simplify procedures in business process. This Act introduces the omnibus bill method as a solution to the law-making process.

Previously, Indonesia also have the experience to implement deregulation policy. During Soeharto's administration, the government introduce Pakto 1988. Pakto 1988 was preceded by "Paket 1983", these Programs ruling policies in the banking sector. Pakto 1988 is considered successful in creating a climate for establishing a bank and raising public funds[1].

The Omnibus bill method in Act 11/2020 regulates a broad scope including creating new norms, annul norms, and amendment norms, around 79 Statutes in investment and employment. Interestingly, this method is not recognize in the procedure of legislation making as stipulated in the Law of

[1] Winarti, W., and Haryono Rinardi. "Paket Kebijakan Deregulasi 27 Oktober 1988 (Pakto 1988): Pengaruhnya Terhadap Liberalisasi Perbankan Indonesia Periode 1988-1993." Historiografi 1, no. 1 (2020): p. 29-37.

12/2011 in the law-making process. pros and cons reactions appear to this Act. in the past, Pakto 1988 deregulation process in other regulations lower than act, in the level of practice it was more implementable and had legal certainty. Meanwhile, Act 11/2020 is considered to fail in deregulating, because it mandates many implementing regulations.

This paper will discuss on the omnibus bill adoption in the job creation law, in specific will see the constitutional court view regarding the adoption of such method on their decision. before coming to that discussion, it will look at other jurisdiction, The US and Canada, which has applied omnibus bill as part of their lawmaking process.

While in other countries, such as the US and Canada, omnibus bill is well-establish as part of their lawmaking procedures. The omnibus bill method in Canada and the United States and several other countries has advantages over the drafting method, including[2]:

a) The omnibus bill shortens the process of deliberation which is considered protracted in parliament. In America, Parliament calculates that the average product takes about 175 days (1991) and became 136 days in 2010. This occurred in the amendments to Code 38 of the United States Code of Federal Regulations (CFR) which regulates pension rights for veterans in during the 1982 crisis.

b) Another advantage is that Omnibus bills are usually used to obscure controversial policies. Because the omnibus usually consists of many aspects, both populist and unpopular policies by the people and parliament. For this reason, it is necessary to review the law in its entirety and underline which parts you want to reformulate or which norms you want to change.

In addition, this omnibus method creates “regulation in the theme” such as compilation of laws on the environment, laws on investment, laws

[2] Massicotte, Louis. “Omnibus bills in theory and practice.” Canadian parliamentary review 36, no. 1 (2013): p. 13-17.

on social security, etc. Omnibus bill method actually makes it easier to search for certain topics, however this technique has high slippery slope. High complexity create many loopholes that are not predicted by the parliament and executive. In another article, Glen S. Krutz spell out the factors behind the omnibus bill being populer. These factors are:

> *First*, with regard to productivity, proponents of omnibus law-making argue that the omnibus technique provides a way to get things done in a difficult legislative process. *Second*, with regard to constancy, Mayhew ponders why he did not find peak-and-valley patterns of major enactments according to party control circumstances. What factors help even things out? Edwards, Barrett, and Peake, find that more important failures exist in divided than in unified government[3].

Relate with Louis[4], Glen S. Krutz[5] emphasized that this method has advantages: *First*, the omnibus is considered to simplify the convoluted law making process. *Second* is the measure of the success of this technique in parliament is the strength of the opposition. In the article, it is explained that if the power of the opposition is much lower than that of the government (unified government), has possibility omnibus bill will succeed. Meanwhile, for a more diverse and multi-faceted opposition (divided government), there will be more chances of failure. Glen S. Krutz emphasized that this omnibus method breaks the bottleneck of the convoluted law-making process.

Critics of this omnibus method are found in the drafting process of the Economic Law in Canada in The Canadian Economic Action Plan (EAP) in Laws No. C-38 and C-45. Denis Kirchhoff dan Leonard Tsuji[6] criticized

[3] Krutz, Glen S. "Getting around gridlock: The effect of omnibus utilization on legislative productivity." *Legislative Studies Quarterly* (2000): p. 533-549.
[4] Massicotte, Louis. "Omnibus bills in theory and practice." *Canadian parliamentary review* 36, no. 1 (2013): p. 13-17.
[5] Krutz, Glen S. "Getting around gridlock: The effect of omnibus utilization on legislative productivity." *Legislative Studies Quarterly* (2000): p. 533-549.
[6] Kirchhoff, Denis, and Leonard JS Tsuji. "Reading between the lines of the 'Responsible Resource Development'rhetoric: the use of omnibus bills to 'streamline'Canadian environmental legislation." Impact Assessment and Project Appraisal 32, no. 2 (2014):

the Omnibus Bills method, both the act should have a more limited scope. Its practice in Canada on EAP in Laws No. C-38 and C-45 also sparked protests at the implementation process.

Kristine Størkersen dkk[7], in the article entitled "how Statutory Deregulation can become overregulation" reveals the factors that can cause overregulation at the implementing regulation level. the article raised overregulation in the employment and environmental protection as well as fish farming. At the implementing regulations, the things that make Statutory Deregulation not work are:

a) that the process of work carried out must be auditable and accountable.
b) overregulation occurs when Statutory Deregulation meets managerial confusion due to "fear" of auditors' judgments.
c) overregulation occurs because of the audit mechanism. where an audit mechanism that aims to facilitate auditors requires SOPs in the entire process.
d) overregulation occurs when Statutory Deregulation meets market demands, lengthy bureaucracy and supervisory mechanisms.

The omnibus law mechanism that is practiced in Canada[8] and Norway[9] has characteristics where the omnibus law can be implemented in regulations that have a more limited scope, such as aquaculture, worker protections, and environmental protection. The definition of Omnibus

p. 108-120.

[7] Størkersen, Kristine, Trine Thorvaldsen, Trond Kongsvik, and Sidney Dekker. "How deregulation can become overregulation: an empirical study into the growth of internal bureaucracy when governments take a step back." *Safety Science* 128 (2020): 104772.

[8] Størkersen, Kristine,dkk. ibid.

[9] Kirchhoff, Denis, and Leonard JS Tsuji. "Reading between the lines of the 'Responsible Resource Development'rhetoric: the use of omnibus bills to 'streamline'Canadian environmental legislation." *Impact Assessment and Project Appraisal* 32, no. 2 (2014): p. 108-120.

bills according to Glen S. Krutz requires further explanation of the terms major legislation, major topic policy area, subtopic policy area, and size. Specifically includes:

> "Omnibus Bill is any piece of major legislation that: (1) spans three or more major topic policy areas OR ten or more subtopic policy areas, AND (2) is greater than the mean plus one standard deviation of major bills in size. This definition requires further explanation of the terms major legislation, major topic policy area, subtopic policy area, and size."[10].

What about the omnibus bill which contains 174 norms on 79 multi-sector laws with 1253 topics? The complexity of the statute usually has an impact on the implementation process. The more complex statute, the more possibility of failure in the implementation process. Abbe R. Gluck[11], illustrates that the success of the omnibus law has 3 perspectives on the preparation of the Legislative text, implementing of the executive process, and responding to the court about the law. The legislature sees this technique as beneficial in shortening the process at the congress, for example in the congressional process of the Affordable Care Act. On the other hand, this method is considered to often have an insert agenda for a policy. Abbe Gluck[12] termed A Strategy Bits and Pieces of a Law that No One Understands, Complexity becomes an obstacle to fully understanding existing regulations.

> "This procedure yields 242 omnibus bills of the 1,180 major bills from 1949 to 1994. 5 Figure 1 displays the number of omnibus bills per Congress, 1949-94. The first modem use of the omnibus procedure was in 1950 (Congressional Quarterly, Inc. 1951), and the omnibus technique was employed on a regular, increasing basis until the 1980s, when its use increased dramatically. There was a slight decline and leveling-off in raw

[10] Krutz, Glen S. "Getting around gridlock: The effect of omnibus utilization on legislative productivity." *Legislative Studies Quarterly* (2000): p. 533-549

[11] Gluck, Abbe R. "Imperfect Statutes, Imperfect Courts: Understanding Congress's Plan in the Era of Unorthodox Lawmaking." *Harv. L. Rev.* 129 (2015): p. 62.

[12] Gluck, Abbe R. "Imperfect Statutes, Imperfect Courts: Understanding Congress's Plan in the Era of Unorthodox Lawmaking." *Harv. L. Rev.* 129 (2015): p. 62

> numbers of omnibus bills after the 99th Congress (1985-86), but the omnibus technique is still employed much more in recent times than it was earlier in the post-World War II period."[13]

The theory above only supports this method from a legislative perspective, what about the executive? And how does the judiciary respond to the promulgation of laws with a drafting mechanism outside of the standard mechanism? According to Abbe Gluck[14], the court's responding to changes in the landscape of drafting laws. The next problem is how far the courts can interpret the norms using this mechanism? The Purposivism Debate v. textualism, then the court's bearing whether restrained v. activism. Here several cases law such as the ACA, Sarbanes-Oxley act in the United State and the Indonesian Constitutional Court Decision 91/2020 has good point of view bout this issues.

2. Canada

> "… British practice of passing at times, from the 1860s onwards, a Statute Law Revision Act, that repealed legislative enactments that had become spent. Some Commonwealth countries, like Canada and Australia, have emulated this practice. Constitutional scholars are aware that some of those bills repealed provisions of Canadian constitutional documents, without Canada either requesting or objecting to the measure, because such bills really amounted to cleaning jobs. Hundreds of different statutes could be altered at one stroke by such pieces of legislation, the basic purpose of which was to expunge from the statute book provisions that were either obsolete or spent. Five years ago, Ireland passed a statute of that nature that repealed no less than 3,225 statutes, arguably a world record."[15]

In the end, proposals using the Omnibus Bill method to the Canadian parliament were suggested with limited issues since the 1980s. The omnibus bill became part of the legislation in Canada through the legal basis of The

[13] Krutz, Glen S. "Getting around gridlock: The effect of omnibus utilization on legislative productivity." *Legislative Studies Quarterly* (2000): p. 533-549

[14] Gluck, Abbe R., and Lisa Schultz Bressman. "Statutory Interpretation from the Inside-An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I." *Stan. L. Rev.* 65 (2013): p. 901.

[15] Massicotte, Louis. "Omnibus bills in theory and practice." *Canadian parliamentary review* 36, no. 1 (2013): p. 13-17.

Standing Orders of the Québec National Assembly in provisions number 258 to 262.[16] although in 1868 the parliament had started this method by annulling some norms and Amended the norms in several laws completely. directly with limited topics, namely bankruptcy, peace at the border and banks. This method is stated in An Act To Continue For A Limited Time The Several Acts Therein Mentioned[17].

The response of this omnibus method received a lot of criticism in terms of nature, admissibility, appropriateness, and others. Until now, legislative products that use this method include: [18]

1. 1968: Bill C-150 the Criminal law amendment act, 1968-69. Many subjects in this Statute regulate abortion, homosexuality, and gun control. the bill was enacted by parliament in June 1969.
2. 1971: Bill C-207, the Government Organization Act, The subject of this Act regulates changes to the departmental structure of the government. however, some parts of this proposal did not receive approval from the parliament. This draft was passed in May 1971.
3. 1982: Bill C-94, The Energy Security Act, This law supports government policies through the National Energy Program in 1980. Jenne Sauve suggests dividing this Act into several sections. This law was postponed and then the opposition asked to be divided into 8 Statutes.
4. 1988: Bill C130, the Canada-United State Free Trade Agreement Implementation Act, this law faced substantial reaction on the issue of admissibility. until this statute was declared invalid by an order paper with dissolution of the 33rd Parliament. However, government repropose the proposal until declared effective in December 1988.

[16] Massicotte, Louis. "Omnibus bills in theory and practice." *Canadian parliamentary review* 36, no. 1 (2013): p. 13-17.
[17] Bédard, Michel. "Omnibus bills: Frequently asked questions." (2012).
[18] Bédard, Michel. "Omnibus bills: Frequently asked questions." (2012).

5. 2012: Bill C-38, The Jobs, Growth, and Long-term Prosperity Act, this law is to support the government budgetary policy for 2012. The opposition expressed objections to this law, but this law was successfully passed by the parliament.

The world trend seems to make this method a way to trim the giant pile of existing regulations. In terms of law-making statute Indonesian can be used as an example for bold reactions to legislature from court to this law-making mechanism. Meanwhile, the substance of the statute regarding the reaction from the public who strongly demands from the court to cancel legislative products can be seen in US practice in the Affordable Care Act.

3. The United States

The practice of each state is different, in California for example, the state constitution considers the practice of omnibus to be enforceable, namely Art. 4, Sec. 9. The constitution states that omnibus is a compilation of regulations on one issue[19]. However, many states do not use this omnibus mechanism in their regulatory drafting techniques. Pennsylvania, for example, cites the case of Commonwealth vs. Barnett (199 Pa. 161) with the following considerations:

> *"Bills, popularly called omnibus bills, became a crying evil, not only from the confusion and distraction of the legislative mind by the jumbling together of incongruous subjects, but still more by the facility they afforded to corrupt combinations of minorities with different interests to force the passage of bills with provisions which could never succeed if they stood on their separate merits. So common was this practice that it got a popular name, universally understood, as logrolling. A still more objectionable practice grew up, of putting what is known as a rider (that is, a new and unrelated enactment or provision) on the appropriation bills, and thus coercing the executive to approve obnoxious legislation, or bring the wheels of the government to a stop for want of funds. These were some of the*

[19] Massicotte, Louis. "Omnibus bills in theory and practice." *Canadian parliamentary review* 36, no. 1 (2013): p. 13-17.

evils which the later changes in the constitution were intended to remedy"[20].

Legal reasoning omnibus does not need to be regulated in the statutory system are failing to implement the omnibus is the reason. So to avoid this failure, the proposals submitted to parliament must be specific and have limited issues. Until 2012, Pennsylvania had a special regulation that required the "compilation" regulation to have one subject in the US Parliament Bill HR 3806.

An example of an act that uses an omnibus, that success story is the Omnibus Taxpayers' Bill of Rights Act in 1987, which compiles taxpayer protection regulations. With a relatively small scope including taxes, levies, mortgages, as well as non-economic taxes such as land and building taxes, the Law can be the basis for implementing The Internal Revenue Service (IRS) and the Tax Court[21]. In other cases, the Omnibus bill in the Affordable Care Act (ACA)[22] reacted differently from the Omnibus Taxpayers' Bill of Rights Act. This law has been tested more than 100 times but the court chose to keep the law[23].

a. Cases of review ACA act

The ACA's legislative process was extremely intense, lengthy, and complex, moreover, the ACA's legislative process compared to other legal processes was relatively faster. With a very complex content, this statute has many highlights, where the Legislature's opinion is not finished in discussing all norms and does not anticipate legal loopholes that arise from setting these norms. Moreover, this law regulates the subsidies that

[20] Quoted in "Omnibus Bill Definition", see the article entitled Duhaime Legal Dictionary, "Omnibus Bill definition", website http://www.duhaime.org/LegalDictionary/O/OmnibusBill.aspx, accessed on September 22, 2012.
[21] Meland, Creighton R. "Omnibus Taxpayers' Bill of Rights Act: Taxpayers' Remedy or Political Placebo?." *Michigan Law Review* 86, no. 7 (1988): p. 1787-1818.
[22] Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified as amended in scattered sections of the U.S. Code).
[23] Gluck, Abbe R. "Imperfect Statutes, Imperfect Courts: Understanding Congress's Plan in the Era of Unorthodox Lawmaking." *Harv. L. Rev.* 129 (2015): p. 62.

the government provides for health insurance. The public's attention in overseeing the implementation of the Law becomes very large when the Court is considered unable to fulfill the community's demands for "healthy" norms.

Gluck[24] argues that the ACA drafting technique has drawbacks. This statute has been reviewed more than 100 times but the court has always affirmed. the legal reason for seeing the decision is that it must be the original intention of the norm (textualism perspective). The public's view is that the Court refuses to interpret the ACA norms.

b. Sarbanes-Oxley Act

The Sarbanes-Oxley Act emerged against the background of scandalous audits that occurred in several large companies such as Enron, WorldCom, Global Crossing and Tyco v. several mayoral audit firms including Arthur Andersen[25]. The decline in investor confidence after the scandal prompted the United States government to make regulations regarding auditing firm ethics for corporates.

Sarbanes-Oxley contains a variety of provisions regarding business ethics. The two that have particular potential to deter unethical business practices and that accordingly are the principal focus of this article are, first, the requirement that corporations develop codes of ethics for senior financial officers that include, among other things, enforcement mechanisms (Section 406) and, second, the requirement that outside auditors be rotated on a regular basis (Sections 203 and 207)[26].

Every major recent statutory opinion, from every Justice on the Court, has relied heavily on interpretive canons to decide cases; their rise

[24] Gluck, Abbe R. "Imperfect Statutes, Imperfect Courts: Understanding Congress's Plan in the Era of Unorthodox Lawmaking." *Harv. L. Rev.* 129 (2015): p. 62.
[25] Gray, Tara. *Canadian response to the US Sarbanes-Oxley Act of 2002: new directions for corporate governance*. Parliamentary Information and Research Service, 2005.
[26] Orin, Richard M. "Ethical guidance and constraint under the Sarbanes-Oxley Act of 2002." *Journal of Accounting, Auditing & Finance* 23, no. 1 (2008): p. 141-171.

derives from textualism's impact on the tools that virtually all judges now use to interpret statutes[27]. For example case from Yates v. United States, a case decided last Term that considered the application of the evidence-destruction prohibitions of the Sarbanes-Oxley Act, which were enacted after the Enron scandal, to illegally caught fish. The case was a veritable linguistic-canon tennis match between two only moderate textualists, Justices Ginsburg and Kagan, each wielding Latin presumptions to her advantage[28].

The prior Term's prominent statutory cases were no different. The last three major statutory decisions of the 2013 Term were wars of canonical interpretation over the rule of lenity, a conflict among "competing maxims," and the federalism canon. Many similarly expected that the Court would use a canon as a punt or an otherwise clean exit strategy, as some viewed the Chief Justice's use of the constitutional avoidance canon to save the ACA in NFIB, or his use of the federalism canon in 2014 to prevent the application of a chemical weapons statute to a domestic love triangle[29].

4. The Indonesian Constitutional Court's view on Omnibus Bill Method

Act number 11/2020 has multi dimensions topics and compile lot of acts, its contain:

> "1) Simplification of land permits; 2) Investment Requirements; 3) Employment; 4) Small and Medium Enterprises (SMEs) Protection; 5) Ease of doing business; 6) Research and innovation support; 7) Government administration; 8) Imposition of Sanctions; and 9) Control of Land. contains 174 systematic articles, but substantially contains changes and cancellations of

[27] Gluck, Abbe R. "Imperfect Statutes, Imperfect Courts: Understanding Congress's Plan in the Era of Unorthodox Lawmaking." *Harv. L. Rev.* 129 (2015): p. 62.
[28] Gluck, Abbe R. "Imperfect Statutes, Imperfect Courts: Understanding Congress's Plan in the Era of Unorthodox Lawmaking." *Harv. L. Rev.* 129 (2015): p. 62
[29] Gluck, Abbe R. "Imperfect Statutes, Imperfect Courts: Understanding Congress's Plan in the Era of Unorthodox Lawmaking." *Harv. L. Rev.* 129 (2015): p. 62.

norms on 79 multi-sector laws with 1253 topics.[30]"

The characteristics described above, that statutes that are drafted using the Omnibus bill technique with a multidimensional number of subjects have many criticisms at the implementation level. In Law 11/2020 on job creation, for example, on various occasions, criticism is conveyed through pieces of the law that are discussed in depth. This criticism, for example, applies to norms related to employment and the environment.

Decision Number 91/2020 concerning Formal Examination of ACT 11/2020 was declared conditionally unconstitutional, in this decision mandates lawmakers to improve drafting procedures within two years. If in that period it is not corrected, the act is declared null and void. The legal reasoning behind the decision is the omnibus bill method has not been adopted by the legislature in the law-making process. The preparation of this part of the law was also considered confusing, so the Constitutional Court took the bold step of holding it for two years of improvement.

The bold step should be accompanied with order to stipulate this method officially. Legal reasoning in this decision revealed that constitution never prohibite omnibus bill method. However when the court order this provision, its contrary with legal principle "ultra petita". Unless legislative would not forget amend Act 11/2012 bout mechanism and method in statutory forming, this provision be an important point.

5. Different Legal Perspective about the Textualist Camps and the Purposivist

> "The canons include such precepts as: every word of a statute must be given significance; repeals by implication are disfavored (a statute will not be considered as repealing prior acts on the same subject in the absence of express words to that effect, unless there is an irreconcilable repugnancy between them, or

[30] Tejomurti, Kukuh, and Sukarmi Sukarmi. "The Critical Study of the Omnibus Bill on Job Creation Based on John Rawls View on Justice." *Unnes Law Journal: Jurnal Hukum Universitas Negeri Semarang* 6, no. 2 (2020): p. 187-204

> unless the new law is evidently intended to supersede all prior acts); the expression of one thing is the exclusion of another; penal statutes are to be interpreted narrowly; if the language is plain, construction is unnecessary; the starting point is the language of the statute; when a list of two or more descriptors is followed by more general descriptors, the otherwise wide meaning of the general descriptors must be restricted to the same class, if any, of the specific words that precede them."[31]

The textualist puts meaning in accordance with the text in the statutes. Judge Scalia has a concurring opinion in review ACA mentions that "We are regulated by law, not by the intent of the legislators, not by committee reports". so that a legislative product has been approved by the executive, then the law has been "spoken by itself". Here's how far this advance works, just for minor corrections to the statutes that already have legal force.

> "contextual canon such as the absurdity doctrine that "a provision may be either disregarded or judicially corrected as an error (when the correction is textually simple) if failing to do so would result in a disposition that no reasonable person could approve.[32]"
>
> "… and the purpose of those references was not primarily to inform the Members of Congress what the bill meant . . . but rather to influence judicial construction.[33]"

Textual criticizes the purposive approach based on several arguments:

1. premised on the Constitution, is the idea that the only legitimate law is text that both chambers and the President have approved. the Supreme Court held legislative vetoes unconstitutional because they evaded procedures of bicameralism, whereby a bill cannot become law without both House and Senate approval, and presentment, whereby all bills that make it through Congress have to be presented to the President for his signature.;

[31] Katzmann, Robert A. *Judging statutes*. Oxford University Press, 2014. h. 50.
[32] Katzmann, Robert A. *Judging statutes*. Oxford University Press, 2014. h. 51.
[33] Justice scalia concuring opinion in Katzmann, Robert A. *Judging statutes*. Oxford University Press, 2014.

2. critics of legislative history argue that its use impermissibly increases the discretion of judges to roam through the wide range of often inconsistent materials and rely on those that suit their position;
3. A third component of the assault on legislative history is grounded in the idea that legislators will be compelled to write statutes with more precision if they know that courts cannot consult such materials; and
4. the criticism of legislative history is a decidedly negative conception of the legislative process.

John Manning also puts critics on the arguments related to bicameralism, presentation, and nondelegation[34]. Henry M. Hart, Jr. and Albert M. Sacks said that court's role is to interpret the statutes "to carry out the purpose as best it can"[35]. What justice should intrepet? the phrase which has the meaning that contains a certain purpose; meaning that obscures an already clear policy or norm. Some expertist consider that the Court can still have a role to interpret in certain conditions that are not predicted by the legislature.

The purposive approach has received criticism, the statutes formed by the legislature have a lot of ambiguity, and when it is interpreted they will have many interpretations depending on judges. however, according to Katzman[36] omnibus bills often have blink spots. the legislator approves of the Act only partially, and the other part is not fully approved by the legislator. So this purposive approach allows the court to clarify the meaning of the ambiguous part.

> "Finding the law, therefore, involves more than just looking up a statutory provision in a legal code and reading the answer. Legal reasoning is not the same as legal research. Nor is it an impersonal, technical, scientific process."[37]

[34] Katzmann, Robert A. *Judging statutes*. Oxford University Press, 2014.
[35] Katzmann, Robert A. *Judging statutes*. Oxford University Press, 2014. h. 33.
[36] Katzmann, Robert A. *Judging statutes*. Oxford University Press, 2014.
[37] Shapiro, Scott J. "Legality." (2011). Hal 237.

> "Judges do not restrict themselves to the available legal texts, but often resort to moral argument in order to resolve disputes. It is far from obvious, therefore, how the Planning Theory can be squared with the realities of legal practice.[38]"

The advantage of the omnibus method is that the discussion is fast, as well as the range of topics with high complexity, so often the Legislature cannot predict problems that arise in each norm. However, the two debates can meet if a norm has a clear meaning, then the court does not need to interpret it. Vice versa.

Legal formalism may be understood as an account that is committed to the following four theses[39]:

a) Judicial Restraint: The formalist conception of the judicial role is highly restrictive. According to it, judges are always under a duty to apply existing law.

b) Determinacy: Not only do formalists maintain that judges are obligated to apply law whenever it exists, they think that the law always exists and is available to judges for deciding cases. On their view, the law is completely determinate: for every legal question, there is one, and only one, correct answer. Formalists thus deny that there are factual situations ungoverned by a legal norm, or "gaps" in the law. Nor do they accept the possibility of legal inconsistencies, factual situations governed by two or more mutually unsatisfiable rules. For this reason, judges may never throw up their hands and say there is no law to apply. From the formalistic point of view, there is always one right way to decide a dispute, and judges are required to find and apply it.

c) Conceptualism: The generality and abstraction of these principles not only secure the determinacy and knowability of the law, but lend legal doctrine a pleasing conceptual order. The bulk of the law can be subsumed under a few general principles, and the fixed abstract concepts that they employ classify the rules in an intelligible fashion.

d) Amorality of Adjudication: According to the formalists, judges

[38] Shapiro, Scott J. "Legality." (2011). Hal 239.
[39] Shapiro, Scott J. "Legality." (2011). Hal 242.

> must decide cases without resorting to moral reasoning. They must, in other words, be able to discover the general legal principles, derive the lower level rules, and apply the rules to the facts at hand without resort to moral considerations. Judges are only supposed to use "logic," where logic is broadly construed to include the operations of deduction, induction, and conceptual analysis.

6. CONCLUSION

The practice of some countries' omnibus bills is one method that is profitable for the legislature. however, the practice in America, Canada, and Indonesia is highlighted that this method tends to have a criticism at the implementation level. The court also experienced the same problem in reviewing the statute. an act that regulates specific subjects and uses a clear meaning to reduce criticism of the act that uses this method.

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CONSTITUTIONAL REVIEW

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Constitutional review, or constitutional oversight, is the evaluation of the constitutionality of laws in some countries.

It is meant to be a system to prevent the violation of rights granted by the Constitution, and to ensure its effectiveness, stability and preservation.

A system that gives the Court the power to examine the actions of various national institutions, including legislative actions, to see if they comply with the constitution.

And to declare actions invalid if they are unconstitutional. It is also called judicial review system or legal review system.

It is one of the constitutional security systems established to prevent the violation of the national constitution by highest laws and regulations of the state.

The Constitutional Review in Challenging Times

Why Do Countries Adopt Constitutional Review?

In recent decades, there has been a wide-ranging global movement towards constitutional review.

This development poses important puzzles of political economy:

Why would self-interested governments willingly constrain themselves by constitutional means?

What explains the global shift toward judicial supremacy?

Though different theories have been proposed, none have been systematically tested against each other using quantitative empirical methods.

In this article, we utilize a unique new dataset on constitutional review for 204 countries for the period 1781–2011 to test various theories that explain the adoption of constitutional review.

Using a fixed-effects spatial lag model, we find substantial evidence that the adoption of constitutional review is driven by domestic electoral politics. By contrast, we find no general evidence that constitutional review adoption results from ideational factors, federalism, or international norm diffusion. (JEL: K00, K19, K49)

1. Introduction

Constitutional review, the ability of judges to supervise the constitution, has spread around the world in recent decades. By our account, some 38% of all constitutional systems had constitutional review in 1951; by 2011, 83% of the world's constitutions had given courts the power to supervise implementation of the constitution and to set aside legislation for constitutional incompatibility. Thus, what Alexis de Tocqueville once

described as an American peculiarity is now a basic feature of almost every state (De Tocqueville 1835: 72-77).

The spread of this institution poses an important puzzle in political economy:

Why would self-interested governments willingly constrain themselves by constitutional means?

And why would democratic majorities restrict their future political choices by putting their faith in the hands of unelected judges?

What underlies this radical global move toward "judicialization" or "juristocracy" (Hirschl 2004; Gardbaum 2009)?

Several theories have been proposed to explain this phenomenon. Early theoretical accounts were federalist or ideational in character. Some argued that constitutional review arose to respond to governance problems such as federalism, or the need to coordinate among multiple branches of government (Shapiro 1999).

Ideational accounts instead emphasized the importance of rights protection and the rule of law, or the need to be protected from the vagaries of government action (Cappelletti 1989).

More recent work has proposed strategic explanations, in which constitutional review is conceptualized as a response to the domestic electoral market (Ginsburg 2003; Hirschl 2004; Finkel 2008; Stephenson 2003; Erdos 2010).

When constitution-makers foresee losing power after constitutional adoption or revision, they are more likely to institute constitutional review, as the judiciary may protect the substantive values that the drafters will be unable to vindicate through the political process. Constitutional review, in this account, is a form of "political insurance," through which constitution-

makers safeguard their future political interest (Ginsburg 2003).

In addition, there is a recent but growing literature on cross-national diffusion of constitutional norms, which suggests that provisions might be adopted in response to constitutional developments in foreign states (Goderis and Versteeg 2011; Law and Versteeg 2011; Dixon and Posner 2011; Elkins 2009).

If constitutional norms diffuse, so might constitutional review, as drafters seek to achieve conformity with international norms (Stone Sweet 2008).

Although there is no lack of theories, little is known in an empirical and systematic way about the origins and evolution of constitutional review on a global scale. None of the theories have been systematically tested against each other using quantitative empirical methods, and in particular, there has been almost no effort to apply theories of norm diffusion to the adoption of constitutional review.

This article takes up these challenges. Drawing on an original dataset on 204 countries since 1781, we are in a unique position to empirically document the historical trajectory of constitutional review. We then use this data to test which of the theories appear to provide the best explanation for the spread of constitutional review around the globe over the past two centuries.

We find that the adoption of constitutional review is best explained by domestic politics, and in particular, uncertainties in the electoral market. More specifically, we find that electoral competition, as measured by the difference between the proportion of seats held by the first and second parties in the legislative branch, predicts the adoption of constitutional review. This phenomenon, we find, is present in autocracies and democracies alike.

Although we find empirical support for the theory that constitutional

review is adopted as a form of political insurance, we do not find robust evidence to support theories of transnational diffusion, or the idea that constitutional review is adopted in response to previous adoption by other states.

We only find some evidence of diffusion in the sub-sample of democratic regimes, but do not find a diffusion effect in the full sample of countries. This finding has implications for the literature on norm diffusion. Recent work has revealed substantial evidence of diffusion in the realm of constitutional rights (Goderis and Versteeg 2011).

Our findings suggest that the structural part of the constitution is less prone to foreign and international influence than is the bill of rights. This dichotomy arguably follows from the fact that structural provisions such as constitutional review are likely to have more direct effects on the political and institutional interests of constitution-makers, while rights provisions can be a relatively inexpensive way of signaling conformity to international norms (Cope 2013).

Only democracies-regimes that may genuinely want to constrain themselves by constitutional means-are susceptible to following international norms regarding the adoption of constitutional review.

PRACTICE OF REFERRAL OF CASES TO THE CONSTITUTIONAL COUNCIL OF THE REPUBLIC OF KAZAKHSTAN BY ORDINARY COURTS

Kairat Mami

Chairman of the Constitutional Council
of the Republic of Kazakhstan

Content:

Introduction.

The Constitutional Council of the Republic of Kazakhstan is the only state body that has the authority to review laws and other normative legal acts for compliance with the Constitution and recognize them as unconstitutional. The legislative status of this institution implies absolute independence and autonomy in decision-making.

Constitutional proceedings are of particular value, since the normative resolutions of the Constitutional Council are an integral part of the current law in the Republic of Kazakhstan[1] and contain official interpretation and clarification on the issues of compliance with the Constitution of legal acts.

It should be noted that constitutional review in our State, implemented through the functions of constitutional proceedings, is a relatively new legal institution for protecting the rights and freedoms of citizens and legal entities, characteristic of the recent history of independent Kazakhstan. Appeal to the Constitutional Council is possible only in certain cases specified by the Constitution for the purpose of legitimate review of a normative act.

Given that the Constitutional Council of the Republic of Kazakhstan, as a constitutional review body, is an important part of the legal mechanism and the Basic Law, it acts as a guarantor of the exercise of human and civil rights and freedoms; and through its formally defined, legally binding, normative and basic final decisions, it actually participates in ensuring the balance of power and predetermines the directions of legislative and judicial reforms.

The competence of the Council in accordance with the Constitutional Law of the Republic of Kazakhstan "On the Constitutional Council of the Republic of Kazakhstan" dated December 29, 1995 includes: the decision in case of a dispute on the correctness of the election of the President of the Republic and deputies of the Parliament, Republican referendum; consideration for compliance with the Constitution prior to signing by the President of the laws adopted by the Parliament, resolutions adopted by the Parliament and its Chambers, international treaties of the Republic prior to their ratification; official interpretation of the norms of the Constitution;

[1] Paragraph 1 of Article 4 of the Constitution of the Republic of Kazakhstan, adopted at the republican referendum on August 30, 1995.

prior to the adoption by the Parliament, respectively, of the decision on early dismissal of the President of the Republic, the final decision on dismissal of the President of the Republic - giving an opinion on compliance with the established constitutional procedures; reviewing the appeals of the President of the Republic, the submissions by the ordinary courts in cases of infringement of human and civil rights and freedoms by laws in force; according to the results of the compilation of the practice of constitutional proceedings, sending an annual message to the Parliament on the status of constitutional legality in the Republic[2].

The following persons and bodies shall be recognized as participants in the constitutional proceedings: the President, the Chairman of the Senate of the Parliament, the Chairman of the Majilis of the Parliament, deputies of the Parliament numbering at least one fifth of their total number, the Prime Minister, the courts of the Republic, State bodies and officials, the constitutionality of the acts of which is verified[3].

Constitutional review in Kazakhstan is an independent sphere of activity of the State and serves to protect the political, legal, socio-economic and moral values of society, enshrined in the Basic Law[4] of our State. Therefore, verification of the constitutionality of laws and other normative legal acts, decisions and actions of state authorities, their officials, is carried out through constitutional review in order to ensure the rule of law, protect human rights and democratic values of a sovereign State. The Constitutional Council is vested with coercive power to exercise the function of control: within the framework of the Constitution, it is entitled to declare unconstitutional laws adopted by Parliament before being signed by the President, repeal existing laws and other normative legal acts, decide on the correctness of elections of the President, deputies of the Parliament, establish compliance with constitutional procedures at dismissal of the President from office. The exercise of coercive powers is expressed in a specific scope of functions related to constitutional proceedings.

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[2] The Constitution of the Republic of Kazakhstan, adopted at the republican referendum on August 30, 1995. Article 17 of the Constitutional Law of the Republic of Kazakhstan "On the Constitutional Council of the Republic of Kazakhstan" dated December 29, 1995.

[3] Article 72 of the Constitution of the Republic of Kazakhstan, adopted at the republican referendum on August 30, 1995. Article 20 of the Constitutional Law of the Republic of Kazakhstan "On the Constitutional Council of the Republic of Kazakhstan" dated December 29, 1995.

[4] Hereinafter, the "Basic Law" means the Constitution of the Republic of Kazakhstan.

The Constitutional Council in its messages and normative resolutions emphasizes the imperative role of the constitutional provisions on the recognition of a person, his life, rights and freedoms as the highest values of the State. Interpreting the constitutional norms on guarantees and mechanisms for the realization of individual rights, the Council noted 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. The recognition of human rights and freedoms as absolute means that they are extended to every person in the territory of the Republic, regardless of his or her citizenship of the Republic. The inalienability of rights and freedoms implies that a person cannot be deprived of the rights and freedoms established by the Constitution by anyone, including the State, except in cases provided for by the Constitution and laws adopted on its basis. These human rights and freedoms determine the content and application of laws and other regulatory legal acts. The elevation of specific types of rights and freedoms to the constitutional level and the declaration of their guarantee in the Constitution implies that the State has a special obligation to ensure the realization of these rights and freedoms. The legislator, when adopting laws, shall be bound by the constitutional limits on the permissible limitation of human and civil rights and freedoms, without distorting the essence of constitutional rights and freedoms or imposing such restrictions as are inconsistent with constitutionally defined objectives[5].

The effectiveness of constitutional review to a certain extent depends on the activity of the subjects of appeal to the Constitutional Council. The number of cases dealt with has tended to decline in recent years. The enormous potential of opening up the possibilities of constitutional review is realized if subjects of appeal are active.

In the practice of some foreign countries, the institution of a constitutional complaint is quite common, which allows citizens to initiate a review of the constitutionality of laws affecting their rights and legitimate interests: they can ask for an assessment not only of the law, but also of a specific court decision in terms of compliance with constitutional requirements (timeliness explaining the rights of the suspect, whether the principle of the presumption of innocence was respected, whether a lawyer

[5] Normative Resolution of the Constitutional Council of the Republic of Kazakhstan dated October 28, 1996 No. 6, dated March 12, 1999 No. 3/2, dated April 29, 2005 No. 3, dated February 27, 2008 No. 2, etc.

was provided, etc.). This institution works quite effectively, allowing citizens to directly participate in the resolution of legislative conflicts and makes a significant contribution to strengthening the foundations of the rule of law. Constitutional experience has shown that providing this opportunity to citizens is an international trend. The Venice Commission of the Council of Europe notes that the combination of a constitutional complaint of citizens with preliminary requests by the ordinary courts to the constitutional review body is the most effective in terms of protecting human rights.

In Kazakhstan, until recently, citizens had the right only to indirect appeal to the Constitutional Council, which is implemented through the ordinary courts of the Republic. The mechanism is derived from the progressive heritage of world constitutionalism and its application takes into account international experience.

The Constitutional Council has repeatedly stated in a number of regulations that the law must meet the requirements of legal precision and predictability of effects, that is, its rules must be formulated with a sufficient degree of clarity and based on understandable criteria, excluding the possibility of arbitrary interpretation of the provisions of the law. From the principle of the rule of law follows the requirement of formal certainty, clarity and consistency of legal regulation, mutual consistency of subject-related norms of different branches[6].

It is the ordinary courts, when considering specific cases, that are faced with legal norms infringing the rights of the individual, gaps and contradictions of existing law. They may also be identified by the parties to the proceedings. Therefore, the ordinary courts have a good opportunity to participate directly in ensuring the conformity of legal acts with the Constitution by submitting their verification to the Constitutional Council.

One promising area in this regard is the improvement of the procedure for consideration by the ordinary courts of petitions of participants in legal proceedings to initiate constitutional proceedings.

The courts need to be deeply aware of the responsibility and to be attentive to such requests by the parties. Several thousand complaints

[6] Normative resolutions of the Constitutional Council of the Republic of Kazakhstan dated February 27, 2008 No. 2, dated February 11, 2009, dated December 7, 2011 No. 5, dated July 3, 2018 No. 5 and others.

from citizens and organizations are received annually by State bodies. The Constitutional Council also receives several hundred applications, many of which are not within its powers and are forwarded to the competent State bodies. However, there have also been petitions raising questions about the constitutionality of the law, whose authors have been tried and could certainly have been heard by the courts.

At the same time, there is a huge potential for opportunities in this area, the legislative implementation of which ultimately serves to strengthen Kazakhstan's statehood based on legal values.

Analyzing the activities of the Constitutional Council in previous years, it should be noted that its decisions were aimed at realizing the potential of the Basic Law. They have become the basis for the formation of separate conceptual directions of the modern national legal system and the legal policy of the State. The constitutionalization of all sectors of State, legal and public life, international activities, forms and stimulates the constitutional and applied practice, building a stable regime of constitutional legality in the country.

This research article provides an overview of the practice of constitutional proceedings in the Republic of Kazakhstan on referral of cases by ordinary courts.

Section 1. Legal basis for the constitutional proceedings of the practice of applying to the Constitutional Council of the Republic of Kazakhstan on the requests of the ordinary courts.

The ordinary courts of the Republic of Kazakhstan are one of the subjects of appeal in constitutional proceedings. The courts are not entitled to apply laws and other regulatory legal acts that infringe the rights and freedoms of a person and citizen enshrined in the Constitution[7]. If the court finds that the law or other regulatory legal act to be applied infringes upon the rights and freedoms of a person and citizen enshrined in the Constitution, he is obliged to suspend the proceedings and apply to the Constitutional

[7] Articles 72, 78 of the Constitution of the Republic of Kazakhstan, adopted at the republican referendum on August 30, 1995. Subparagraph 6) of Paragraph 1 of Article 20 of the Constitutional Law of the Republic of Kazakhstan "On the Constitutional Council of the Republic of Kazakhstan" dated December 29, 1995.

Council with a view to declare this act unconstitutional[8].

As a party to constitutional proceedings[9], the ordinary courts may refer preliminary questions to the Constitutional Council of the Republic of Kazakhstan for verification of the constitutionality of a provision of the law[10]. The preliminary questions by ordinary court of a constitutional review of a provision of law is one of the types of appeal to the Constitutional Council[11].

Article 78 of the Constitution of the Republic of Kazakhstan establishes this procedure as a duty of a judge, and not as his right. This is an important argument in favor of the impossibility of applying normative acts that infringe on the rights and freedoms of everyone enshrined in the Constitution.

For example, Article 6 of the Civil Procedure Code of the Republic of Kazakhstan states that, when considering and resolving civil cases, the court shall strictly comply with the requirements of the Constitution of the Republic of Kazakhstan, constitutional laws of the Republic of Kazakhstan, this Code, other regulatory legal acts, international agreements of the Republic of Kazakhstan subject to application[12].

In accordance with the requirements of the Basic Law, there is every reason to believe that the *judiciary*, in addition to dealing with traditional criminal, civil and administrative cases, *monitors the constitutional and legal content of normative legal acts*.

Consequently, one of the mechanisms for asserting constitutional legality and executing decisions of the Constitutional Council are the courts, which do not apply unconstitutional legal acts in resolving specific cases.

[8] Article 78 of the Constitution of the Republic of Kazakhstan, adopted at the republican referendum on August 30, 1995.
[9] Article 20 of the Constitutional Law of the Republic of Kazakhstan "On the Constitutional Council of the Republic of Kazakhstan" dated December 29, 1995.
[10] Article 21 of the Constitutional Law of the Republic of Kazakhstan "On the Constitutional Council of the Republic of Kazakhstan" dated December 29, 1995.
[11] Subparagraph 8) of paragraph 2 of Article 22 of the Constitutional Law of the Republic of Kazakhstan "On the Constitutional Council of the Republic of Kazakhstan" dated December 29, 1995
[12] Article 6 of the Civil Procedure Code of the Republic of Kazakhstan dated October 31, 2015.

In accordance with the Constitution and paragraph 1 of Article 10 of the Law of the Republic of Kazakhstan "On Legal Acts"[13], the Constitution has the highest legal force. This is of great importance for the protection of human rights and freedoms, since the norms of the Constitution have direct effect. In accordance with this provision, all constitutional norms have supremacy over other laws and by-laws. Any normative act, any action (or inaction) of a government body or its official must comply with the Constitution, its norms and principles. The courts shall actively apply the articles of the Constitution in the presence of a law or other normative legal act contradicting them, when this contradiction is obvious and beyond any doubt[14].

When initiating submissions to the Constitutional Council, the ordinary courts are guided by the following legal requirements, which are standard for any type of legal proceedings in Kazakhstan:

- At any stage of the consideration of the case, the judge, guided by the provision of the Basic Law that the court is not entitled to apply normative legal acts that infringe on the rights and freedoms of a person and citizen enshrined in the Constitution, is obliged to suspend the proceedings in a particular case and apply to the Constitutional Council[15].

- Previously, the submission was signed by the Chairman of the respective court, from which the initiative comes, since the judge alone, on his own behalf, could not apply to the Constitutional Council. This circumstance somewhat hampered the activity of the judges, as it was up to the president of the court to decide whether to make the submission. Subsequently, the Constitutional Law of the Republic of Kazakhstan dated June 15, 2017 "On Amendments and Additions to Certain Constitutional Laws"[16] amended the legislation and at the moment the judge may apply to the court and personally

[13] Paragraph 1 of Article 10 of the Law of the Republic of Kazakhstan "On Legal Acts" dated April 6, 2016.

[14] Commentary to the Civil Procedure Code of the Republic of Kazakhstan dated October 31, 2015, Astana, 2016 - see. commentary on Article 6. Normative Resolution of the Supreme Court of the Republic of Kazakhstan No. 4 gp-82-07.

[15] Article 78 of the Constitution of the Republic of Kazakhstan, adopted at a referendum on August 30, 1995, subparagraph 3) of Article 23 of the Constitutional Law "On the Constitutional Council of the Republic of Kazakhstan".

[16] Constitutional Law of the Republic of Kazakhstan dated June 15, 2017 No. 75-VI.

sign the submission[17]. This legally enhances the status of judicial independence in dealing with such matters.

- The subject of submission of the courts of the Republic are laws or other normative legal acts, as a result of which the constitutional rights and freedoms of a person and a citizen may be infringed, therefore the Constitutional Council shall not give legal assessment of judicial decisions.

- The submission is based only on the materials of the case pending before the courts, the consideration of which is suspended at the time of applying to the Constitutional Council in accordance with Article 78 of the Constitution.

- After the adoption of the final decision by the Constitutional Council, the court resumes the case and considers it on the merits.

Let's consider the procedural features of this procedure for each type of legal proceedings separately.

The Civil Procedural Code of the Republic of Kazakhstan clearly regulates the procedure for applying to the Constitutional Council by a court. Subparagraph 5) of paragraph 1 of Article 272 of the Code of Civil Procedure clearly indicates that the courts *are obliged to suspend the proceedings* in cases where the law or other regulatory legal act to be applied in this case infringes on the rights and freedoms of a person and citizen enshrined in the Constitution, and apply to the Constitutional Council of the Republic of Kazakhstan with a view to declare this act unconstitutional, and also if it becomes known that the Constitutional Council, on the initiative of another court, is reviewing the constitutionality of the normative legal act to be applied in this case.

Civil proceedings are suspended until the entry into force of the decision of the Constitutional Council of the Republic of Kazakhstan[18]. In accordance with paragraph 1 of Article 38 of the Constitutional Law "On the Constitutional Council of the Republic of Kazakhstan", the final decision of the Constitutional Council comes into force from the date of its adoption, shall be binding on the whole territory of the Republic, final and

[17] Paragraph 3 of Article 22 of the Constitutional Law "On the Constitutional Council of the Republic of Kazakhstan" dated December 29, 1995.
[18] Subparagraph 5) of paragraph 1 of Article 272, subparagraph 4) of Article 274 of the Civil Procedural Code of the Republic of Kazakhstan on October 31, 2015.

not subject to appeal.

The criminal procedural legislation of the Republic of Kazakhstan provides for similar norms, according to which the ordinary court is obliged to suspend the whole or the relevant part of the proceedings in the event that the court refers to the Constitutional Council of the Republic of Kazakhstan with a request to declare as unconstitutional the law or other normative legal an act that infringes on the rights and freedoms of a person and citizen enshrined in the Constitution of the Republic of Kazakhstan[19]. In accordance with Article 45 of the Criminal Procedure Code of the Republic of Kazakhstan on the suspension of judicial proceedings in case and the interruption of the terms for pre-trial investigation, the ordinary court at the request of the parties, is obliged to suspend the whole or the relevant part of the proceedings, if the Constitutional Council of the Republic of Kazakhstan on the initiative of another court, accepts a submission on the recognition of a law or other regulatory legal act to be applied in this criminal case as unconstitutional. The criminal proceedings shall be suspended until the elimination of the circumstances, caused its suspension, and in this, the period for consideration of the case in court is terminated. After their elimination, it shall be renewed by court order. The participants of the proceedings shall be reported on the suspension or resumption of the proceedings[20]. The decision to suspend the proceedings is ordered by the judge on the above grounds. The proceedings may be suspended in respect of one of the several defendants, provided that it does not infringe his (her) rights or the rights of other defendants to defense. In the case, where the defendants in respect of whom, the proceeding is not suspended, are in custody and the judge does not find it possible to change their preventive measure, the suspension of proceedings shall be possible for a period not exceeding six months. If during this time the grounds for the suspension of proceedings against any of the defendants do not disappear, the proceedings against the other defendants should be renewed and the date of the main trail is appointed[21].

In administrative and tort proceedings, the ordinary court, state

[19] Paragraph 2 of Article 10 of the Criminal Procedure Code of the Republic of Kazakhstan dated July 4, 2014.

[20] Article 45 of the Criminal Procedure Code of the Republic of Kazakhstan dated July 4, 2014.

[21] Article 324 of the Criminal Procedure Code of the Republic of Kazakhstan dated July 4, 2014.

bodies and officials authorized to consider cases on administrative offenses, in the proceedings on cases of administrative offenses, shall be obliged to comply exactly with the requirements of the Constitution of the Republic of Kazakhstan, the Code of Administrative Offenses and other regulatory legal acts. Given that the Constitution of the Republic of Kazakhstan has the supreme legal force and direct effect on the entire territory of the Republic of Kazakhstan, In case of inconsistency between the rules established by the Law and the Constitution of the Republic of Kazakhstan, the provisions of the Constitution shall be applied[22]. Similar to civil and criminal proceedings in administrative-tort proceedings, the rule on the duty of the ordinary court to suspend the proceedings and refer to the Constitutional Council with a request to declare this act as unconstitutional if the court finds that the law or other normative legal act to be applied infringes on the rights and freedom of person and citizen enshrined in the Constitution is harmonized with the norm of Article 78 of the Constitution. Upon receipt of decision of the Constitutional Council by the court, the proceeding on case shall be revived.

Decisions of courts and bodies (civil servants) being authorized to consider the cases on administrative infractions based on the Law or another regulatory legal act recognized as unconstitutional shall not be subject to execution[23].

In 2020, Kazakhstan adopted **the Administrative Procedural and Process-related Code**, which regulates relations associated with the implementation of administrative procedures, in terms of the ones not regulated by the laws of the Republic of Kazakhstan. The order of administrative legal proceedings on the territory of the Republic of Kazakhstan shall be determined by the constitutional laws of the Republic of Kazakhstan, the Administrative Procedural and Process-related Code, based on the Constitution of the Republic of Kazakhstan and generally recognized principles and standards of international law[24].

In administrative legal proceedings, the court is also obliged to suspend the proceedings and apply to the Constitutional Council with a

[22] Paragraph 2 of Article 8 of the Code of Administrative Offenses of the Republic of Kazakhstan dated July 5, 2014.
[23] Paragraphs 2 and 3 of Article 8 of the Code of Administrative Offenses of the Republic of Kazakhstan dated July 5, 2014.
[24] Article 1 of the Administrative Procedural and Process-related Code of the Republic of Kazakhstan dated June 29, 2020.

proposal to declare the law or other regulatory legal act to be applied if it finds an infringement of the rights and freedoms of a person and citizen enshrined in the Constitution. Upon receipt by the court of the decision of the Constitutional Council of the Republic of Kazakhstan, the proceedings on the case shall be resumed[25].

At the moment, the Constitutional Council of the Republic of Kazakhstan has developed a draft Concept for Improving the Legal Framework of the Constitutional Council (hereinafter referred to as the "Concept"), which sets out Kazakhstan's intention to strengthen the mechanisms for protecting human rights through more intensive review of the constitutionality of laws and other regulations.

The European Commission for Democracy through Law (Venice Commission), in its Opinion on the Concept for Improving the Legal Framework of the Constitutional Council, approved at the 126th plenary session on March 19-20, 2021, states that the Kazakh model of constitutional justice comes closer to the European model of concentrated review, which is vested in the Constitutional Council.

In ordinary legal proceedings, the judge (and the parties) may encounter a legal provision that may be unconstitutional, but which the judge would be obliged to apply to the case at hand. In order not to force the adoption of a judgment on the basis of a possibly unconstitutional provision, the ordinary judge (judge a quo) may stay the proceedings in the case at hand and refer the question of the unconstitutionality of that provision to the constitutional court (judge ad quem).

These type of referrals to the constitutional court are variously called preliminary requests or, in some countries, exception of unconstitutionality, priority question of constitutionality or concrete review.

To allow ordinary courts to refer preliminary questions to a constitutional court recognizes their position at the frontlines of protecting constitutional law. They are the first to be confronted with a potential constitutional problem that may result from their application of a law. Therefore, their understanding of constitutional provisions crucially determines the overall quality of protection afforded by the constitutional order.

[25] Part 3 of Article 7 of the Administrative Procedural and Process-related Code of the Republic of Kazakhstan dated June 29, 2020.

Therefore, the effectiveness of preliminary requests heavily relies on the capacity and willingness of ordinary judges to identify potentially unconstitutional normative acts and to refer preliminary questions to the constitutional court or council. Depending on the model, it relies, to a lesser extent, on the ability of individuals to invoke this procedure.

In the practice of many countries, especially in post-Soviet countries, ordinary courts that have to deal with an array of substantive and procedural provisions in their daily work are usually reluctant to assume the task of dealing with the unconstitutionality of a law. Constitutional courts, which have been established precisely for that purpose, are in a better position to accomplish this task. Forcing ordinary courts to take a definite position on the unconstitutionality of a provision rather than to limit it to (serious) doubt might set the threshold too high and could result in a very low number of findings of unconstitutionality by ordinary courts.

The Constitutional Council is currently in charge of *a priori review and a posteriori review of laws* (before and after their publication, respectively). For a priori review, paragraph 2 of Article 72 of the Constitution provides that the Constitutional Council "considers the laws adopted by Parliament with respect to their compliance with the Constitution of the Republic before they are signed by the President", on request of the President, Parliament or the Prime Minister.

A posteriori review, through preliminary requests from the ordinary courts has existed for 26 years but only 71 cases have reached the Constitutional Council in this period. The Concept Paper's proposal is to operationalize this procedure which is not sufficiently used by the ordinary courts.

The following are some specific examples of referral of cases to Constitutional Council by ordinary courts on the review of the constitutionality of the provisions of laws, in cases where the existing norms of the laws have been found to be unconstitutional.

Section 2. Practice of referral of cases to Constitutional Council by ordinary courts on the review of the constitutionality of the provision of the law

1) The first example is preliminary request from the ordinary court on the normative acts applied in a civil case. A judge of the Alatau district court of Almaty city referred preliminary request to review the constitutionality of subparagraph 8) of Article 107 of the Law of the Republic of Kazakhstan "On Housing Relations". This norm of the Law on Housing Relations previously allowed the unconditional eviction of the tenant (sub-tenant), all members of his or her family and other cohabitants from the state housing if they acquired another dwelling on the right of ownership, without taking into account the degree of their need for housing, does not meet the basic principles of State social policy and the objectives of lawful limitation of constitutional human rights and, therefore, contradicted paragraph 1 of Article 1, paragraph 2 of Article 7, Article 14, paragraph 2 of Article 25 and paragraph 1 of Article 39 of the Constitution of the Republic of Kazakhstan. On January 21, 2020, the Constitutional Council of the Republic of Kazakhstan adopted a final decision on this referral: subparagraph 8) of Article 107 of the Law of the Republic of Kazakhstan dated April 16, 1997 "On Housing Relations" was declared unconstitutional, since, according to paragraph 1 of 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, defense of public order, human rights and freedoms, and the health and morality of the population. The Government of the Republic of Kazakhstan was recommended to consider initiating amendments and additions to the Law of the Republic of Kazakhstan dated April 16, 1997 "On Housing Relations" with a view to better ensuring citizens' housing rights in accordance with the legal positions of the Constitutional Council contained in this normative resolution[26].

2) The second example is preliminary request from ordinary court based on a criminal case. The Kapshagay city court of Almaty region referred preliminary questions to review the constitutionality of the first and fourth parts of Article 361 of the Criminal Code of the Republic of Kazakhstan.

[26] Normative Resolution of the Constitutional Council "On the review of the constitutionality of subparagraph 8) of Article 107 of the Law of the Republic of Kazakhstan "On Housing Relations" on the preliminary request of the Alatau District Court of Almaty" dated January 21, 2020 No. 1.

By the final decision of the Constitutional Council on this referral dated February 27, 2008, part one and part four of Article 361 of the Criminal Code of the Republic of Kazakhstan were declared unconstitutional on the grounds that, in accordance with paragraph 1 of Article 39 of the Constitution, the State, when establishing criminal law measures as well as prevention of crime, must strictly follow the above-mentioned objectives and assume that persons deprived of their liberty have the same rights and freedoms as other persons, with exceptions, caused by exclusion from society. With regard to the subject of referral, the provisions of paragraph 1 of Article 39 of the Constitution mean that the protection of the constitutional system, defense of public order, human rights and freedoms, and the health and morality of the population may result in the restriction of rights and freedoms, If such restriction is adequately justified by law and meets the requirements of fairness, it is proportionate, commensurate and necessary in a democratic State to protect constitutionally significant values[27].

3) The third example relates to the scope of administrative procedures. An example of such a case is preliminary request from the ordinary court of Astana city to recognize paragraph 3 of Article 15 of the Law "On Notaries"[28] as contrary to the Constitution. This provision stipulated that private notaries must be certified every five years, which did not apply to public notaries, violating the constitutional provision on the equality of all before the law and the courts. After considering the appeal, the Constitutional Council recognized the specified paragraph of the law as contrary to the Constitution on the grounds that paragraph 1 of Article 14 of the Constitution establishes the equality of everyone before the law and the court. This implies equality of rights and obligations, unity of requirements and legal responsibility for all subjects of the relevant legal relations, carrying out homogeneous types of activities[29].

According to paragraph 2 of Article 74 of the Constitution of the Republic of Kazakhstan, Laws and other legal acts recognized as

[27] Normative Resolution of the Constitutional Council of the Republic of Kazakhstan dated February 27, 2008 N 2 "On the review of the constitutionality of the first and fourth parts of Article 361 of the Criminal Code of the Republic of Kazakhstan on the preliminary request of the Kapshagay City Court of Almaty Region."

[28] Law of the Republic of Kazakhstan "On Notaries" dated July 14, 1997 No. 155.

[29] Normative Resolution of the Constitutional Council dated January 31, 2005 N1 "On the review of the constitutionality of paragraph 2 of Article 15 of the Law of the Republic of Kazakhstan "On Notaries" on the preliminary request fron the ordinary court of Astana city.

unconstitutional, including those that infringe the rights and freedoms of a person and citizen enshrined in the Constitution, are repealed and shall not be applied. Thus, by declaring unconstitutional the law or its individual provisions, the Constitutional Council «withdraws» it from the system of current law, and the courts do not apply these provisions.

Section 3. Legal consequences of declaring laws unconstitutional in the field of legal proceedings

As the Venice Commission states, the implementation of the rulings of the constitutional court is an important requirement of the rule of law[30]. Article 39 of the Constitutional Law "On the Constitutional Council of the Republic of Kazakhstan" contains a clear list of legal consequences of the adoption of final decisions by the Constitutional Council: laws and other legal acts recognized as unconstitutional, infringing on the rights and freedoms of a person and citizen enshrined in the Basic Law, lose their legal force, are not subject to application and are cancelled; and court decisions based on such a law or other legal act shall not be enforceable[31].

On the basis of *the Civil Procedural Code* of the Republic of Kazakhstan, court acts based on law or other regulatory legal act, which is recognized by the Constitutional Council of the Republic of Kazakhstan as unconstitutional, shall not be subject to enforcement[32]. Judgements, determinations and orders have entered into force may be revised due to newly defined or new circumstances[33]. The recognition by the Constitutional Council of the Republic of Kazakhstan laws and other regulatory legal acts as unconstitutional, with use of which a judicial act was issued, refers to new circumstances and is the basis for the revision of the judicial act[34].

In accordance with the *Criminal Procedure Code* of the Republic of Kazakhstan, a criminal case shall be terminated if enacted a law,

[30] Opinion of the European Commission for Democracy through Law (Venice Commission) on the Concept for Improving the Legal Framework of the Constitutional Council, approved at the 126th plenary session on March 19-20, 2021, p. 10.
[31] Paragraph 2 of Article 39 of the Constitutional Law "On the Constitutional Council of the Republic of Kazakhstan" dated December 29, 1995.
[32] Part 2 of Article 21 of the Civil Procedural Code of the Republic of Kazakhstan dated October 31, 2015.
[33] Part 1 of Article 455 of the Civil Procedural Code of the Republic of Kazakhstan dated October 31, 2015.
[34] Subparagraph 3) of part 3 of Article 455 of the Civil Procedure Code of the Republic of Kazakhstan dated October 31, 2015.

abolishing criminal liability for the offence committed, or in the case when the Constitutional Council of the Republic of Kazakhstan recognizes the law or other regulatory legal act to be applied in the criminal case and which determines the characterization of an action as a criminal offence, as unconstitutional[35]. The Court shall postpone the sentence, if the Constitutional Council of the Republic of Kazakhstan on the initiative of another court adopts a proposal to declare the law or other regulatory legal act to be applied in the criminal case, as unconstitutional[36]. The jurisdiction of the court also includes consideration of the issue, related to the execution of the sentence in case the Constitutional Council of the Republic of Kazakhstan finds unconstitutional the law or other normative legal act applied by the court at sentencing[37].

The recognition by the Constitutional Council of the Republic of Kazakhstan the law or other regulatory legal act, which applied by the court in making the judicial act, as unconstitutional shall be the grounds for renewal of the proceedings on newly discovered circumstances[38]. The day of opening of the new circumstances shall be the date of adoption of the final decision of the Constitutional Council of the Republic of Kazakhstan on recognition of the law or other regulatory legal act as unconstitutional[39], which was applied by the ordinary court when making a judicial act.

In accordance with *the Administrative Procedural and Process-related Code* of the Republic of Kazakhstan, the decisions of the courts authorized to consider administrative cases based on a law or other normative legal act recognized as unconstitutional are subject to cancellation[40]. Judicial acts based on a law or other normative legal act recognized as unconstitutional by the Constitutional Council of the

[35] Paragraph 6) of the first part of Article 35 of the Criminal Procedure Code of the Republic of Kazakhstan dated July 4, 2014.
[36] Part six of Article 390 of the Criminal Procedure Code of the Republic of Kazakhstan dated July 4, 2014.
[37] Paragraph 15) of Article 476 of the Criminal Procedure Code of the Republic of Kazakhstan dated July 4, 2014.
[38] Paragraph 5) of the second part of Article 499 of the Criminal Procedure Code of the Republic of Kazakhstan dated July 4, 2014.
[39] Paragraph 2) of the fourth part of Article 501 of the Criminal Procedure Code of the Republic of Kazakhstan dated July 4, 2014.
[40] Part 4 of Article 7 of the Administrative Procedural and Process-related Code of the Republic of Kazakhstan dated June 29, 2020.

Republic of Kazakhstan, shall not be subject to execution[41].

According to the Code on Administrative Infractions, decisions of courts and bodies (civil servants) being authorized to consider the cases on administrative infractions based on the Law or another regulatory legal act recognized as unconstitutional shall not be subject to execution[42]. Administrative infractions proceeding may not be initiated, and the initiated shall be subject to termination if the law or its separate provisions establishing administrative liability, or another legislative legal act subjected to applying in this case on administrative infraction from which the determination of the act as administrative infraction depends on, are recognized unconstitutional by the Constitutional Council of the Republic of Kazakhstan[43]. The recognition of the Law or another regulatory legal act as unconstitutional by the Constitutional Council of the Republic of Kazakhstan that was applied in this case on administrative infraction is the grounds for review of decrees, prescriptions on newly discovered circumstances[44].

Section 4. Problems and Trends in the Development of Constitutional Review on the Submissions by Ordinary Courts on the Review of the Constitutionality of the Norms of Laws

Analyzing the trends in the development of constitutional review in Kazakhstan, it should be noted that gradually the legislator is moving towards the expansion of the subjects of appeal to the Constitutional Council. It may not be direct, but indirect. For example, on December 29, 2021, the Law of the Republic of Kazakhstan «On the Commissioner for Human Rights in the Republic of Kazakhstan» was adopted, in accordance with subparagraph 2) of paragraph 2 of Article 13, in cases of particular public importance, or related to mass violation of rights and freedoms of individual and citizen guaranteed by the Constitution of the Republic of Kazakhstan, the Commissioner for Human Rights has the right to petition

[41] Part 2 of Article 18 of the Administrative Procedural and Process-related Code of the Republic of Kazakhstan dated June 29, 2020.

[42] Part 3 of Article 8 of the Code on Administrative Infractions of the Republic of Kazakhstan dated July 5, 2014.

[43] Paragraph 4) of part 1 of Article 741 of the Code on Administrative Infractions of the Republic of Kazakhstan dated July 5, 2014.

[44] Paragraph 5) of part 2 of Article 852 of the Code on Administrative Infractions of the Republic of Kazakhstan dated July 5, 2014.

for sending an appeal to the Constitutional Council by persons who have such a right in accordance with the Constitution and the Constitutional Law "On the Constitutional Council of the Republic of Kazakhstan"[45].

For several years, the possibility of a direct appeal to the Constitutional Council by the Procurator-General and the Commissioner for Human Rights of the Republic of Kazakhstan was discussed.

As indicated earlier, in 2020, the Constitutional Council developed the Concept Paper for Improving the Legal Framework of the Constitutional Council, with the aim of strengthening the mechanism for the protection of human rights through a more intensive review of the constitutionality of laws and other regulatory acts.

The Constitutional Council annually receives a huge number of complaints and applications from both individuals and legal entities. Such appeals include: requests on the review of normative legal acts for compliance with the Constitution, on the official interpretation of the norms of the Constitution; on the revision of normative legal acts and others.

The Concept paper proposes to expressly regulate in procedural legislation (civil, criminal, administrative) the possibility of a motion of the parties in the proceedings to refer the case to the Constitutional Council.

"The discretion of the court" could imply that a judge should be fully convinced of the unconstitutionality of a law. However, such an interpretation would go too far because the Constitution of Kazakhstan opted for concentrated (centralized) review. It is the Constitutional Council that decided on constitutionality. Furthermore, such an interpretation would not value sufficiently the motions from the parties, which are the purpose of the Concept Paper. it would be advisable to leave this assessment of constitutionality to the Constitutional Council itself.

The Venice Commission, when analyzing the current situation of constitutional review in Kazakhstan, noted that when there is no direct individual access to constitutional courts, it would be too high a threshold to limit preliminary questions to circumstances in which an ordinary judge has to be fully convinced of the unconstitutionality of a provision; serious

[45] Paragraph 1 of Article 1, subparagraph 2) of paragraph 2 of Article 13 of the Law of the Republic of Kazakhstan "On the Commissioner for Human Rights in the Republic of Kazakhstan" December 29, 2021.

doubt should suffice as the threshold for referring a case to the Constitutional Council. The "finding" by the ordinary court would therefore relate to doubts, not to a full assessment of constitutionality, which is reserved to the Constitutional Council. This would not affect the independence of the judge who is given a wider scope to refer the case to the Constitutional Council.

Kazakhstan is currently on the path of transformation. Therefore, on March 16, 2022, the President of the Republic of Kazakhstan, at the joint session of the Houses of Parliament, delivered a State-of-the-Nation Address to the people of Kazakhstan, within the framework of which theses of the reform on strengthening human rights institutions were presented. According to the President, citizens are deprived of the opportunity to directly apply to the Constitutional Council for clarification. At the same time, in most countries of the world there is such an institution as the Constitutional Court, where everyone can send the appropriate requests. At the dawn of Independence, this body existed in Kazakhstan as well. Experts agree that its activities are more effective in ensuring compliance with the provisions of the Basic Law. Given these circumstances, the President made a proposal to establish the Constitutional Court of the Republic of Kazakhstan, to empower the Prosecutor General and the Commissioner for Human Rights with the right to appeal to the Constitutional Court. These initiatives will be an important step in building a fair and lawful state, institutionally strengthening the system of checks and balances and protecting the constitutional rights of citizens[46].

This is necessary for the establishment of Kazakhstan as a strong democratic and rule-of-law State, worthy of its positioning in the world community of sovereign states.

Thus, analyzing the activities of the Constitutional Council over the past years, it should be noted that all its decisions were aimed at realizing the potential of the Basic Law. They formed the basis for the formation of separate conceptual directions of the modern national legal system. The constitutionalization of all sectors of State, legal and public life, international activities, forms and stimulates the constitutional and applied practice, building a sustainable constitutional legality regime in the country.

[46] State-of-the-Nation Address by President of the Republic of Kazakhstan Kassym-Jomart Tokayev at the joint session of the Houses of Parliament of the Republic of Kazakhstan, dated March 16, 2022.

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5. Criminal Procedure Code of the Republic of Kazakhstan dated July 4, 2014.

6. Code on Administrative Infractions of the Republic of Kazakhstan dated July 5, 2014.

7. Civil Procedural Code of the Republic of Kazakhstan dated October 31, 2015.

8. Law of the Republic of Kazakhstan "On Legal Acts" dated April 6, 2016.

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18. Normative Resolution of the Constitutional Council of the Republic of Kazakhstan dated February 27, 2008 No. 2

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20. Normative Resolution of the Constitutional Council of the Republic of Kazakhstan dated December 7, 2011 No. 5

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DEVELOPMENT AND CHALLENGES OF CONSTITUTIONAL REVIEWS IN KOREA

Centering on Objects of Constitutional Review and Types of Decisions

Kiyoung Kim

Justice of the Constitutional Court of Korea

1. Introduction

A. Meaning and Role of Constitutional Review

A constitution, as the supreme law of the land, is a set of fundamental principles that constitute the legal basis of a state and govern the basic relations between a state and its people. Core matters are implicitly expressed in a constitution, as it defines the fundamental principles of the state structure and its operation, and the core values pursued by the community. The abstract and open-ended nature of a constitution allows its provisions to evolve in meaning and content throughout history. For such open-ended and abstract constitutional norms to be implemented in state activity and social life, it is essential to undertake constitutional interpretation which is a process of identifying and understanding the meaning and content of constitutional provisions.

Meanwhile, for a constitution to exercise normative power in all areas of state activities including the legislative, executive, and judicial branches, it should be combined with the constitutional adjudication system as a judicial measure to ensure the supremacy of the constitution. Constitutional adjudicatory bodies conduct constitutional review to provide a final interpretation of a constitution, secure its normative power and contribute to realizing constitutional values in concrete cases.

B. Overview

The Republic of Korea (hereinafter referred to as “Korea”) is one of

the countries that are quite active in exercising the power of constitutional review. We will take a look at the country's historic development of constitutional review since the founding Constitution. It should be particularly noted that the progress towards democratization was behind the creation of the current Constitutional Court of Korea and its active exercise of constitutional review.

Since its inception, the Constitutional Court of Korea has adopted an expansive interpretation for the subject matter of constitutional review. It tried to assert constitutional control on some of the state power exercised by the judiciary and the executive as well as statutes enacted by the legislature. The scope of its subject matter is defined through accumulated case law.

Also, since the early years of its foundation, the Constitutional Court has adopted and implemented modified decisions, of which a decision of nonconformity to the Constitution demonstrates the mutually cooperative and complementary relationship built between the Constitutional Court and the National Assembly in the legislative amendment process.

Korean society has recently undergone a variety of changes. A new form of exercise of executive power has emerged in response to the rapid changes of society, and the legislature's ability to mediate conflicts has been undermined, leading to a majority of highly controversial issues pending before the Constitutional Court. Accordingly, constitutional review in Korea is faced with a new challenge and the Constitutional Court of Korea persistently strives to ensure the sustained and continued development of constitutional review.

2. Historical Development and Current Status

A. Constitutional Review before the Establishment of the Current Constitutional Court

The history of constitutional review in Korea began with the introduction of the constitutional review system in the founding Constitution in 1948. Back then, there were significant controversies over whether the ordinary courts should have authority over constitutional review of statutes or an independent organization should be created to take charge of it. Consequently, an independent Constitutional Committee was set up to be tasked with adjudicating the constitutionality of statutes while the Supreme Court was vested with final authority to review the constitutionality of

any order, regulation or disposition. Such a dual system for the power of norm control is unique among countries with an independent constitutional review body, and it remains in the current Constitution. Over a decade, the Constitutional Committee adjudicated on six cases of constitutionality of laws, of which two cases were declared unconstitutional. It is highly significant that Korea, as a then-fledgling independent nation, introduced the constitutional adjudication system at a relatively early time. Given the times when constitutionalism was still unstable due to the civil war and revolution, the two decisions of unconstitutionality rendered by the Constitutional Committee showed the possibility of constitutional review taking root in society.

The amended Constitution of 1960 introduced the Constitutional Court of Korea. The Court was vested with the jurisdiction as follows: constitutional review of statutes, a final interpretation of the Constitution, adjudication on competence disputes among different government agencies, adjudication on the dissolution of a political party, adjudication on impeachment, and judgement on election disputes of the President, the Chief Justice and Justices of the Supreme Court. It was followed by the enactment of the *Constitutional Court Act* in 1961. However, the Constitutional Court was never established due to a military coup that occurred just one month after enactment of the Act. Nevertheless, the Constitutional Court system of the Second Republic became a crucial reference for the formation of the Constitutional Court as it stands today.

The amended Constitution of 1962 did not provide for an independent constitutional adjudicatory body but empowered the Supreme Court to review the constitutionality of statutes. In other words, the Supreme Court was granted final authority to review cases when the premise of trial was the constitutionality of statutes or the legality of any order, rule or disposition. While the then Supreme Court was perceived to be generally passive in exercising the power of reviewing the constitutionality of laws, it rendered unconstitutional a provision of the *State Compensation Act* which limited the right of a person on active military service or an employee of the military forces to claim state compensation in 1971. However, the Justices who issued an opinion of unconstitutionality in this case failed to secure reappointment, and the so-called Yushin Constitution, resulting from the 1972 amendments, explicitly provided for the provisions that were rendered unconstitutional and blocked further discussion of unconstitutionality. As

such, in the era of the executive supremacy under the military government, the judicial power was restricted, inevitably leading the judiciary to remain passive in constitutional adjudication. As politics exerted a huge influence on the composition of the judiciary and there were many instances of infringing the independence of the judiciary, constitutional adjudication played a limited role in keeping state power in check and safeguarding citizens' fundamental rights.

While the 1972 Constitution created a Constitutional Committee, an independent institution reviewing the constitutionality of laws, the purpose was not to safeguard the Constitution and guarantee citizens' fundamental rights. Rather, it was created as a response to its past experience where the Supreme Court went against the will of the government and issued an unconstitutionality ruling. The Constitutional Committee was designed to make a constitutional review body exist only in name and thereby paralyze the function of constitutional adjudication. Such a system remained in the 1980 Constitution and not a single application of unconstitutionality was submitted to the Constitutional Committee.

As seen above, while the Republic of Korea introduced systems which authorized a Constitutional Committee or the Supreme Court to review the constitutionality of laws since the founding Constitution in 1948, these were not active in exercising review. After going through the periods of political chaos and the authoritarian regime, the concept of "constitutional supremacy" in the governance system was nothing more than declaratory and ornamental, and the power to review constitutionality of statutes was exercised in an extremely limited manner**,** preventing constitutional adjudication from functioning properly. However, the Constitutional Court reintroduced after the 1987 June Democratic Movement took a path different from the past years which no one expected.

B. Creation of the Current Constitutional Court and Development of Constitutional Review

The ninth constitutional amendment responded to the people's aspiration for democratization that followed the June Democratic Movement in 1987, and the people's demand for the right to freely choose their government and for constitutional amendment to expand and strengthen fundamental rights. For the first time in constitutional history, constitutional amendment was made after substantial political negotiations

between the ruling and opposition parties and the monitoring and criticism by the mature democratic people. The current Constitution, motivated by a thorough reflection on its past constitutional history under the authoritarian regime and prompted by the people's strong desire for democracy, provides for the establishment of a constitutional court designed to guarantee fundamental rights of the people and realize the rule of law. Consequently, the Constitutional Court of Korea was established in September 1988.

As discussed above, while Korea, since the founding Constitution in 1948, introduced various types of the constitutional review system including the Constitutional Committee of the First Republic, the short-lived Constitutional Court in the Second Republic, the judicial constitutional review system of the Third Republic, and the Constitutional Committee of the Fourth and Fifth Republics, the effectiveness of these institutions were questionable and they were at times regarded as nothing more than a mere ornamental institution. That is why, when the Constitutional Court was launched in 1988, many expressed concerns that it would only exist in name as in the past despite huge public expectations. The then government and the National Assembly were also hardly active in promoting constitutional review.

The *Constitutional Court Act*, drafted hastily with little study and experience in constitutional adjudication, had legislative flaws and inadequacies in the organization, jurisdiction and procedure of the Constitutional Court, which could have prevented stable and smooth operation of the Court. Particularly, it prevented the Constitutional Court from adjudicating on the constitutionality of the ordinary court's judgements and demanded the fulfillment of the subsidiarity requirements for application of a constitutional complaint, leaving only a few matters being subject to a constitutional complaint. Given this, the prevailing opinion was that the system would become a dead letter.

However, such an incomplete legal and institutional framework could not weaken the Court's operation. Responding to the people's yearning for the Court to serve as a guarantor of fundamental rights and a watchdog against state abuse of power, the Constitutional Court has been very active from the start. Its active activities were largely attributable to the growing awareness of constitutionalism among the people and a more mature political culture. With the implementation of the new constitutional amendment, various opinions were expressed on constitutional values and meanings,

and more academic papers and research publications on the Constitution and constitutional adjudication were produced. The Constitutional Court provided a forum for collecting citizens' opinions on constitutional issues, thereby heightening civic awareness of constitutionalism and enhancing rights awareness among the people.

Against this backdrop, beginning with the first ruling of unconstitutionality[1] in January 1989, the next year after its launch, the Constitutional Court has been active in its exercise of constitutional review power since its early years. To date, the Court has shown an unwavering commitment to the duty of the state to ensure fundamental rights of its citizens, and persistently strived to thoroughly review the statutes and the exercise of governmental power which are inconsistent with the Constitution. As a consequence, the Constitutional Court of Korea gradually won the hearts and minds of the people yearning for the rule of law and guarantee of fundamental rights. Now, the Constitution is no longer a simple ornament in the code of law but a living norm in people's everyday lives. It is also regarded as a standard for every state action, as the rule of law principle, which mandates state powers to abide by the Constitution and laws, has been constantly put into practice through constitutional review.

As such, the history of constitutional review is closely linked with the history of democracy. At a time when democracy was under severe threat, the Constitution and constitutional review had existed in name only. However, as political freedom and democracy took their actual shape at least in terms of structure, constitutional review was promoted. Furthermore, the active exercise of constitutional review prompted and stimulated the progress and development of democracy. In this regard, it is safe to say that these two are intertwined in a virtuous cycle where the two affect each other.

C. Current Status of Constitutional Review

The Constitutional Court of Korea has reviewed about 43,000 cases over the past 33 years, of which 1,000 cases were ruled unconstitutional

[1] Constitutional Court of Korea, *88Hun-Ka7*, January 25 1989. In this decision, the Constitutional Court ruled that a provision prohibiting the provisional execution in the event of a claim of property rights against the state is against the equality principle, as it grants the state a superior legal status without a reasonable ground. This decision is considered to have laid the foundation to fundamentally change the state-centered thinking and the systems and practices expedient for the State.

including in modified forms, and 800 cases were granted. The annual caseload did not reach 500 until 1995. However, the number continued to grow from 1,000 in 2001 to 2,000 in 2017 and to over 3,000 in 2020.

In addition to the increase in constitutional review cases, constant research and improvements have been made to improve its quality. The section below discusses the historical development and challenges of constitutional review in terms of the objects of constitutional review and types of decisions.

3. Objects of Constitutional Review

A. Objects of Constitutional Review of Statutes

Under Article 111(1)(a) of the Constitution and Article 41 of the *Constitutional Court Act*, constitutional review of "statutes" is performed through the request of an ordinary court. It is a system of concrete review where the constitutionality of a statute or a provision becomes the premise of a specific case pending in court, the court presiding over the case may request the Constitutional Court to decide the constitutionality.

However, as constitutional review of statutes can only be initiated at the request of a court, it may become useless if the court hearing the case does not request for constitutional review of the provision at issue. In fact, there were times in our constitutional history when the constitutional review body could not practically exercise its power of norm control due to the passive exercise of the power to request constitutional review by the ordinary courts. Recognizing this criticism, the *Constitutional Court Act* provides for a systematic mechanism to facilitate the exercise of concrete review of norms by the Constitutional Court. Article 68(2) of the *Constitutional Court Act* allows a party of a specific case pending in court to directly file for constitutional review in the form of a "constitutional complaint" without the request of the court. Although this claim takes the form of a constitutional complaint, it is regarded identical to "constitutional review of statutes", which is a unique system in Korea.

Meanwhile, article 107(2) of the Constitution stipulates that the Supreme Court shall have the power to make a final review of the constitutionality or legality of administrative decrees, regulations or actions, when their constitutionality or legality is at issue in a trial, vesting the judicial review authority in ordinary courts. Constitutional review in

Korea has a dualistic structure according to the nature of norms. However, as seen below, the Constitutional Court allows a constitutional complaint against administrative decrees and regulations so that their constitutionality can actually be challenged before the Constitutional Court.

B. Objects of Constitutional Complaint

(1) Introduction

The First (1988-1994) and Second (1994-2000) Term Courts which laid the foundation for the Court's development strived to facilitate constitutional review. They provided an active interpretation to expand the scope of the subject matter and relaxed the requirements for the principle of subsidiarity.

For example, a question was raised over whether a person who is not party to a pending case can directly file a constitutional complaint before the Constitutional Court on the ground that a statute violated the person's fundamental rights. The Constitutional Court considered that the governmental power specified in Article 68(1) of the *Constitutional Court Act* surely includes the legislative power. It also noted that where a statute directly and presently infringes a fundamental right guaranteed by the Constitution without awaiting for any enforcement action, one can directly file a constitutional complaint without going through any remedial process (*89Hun-Ma220*, June 25, 1990). This decision provided momentum for active constitutional review of statutes in the form of a constitutional complaint. To date, more than 200 statutes have been ruled unconstitutional only by means of a constitutional complaint under Article 68(1) of the *Constitutional Court Act*.

Also, when the ordinary courts offered insufficient remedies for an abuse of executive power, the Constitutional Court tried to complement it by ensuring greater access to the application of a constitutional complaint. The Constitutional Court confirmed that administrative decrees, regulations or actions directly infringing upon fundamental rights of the people and other forms of state action not subject to administrative proceedings are applicable to constitutional complaint proceedings. The Court also deemed that the non-institution of prosecution can be the object of a constitutional complaint. The discussion below examines the results of such efforts one by one.

(2) Administrative Decrees, Regulations and Actions

In the case of the constitutional complaint filed against the *Enforcement Rule of the Certified Judicial Scriveners Act* in October 1990, the Constitutional Court recognized for the first time that not only statutes enacted by the legislature, but also enforcement regulations or rules enacted by the executive and rules established by the judiciary may all be subject to a constitutional complaint if they directly infringe upon the people's fundamental rights without awaiting for any enforcement action.

Pursuant to Article 107(2) of the Constitution, the power of constitutional review of administrative decrees, regulations or actions is granted to ordinary courts. If administrative decrees or regulations become the premise of a specific case pending in court, a court can review their constitutionality under the above provision. If not, their constitutionality cannot be reviewed even if fundamental rights are directly infringed by the decrees or regulations. To fill the gap in remedying the rights in this case, the Constitutional Court acknowledged that the decrees and regulations directly infringing upon fundamental rights can also be examined by way of a constitutional complaint.

When an ordinary court finds decrees or regulations unconstitutional, the decision only excludes the application of the unconstitutional norms in the specific case. However, when the Constitutional Court renders them unconstitutional, the unconstitutionality ruling has general effect.

Also, in the constitutional complaint case regarding an ordinance enacted by a local council, the Constitutional Court noted that if the ordinance itself violates fundamental rights of the citizens without awaiting for any enforcement action, the ordinance may also be subject to a constitutional complaint (*92Hun-Ma264, etc.,* April 20, 1995).

(3) Non-Institution of Prosecution

The former *Criminal Procedure Act* significantly narrowed the scope of crimes available for the application for adjudication, leaving criminal victims no effective tools to protect their rights against a prosecutor's decision of non-institution of prosecution. Hence, the Constitutional Court sustained the constitutional complaint filed by a victim of the prosecutor's decision of non-institution of prosecution as a legitimate claim. Since then, constitutional complaints challenging a prosecutor's decision of

non-institution of prosecution have formed the bulk of constitutional adjudication (out of 34,435 constitutional complaint cases (in accumulated number) filed as of January 2022, 15,742 are regarding non-institution of prosecution). However, a concern has been raised that given the original role and function of the Constitutional Court, whether or not examining a prosecutor's decision is suitable for the Court whose mission is to defend and maintain the Constitution.

Article 260(1) of the amended *Criminal Procedure Act* which took effect on January 1, 2008, extended its application for adjudication of non-institution of prosecution. Under the amended provision, the rights of criminal victims who were previously protected in the form of a constitutional complaint are now protected by application for adjudication.

(4) Judicial Judgment

Article 68(1) of the *Constitutional Court Act* excludes the ordinary court's judgement from the constitutional complaint jurisdiction. Thus, the Constitutional Court cannot exercise its jurisdiction of constitutional adjudication for the judgements rendered by the ordinary courts. However, the Constitutional Court noted that to the extent that Article 68(1) of the above Act is interpreted to exclude from the application of a constitutional complaint an ordinary court's judgement that enforces the laws previously struck down by the Constitutional Court and thereby infringes upon people's fundamental rights, it violates the Constitution (*96Hun-Ma172, etc.,* December 24, 1997).

Accordingly, exceptions to the category of "the ordinary court's judgement" under the Act are the judgements that enforce the laws invalidated by the Constitutional Court. The Constitutional Court may review the ordinary court's judgments to this extent, thereby limiting the judicial power of the ordinary courts.

(5) Exercise of Governmental Power

As judicial decisions are excluded from the jurisdiction of constitutional complaint and the requirements of the principle of subsidiarity should be met before lodging a constitutional complaint, most administrative actions may not end up as objects of a constitutional complaint. However, the Constitutional Court expanded the scope of its jurisdiction by acknowledging that a constitutional complaint can be

lodged against the exercise of governmental power that requires a legal remedy even if the complaint is considered to be moot in the administrative proceeding.

For instance, in the *Case on the 1994 Seoul National University's Entrance Examination Plan* in October 1992, the Constitutional Court recognized that the University's new entrance examination plan is an unconstitutional exercise of governmental power subject to a constitutional complaint (*92Hun-Ma68, etc.,* October 1, 1992), and in July 1993, it also considered that the exercise of governmental power aimed at the dissolution of Kukje Group which was led by the Minister of Finance constituted de facto exercise of power and was therefore subject to a constitutional complaint (*89Hun-Ma31*, July 29, 1993). As noted above, the Court demonstrates a consistent attitude towards this type of governmental power.

The Constitutional Court also recognized that the following acts are subject to a constitutional complaint: the act of having a person use a lavatory within the detention facility that was of an open structure with insufficient cover (*2000Hun-M546*, July 19, 2001); a comprehensive bodily search of inmates confined in a police detention facility or a confinement facility (*2000Hun-Ma327*, July 18, 2022; *2004Hun-Ma826*, June 29, 2006); the action of the Chief of the National Police Agency that totally blocked passage to Seoul Plaza with police buses (*2009Hun-Ma406*, June 30, 2011); the act of the chief of a detention center that prohibited a pre-trial detainee from attending religious services (*2009Hun-Ma527*, December 29, 2011; *2012Hun-Ma782*, June 26, 2014), the conduct of the chief of a detention facility that confined inmates in an overcrowded space (*2013Hun-Ma142*, December 29, 2016); and the act of the police firing a straight jet of water directly at demonstrators by using water cannon (*2015Hun-Ma1149*, April 23, 2020).

C. Evaluation and Challenges

Unlike the time the Constitutional Court was first launched in 1988, today there is hardly any doubt about the role and effects of constitutional review performed by the Constitutional Court. This is the fruition of the efforts made by the Constitutional Court which actively interpreted the Constitutional Court Act to protect individuals' fundamental rights. It is also difficult to deny that at the heart of such efforts lies expanding the scope of matters that fall within the remit of constitutional review.

The objects of constitutional review are now faced with bigger challenges. The world has undergone an unprecedented period of COVID-19 pandemic and novel concepts based on new technologies such as virtual currency and sharing economy are emerging. As society changes faster than ever and more and more situations require urgent response in the absence of legislation by the National Assembly, there is a greater need for exercising new forms of governmental power in addition to the traditional types of norms such as statutes, decrees and rules. While constitutional review was performed mostly on statutes, new challenges arise as to how various types of state abuse of power can be detected and presented as the object of constitutional review.

4. Types of Decisions in Constitutional Review

A. Introduction and Operation of Modified Decisions

Article 45 of the *Constitutional Court Act* stipulates that the Constitutional Court issues either a decision of constitutionality or a decision of unconstitutionality as the results of norm control. However, such a binary categorization of decisions cannot solve all types of problems arising as the results of norm control. That is why the Constitutional Court adopted modified forms of decisions such as "conditional constitutionality," "conditional unconstitutionality," and "nonconformity to the Constitution," and have used them properly according to the nature of each case since the First Term Court.

These forms of decisions adhere to "constitution-conforming interpretation." This principle is generally recognized in the constitutional justice systems of countries that are active in constitutional adjudication such as Germany, and is inevitable to respect the legislative power of the legislature and to avoid any confusion arising out of the legal vacuum created by a decision of unconstitutionality.

B. Conditional Constitutionality and Conditional Unconstitutionality

The Constitutional Court of Korea issued its first decision of conditional constitutionality in the case regarding Article 32-2(1) of the *Inheritance Tax and Gift Tax Act* on July 21, 1989, using the expression "is not unconstitutional as long as it is interpreted to mean…" The Court also stated that even if a provision contains unconstitutional elements, and thus

may be unconstitutional, it can be declared conditionally constitutional or unconstitutional as long as it could be interpreted to comply with the Constitution. The Constitutional Court rendered its first decision of conditional unconstitutionality in the case regarding Article 764 of the *Civil Act* in April 1991, using the expression "as long as it is interpreted… it violates the Constitution."

Much conflict has arisen between the Constitutional Court and the Supreme Court over the decisions of conditional constitutionality and conditional unconstitutionality. While the Constitutional Court views these types of decisions as a decision of unconstitutionality, the Supreme Court considers them an interpretation of statutes. The Supreme Court refused to accept a decision of conditional unconstitutionality as binding. It argued that a decision of conditional unconstitutionality is a mere statutory interpretation of the Constitutional Court and the exclusive power of statutory interpretation and application is vested with the ordinary courts, and thus the statutory interpretation of the Constitutional Court should be considered as a mere non-binding expression of opinion (*Supreme Court Decision 95Nu11405*, April 9, 1996).

The Constitutional Court on December 24, 1997 annulled the decision of the Supreme Court which denied the binding force of a decision of conditional unconstitutionality. The Court noted that the Constitution demands the Constitutional Court to conduct a final review of the ordinary court's judgments which infringe upon fundamental rights of the people against the binding decisions rendered by the Constitutional Court including modified forms of decisions in order to recover the power of constitutional justice and ensure the supremacy of the Constitution (*96Hun-Ma172, etc.*, December 24, 1997).

Since then, the Constitutional Court issued a ruling of conditional unconstitutionality against an addendum of the former *Act on Regulation of Tax Reduction and Exemption* (*2009Hun-Ba123, etc.,* May 31, 2012; *2009Hun-Ba35, etc.*, July 26, 2012). The ordinary court denied the request to hear the appeal from the claimants in the pending case, maintaining its previous stance against the decision of conditional unconstitutionality. With regard to the decision of conditional unconstitutionality against Article 129(1) of the *Criminal Act* (*2011Hun-Ba117*, December 27, 2012), the original court refused to accept the binding force of the decision and dismissed the appeal request of the claimant in the pending case. A

constitutional complaint was then lodged against the dismissal. As such, the conflict between the Constitutional Court and the ordinary courts over the decision of conditional unconstitutionality is still ongoing.

C. Decision of Nonconforming to the Constitution

(1) Concept and Grounds of Decision of Nonconforming to the Constitution

A decision of nonconformity to the Constitution is a decision meant to recover the constitutional order by requiring the legislature to amend an unconstitutional law instead of immediately invalidating it. The key points of the nonconformity decision include: first, it is a type of unconstitutionality decision, but it only recognizes invalidating the law "from the date on which the decision is made" as specified in Article 47(2) of the *Constitutional Court Act*, and second, the constitutional order can only be restored by imposing on the legislature the duty to amend legislation and applying the amended law.

Even though the Constitutional Court finds a statutory provision unconstitutional, if the immediate invalidation of the provision may cause a legal vacuum in law, or if there are various ways of eliminating the unconstitutional elements from the provision based on the principles of the separation of powers and democracy, the Court renders a decision of nonconformity instead of a decision of simple unconstitutionality to guarantee the legislature's formative power as much as possible. When legislative supplement is normatively required for the recovery of the constitutional order, and the Court deems it difficult to ultimately restore the constitutional status by removing unconstitutionality through a decision of simple unconstitutionality, the Court renders a decision of nonconforming to the Constitution so as to allow the legislature to perform the final duty of removing the unconstitutionality.

Since the Constitutional Court delivered its first decision of nonconformity to the Constitution in the case of constitutional review on the provision of the *Act on Election of National Assembly Members* which specified the candidates' obligations to make an election deposit in September 1989 (*88Hun-Ka6*, September 8, 1989), the Court has actively used this form of decision (in about 145 cases) and the decision of nonconforming to the Constitution is now firmly established as one of the representative types of unconstitutionality decisions.

(2) Effects of Decision of Nonconformity to the Constitution

Although there is no explicit provision that stipulates the binding force of a nonconformity decision, it is undoubtedly a type of unconstitutionality decisions.

While rendering a decision of unconstitutionality immediately invalidates the statute, a statute ruled unconstitutional in a decision of nonconformity to the Constitution continues to exist in formality. Therefore, the decision of nonconformity to the Constitution accompanies the duty of the legislative branch to amend the legislation for eliminating the unconstitutional elements at the earliest time possible, and the Constitutional Court determines whether to order its continued application until the legislature amends it. If the Constitutional Court orders the immediate suspension of its application, its application is suspended until the legislature eliminates the unconstitutionality by amending the legislation, and the infringed right of the complainant can be remedied by the retroactive application of the amended law. On the other hand, if the Constitutional Court orders the temporary application of the law declared nonconforming to the Constitution, the provision continues to be applied by the government.

Notably, since the Fourth Term Court (from 2006 to 2012), the Court has imposed a deadline by which the legislature shall revise the law declared nonconforming to the Constitution and often used the expression in the text of its decision that the provision at issue shall be invalidated if the deadline lapses. In this way, the legislatures' duty of legislative amendment is obligated not only in terms of content but also of time frame.

(3) Response of the National Assembly to Decisions of Nonconforming to the Constitution

When the first decision of nonconforming to the Constitution was made, it was not immediately received well by the National Assembly. Some members raised doubts about whether or not a decision of nonconformity to the Constitution not grounded on an express provision can be recognized and whether and to what extent it is binding. Also, there were concerns that it could be seen as an excessive interference with the legislative power. However, the National Assembly recognized without much disagreement the effect of the decision of nonconformity to the Constitution at the plenary meeting on April 23, 1991 out of respect for the decision rendered by the

Constitutional Court. The Minister of the responsible Ministry of Justice who was also at the meeting accepted the nonconformity decision as it is, emphasizing that "the provision at issue shall be amended by the end of May 1991" in accordance with the first nonconformity decision issued by the Constitutional Court. Since then, the decision of nonconforming to the Constitution has taken root as one of the main types of decisions by which the Constitutional Court and the National Assembly achieve constitutionalism in a complementary and mutually cooperative manner.

Presently, the National Assembly acts swiftly and proactively in amending unconstitutional legislation to bring it into line with the nonconformity decision. The Speaker of the National Assembly has recently made a comment highlighting the need to swiftly amend legislation in accordance with the decision of nonconforming to the Constitution at the opening ceremony of an extraordinary session.

The National Assembly seems to show an increasing tendency to enact amended legislation in strict observance of the intent and content of the nonconformity decision. There are about 20 cases where a provision amended by the National Assembly after the nonconformity decision became subject to constitutional review by the Constitutional Court. Except for only a few cases, most of them were ruled constitutional. This suggests that the National Assembly amends legislation in full observance of the intent of the nonconformity decisions and the Constitutional Court, in turn, respects the legislation amended by the National Assembly.

In addition, the National Assembly finds it beneficial to amend the law on a sharply divided and politically charged issue "in line with the intent behind the decision of nonconformity to the Constitution" as it helps to eliminate the possibility of further political conflicts and save time and money that would otherwise be spent in a political debate. Particularly, the decision of nonconforming to the Constitution which specifies a deadline for legislative amendment in the text puts time pressure on the National Assembly to be more driven to act swiftly in enacting a revised law on an issue that is likely to face political stalemate.

The decision of nonconformity to the Constitution continued to raise awareness in the National Assembly about the need to promptly amend the law declared nonconforming to the Constitution and gave rise to a sense of constitutionalism in the overall legislative process of enactment and

amendment. The frequency of the usage of the terms such as nonconforming to the Constitution and unconstitutional has surged at meetings in the National Assembly and the National Assembly increasingly conducts preliminary review of constitutionality of laws. Such a complementary and mutually-cooperative relationship between the Constitutional Court and the National Assembly built through a decision of nonconformity to the Constitution contributes to securing normative power of the Constitution and realizing constitutionalism.

D. Prospects and Challenges

The Constitutional Court of Korea has introduced and used from the start modified decisions to deliver effective constitutional review.

Among different types of modified decisions, a decision of nonconforming to the Constitution can particularly be seen as a dialogue between the Constitutional Court and the National Assembly to realize constitutionalism. The decision of nonconforming to the Constitution allows the National Assembly to relatively easily address an issue that is impossible or substantially impracticable to be resolved through political solution. Furthermore, instead of carrying the burden of possibly creating legal confusion caused by rendering a decision of simple unconstitutionality and thus immediately invalidating the law, the Constitutional Court can delegate to the National Assembly the task of improving the legislation, ultimately leading to a more appropriate amendment to the challenged legislation. This could be seen as the Constitutional Court sharing some of the functions of the National Assembly to solve social conflicts. Such a trend is likely to continue for some time. Therefore, the Constitutional Court needs to study further and refine types of decisions in constitutional review cases.

5. Conclusion

For the past thirty three years since its birth, the Constitutional Court of Korea has adjudicated numerous cases of constitutional review to guarantee citizens' fundamental rights and control the abuse of state power, therefore actively contributing to the task of realizing constitutional ideas and values in Korean society. In the process, the scope of matters subject to constitutional review has been expanded and various types of decisions have been identified and established.

However, we have recently seen an increasing demand for exercising new forms of state power, different from the traditional forms of state power based on law, and concerns are growing over a possible vacuum in constitutional control. Also, due to the political failure to find adequate solutions through dialogue and compromise, more and more highly influential political, economic and social issues are presented to the Constitutional Court for judicial review. Consequently, the Constitutional Court is increasingly asked to resolve deeply divided and controversial issues through the exercise of constitutional review. This trend is often referred to as the judicialization of politics or the politicization of judiciary.

Furthermore, under the model of the modern constitutional state, the legislature enacts laws, the executive branch enforces them and the judiciary reviews them thereafter. However, what we are witnessing is that this order and their roles get mixed up. While there may be many reasons as to why this is happening, it has to do with the fact that society is changing faster than it was and the legislature's ability to solve problems has weakened. This trend is probably not confined to Korea but is a global phenomenon. In a situation where the model of the modern constitutional state which forms the basis of the constitutional review system needs to take stock of itself and prepare for a new leap forward, I hope that the exchange of knowledge and experiences among constitutional review bodies of different countries will help us get to a solution as to what role constitutional review should play.

LEGAL POSITIONS OF THE BODY OF CONSTITUTIONAL CONTROL OF THE KYRGYZ REPUBLIC ON THE PROTECTION OF CONSTITUTIONAL RIGHTS AND FREEDOMS OF CITIZENS IN THE INFORMATIZATION OF VARIOUS SPHERES OF PUBLIC LIFE

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The rapid development and implementation of information technologies in social life gave impetus to the emergence of various social legal relations, including relations affecting the sphere of protection and implementation of the constitutional rights and freedoms of citizens.

Quite debatable in the period of global access to information, including personal data, is the degree of observance of the right to respect for private life and freedom of speech. Thanks to the Internet and the development of social networks, the possibility of human rights violations in this area has also increased many times over.

The trend towards digitalization of all social processes, including law, is pushing for the emergence of fundamentally new subjects and objects of law. In the process of evolution of social relations, more and more new rights appear in various spheres of social life. Such an evolution shows the following dynamics in the development of generations of human rights: the right to life - the right to die (recognition of euthanasia) - the right to be forgotten. The last right is the right that allows a person to demand, under certain conditions, the removal of information about him from the search results by name of a person. First, this concerns links to data that can harm him[1]. Information that is outdated, irrelevant, incomplete, inaccurate or redundant information whose legal basis for keeping has disappeared over

[1] N.V. Kravchuk, THE RIGHT TO BE FORGETTEN: THE INTERNET AND HUMAN RIGHTS ISSUES.

time. Such a right is a product of informatization (digitization) of public relations.

In Kyrgyzstan, the right to be forgotten is legally enshrined[2]. Therefore, if the subject of personal data reveals their unreliability or disputes the legality of actions in relation to his personal data, he has the right to demand that the holder (possessor) block this data.

With the emergence of new rights in connection with the introduction of digitalization into public relations, is it necessary to assume that a new generation of rights has arisen that requires thorough study and analysis? Global access to information, including personal data, carries certain risks of violating the right to respect for a person's private life. At the same time, the right to be forgotten may conflict with such fundamental rights as freedom of speech and freedom of access to information. Accordingly, a conflict of constitutional values arises, which in each case have their own priority.

It should be noted that most of the legal instruments in the field of human rights protection were adopted long before the start of the rapid informatization of all areas of human life. Therefore, the provisions on the fundamental rights of man and citizen should be fully applicable to social relations that are taking shape in connection with the development of information technology.

The body of constitutional control in the course of its activities also resolves disputes related to the violation of constitutional rights when introducing new technologies into public life. The Constitutional Court of the Kyrgyz Republic has already considered and, over time, may have to consider more cases related to the protection of constitutional rights and freedoms against the background of the rapid pace of development of digital technologies.

For example, in 2015, the Constitutional Court challenged the constitutionality of the norms of the Law of the Kyrgyz Republic "On Biometric Registration of Citizens of the Kyrgyz Republic"[3].

[2] Law of the Kyrgyz Republic «On Personal Information» dated April 14, 2008 N 58.

[3] Decision of the Constitutional Chamber of the Supreme Court of the Kyrgyz Republic dated September 14, 2015, on the case of checking the constitutionality of part 1, paragraph 2 of part 2 of Article 2, paragraph 3 of Article 3, paragraphs 1, 2 of Article 4, parts 1, 2 of Article 5, parts 1, 3 articles 6, articles 7 of the Law of the Kyrgyz Republic "On biometric registration of citizens of the Kyrgyz Republic".

In this case, the submitting party noted that biometric data reflect the individual physical characteristics of a person, inherent only to him and allowing him to be identified, and thus, are information about the private life of a person, the protection of which is guaranteed by the Constitution of the Kyrgyz Republic. The principle of mandatory biometric registration implies the possibility of coercion to surrender biometric data, coercion, in turn, opens up the possibility of physical violence, since the surrender of biometric data is impossible without the participation of the biometric data carrier, which contradicts the constitutional ban on the collection, storage, use and dissemination of confidential information, information about the private life of a person without his consent. In addition, the Applicant believed that the contested norms allow the unlawful collection of confidential information about a person without his consent, as well as without an appropriate court decision, while the biometric data of citizens are personal data and are subject to the guarantees and principles of privacy laid down in the Constitution of the Kyrgyz Republic. Republic.

The subject of the petition also noted that the contested norms encroach on the right to independently determine one's personal data guaranteed by the Constitution of the Kyrgyz Republic. The applicant considered that no legislative act could oblige citizens to provide their personal data on a mandatory basis and no state body has the right to require citizens to provide their personal data, since the Constitution of the Kyrgyz Republic does not allow the establishment of restrictions on rights and freedoms for other purposes and to a greater extent than provided by the Constitution of the Kyrgyz Republic.

Determining its legal position, the Constitutional Court in this case noted that human rights and freedoms are the highest value, they act directly; determine the meaning and content of the activities of the legislative, executive and local governments. All this fully applies to the constitutional rights to personal integrity and privacy. The Constitution of the Kyrgyz Republic prohibits the collection, storage, use and dissemination of confidential information, information about the private life of a person without his consent, except in cases established by law. This prohibition is supported by a guarantee of privacy protection, including judicial protection, in case of illegal collection, storage, distribution of confidential information, information about a person's private life, as well as the right to compensation for material and moral damage caused by illegal actions.

The concept of "private life" refers to the sphere of a person's personal discretion, which, from a legal point of view, is a value of an intangible nature, subject to protection by law from arbitrary encroachments from outside, including from the state, by establishing the boundaries of permissible, legitimate intrusion. Legal protection of the right to privacy is realized primarily through the establishment of constitutional guarantees. The level of guarantee and observance of the inviolability of the private life of citizens determines the degree of freedom of the individual in the state, the democracy and humanity of the constitutional order existing in it.

Cases of possible state interference in the exercise of this right are allowed only on the basis of the law, and solely for the purpose of protecting national security and public order, protecting the health and morals of the population, protecting the rights and freedoms of others. In turn, the introduction of such a mechanism as biometric registration of citizens, which provides for the collection, storage, use and dissemination of biometric data, should be proportionate to the specified constitutional goals.

International standards for the admissibility of restrictions include the following elements: restrictions must be imposed by national law; they must be necessary in a democratic society; they must serve one of the legitimate purposes set out in each of the limitation clauses of the International Covenant on Civil and Political Rights. Thus, among the requirements for the possible restriction of human and civil rights, they establish a mandatory legislative form of the imposed restrictions and thereby prohibit the adoption for these purposes of other types of regulatory legal acts that provide for restrictive measures. At the same time, the legislative act, directly developing, concretizing the fundamental constitutional provisions, clarifying their meaning and content, should not go beyond the limits allowed by the Constitution of the Kyrgyz Republic.

The Constitutional Court noted that the biometric registration of citizens is a procedure for collecting biometric data of citizens with the subsequent storage of these data in an updated database. Biometric data is information that characterizes the physiological characteristics of a person, based on which his identity can be established (digital graphic image of the face, graphic structure of papillary finger patterns, image of the iris and other biometric data). Human identification using biometric data, as an achievement of modern science and technology, is increasingly recognized

in many countries of the world and international organizations and is an important means of ensuring national security.

Since the main mission of introducing the mandatory use of biometric data for identifying a person was participation in the electoral processes taking place in Kyrgyzstan, the Constitutional Court in its decision noted that elections, as the basis of the constitutional order in the sphere of organization and functioning of state power, are an object of national security. The periodic holding of elections of representative bodies acts as a guarantor of the timely reproduction of the institutions of state power and local self-government and ensures the stability of the constitutional order.

Elections serve as an indicator of people's trust in power and the most important way of its legitimation. At the same time, due to the socio-political significance of the elections, they can become the object of illegal aspirations of various groups and individuals aimed at falsifying the election results by manipulating voters, which, as the recent history of the country shows, can lead to various social-political upheavals that could damage the national security of the Kyrgyz Republic. Therefore, the state has the right to develop and use various tools to ensure transparency, honesty and fairness of the elections. One such tool may be the use of new technologies in compiling an up-to-date list of voters.

The issues of ensuring national security also include the exclusion of the possibility of using fake identity documents issued to citizens of the Kyrgyz Republic. Official documents that are not protected from forgery pose a significant threat to the security of any state. Such a threat implies the possibility of using forged documents to commit illegal actions by both citizens of the Kyrgyz Republic and foreign citizens.

Thus, the biometric registration of citizens for the purpose of timely registration of citizens and the issuance of identification documents, as well as the compilation of an updated voter list, as an integral part of the electoral process that can ensure fair, free and transparent elections, is a proportionate restriction of the right to privacy, in the framework of ensuring protecting the national security of the state.

The Constitutional Court, taking into account the above, the requirement for mandatory biometric registration of citizens, established by the Law of the Kyrgyz Republic "On Biometric Registration of Citizens of the Kyrgyz Republic", noted that such requirements are aimed at satisfying

both the interests of citizens and the public interests of society, and such a restriction of the right is proportional and proportionate, adopted within the limits of constitutional requirements.

On the whole, while recognizing as constitutional the restrictions established in the contested law, the Constitutional Court nevertheless sent the legislator an appropriate message, noting that the so-called other tasks defined in the challenged norm, despite their state and social significance, are of an unacceptably generalized nature, that is unacceptable when restricting the rights and freedoms of man and citizen, guaranteed by the Constitution of the Kyrgyz Republic. These tasks, in essence, are the goals of the contested Law, which are supposed to be achieved through the creation of an updated database of citizens of the Kyrgyz Republic using biometric data.

Determination of the qualitative and quantitative composition of citizens of the Kyrgyz Republic residing on the territory of the Kyrgyz Republic and beyond its borders; effective fight against crime, illegal migration, terrorism and human trafficking; timely and high-quality provision of services to the population do not fully disclose the intentions of the state, do not contain detailed provisions defining the procedure for using the biometric database to achieve the tasks (goals) of the Law established by part 2 of Article 2 of the Law.

In this regard, the legislator should make appropriate changes to the Law of the Kyrgyz Republic "On Biometric Registration of Citizens of the Kyrgyz Republic", defining the precise and clear goals of this Law, as well as mechanisms for achieving them. At the same time, the legislator must correctly use legal terminology in the legislative process in order to eliminate ambiguity and ambiguous understanding of the provisions of the Law. When creating state information systems, the following conditions must be observed: fixing the biometric data of citizens without humiliating the dignity of the individual and causing harm to health; exclusion of the possibility of illegal reproduction, use and distribution of biometric data of citizens; ensuring the confidentiality and security of information contained in the state information system, and limiting this information to only those information that is necessary to verify the authenticity of new generation identification documents.

Moreover, the Constitutional Court noted that biometric data is a

particularly sensitive category of personal data, the illegal use of which poses a threat and can significantly harm the rights and legitimate interests of the subjects of this data. Accordingly, the authorized state body in charge of the collection, storage, use and dissemination of biometric data must ensure strict compliance with the requirements of relevant laws to prevent unauthorized access to the database.

In addition, the Constitutional Court drew attention to the norm of the contested Law providing for obtaining information on biometric data without the consent of the subject in cases provided for by the legislation of the Kyrgyz Republic, and noted that the contested norm of the law would not contradict the Constitution of the Kyrgyz Republic, under the condition that the term "legislation" refers only to the laws of the Kyrgyz Republic. A different understanding of the contested norms of the Law may lead to a violation of the constitutional guarantee of ensuring the security of personal data, constitutional rights and freedoms of a person and a citizen. In connection with the above, the Constitutional Court recommended that the legislator, in order to eliminate ambiguity in the understanding and application of the contested norms, introduce appropriate amendments to the Law of the Kyrgyz Republic "On Biometric Registration of Citizens of the Kyrgyz Republic".

One of the cases considered by the body of constitutional control in the field of protecting the constitutional rights and freedoms of citizens in the informatization of public life is the case on the verification of the constitutionality of the norms of the Law "On Electric and Postal Communications", the Law "On Investigative Activities" and the Government's decree in connection with by a company engaged in the production of electrical signaling and other communication equipment. The decision on this case was made on April 22, 2015[4].

The subject of consideration by the body of constitutional control in this case were the regulatory provisions of the Law "On Operative-Search Activities", which established that the list of types of special technical means intended for secretly obtaining information in the process of carrying out operational-search activities, as well as the procedure for their use are determined by the Government. Besides, the subject of consideration

[4] The decision of the Constitutional Chamber of the Supreme Court of April 22, 2015 on the case of checking the constitutionality of the provisions of the Law "On Electric and Postal Communications", the Law "On Operational-Investigative Activities".

was the provision of the Law "On operational-investigative activities", which stated that operational-investigative activities related to the use of a communication network are technically carried out by national security agencies in the manner determined by the Government, as well as the provision of this Law, establishing the obligation of telecom operators and limiting the rights of users of communication services during the conduct of operational-investigative activities and the implementation of investigative actions. Also in this case the Decree of the Government of the Kyrgyz Republic "On Approval of the Instruction on the Procedure for Interaction of Telecommunication Operators and Mobile Cellular Operators with State Bodies of the Kyrgyz Republic Carrying out Operative and Investigative Activities" was contested in the form of a regulatory legal act, which involved checking the authority of the Government to adopt the contested act.

To substantiate his claims, the Applicant argued that the Parliament, by using the term "legislation" in the contested norm, admitted the possibility of restricting the constitutional rights of a person and a citizen by subordinate legislation which included in the legislation system of the Kyrgyz Republic, thereby creating conditions for an arbitrary illegal intrusion of operational search services to private life, which is a violation of the provisions of the Constitution. According to the applicant, any cases of interference with a person's private life, including the collection, storage and use of information about it, as a restrictive measure, should be established exclusively by laws.

The subject of the appeal also argues that the Instruction, approved by the contested resolution, imposes on the mobile operator an unlawful burden to acquire, ensure the installation, operation, assembling, further maintenance and timely updating of the software of the technical means of the operational-search activities support system (TS SORM) on its own networks and communication channels at its own expense. Thus, the state normatively fixes the obligation of business to install technical equipment at its own expense, intended for secret obtaining of information about communication subscribers and the communication services they receive. The acquisition of SORM TS at the expense of the telecom operator implies its ownership of them, however, based on the purpose of this equipment and the obligations imposed by the Instruction on the telecom operator, the latter cannot exercise the owner's powers - to possess, receive benefits and

determine the legal fate of SORM TS. Such a provision, in the applicant's opinion, violates the right of inviolability of property guaranteed by the Constitution.

The Constitutional Chamber, having considered this case, recognized the contested normative provisions of the Law "On Investigative Activities", the Law "On Electricity and Postal Communications" as not contradicting parts 1, 2, 3 of Article 29 of the Constitution on the following grounds.

The right to privacy of correspondence, telephone and other conversations, postal, telegraphic, electronic and other communications is not an absolute right and may be subject to restrictions allowed only in accordance with the law and solely on the basis of a judicial act. At the same time, the requirements of Part 2 of Article 20 of the Constitution predetermine the criteria for the imposed restrictions, which must be proportionate to the goals of protecting national security, public order, protecting the health and morals of the population, protecting the rights and freedoms of others.

Thus, the right of the legislator to restrict the secrecy of correspondence, telephone conversations, postal, telegraphic and other communications is ensured in the Kyrgyz Republic in accordance with the Constitution and in accordance with the generally recognized principles and norms of international law; legal restrictions must be introduced by law, which establishes the limits, grounds, conditions and procedure for its implementation; interference of executive authorities with the right to secrecy of correspondence, telephone conversations, postal, telegraphic and other communications is allowed on the basis of the law and by a court decision; restriction of the right to secrecy of correspondence, telephone conversations, postal, telegraphic and other communications is carried out for generally significant constitutional purposes.

In terms of its goals, objectives, methods of their solution, operational-search activity is objectively connected with the need to limit the constitutional rights of the individual involved in the scope of its implementation.

The normative provisions of the Law "On Operative-Search Activities" being checked for constitutionality do not contain any provisions that could be regarded as violating the right to private life, including the

right to privacy of correspondence, telephone and other conversations, postal, telegraph, electronic and other communications. Accordingly, based on the specifics of the use of special technical means, there is no need for substantive regulation of this issue by laws; such legal regulation can be carried out at the level of subordinate rule making.

The illegal use of special technical means designed to secretly obtain information, due to their inherent properties, provides an opportunity to seriously intrude into the sphere of an individual's private life, which is vulnerable to external interference, without his consent and leads to a violation of the individual's rights guaranteed by Article 29 of the Constitution. In this regard, the Government is obliged to regulate the development, production, sale and acquisition of special technical means, the procedure for their registration and accounting, determine their technical characteristics and parameters in order to exclude their illegal use, and thereby damage the security of the state, human rights and freedoms.

Based on the fact that the use of SORM TS requires coordinated actions of the authorized body and the telecom operator, the specification and detailing of the specifics of their interaction can be regulated by subordinate regulatory legal acts, including the development of technical regulations, the distribution of areas of responsibility, and the solution of other technical issues. Such a legal regulation was carried out by the Government through the adoption of a resolution "On approval of the Instruction on the procedure for the interaction of telecommunications and mobile cellular operators with state bodies of the Kyrgyz Republic engaged in operational-search activities".

The assignment to the national security bodies of the technical implementation of operational-search activities in networks and communication channels is predetermined by the need to establish a single body responsible for the installation, use and safety of software, its maintenance and normal operation, and most importantly, ensuring the rule of law and maintaining secrecy during operational search activities.

The duty of a cellular operator to provide the necessary information arising from the contested norm of the Law of the Kyrgyz Republic "On Electricity and Postal Communications" is conditioned by the tasks of operational-search activity. At the same time, the activities of authorized state bodies should proceed exclusively in the manner and forms provided

for by law, as well as within the limits of competence determined by law. Consequently, any actions, including the solicitation and withdrawal of information, affecting the legally protected secrecy of correspondence, telephone and other conversations, telegraph and other messages transmitted over electric communication networks, are allowed for strictly established purposes and solely on the basis of a judicial act. The challenged norm is the initial legal basis on the basis of which subordinate normative legal acts regulating the rules and procedures for the interaction of a telecom operator with authorized bodies can be developed and adopted. At the same time, this norm does not cancel the constitutional requirement that a judicial act is necessary for the implementation of operational-search measures affecting human rights guaranteed by the Constitution.

The next decision of the body of constitutional control of the Kyrgyz Republic was on the issue of open indication of information about ethnicity on the electronic chip of the passport of a citizen of the Kyrgyz Republic of the 2017 sample (ID-card), approved by the Decree of the Government of the Kyrgyz Republic[5].

The subject of the appeal noted in his petition that in the contested Regulations, a separate column describing the ethnicity (nationality) of a citizen in passports, information about ethnicity, is not indicated openly and the content of the information "ethnicity" on the electronic chip is indicated at the request of the applicant. The invoking party noted that, in accordance with the Constitution of the Kyrgyz Republic, every person and citizen enjoys the constitutional right to freely determine and indicate their ethnicity. The exclusion of the column indicating the nationality of a citizen in the new passport of 2017 is not only a violation of human and civil rights, but also a policy against the Kyrgyz nation.

The Constitutional Court, substantiating its legal position, noted the following. The Declaration on State Sovereignty of the Republic of Kyrgyzstan of December 15, 1990 proclaimed that the citizens of

[5] The decision of the Constitutional Chamber of the Supreme Court of the Kyrgyz Republic dated October 14, 2020 on the case on the verification of the constitutionality of paragraph 3 of the Regulations on the identification card - passport of a citizen of the Kyrgyz Republic of the sample of 2017 (ID-card), approved by the Decree of the Government of the Kyrgyz Republic dated April 3, 2017 No. 197 " On an identification card - a passport of a citizen of the Kyrgyz Republic of the sample of 2017 (ID-card)", in which information about ethnicity is not indicated openly and the content of the information "ethnicity (at the request of the applicant)" on an electronic chip.

the republic of all nationalities constitute the people of the Republic of Kyrgyzstan, which is the only source of state power in the republic.

Being a logical continuation of the will of the people, the Constitution of the Kyrgyz Republic in its preamble established the basic principles on which all subsequent constitutional provisions are based, emphasizing the importance of the unity of the people in strengthening the Kyrgyz statehood and state sovereignty.

At the same time, the awareness by the citizens of the country of their belonging to a single state does not exclude the right of everyone to a social identity.

Social identity is the perception of oneself as a member of a certain group, a sense of belonging and emotional attachment to it. One of the varieties of the social identity of the individual is ethnicity, that is, a person's awareness of himself as a representative of a particular ethnic group.

Ethnicity is set together with birth, the ability to speak the native language, cultural environment and other phenomena, due to which the individual becomes characteristic of the accompanying ethnicity signs such as language, name, idea of a common origin, attachment to a certain territory, religion, common system of values, group solidarity, on the basis of which outsiders easily attribute the individual.

The task of the state in these conditions is to form in society a respectful attitude towards the original culture, native language, the originality of the customs and traditions of people of any ethnic community, as well as to eradicate ethnic prejudices, create conditions for self-determination and self-realization of the individual in the matter of ethnicity, ensuring autonomy and independence of his will.

At the same time, the Constitutional Court noted that, under no circumstances, ethnicity can serve as a basis both for granting a person any privileges, and for restricting his rights, because the Constitution of the Kyrgyz Republic establishes the unconditional equality of the rights and freedoms of a person and a citizen, regardless, among other things, from the fact of ethnicity. This guarantee is provided by the liability provided for by law for violation of the principle of equality depending on gender, race, nationality, language, disability, ethnicity, religion, age, political or other opinions, education, origin, property or other status.

In accordance with the Constitution of the Kyrgyz Republic, everyone has the right to freely determine and indicate their ethnicity. In other words, everyone is given the right, at their own discretion, firstly, to determine, and secondly, to indicate their ethnicity in a document relating to a given person, or to completely refuse to indicate it.

In its meaning and content, the constitutional provision on the right to determine one's ethnicity freely means a conscious act of self-determination of a person, attributing oneself to a certain ethnic community, as well as the ability to choose one's own cultural identity and the right to satisfy the interests and demands associated with ethnicity.

Under such permission as "freely indicate", the Constitution of the Kyrgyz Republic sees the need to provide everyone, as a form of personal expression, with the right to publicize, freely express and disseminate information about their ethnicity in any publicly available sources, including official documents relating to a particular person.

Meanwhile, the constitutional and legal meaning of the granted right lies not only in the ability of a person to determine or not to determine, indicate or not indicate his ethnicity for various legally significant purposes, but also completely refuse to determine and indicate his ethnicity, or give it form of restricted access.

At the same time, the Constitution of the Kyrgyz Republic establishes the fundamental inadmissibility of coercion to determine and indicate a person's ethnicity. In general, this article imperatively makes the official recording of information about the ethnicity of an individual in any documents issued for the purpose of his identification dependent on his will.

Moreover, in order to strictly enforce the prohibition of coercion to identify and indicate an individual's ethnicity, the Constitution of the Kyrgyz Republic classified it as absolute and not subject to any changes. This means that the freedom to choose one's ethnicity, to make it public, is the exclusive privilege of every person and the state cannot force him to such a choice or exert any other influence on him.

National passports of citizens of the Kyrgyz Republic are documents proving the identity of citizens of the Kyrgyz Republic and confirmed by an embedded electronic chip, which is an integral part of the passport.

The norm of the Regulation disputed by the appealing party establishes a list of information to be included in the ID card. At the same time, information is divided into two categories: in text form and on an electronic chip. Information relating to ethnicity, at the request of the applicant, is included in the content of the electronic chip.

An electronic chip is a numerical integrated processor (electronic microcircuit) built into an identification card - a 2017 sample passport that allows the recording, processing and storage of the applicant's personal and biometric data by the authorized body for the implementation state policy in the field of population registration and acts of civil status. That is, the inclusion of information about ethnicity in an electronic chip means the use of cryptographic technologies in order to restrict access to the information contained in it, which is possible only at the will of the person himself who wants to determine his ethnicity, but indicate it in private. In other words, if the applicant wishes to include information about his ethnicity in an electronic chip, that is, to keep this information in a restricted access mode, is one of the forms of exercising the constitutional right to freedom of definition and indication of his ethnicity and cannot contradict the Constitution of the Kyrgyz Republic.

However, at the same time, not providing the opportunity to indicate information about ethnicity in text form in the ID-card, if the applicant himself wishes, means a direct violation of the right to make public or otherwise disseminate information about his ethnicity, including in the ID-card, proving the identity of a particular person. That is, it violates the guarantees provided by the Constitution of the Kyrgyz Republic on the right of everyone to freely determine and indicate their ethnicity.

The Constitutional Court also pointed out to the rule maker that in the process of bringing the contested act in line with constitutional requirements, it should be borne in mind that, by virtue of the norms of the Constitution of the Kyrgyz Republic, the existing ban on any form of coercion to determine and indicate the ethnicity of a person and citizen cannot be limited.

Thus, at present, all countries of the world to some extent carry out the process of informatization, in which there are both advantages and disadvantages. Most importantly, it is necessary to properly implement it in public life in terms of ensuring and protecting the fundamental rights and freedoms of man and citizen.

ПРАВОВЫЕ ПОЗИЦИИ ОРГАНА КОНСТИТУЦИОННОГО КОНТРОЛЯ КЫРГЫЗСКОЙ РЕСПУБЛИКИ ПО ВОПРОСАМ ЗАЩИТЫ КОНСТИТУЦИОННЫХ ПРАВ И СВОБОД ГРАЖДАН ПРИ ИНФОРМАТИЗАЦИИ РАЗЛИЧНЫХ СФЕР ОБЩЕСТВЕННОЙ ЖИЗНИ

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Бурное развитие и внедрение информационных технологий в социальную жизнь послужило толчком для возникновения различных общественных правоотношений, в том числе отношений, затрагивающих сферу защиты и реализации конституционных прав и свобод граждан.

Достаточно дискуссионным в период глобального доступа к информации, в том числе к персональным данным, является степень соблюдения права на уважение частной жизни и свободы слова. Благодаря интернету и развитию социальных сетей возможности нарушения прав человека в этой сфере также возросли в многократном размере.

Тенденция на цифровизацию всех общественных процессов, в том числе и права, толкает на появление принципиально новых субъектов и объектов права. В процессе эволюции общественных отношений появляются все новые права в различных сферах жизни социума. Такая эволюция показывает следующую динамику развития поколений прав человека: право на жизнь –право на смерть (признание эвтаназии) - право на забвение. Последнее право – это право позволяющее человеку потребовать при определенных условиях удаления информации о нем из результатов поиска по имени лица. В первую очередь это касается ссылок на те данные, которые могут нанести ему вред[1]. Имеются в виде устаревшие, неуместные,

[1] Н.В. Кравчук, ПРАВО НА ЗАБВЕНИЕ: ИНТЕРНЕТ И ПРОБЛЕМЫ ПРАВ ЧЕЛОВЕКА.

неполные, неточная или избыточная информация, законные основания для хранения которой исчезли с течением времени. Такое право является продуктом информатизации (цифровизации) общественных отношений.

В Кыргызстане право на забвение законодательно закреплено[2]. Так, в случае если субъект персональных данных выявляет их недостоверность или оспаривает правомерность действий в отношении его персональных данных, он вправе потребовать от держателя (обладателя) заблокировать эти данные.

С появлением новых прав в связи внедрением цифровизации в общественные отношения нужно ли полагать, что возникло новое поколение прав, которое требует основательного изучения и анализа? Глобальный доступ к информации, в том числе к персональным данным, несет определенные риски нарушения права на уважение частной жизни человека. В то же время право на забвение может противоречить таким фундаментальным правам человека, как свобода слова и свобода доступа к информации. Соответственно, возникает конфликт конституционных ценностей, которые в каждом конкретном случае имеют свой приоритет.

Надо отметить, что большинство правовых инструментов в области защиты прав человека были приняты задолго до начала стремительной информатизации всех областей человеческой жизни. Поэтому положения о фундаментальных правах человека и гражданина полностью должны быть применимы к общественным отношениям, которые складываются в связи с развитием информационных технологий.

Орган конституционного контроля в процессе своей деятельности также разрешает споры, связанные с нарушением конституционных прав при внедрении новых технологий в общественную жизнь. Конституционный суд Кыргызской Республики уже рассмотрел и со временем, возможно, придётся больше рассматривать дела, связанные с защитой конституционных прав и свобод на фоне быстрого темпа развития цифровых технологий.

Так, например, 2015 году в Конституционном суде оспаривались на конституционность нормы Закона Кыргызской Республики «О

[2] Закон КР «Об информации персонального характера» от 14 апреля 2008 года N 58.

биометрической регистрации граждан Кыргызской Республики»[3].

По данному делу обращающая сторона отмечала, что биометрические данные отражают индивидуальные физические особенности человека, присущие только ему и позволяющие идентифицировать его, и тем самым, являются сведениями о частной жизни человека, защита которой гарантируется Конституцией Кыргызской Республики. Принцип обязательной биометрической регистрации подразумевает возможность принуждения к сдаче биометрических данных, принуждение, в свою очередь, открывает возможность физического насилия, так как сдача биометрических данных невозможна без участия носителя биометрических данных, что противоречит конституционному запрету сбора, хранения, использования и распространения конфиденциальной информации, информации о частной жизни человека без его согласия. Кроме того, заявитель полагал, что оспариваемые нормы допускают неправомерный сбор конфиденциальной информации о человеке без его согласия, а также без соответствующего судебного решения, тогда как биометрические данные граждан являются персональными данными и на них распространяются гарантии и принципы неприкосновенности частной жизни, заложенные в Конституции Кыргызской Республики.

Субъект обращения также отмечал, что оспариваемые нормы посягают на право самостоятельного определения своих личных данных, гарантируемых Конституцией Кыргызской Республики. Заявитель считал, что никакой законодательный акт не может налагать обязанность на граждан предоставлять свои персональные данные в обязательном порядке и ни один государственный орган не вправе требовать от граждан обязательного предоставления своих персональных данных, поскольку Конституция Кыргызской Республики не допускает установления ограничений прав и свобод в иных целях и в большей степени, чем это предусмотрено Конституцией Кыргызской Республики.

Определяя свою правовую позицию Конституционный

[3] Решение Конституционной палаты Верховного суда Кыргызской Республики от 14 сентября 2015 года, по делу о проверке конституционности части 1, пункта 2 части 2 статьи 2, абзаца 3 статьи 3, пунктов 1, 2 статьи 4, частей 1, 2 статьи 5, частей 1, 3 статьи 6, статьи 7 Закона Кыргызской Республики «О биометрической регистрации граждан Кыргызской Республики».

суд по данному делу отметил, что права и свободы человека являются высшей ценностью, они действуют непосредственно, определяют смысл и содержание деятельности законодательной, исполнительной власти и органов местного самоуправления. Все это в полной мере относится к конституционным правам на личную неприкосновенность и неприкосновенность частной жизни. Конституцией Кыргызской Республики запрещается сбор, хранение, использование и распространение конфиденциальной информации, информации о частной жизни человека без его согласия, кроме случаев, установленных законом. Данный запрет подкрепляется гарантией защиты частной жизни, в том числе судебной, в случае неправомерного сбора, хранения, распространения конфиденциальной информации, информации о частной жизни человека, а также правом на возмещение материального и морального вреда, причиненного неправомерными действиями.

Понятие «частная жизнь» относится к сфере личного усмотрения человека, которая с правовой точки зрения является ценностью нематериального характера, подлежащей защите законом от произвольных посягательств извне, в том числе и со стороны государства, путем установления границы допустимого, легитимного вторжения. Правовая охрана права на неприкосновенность частной жизни реализуется, прежде всего, через установление конституционных гарантий. От уровня гарантированности и соблюдения неприкосновенности частной жизни граждан определяется степень свободы личности в государстве, демократичности и гуманности существующего в нем конституционного строя.

Случаи возможного вмешательства государства в осуществление этого права допускаются только на основании закона, и исключительно в целях защиты национальной безопасности и общественного порядка, охраны здоровья и нравственности населения, защиты прав и свобод других лиц. В свою очередь, введение такого механизма как биометрическая регистрация граждан, предусматривающая сбор, хранение, использование и распространение биометрических данных, должно быть соразмерным указанным конституционным целям.

Международные стандарты допустимости правоограничений

включают в себя следующие элементы: ограничения должны налагаться национальным законом; они должны быть необходимы в демократическом обществе; они должны служить одной из законных целей, изложенных в каждом из положений об ограничениях Международного пакта о гражданских и политических правах. Таким образом, в числе требований к возможному ограничению прав человека и гражданина устанавливают обязательную законодательную форму вводимых ограничений и тем самым запрещают принятие в этих целях иных видов нормативных правовых актов, предусматривающих ограничительные меры. При этом законодательный акт, непосредственно развивая, конкретизируя основополагающие конституционные положения, уточняя их значение и содержание, не должен выходить за пределы, допускаемые Конституцией Кыргызской Республики.

Конституционный суд отметил, что биометрическая регистрация граждан представляет собой процедуру сбора биометрических данных граждан с последующим хранением этих данных в актуализированной базе. Биометрические данные представляют собой сведения, которые характеризуют физиологические особенности человека, на основе которых можно установить его личность (цифровое графическое изображение лица, графическое строение папиллярных узоров пальцев, изображение радужной оболочки глаз и другие биометрические данные). Идентификация человека с использованием биометрических данных, как достижение современной науки и технологий, получает все большее признание во многих странах мира и международных организациях и является важным средством обеспечения национальной безопасности.

Поскольку основная миссия внедрения обязательного использования биометрических данных для идентификации человека было участие в избирательных процессах, проходящих в Кыргызстане, Конституционных суд в своем решении отметил что выборы как основа конституционного строя в сфере организации и функционирования государственной власти являются объектом национальной безопасности. Периодическое проведение выборов представительных органов выступает гарантом своевременного воспроизводства институтов государственной власти и местного

самоуправления и обеспечивает стабильность конституционного строя.

Выборы служат индикатором доверия народа к власти и важнейшим способом ее легитимации. В то же время, в силу социально–политической значимости выборов, они могут стать объектом противоправных устремлений различных групп и отдельных лиц, направленных на фальсификацию результатов выборов, посредством манипуляции с голосами избирателей, что может, как показывает новейшая история страны, привести к различным социально-политическим потрясениям, способным нанести ущерб национальной безопасности Кыргызской Республики. Поэтому государство вправе разрабатывать и использовать различные инструменты обеспечения прозрачности, честности и справедливости проводимых выборов. Одним из таких инструментов может являться использование новых технологий в составлении актуализированного списка избирателей.

К вопросам обеспечения национальной безопасности также относится и исключение возможности использования поддельных документов, удостоверяющих личность, выданных гражданам Кыргызской Республики. Незащищенные от подделки официальные документы несут в себе значительную угрозу для безопасности любого государства. Такая угроза предполагает возможность использования поддельных документов для совершения неправомерных действий как гражданами Кыргызской Республики, так и иностранными гражданами.

Таким образом, биометрическая регистрация граждан с целью своевременной регистрации граждан и выдачи идентификационных документов, а также составления актуализированного списка избирателей, как неотъемлемой части избирательного процесса, способной обеспечить честные, свободные и прозрачные выборы, является соразмерным ограничением права на неприкосновенность частной жизни, в рамках обеспечения защиты национальной безопасности государства.

Конституционный суд, учитывая вышеизложенное, требование об обязательности биометрической регистрации граждан, установленное Законом Кыргызской Республики «О биометрической

регистрации граждан Кыргызской Республики», отметил, что такие требования направлены на удовлетворение как интересов граждан, так и публичных интересов общества, и такое ограничение права является пропорциональным и соразмерным, принято в пределах конституционных требований.

В целом признав конституционным ограничения, установленные в оспариваемом законе, тем не менее, Конституционный суд сделал законодателю соответствующий посыл, отметив, что так называемые иные задачи, определенные в оспариваемой норме, несмотря на их государственную и социальную значимость, носят недопустимо обобщенный характер, что является неприемлемым при ограничении прав и свобод человека и гражданина, гарантированных Конституцией Кыргызской Республики. Указанные задачи, по своей сути, являются целями оспариваемого Закона, достижение которых предполагается посредством создания актуализированной базы данных граждан Кыргызской Республики с использованием биометрических данных.

Определение качественного и количественного состава граждан Кыргызской Республики, проживающих на территории Кыргызской Республики и за ее пределами; эффективная борьба с преступностью, нелегальной миграцией, терроризмом и торговлей людьми; своевременное и качественное предоставление услуг населению не раскрывают в полной мере намерений государства, не содержат детальных положений, определяющих порядок использования базы биометрических данных для достижения задач (целей) Закона, установленных частью 2 статьи 2 Закона.

В этой связи законодателю следует внести соответствующие изменения в Закон Кыргызской Республики «О биометрической регистрации граждан Кыргызской Республики», определяющие точные и ясные цели данного Закона, а также механизмы их достижения. При этом законодателю необходимо правильно использовать юридическую терминологию в законотворческом процессе, чтобы исключить двусмысленность и неоднозначное понимание норм Закона. При создании государственных информационных систем должны соблюдаться следующие условия: фиксирование биометрических данных граждан без унижения достоинства личности и причинения вреда здоровью; исключение

возможности незаконного воспроизведения, использования и распространения биометрических данных граждан; обеспечение конфиденциальности и безопасности информации, содержащейся в государственной информационной системе, и ограничение этой информации только теми сведениями, которые необходимы для проверки подлинности идентификационных документов нового поколения.

Кроме того, Конституционный суд отметил, что биометрические данные являются особо чувствительной категорией персональных данных, незаконное использование которых создает угрозу и может нанести существенный вред правам и законным интересам субъектов этих данных. Соответственно, уполномоченный государственный орган, в ведении которого находятся сбор, хранение, использование и распространение биометрических данных, должен обеспечить неукоснительное исполнение требований соответствующих законов для исключения несанкционированного доступа к базе данных.

Кроме того, Конституционный суд обратил внимание на норму оспариваемого Закона, предусматривающую получение информации о биометрических данных без согласия субъекта в случаях, предусмотренных законодательством Кыргызской Республики, и отметил, что оспариваемая норма закона не будет противоречить Конституции Кыргызской Республики при условии, что под понятием «законодательство» подразумеваются только законы Кыргызской Республики. Иное понимание оспариваемых норм Закона может привести к нарушению конституционной гарантии обеспечения безопасности персональных данных, конституционных прав и свобод человека и гражданина. В связи с изложенным, Конституционной суд рекомендовал законодателю, в целях исключения двусмысленности в понимании и применении оспариваемых норм, внести соответствующие изменения в Закон Кыргызской Республики «О биометрической регистрации граждан Кыргызской Республики».

Одним из дел, рассмотренных органом конституционного контроля в сфере защиты конституционных прав и свобод граждан при информатизации общественной жизни, является дело о проверке конституционности норм Закона «Об электрической и почтовой связи», Закона «Об оперативно-розыскной деятельности» и постановления

Правительства в связи с обращением компании, занимающейся производством электросигнального и прочего оборудования связи. Решение по данному делу было вынесено 22 апреля 2015 года[4].

Предметом рассмотрения органа конституционного контроля по данному делу явились нормативные положения Закона «Об оперативно-розыскной деятельности», которые устанавливали, что перечень видов специальных технических средств, предназначенных для негласного получения информации в процессе осуществления оперативно-розыскной деятельности, а также порядок их использования определяются Правительством. Кроме того, предметом рассмотрения выступило положение Закона «Об оперативно-розыскной деятельности», где говорилось о том, что оперативно-розыскные мероприятия, связанные с использованием сети связи, технически осуществляются органами национальной безопасности в порядке, определяемом Правительством, а также положение этого Закона, устанавливающее обязанность операторов связи и ограничение прав пользователей услугами связи при проведении оперативно-розыскных мероприятий и осуществлении следственных действий. Также в этом деле оспаривалось постановление Правительства Кыргызской Республики «Об утверждении Инструкции о порядке взаимодействия операторов электросвязи и операторов мобильной сотовой связи с государственными органами Кыргызской Республики, осуществляющими оперативно-розыскную деятельность» по форме нормативного правового акта, что предполагало проверку правомочия Правительства на принятие оспариваемого акта.

В обоснование своих требований заявитель приводил доводы о том, что парламент, применяя в оспариваемой норме термин «законодательство» допустил возможность ограничения конституционных прав человека и гражданина подзаконными актами, которые входят в систему законодательства Кыргызской Республики, создав тем самым условия для произвольного незаконного вторжения оперативно-розыскных служб в частную жизнь, что является нарушением положений Конституции. По мнению заявителя, любые случаи вмешательства в частную жизнь человека, в том

[4] Решение Конституционной палаты Верховного суда от 22 апреля 2015 года по делу о проверке конституционности норм Закона «Об электрической и почтовой связи», Закона «Об оперативно-розыскной деятельности».

числе сбор, хранение и использование информации о ней, как меры правоограничительного характера должны устанавливаться исключительно законами.

Субъект обращения также приводит доводы о том, что Инструкция, утвержденная оспариваемым постановлением, возлагает на оператора сотовой связи неправомерное обременение приобретать, обеспечивать установку, функционирование, монтаж, дальнейшее техническое обслуживание и своевременное обновление программного обеспечения технического средства системы обеспечения оперативно-розыскных мероприятий (ТС СОРМ) на принадлежащих ему сетях и каналах связи за счет собственных средств. Тем самым, государство нормативно закрепляет обязательство бизнеса за свой счет устанавливать техническое оборудование, предназначенное для негласного получения информации об абонентах связи и получаемых ими услугах связи. Приобретение за счет средств оператора связи ТС СОРМ предполагает его право собственности на них, однако, исходя из назначения данного оборудования и обязательств, возлагаемых Инструкцией на оператора связи, последние не могут осуществлять правомочия собственника – обладать, получать выгоду и определять юридическую судьбу ТС СОРМ. Такое положение, по мнению заявителя нарушает гарантированное Конституцией право неприкосновенности собственности.

Конституционная палата, рассмотрев данное дело, признала оспариваемые нормативные положения Закона «Об оперативно-розыскной деятельности», Закона «Об электрической и почтовой связи» не противоречащими частям 1, 2, 3 статьи 29 Конституции по следующим основаниям.

Право на тайну переписки, телефонных и иных переговоров, почтовых, телеграфных, электронных и иных сообщений не является абсолютным правом и может подвергаться ограничениям, допускаемым только в соответствии с законом и исключительно на основании судебного акта. При этом требования части 2 статьи 20 Конституции предопределяют критерии вводимых ограничений, которые должны быть соразмерны целям защиты национальной безопасности, общественного порядка, охраны здоровья и нравственности населения, защиты прав и свобод других лиц.

Таким образом, право законодателя на ограничение тайны переписки, телефонных переговоров, почтовых, телеграфных и иных сообщений обеспечивается в Кыргызской Республике согласно Конституции и в соответствии с общепризнанными принципами и нормами международного права; правоограничения должны вводиться законом, в котором устанавливаются пределы, основания, условия и порядок его осуществления; вмешательство исполнительных органов власти в право на тайну переписки, телефонных переговоров, почтовых, телеграфных и иных сообщений допускается на основании закона и по решению суда; ограничение права на тайну переписки, телефонных переговоров, почтовых, телеграфных и иных сообщений осуществляется в общезначимых конституционных целях.

По своим целям, задачам, способам их решения оперативно-розыскная деятельность объективно связана с необходимостью ограничения конституционных прав личности, вовлекаемой в сферу ее осуществления.

Проверяемые на предмет конституционности нормативные положения Закона «Об оперативно-розыскной деятельности» не содержит каких-либо положений, которые могли бы быть расценены как нарушающие право на частную жизнь, в том числе право на тайну переписки, телефонных и иных переговоров, почтовых, телеграфных, электронных и иных сообщений. Соответственно, исходя из специфики использования специальных технических средств, нет необходимости в содержательной регламентации данного вопроса законами, такое правовое регулирование может быть осуществлено на уровне подзаконного нормотворчества.

Незаконное использование специальных технических средств, предназначенных для негласного получения информации, в силу присущих им свойств предоставляет возможность серьезно вторгаться в уязвимую для внешнего вмешательства сферу частной жизни индивида без его согласия и ведет к нарушению прав личности, гарантированных статьей 29 Конституции. В этой связи Правительство обязано урегулировать деятельность по разработке, производству, реализации и приобретению специальных технических средств, порядок их регистрации и учета, определять их технические характеристики и параметры в целях исключения их нелегального использования, и тем самым – нанесения ущерба безопасности

государства, правам и свободам человека.

Исходя из того, что использование ТС СОРМ требует согласованных действий уполномоченного органа и оператора связи, конкретизация и детализация специфики их взаимодействия может быть урегулирована подзаконными нормативными правовыми актами, включая проработку технического регламента, распределения зон ответственности, решения иных технических вопросов. Такое правовое урегулирование осуществлено Правительством посредством принятия постановления «Об утверждении Инструкции о порядке взаимодействия операторов электросвязи и мобильной сотовой связи с государственными органами Кыргызской Республики, осуществляющими оперативно-розыскную деятельность».

Возложение на органы национальной безопасности технического осуществления оперативно-розыскных мероприятий в сетях и каналах связи предопределено необходимостью установления единого органа, ответственного за установку, использование и сохранность программного обеспечения, его техническое обслуживание и нормальную эксплуатацию, а главное – обеспечение законности и соблюдение режима секретности при проведении оперативно-розыскных мероприятий.

Вытекающая из оспариваемой нормы Закона Кыргызской Республики «Об электрической и почтовой связи» обязанность оператора сотовой связи предоставлять необходимую информацию обусловлена задачами оперативно-розыскной деятельности. При этом деятельность уполномоченных государственных органов должна протекать исключительно в предусмотренных законом порядке и формах, а также в пределах определенной законом компетенции. Следовательно, любые действия, в том числе истребование и изъятие информации, затрагивающие охраняемые законом тайну переписки, телефонных и иных переговоров, телеграфных и иных сообщений, передаваемых по сетям электрический связи, допускаются в строго установленных целях и исключительно на основании судебного акта. Оспариваемая норма является исходной правовой базой, на основании которой могут разрабатываться и приниматься подзаконные нормативные правовые акты, регулирующие правила и процедуры взаимодействия оператора связи с уполномоченными органами. При этом, данная норма не отменяет конституционное

требование о необходимости судебного акта для осуществления оперативно-розыскных мероприятий, затрагивающих права человека, гарантированных Конституцией.

Следующее решение органа конституционного контроля Кыргызской Республики было по вопросу открытого указания сведения об этнической принадлежности на электронном чипе паспорта гражданина Кыргызской Республики образца 2017 года (ID-карта), утвержденного постановлением Правительства Кыргызской Республики[5].

Субъект обращения в своем ходатайстве отмечал, что в оспариваемом Положении отдельная графа, описывающая этническую принадлежность (национальность) гражданина в паспортах сведение об этнической принадлежности, не указывается открыто и содержание информации «этническая принадлежность» на электронном чипе указывается по желанию заявителя. Обращающая сторона отмечала, что в соответствии с Конституцией Кыргызской Республики каждый человек и гражданин пользуется конституционным правом свободно определять и указывать свою этническую принадлежность. Исключение графы, указывающей национальность гражданина в новом паспорте образца 2017 года является не только нарушением прав человека и гражданина, но и проводимой политикой против нации кыргызов.

Конституционный суд, обосновывая свою правовую позицию, отметил следующее. Декларация о государственном суверенитете Республики Кыргызстан от 15 декабря 1990 года провозгласила, что граждане республики всех национальностей составляют народ Республики Кыргызстан, который является единственным источником государственной власти в республике.

Являясь логическим продолжением волеизъявления народа,

[5] Решение Конституционной палаты Верховного суда Кыргызской Республики от 14 октября 2020 года по делу о проверке конституционности пункта 3 Положения об идентификационной карте - паспорте гражданина Кыргызской Республики образца 2017 года (ID-карта), утвержденного постановлением Правительства Кыргызской Республики от 3 апреля 2017 года № 197 «Об идентификационной карте-паспорте гражданина Кыргызской Республики образца 2017 года (ID-карта)», в котором сведение об этнической принадлежности не указывается открыто и содержание информации «этническая принадлежность (по желанию заявителя)» на электронном чипе.

Конституция Кыргызской Республики в своей преамбуле установила исходные принципы, на которых основываются все последующие конституционные установления, особо обозначив значимость единства народа в укреплении кыргызской государственности и государственного суверенитета.

В то же время, осознание гражданами страны своей принадлежности к единому государству не исключает право каждого на социальную идентичность.

Социальная идентичность – это восприятие себя как члена определенной группы, ощущение принадлежности и эмоциональной привязанности к ней. Одной из разновидностей социальной идентичности индивида является этническая принадлежность, то есть осознание человеком себя как представителя определенного этноса.

Этническая принадлежность задается вместе с рождением, умением говорить на родном языке, культурным окружением и другими явлениями ввиду чего индивиду становится свойственным сопровождающие этничности признаки такие, как язык, имя, представление об общем происхождении, привязанность к определенной территории, религии, общей системе ценностей, групповой солидарности, на основе которых посторонние легко атрибутируют индивида.

Задача государства в этих условиях заключается в формировании в обществе уважительного отношения к самобытной культуре, родному языку, своеобразию обычаев и традиций людей любой этнической общности, а также в искоренении этнических предрассудков, создании условий для самоопределения и самореализации индивида в вопросе этнической принадлежности, обеспечения автономии и независимости его воли.

Вместе с тем, Конституционный суд отметил, что ни при каких обстоятельствах этническая принадлежность не может служить основанием как для предоставления лицу каких-либо привилегий, так и для ограничения его прав, ибо Конституция Кыргызской Республики устанавливает безусловное равенство прав и свобод человека и гражданина независимо, помимо прочего, от факта этнической принадлежности. Данная гарантия обеспечивается предусмотренной законодательством ответственностью за нарушение

принципа равноправия в зависимости от пола, расы, национальности, языка, инвалидности, этнической принадлежности, вероисповедания, возраста, политических или иных убеждений, образования, происхождения, имущественного или иного положения.

В соответствии с Конституцией Кыргызской Республики каждый имеет право свободно определять и указывать свою этническую принадлежность. Иначе говоря, каждому предоставлено право по своему усмотрению, во-первых, определять, во-вторых указывать в документе, касающемся данного человека, свою этническую принадлежность, либо вовсе отказаться от ее указания.

По своему смыслу и содержанию конституционное положение о праве свободно определять свою этническую принадлежность означает сознательный акт самоопределения человека, отнесения самого себя к определенной этнической общности, а также возможность выбора собственной культурной идентичности и право удовлетворять интересы и запросы, связанные с этнической принадлежностью.

Под таким дозволением как «свободно указывать» Конституция Кыргызской Республики усматривает необходимость предоставления каждому, как форму самовыражения личности, право придавать гласности, свободно выражать и распространять информацию о своей этнической принадлежности в любых общедоступных источниках, в том числе официальных документах, касающихся конкретного человека.

Между тем, конституционно-правовой смысл предоставляемого права заключается не только в возможности человека определять или не определять, указывать или не указывать свою этническую принадлежность для различного рода юридически значимых целей, но и вовсе отказаться от определения и указания своей этнической принадлежности, или же придать ей форму ограниченного доступа.

Одновременно с этим Конституция Кыргызской Республики устанавливает принципиальную недопустимость принуждения к определению и указанию человеком своей этнической принадлежности. В целом данная статья в императивном порядке ставит в зависимость официальное фиксирование сведений об этнической принадлежности индивида в каких-либо документах, выдаваемых в целях его

идентификации, от его воли.

Более того, в целях неукоснительного обеспечения соблюдения запрета на принуждение к определению и указанию человеком своей этнической принадлежности Конституция Кыргызской Республики отнесла ее к абсолютным и не подлежащим каким-либо изменениям. Это означает, что свобода выбора своей этнической принадлежности, придания ее гласности, является исключительной привилегией каждого человека и государство не может принуждать его к такому выбору или же оказывать на него какое-либо иное воздействие.

Национальные паспорта граждан Кыргызской Республики являются документами, удостоверяющими личность граждан Кыргызской Республики и подтверждающими встроенным электронным чипом, который является неотъемлемой частью паспорта.

Оспариваемый обращающейся стороной нормы Положения устанавливает перечень сведений, подлежащих включению в ID-карту. При этом сведения подразделены на две категории: в текстовом виде и на электронном чипе. Сведения, касающиеся этнической принадлежности по желанию заявителя включен в контент электронного чипа.

Электронный чип – это числовой интегральный процессор (электронная микросхема), встроенный в идентификационную карту – паспорт образца 2017 года, позволяющий производить запись, обработку и хранение персональных и биометрических данных заявителя уполномоченным органом по реализации государственной политики в области регистрации населения и актов гражданского состояния. То есть включение в электронный чип сведений об этнической принадлежности означает использование криптографических технологий в целях ограничения доступа к содержащейся в нем информации, что возможно лишь по воле самого человека, который желает определить свою этническую принадлежность, но указывать ее в закрытом режиме. Другими словами, при желании заявителя о включении сведений о его этнической принадлежности в электронный чип, то есть содержать данную информацию в режиме ограниченного доступа, является одной из форм реализации конституционного права на свободу

определения и указания своей этнической принадлежности и не может противоречить Конституции Кыргызской Республики.

Однако, в то же время, не предоставление возможности указывать в текстовом виде в ID-карте сведений об этнической принадлежности, если этого желает сам заявитель, означает прямое нарушение права на придание гласности или же распространение иным образом информации о своей этнической принадлежности, в том числе в ID-карте, удостоверяющего личность конкретного человека. То есть нарушает гарантии, предусмотренные Конституцией Кыргызской Республики о праве каждого свободно определять и указывать свою этническую принадлежность.

Конституционный суд также указал нормотворцу о том, что в процессе приведения оспариваемого акта в соответствие с конституционными требованиями следует иметь в виду, что в силу норм Конституции Кыргызской Республики существующий запрет на любые формы принуждения к определению и указанию этнической принадлежности человека и гражданина не может быть ограничен.

Таким образом, в настоящее время все страны мира в той или иной степени осуществляют процесс информатизации, в котором есть как преимущества, так и недостатки. Самое главное необходимо правильно ее внедрять в общественную жизнь с точки зрения обеспечения и защиты фундаментальных прав и свобод человека и гражданина.

JUDICIAL ACTIVISM AND REASONABLE RESTRAINT IN DECISIONS CONSTITUTIONAL COURT OF THE KYRGYZ REPUBLIC[1]

Meergul Bobukeeva

Judge of the Constitutional Court
of the Kyrgyz Republic

The constitutional justice body of the Kyrgyz Republic, since its formation as an institution of constitutional control after the events of April 7, 2010, subsequently and after the constitutional reform of 2021, has issued 117 decisions. During this period, the Constitutional Court in its decisions applied various approaches of constitutional justice, including judicial activism and reasonable restraint. These approaches have different goals. If reasonable restraint helps to maintain a balance between the three branches of government, leaving the norms of the existing law constitutional, then judicial activism provides an opportunity to cancel certain normative judgments of the legislator. In both cases, the application of these approaches by the body of constitutional justice is aimed at ensuring the principle of checks and balances in state power.

As you know, the term "judicial activism" is the doctrine of the administration of justice, which came from the judicial practice of the United States. The basic concept of this doctrine is that judges, based on their political role, should intervene when the legitimately elected representative government either does not act when necessary or passes laws that violate fundamental constitutional values. At the same time, it should be noted that the named doctrine in their activities can be applied exclusively by constitutional courts by virtue of their mission, status and

[1] The body of constitutional justice of the Kyrgyz Republic until May 5, 2021 was referred to as the Constitutional Chamber of the Supreme Court of the Kyrgyz Republic, after that date it was renamed the Constitutional Court. However, the legal positions in previous decisions are considered to be those of the current body. In this connection, for the purposes of this article, the name "Constitutional Court" will be used.

powers.

We believe that it is in the constitutional litigation that judges should go beyond a specific dispute and understand that their decision is very important not only for restoring justice, but also for regulating social relations that arise in the future.

The main task of judges, relying on various grounds, including the arguments of legal science, is to prove the need for certain regulatory requirements and state coercion[2]. With regard to the doctrine of judicial restraint, it is the opposite approach to judicial activism. In the decision where judicial restraint was applied, the Constitutional Court declared the conformity of the contested act with the Constitution, gave its own constitutional interpretation of their meaning, in order to ensure peace and stability in the country.

Nevertheless, activism in court decisions, and sometimes restraint, always cause discussions, and the rule-making body, whose acts were the subject of consideration by the constitutional justice body, argues that the Constitutional Court exceeds its powers, or the other losing party, condemning, believes that the Constitutional Court the court stepped aside from solving the legal problem. At the same time, the legislature substantiates its disagreement with the decision of the Constitutional Court by the fact that it is the representative and servant of the people and knows its desires better, while forgetting that judges are servants of the law and the Constitution.

In this connection, it seems appropriate to cite the decisions of the Constitutional Court, in which judicial activism and reasonable restraint were applied, and to clarify what were the legal consequences of these decisions.

In the practice of the body of constitutional justice of the Kyrgyz Republic, there is a decision, when assessing the constitutionality of an act of the Provisional Government, where the doctrine of judicial activism was applied. It should be noted that in the Kyrgyz Republic the transfer of full state power to the Provisional Government on April 7, 2010 was the result of the socio-political events that took place in the country, this body adopted Decrees during the period of its activity, which later became the

[2] THE CONCEPT OF "INTERPRETIVISM" IN THE ACTIVITIES OF THE US SUPREME COURT, V.N. Safonov.

object of constitutional control[3].

Appealing to the Constitutional Court, the petitioning party in this case substantiated its arguments by the fact that, according to Article 12 of the Constitution, nationalization can be carried out only on the basis of the law with compensation for the value of property and other losses. Thus, failure to comply with the two mandatory conditions established by parts 2 and 3 of Article 12 of the Constitution is a direct violation of the Constitution, which is an act of direct action and has supreme legal force. The applicant also noted that according to Decree No. 1 of April 7, 2010, the Provisional Government was authorized by it to exercise the functions and powers of the President, the Jogorku Kenesh (Parliament) and the Government. However, when the impugned Decree was adopted, the legal procedures for the implementation of nationalization established by law and the mechanism for implementing the act of nationalization by the Provisional Government were not observed. Moreover, in accordance with Decree No. 103 of July 19, 2010 "On the Approval of the Procedure for the Compulsory Seizure of Property", nationalized property should be understood as property identified by law enforcement agencies and related to the family of the former president of the country and his entourage, as well as property privatized in period from 2005 to 2010 using the method without pricing. As the addressing parties noted, as a result of the adoption of the decrees, the expropriation of the property of participants in shared construction in the form of nationalization actually took place. In the same time, Article 12 of the Constitution provides for the possibility of forcible seizure of property only on the basis of a court decision. Compulsory seizure of property is allowed in certain cases provided for by law, while the legality of such seizure is subject to mandatory consideration by the court.

Despite the fact that the decrees of the Provisional Government were not in the system of normative legal acts of the country, the Constitutional Court, in order to eliminate legal uncertainty, as well as to ensure access to justice for citizens to protect private property, adopted and expressed in its decision the following legal position.

[3] Decision of the Constitutional Court of the Kyrgyz Republic on July 11, 2014 on the case of checking the constitutionality of Decrees of the Provisional Government of the Kyrgyz Republic dated November 3, 2010 No. 146 "On the nationalization of a land plot and non-residential premises located at the address: Jalal-Abad city, st. Kurmanbek, 8"; dated June 3, 2010 No. 60 "On the nationalization of the limited liability company "Tashkomur" and other.

He noted that as a result of the April events of 2010, there was a complete inability of state power to carry out its functions. This allows us to conclude that the creation and functioning of the Provisional Government was due to objective reasons derived from the extraordinary socio-political situation and the need to exercise state power in order to stabilize the socio-political and socio-economic situation in the country, to ensure public law and order and security.

Thus, the Provisional Government during the period under review acted as a legitimate subject of political power and exercised state power in the conditions of the incapacity of the official public authorities. That is, the Decrees were adopted by a subject that was not provided for in the political system of the country as a source of political will and a subject of state power, however, having assumed the function of governing the state and responsibility for its further development, the Provisional Government was obliged to take all necessary measures to stabilize the social-political situation and ensuring the legitimate interests of the state and society. Respectively,

In a situation where there is an objective need to restore and implement the functions of state administration to ensure law and order and public security, protect the rights and freedoms of citizens, the activities of the Provisional Government, regardless of its official status, should be considered as a legitimate exercise of state power.

Since the subjects of the appeal to the Constitutional Court disputed the constitutionality of the decrees of the Provisional Government on the nationalization of property from private owners, she noted in her decision the following.

In a substantive sense, the nationalization pursued the goal of maintaining and establishing state control over property allegedly misappropriated. The return of such property to state ownership was considered by the Provisional Government as one of the primary tasks of the transition period. At the same time, it should also be borne in mind that, due to the peculiarities of the current moment, socio-political tensions, social attitudes and expectations about the need to restore "social justice" were significant factors in making decisions on nationalization.

Consequently, the seizure of property from private owners on the basis of nationalization decrees was an exceptional measure, due to the extraordinary nature of the situation and the presence of a special need.

With the adoption of the Constitution of 2010 and the implementation of its provisions on the formation of public authorities, the Provisional Government by Decree No. 147 of December 21, 2010 announced its dissolution, thereby most of the decrees of the Provisional Government lost their legal force.

At the same time, the nationalization decrees retained their legal significance, the relations that arose on their basis were of a continuing nature and gave rise to certain legal consequences for the subjects, in connection with which a legitimate question arose about their role and place in the current system of law, about the possibility of their judicial appeals.

In this regard, the Constitutional Court in its decision noted that the acts of the interim authority on nationalization, adopted in extraordinary conditions, with the restoration of the constitutional order and in the conditions of the functioning of the state and its bodies in the legal regime, should be formalized in the manner established by the current legislation.

In cases where violations of the rights and legitimate interests of individuals and legal entities were committed during the seizure of property on the basis of decrees, their legitimate claims must be considered by the competent state bodies.

At the same time, the state is obliged to ensure the full exercise of the right to judicial protection, which must be fair, competent and effective.

The Constitutional Court, we believe, also showed reasonable restraint, not noting in the operative part of its decision the constitutionality or unconstitutionality of the contested acts, while substantiating this as follows.

By virtue of the requirements of the Constitution and the constitutional law "On the Constitutional Court of the Kyrgyz Republic", according to which strictly formalized laws and other normative legal acts adopted and put into effect in compliance with established procedures should be the subject of verification of the constitutional control body, the question of the constitutionality of the contested decrees, cannot be decided by the Constitutional Court, on the merits. The challenged decrees were adopted outside the established rule-making procedures, do not have the formal features of normative legal acts and cannot be investigated and resolved by legal means available to the Constitutional Court. Moreover, it

is precisely for this reason that decrees cannot be considered by courts of general jurisdiction.

The decrees challenged for constitutionality require research and verification of the factual circumstances relevant to this issue, in addition, the adoption of these Decrees was also due to political reasons. Judicial constitutional control is designed to resolve exclusively issues of law and under no circumstances should give preference to political expediency, try to evaluate anyone's practical actions outside their legal forms. In this regard, the Constitutional Court is obliged to refrain from establishing and examining the actual circumstances in all cases when this falls within the competence of other state bodies. This limitation of the limits of resolving the case by the body of constitutional control is an important element of the constitutional principle of the separation of state power and corresponds to the general restriction of the right of the judiciary to consider issues requiring political evaluation. The essence of such a limitation of the competence of the judiciary lies also in the need to protect the justice sector from the penetration of elements of ideology and political preferences.

At the same time, the exceptional and extraordinary nature of the situation in which the disputed acts were adopted, as well as the essence of the acts, should not serve as an absolute barrier to any kind of consideration, and even more so serve as an absolute justification in case of possible violations of the rights and freedoms of a person and a citizen.

Therefore, in order to study in detail the issues raised by the contested decrees and ensure the right of stakeholders to have access to justice, public authorities need to take appropriate measures, develop a mechanism for resolving disputes within the framework of the current legal field.

The contested acts of the Provisional Government touched upon issues relating to the protection of property rights and ensuring the rights of owners, the Constitution refers such issues to the jurisdiction of the executive power exercised by the Government.

In connection with the above, the Government of the Kyrgyz Republic was instructed to create legal mechanisms that ensure, within a reasonable time, the resolution of disputed relations under the Decrees of the Provisional Government of the Kyrgyz Republic and the possibility of restoring the property rights of legal owners.

The above case is a justified case of judicial activism and reasonable

restraint of the Constitutional Court. Accordingly, in cases where it is necessary to correct any injustice, especially when other constitutional bodies do not act, the application of these approaches by constitutional justice bodies is an objective necessity.

Also, the Constitutional Court considered the submission of the Chairman of the Supreme Court of the Kyrgyz Republic on the verification of the constitutionality of the norm regulating the powers of the legislative body of the Kyrgyz Republic (Jogorku Kenesh) regarding the hearing of annual information on the activities of the judicial system[4]. The petitioner believed that the Supreme Court was not obliged to inform the Parliament annually about the activities of the judiciary. The list of powers of the Jogorku Kenesh of the Kyrgyz Republic is determined by the Constitution and cannot be expanded by laws or other regulatory legal acts. Judicial power belongs only to the courts represented by judges. Constitutional provisions on the independence, inviolability of judges, their subordination only to the Constitution and laws, the ban on interference in the administration of justice determine the legal status of judges and establish the judiciary as an independent and impartial branch of state power. The principle of independence of the court, judges and the judiciary in general is directly related to the implementation of the constitutional right to judicial protection.

In the case under consideration, the Constitutional Court recognized the Supreme Court of the Kyrgyz Republic as a subject having the right to apply to the body of constitutional control, although it was not on the list of subjects having such a right.

This decision of the Constitutional Court is also a prime example of the application of the doctrine of judicial activism.

The argument for recognizing the highest judicial body as a subject is due to the fact that the constitutional Law of the Kyrgyz Republic "On the Constitutional Court of the Kyrgyz Republic" provides for the right of the Jogorku Kenesh of the Kyrgyz Republic and the Government of the Kyrgyz Republic to apply to the constitutional justice body not only in cases of violation of the rights and freedoms guaranteed by the Constitution, but also in any other cases of inconsistency with the Basic Law. The judiciary,

[4] The decision of the CCR of April 24, 2019 on the case on the verification of the constitutionality of paragraph 35 of part 1 of article 3 of the Law of the Kyrgyz Republic "On the Regulations of the Jogorku Kenesh of the Kyrgyz Republic" in connection with the appeal of the Chairman of the Supreme Court of the Kyrgyz Republic.

as one of the branches of state power, does not pursue any private law goals, but implements, along with the legislative and executive branches of power, public law functions aimed at ensuring the rule of law and protecting the constitutional foundations of the state. The Supreme Court, based on its constitutional and legal status and the tasks assigned to it,

The foregoing indicates the democratic nature of the state structure of the Kyrgyz Republic, which is ensured, among other things, by building state power based on the principle of its division into legislative, executive and judicial powers and granting each of them equal rights, in particular, the possibility of applying to the Constitutional court.

In addition, regarding the provision of information to the Parliament by the Chairman of the Supreme Court on the activities of the judiciary, the body of constitutional justice stated the following legal position. The inadmissibility of an explicit assessment by the Jogorku Kenesh of the Kyrgyz Republic of information on the activities of the judicial system not only allows maintaining a balance between the legislative and judicial branches of power, but also indirectly indicates that there is no need for direct presentation of such information by the Chairman of the Supreme Court of the Kyrgyz Republic.

Thus, the judiciary, which ensures the rule of law, must be free from any influence whatsoever in order to be able to be objective and impartial. Its constitutional model is dictated by the idea of providing justice for human rights and freedoms, is set by the universally recognized international principle of the rule of law and does not allow restrictions on the fullness of the judiciary and judicial independence.

In its decision, the Constitutional Court noted that the regulatory effect of the contested norm, which establishes the authority of the Jogorku Kenesh to hear annual information on the activities of the judicial system, goes beyond the powers of the Jogorku Kenesh established by the Constitution and leads to the violation of such constitutional values as the principle of independence of the judiciary and the principle of division authorities. The challenged norm was declared unconstitutional by the Constitutional Court.

At the same time, the Constitutional Court noted that, based on the principle of openness and responsibility of state bodies, the judicial system should not be closed, and information about its activities should be available both to the public and to the Jogorku Kenesh.

In this regard, the form and methods of providing information to the public about the activities of the judiciary should be determined by the Supreme Court of the Kyrgyz Republic independently. Information may be provided to the Jogorku Kenesh of the Kyrgyz Republic solely on the initiative of the judicial branch of power itself.

In my practice The Constitutional Court applied the doctrine of reasonable restraint (self-restraint) when checking the constitutionality of the norm of the constitutional Law of the Kyrgyz Republic "On the suspension of certain norms of the constitutional Law of the Kyrgyz Republic "On elections of the President of the Kyrgyz Republic and deputies of the Jogorku Kenesh of the Kyrgyz Republic"[5].

The popular unrest following the elections scheduled for October 4, 2020 served to apply the doctrine of restraint.

Thus, after the announcement of the preliminary results of the elections of deputies of the Jogorku Kenesh (Parliament) held on October 4, 2020, a number of political parties applied to the Central Commission for Elections and Referendums to cancel its results.

The statement of these political parties indicated that the elections were held with gross violations, massive bribery of voters, threats and pressure on voters, as well as violations in the counting of votes. Public dissatisfaction with the results of the elections, accompanied by mass riots, led to political instability in the republic, in connection with which the Central Commission for Elections and Referendums invalidated the results of the elections of deputies of the Jogorku Kenesh of the Kyrgyz Republic.

The contested constitutional law was adopted at a time of difficult political and economic situation, after the popular unrest and the prevailing events of October 5-6, 2020. The stability of both the rule of law and the security of citizens throughout the republic, as well as the prevention of any civil clashes in the country, depended on the decision of the constitutional justice body.

[5] Decision of the Constitutional Court of the Kyrgyz Republic dated December 2, 2020 on the case of reviewing the constitutionality of the constitutional Law of the Kyrgyz Republic "On the suspension of certain norms of the constitutional Law of the Kyrgyz Republic "On the Elections of the President of the Kyrgyz Republic and Deputies of the Jogorku Kenesh of the Kyrgyz Republic" in connection with the appeals of the political party "Reform" represented by its chairman Sooronkulova Klara Syrgakbekovna, as well as citizens Kasymbekov Nurbek Aityevich and Usubaliev Taalaibek Bolotbekovich.

In this case with the subject of the appeal argued that the contested law was adopted by the Jogorku Kenesh of the Kyrgyz Republic to suit the interests of certain political groups and individuals with gross violations of the procedure for adopting laws, provided for by the laws of the Kyrgyz Republic "On the Regulations of the Jogorku Kenesh of the Kyrgyz Republic" and "On regulatory legal acts of the Kyrgyz Republic". The applicant comes to the conclusion that an important principle of the exercise of state power has been violated - the principle of openness and responsibility of state bodies to the people and the exercise of their powers in the interests of the people. By suspending the operation of the norms regulating the procedure for holding repeat elections to the Jogorku Kenesh, the contested law thereby paralyzed the operation of the provisions of the Constitution containing the constitutional foundations for holding elections of deputies to the Jogorku Kenesh.

According to the applicant, if the elections are declared invalid and not held, by virtue of the constitutional Law on Elections, the Central Electoral Commission calls repeated elections within one month. Repeat elections and main elections are inseparable cycles of a single process, and repeat elections are an organic continuation of the main elections.

The subject of the appeal noted that since the elections were declared invalid due to massive violations of the electoral legislation, which significantly affected the freedom of expression of the voter and distorted the principle of universal equal suffrage, repeated elections are an important legal means of restoring the violated right to elect and be elected, guaranteed by the Constitution. By suspending the rules on elections, the state terminates its obligations to ensure the supremacy of the power of the people, represented and ensured by the popularly elected Jogorku Kenesh. Suspension of the law, affecting the fundamental political rights and freedoms of citizens, is a restriction of these rights within arbitrarily set time limits.

The subject of the appeal questioned the legitimacy of the proposed constitutional changes, in view of the participation in the constitutional reform of the Jogorku Kenesh, whose term of office had already ended.

Constitutional Court arguing his legal position, he noted that the Kyrgyz Republic is a legal, democratic state, which means the rule of law in all spheres of public, political and state life, the subordination of all subjects of legal relations (person and citizen, public associations, state and municipal bodies) to the Constitution and laws.

The defining quality of the law as the only possible regulator of social relations in a constitutional state is its procedural legality (legality), that is, its compliance with constitutional and legislative prescriptions on rule-making rules and procedures for its adoption and publication.

The Constitution of the Kyrgyz Republic contains fundamental requirements for the procedure for the adoption, signing, publication and enactment of constitutional laws and laws by the Jogorku Kenesh of the Kyrgyz Republic, and also guarantees the right for citizens to participate in the discussion and adoption of laws and decisions of republican and local significance.

It is no coincidence that the Basic Law attaches particular importance to the participation of citizens in the discussion and adoption of laws, fixing in an imperative manner the obligation of the state to ensure the implementation of this right. This is due to the inseparable connection of the specified constitutional provision with the principle of democracy. The Constitution proclaims the people of Kyrgyzstan to be the bearer of sovereignty and the only source of state power in the Kyrgyz Republic, the people of Kyrgyzstan exercise their power directly in elections and referendums, as well as through the system of state bodies and local self-government bodies on the basis of the Constitution and laws. This principle is the fundamental beginning of the organization of the life of the state and society as a whole. In this sense, the law-making activity of the state cannot be an exception. Through which its legal system is formed. As a set of interrelated, coordinated and interacting legal means developed in specific laws and other regulatory legal acts, the legal system establishes the pattern of phenomena occurring in society and the level of legal development of the country. In this regard, ignoring the role of society as the primary source of power in the law-making activities of the state is unacceptable.

The Constitutional Court also cited the position of the Venice Commission of the Council of Europe, indicated in Opinion CDL-PL(2020) 015 of November 17, 2020, where it was noted that the rule of law implies, in relation to lawmaking procedures, the right of citizens to participate in public affairs and requires that the public have access to draft laws and the opportunity to contribute.

At the same time, the body of constitutional control, agreeing with the assertion that circumstances may arise in the life of the state that require immediate legislative measures, considers it acceptable to attribute to the discretion of the legislator the establishment of exceptional cases when the

law-making process can be carried out in an accelerated mode. At the same time, it should be taken into account that any exceptions, although they contain regulators other than the main rule, remain its integral part and do not violate its true content, but only detail it due to the impossibility of resolving the issue in a general manner for obvious and objective reasons. Of course, these reasons must be substantial and meet the principle of exceptional necessity.

Thus, since in special cases the adoption of bills in an accelerated mode is possible, public discussion, as an integral part of the legislative process, cannot also prevent the prompt manifestation of legislative power. In such cases, the consent of the electorate in the legitimacy of this form of rule-making is expressed in the fact that the legislative power itself is exercised by its representatives, directly elected in periodic, free and democratic elections. In other words, not every action can be approved by the electorate, since in democracies its consent is expressed primarily through representation.

The urgency of legislative decisions in special cases should not be hampered by other procedural issues that take up a period of time that can neutralize the meaning of a quick legislative response.

It is well known that in connection with the announcement by the World Health Organization of a pandemic of a new coronavirus infection COVID-I9 and the detection of mass cases of the disease in the territory of the Kyrgyz Republic, in accordance with the Law of the Kyrgyz Republic "On Civil Protection" and the order of the Government of the Kyrgyz Republic dated March 22, 2020 No. a state of emergency was introduced, which is currently in force. In addition, the events that took place on October 5-6, 2020 in the city of Bishkek, due to public dissatisfaction with the results of the elections of deputies of the Jogorku Kenesh of the Kyrgyz Republic, accompanied by mass disobedience and riots, had all the signs of social instability.

Destabilization (instability) is defined as a process of disruption and disorganization of the methods of political and legal regulation of public life that have developed in society. The political crisis leads to a loosening of the foundations of the existence and functioning of the political and legal system and to a change in the methods of resolving political conflicts.

In conditions of political crisis, threats to both internal and external security of the country inevitably increase. Accordingly, the discretion

of the legislator may include the definition of related social phenomena, provided that this is due to the need to stabilize the social, economic situation, issues of law and order and security due to the introduction of a state of emergency, emergency or force majeure circumstances.

The principles of periodicity and mandatory elections are the guarantors of a fair democratic structure of the state, meaning that the origin of power is possible only by the will of the people expressed in elections. These principles express the measure of freedom and justice in society and are the basis of just power. In turn, strict intervals between elections ensure, on the one hand, the stability of the work of elected bodies and officials, and, on the other hand, guarantee their turnover. It is for this reason that the Constitution of the Kyrgyz Republic contains various terms for limiting the powers of authorities and officials.

According to the Venice Commission of the Council of Europe, the suspension of the electoral process affects the civil and political rights of the electorate and may harm democracy, so the postponement of elections for any purpose should be limited by the principles of proportionality and necessity. The assessment of the "legitimate aim" and "proportionality" of the restriction on voter rights can be made in a contextual manner, taking into account the actual state of affairs in the country. In very exceptional circumstances, the authorities may postpone elections in order to ease tensions and allow voters to express their will in a safe and well-organized context. The postponement of parliamentary elections to a later date, determined by the constitutional duration of the mandate of the outgoing parliament, and, consequently, the prorogation of its powers,

According to the Convention on Standards for Democratic Elections, Electoral Rights and Freedoms in the States Members of the Commonwealth of Independent States, in a state of emergency or martial law, to ensure the safety of citizens and protect the constitutional order in accordance with the Constitution, laws may establish restrictions on rights and freedoms, indicating the limits and duration of their validity. and elections may be delayed.

Thus, the postponement of elections, including from the point of view of the norms of international law, is permissible if this is due to an exceptional need caused by global crises that carry the threat of harming the interests of the whole society.

Dissatisfaction of significant groups of citizens with the results of

the elections of deputies

The Jogorku Kenesh of the Kyrgyz Republic, held on October 4, 2020, resulted in their open protest against state power, which led to the disorganization of the political system, the depreciation of state power in the eyes of society and the inability of public bodies to carry out their functions in the proper way. In addition, since March 22, 2020, the country has not come out of a state of emergency in connection with the pandemic and the mass illness of the population with the coronavirus infection COVID-19.

Under these conditions, it is impossible to deny the obvious fact that the Kyrgyz Republic is in a state of a large-scale socio-political crisis. Accordingly, there is no reason to believe that the legislator did not have good reasons for recognizing the circumstances in which the decisions were taken as extraordinary.

Regarding the term of office of deputies of the Jogorku Kenesh, the Constitutional Court noted that the Constitution of the Kyrgyz Republic not only establishes a specific period during which deputies of the Jogorku Kenesh are entitled to exercise their powers, but also the mandatory conditions under which these powers can be terminated. The purpose of these constitutional guidelines is that they, in their systemic unity, on the one hand, guarantee the democratic principle of the turnover of authorities, on the other hand, ensure the continuity of the viability of the legislative branch in the system of public authorities. At the same time, the Constitution does not pursue the goal of prolonging the powers of the legislative body, but requires the preservation of the constitutional structure of building state power based on the principle of separation of powers.

In other words, the Basic Law does not exclude the possibility of political crises, as a result of which it will not be possible to form a legislative body within the established time frame, on whose activities the creation of the entire state mechanism directly or indirectly depends.

In support of its position, the body of constitutional control cited the position of the Venice Commission of the Council of Europe, which noted in its conclusion that the mandate of the Parliament begins from the moment the deputies take the oath and ends after 5 years. During this period, the previous legislature still continues to function so that the Kyrgyz Republic is never deprived of a parliament capable of exercising its powers if necessary. The purpose of Article 71 § 3 of the Constitution is to prevent any form of institutional vacuum. The functions of the State must

be ensured at all times without delay or interruption.

The Constitutional Court in its Decision came to the conclusion that interruptions in the general legal capacity of the Jogorku Kenesh, regardless of the reasons, are not permissible, respectively, the powers of the deputies of the Jogorku Kenesh of the sixth convocation can be completed only from the day of the first meeting of the next convocation in the manner prescribed by part 3 of Article 71 Constitution of the Kyrgyz Republic.

Regarding the question of how full-fledged the mandate of the legislative body can be during this period, the Constitutional Court noted that the implementation of parliamentary activities after the expiration of the constitutional term of office does not meet the expectations of the society, formed by the established perception of the strict periodicity of the change of power, which undermines the confidence of citizens in state institutions and damages effective public administration. On this issue, the Venice Commission of the Council of Europe, in its Opinion, drew attention to the fact that in order to prevent interruptions in the work of the legislative body, the current parliament should have limited capacity. During the prorogation, which takes place after the expiration of the term of the legislature, Parliament is allowed to perform only certain ordinary functions, while he is not allowed to approve emergency measures, including constitutional reforms. During the period of prorogation, the level of legitimacy of legislative decisions is lower.

In this connection, the Constitutional Court emphasized that, while retaining the mandate of the legislative body, nevertheless, the Parliament of the Kyrgyz Republic is obliged during the prorogation period to show a high level of political responsibility to society and be guided in its activities by the principle of reasonable restraint. In other words, the parliament can make decisions caused by exceptional necessity and of an urgent nature, that is, aimed at stabilizing the socio-political situation in the country, overcoming various kinds of crises and social tensions, ensuring law and order, the security of the state and the population, the activities of the Government, as well as maintaining the effective functioning of the principle of separation of powers.

The applicants were also concerned about such a basis for the adoption of the contested constitutional Law as the need for constitutional reform, and questioned the legitimacy of the proposed amendments to the Constitution in case of participation in the proposed reform of the then convocation of the Jogorku Kenesh of the Kyrgyz Republic.

The body of constitutional control emphasized the special importance of observing the principle of inviolability of the Constitution of the Kyrgyz Republic, however, noted that the challenged constitutional Law in its subject of regulation is not an act of constitutional reform. In other words, the intention of the Jogorku Kenesh of the Kyrgyz Republic, set out in Article 1 of the contested constitutional Law, cannot be regarded as an independent rule of law containing a command or an authoritative instruction to carry out a constitutional reform. That is, the body of constitutional control cannot assess the legitimacy of the yet uncommitted actions of the Parliament of the Kyrgyz Republic in the framework of the case under consideration, since the contested constitutional Law is not a legal basis for constitutional reform.

Thus, the Constitutional Court recognized the challenged norm as constitutional, minimizing the negative legal consequences, taking into account the current socio-political situation in the country, while fulfilling its mission to ensure peace and stability in the country.

СУДЕБНЫЙ АКТИВИЗМ И РАЗУМНАЯ СДЕРЖАННОСТЬ В РЕШЕНИЯХ КОНСТИТУЦИОННОГО СУДА КЫРГЫЗСКОЙ РЕСПУБЛИКИ[1]

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Орган конституционного правосудия Кыргызской Республики с момента формирования в качестве института конституционного контроля после событий, происшедших 7 апреля 2010 года, в последующем и после конституционной реформы 2021 года, вынес 117 решений. За этот период Конституционный суд в своих решениях применял различные подходы конституционного правосудия, в том числе, такие как судебный активизм и разумная сдержанность. Указанные подходы имеют разные цели. Если разумная сдержанность помогает сохранить баланс между тремя ветвями власти, оставляя нормы существующего закона конституционными, то судебный активизм дает возможность отменить определенные нормативные суждения законодателя. В том и другом случае применение этих подходов органом конституционного правосудия направлено на обеспечение принципа сдержек и противовесов в государственной власти.

Как известно, термин «судебный активизм» - это доктрина отправления правосудия, пришедшая из судебной практики США. Основная концепция этой доктрины заключается в том, что судьи, исходя из их политической роли, должны вмешиваться тогда, когда законно избранная представительная власть либо не действует, когда это необходимо, либо принимает законы, которые нарушают

[1] Орган конституционного правосудия Кыргызской Республики до 5 мая 2021 именовался как Конституционная палата Верховного суда Кыргызской Республики, после указанной даты переименован в Конституционный суд. Однако правовые позиции в предыдущих решениях считаются позицией ныне действующего орган. В связи с чем, для целей настоящей статьи будет применяться название «Конституционный суд».

основополагающие конституционные ценности. При этом необходимо отметить, что названную доктрину в своей деятельности могут применять исключительно конституционные суды в силу их миссии, статуса и полномочий.

Полагаем, что именно в конституционном судебном процессе судьи должны выходить за рамки конкретного спора и понимать, что их решение очень важно не только для восстановления справедливости, но и для регулирования общественных отношений, возникающих в будущем.

Основная задача судей, опираясь на различные основания, в том числе на доводы юридической науки, доказать необходимость тех или иных нормативных требований и государственного принуждения[2]. Что касается доктрины судебной сдержанности, то она является противоположным подходом к судебному активизму. В решении где была применена судебная сдержанность Конституционный суд объявил о соответствии Конституции оспариваемого акта, дал собственную конституционную интерпретацию их смысла, в целях обеспечения мира и стабильности в стране.

Все же активизм в судебных решениях, а иногда и сдержанность всегда вызывают дискуссии, и нормотворческий орган, чьи акты были предметом рассмотрения органа конституционного правосудия, аргументирует это тем, что Конституционный суд превышает свои полномочия, либо другая проигравшая сторона, осуждая, полагают, что Конституционный суд отстранился от решения правовой проблемы. При этом законодательная власть свое несогласие с решением Конституционного суда обосновывает тем, что она являются представителем и слугой народа и лучше знает его желания, забывая при этом, что судьи являются слугами закона и Конституции.

В связи с чем, представляется целесообразным привести решения Конституционного суда, в которых были применены судебный активизм и разумная сдержанность, и прояснить каковы были правовые последствия этих решений.

В практике органа конституционного правосудия Кыргызской Республики есть решение, при оценке конституционности акта

[2] КОНЦЕПЦИЯ «ИНТЕРПРЕТИВИЗМА» В ДЕЯТЕЛЬНОСТИ ВЕРХОВНОГО СУДА США, В.Н. Сафонов.

Временного Правительства, где была применена доктрина судебного активизма. Надо отметить, что в Кыргызской Республике переход всей полноты государственной власти Временному Правительству 7 апреля 2010 года стало результатом произошедших в стране социально-политических событий, указанный орган за период своей деятельности принимал Декреты, которые стали в последующем объектом конституционного контроля.[3]

Обращаясь в Конституционной суд ходатайствующая сторона по данному делу обосновала свои доводы тем, что согласно статье 12 Конституции национализация может проводиться только на основании закона с возмещением стоимости имущества и других убытков. Таким образом, несоблюдение двух обязательных условий, установленных частями 2, 3 статьи 12 Конституции, является прямым нарушением Конституции, являющейся актом прямого действия и имеющей высшую юридическую силу. Также заявитель отмечал, что согласно Декрету №1 от 7 апреля 2010 года Временное Правительство уполномочивалось им самим осуществлять функции и полномочия Президента, Жогорку Кенеша (парламанта) и Правительства. Однако, при принятии оспариваемого Декрета, установленные законодательством правовые процедуры осуществления национализации и механизм реализации акта о национализации Временным Правительством не были соблюдены. Более того, в соответствии с Декретом «Об утверждении Порядка принудительного изъятия имущества» от 19 июля 2010 года №103 под национализируемым имуществом следовало понимать имущество, выявленное правоохранительными органами и имеющее отношение к семье бывшего президента страны и его окружению, а также имущество, приватизированное в период с 2005 по 2010 годы методом без установления цены. Как отмечали обращающиеся стороны, в результате принятия декретов фактически имело место экспроприация имущества участников долевого строительства в форме национализации. В то же время, статья 12 Конституции предусматривает возможность принудительного изъятия имущества только на основании судебного решения. Принудительное изъятие

[3] Решение КС Кыргызской Республики 11 июля 2014 года по делу о проверке конституционности Декретов Временного Правительства Кыргызской Республики от 3 ноября 2010 года №146 «О национализации земельного участка и нежилого помещения, расположенных по адресу: город Джалал-Абад, ул. Курманбека, 8»; от 3 июня 2010 года № 60 «О национализации общества с ограниченной ответственностью «Ташкомур» и других

имущества допускается в отдельных случаях, предусмотренных законом, при этом законность такого изъятия подлежит обязательному рассмотрению судом.

Несмотря на то, что декреты Временного Правительства не были в системе нормативных правовых актов страны, Конституционный суд в целях исключения правовой неопределенности, а также обеспечения доступа к правосудию граждан для защиты частной собственности, принял в производство и выразил в своем Решении следующую правовую позиции.

Он отметил, что в результате апрельских событий 2010 года наблюдалась полная неспособность государственной власти осуществлять свои функции. Это позволяет заключить, что создание и функционирование Временного Правительства было обусловлено объективными причинами, производными от экстраординарной социально-политической ситуации и необходимостью осуществления государственной власти в целях стабилизации общественно-политической и социально-экономической ситуации в стране, обеспечения общественного правопорядка и безопасности.

Таким образом, Временное Правительство в рассматриваемый период выступало легитимным субъектом политической власти и осуществляло государственную власть в условиях недееспособности официальных органов публичной государственной власти. То есть, Декреты были приняты субъектом, который не был предусмотрен в политической системе страны как источник политической воли и субъект государственной власти, однако возложив на себя функцию управления государством и ответственность за его дальнейшее развитие, Временное Правительство обязано было предпринять все необходимые меры для стабилизации социально-политической обстановки и обеспечения законных интересов государства и общества. Соответственно, акты Временного Правительства должны рассматриваться как формализованные средства и методы регулирования и управления общественными отношениями в условиях дезорганизации официальных органов государственной власти.

В ситуации, когда присутствует объективная необходимость в восстановлении и реализации функций государственного управления для обеспечения правопорядка и общественной безопасности, защиты

прав и свобод граждан, деятельность Временного Правительства, независимо от его официального статуса, должна рассматриваться как легитимное осуществление государственной власти.

Поскольку субъекты обращения в Конституционный суд оспаривали конституционность декретов Временного Правительства о национализации имущества у частных собственников, то она в своем решении отметила следующее.

В содержательном смысле национализация преследовала цель сохранения и установления государственного контроля над имуществом, предположительно присвоенного незаконным образом. Возвращение такого имущества в государственную собственность рассматривалось Временным Правительством как одна из первостепенных задач переходного периода. При этом также следует иметь в виду, что в связи с особенностями текущего момента существенными факторами при принятии решений о национализации явились социально-политическая напряженность, социальные установки и ожидания о необходимости восстановления «социальной справедливости».

Следовательно, изъятие имущества у частных собственников на основании декретов о национализации явилось мерой исключительного характера, обусловленное экстраординарностью ситуации и наличием особой необходимости.

С принятием Конституции 2010 года и реализацией ее положений о формировании органов государственной власти, Временное Правительство Декретом №147 от 21 декабря 2010 года объявило о своем расформировании, тем самым большинство декретов Временного Правительства утратили свою юридическую силу.

Вместе с тем, декреты о национализации сохраняли свое юридическое значение, отношения, возникшие на их основе, имели длящийся характер и порождали для субъектов определённые юридические последствия, в связи с чем возникал правомерный вопрос о их роли и месте в действующей системе права, о возможности их обжалования в судебном порядке.

В связи с этим, Конституционный суд в своем решении отметил, что акты органа временной власти о национализации, принятые в

экстраординарных условиях, с восстановлением конституционного порядка и в условиях функционирования государства и его органов в правовом режиме, должны быть формализованы в порядке, установленном действующим законодательством.

В случаях, если при изъятии имущества на основании декретов были допущены нарушения прав и законных интересов физических и юридических лиц, их законные притязания должны быть рассмотрены компетентными государственными органами.

При этом, государство обязано обеспечить полное осуществление права на судебную защиту, которая должна быть справедливой, компетентной и эффективной.

Конституционный суд, полагаем, проявил также и разумную сдержанность, не отметив в резолютивной части своего решения конституционность или неконституционность оспариваемых актов, при этом обосновав это следующими образом.

В силу требований Конституции и конституционного закона «О Конституционном суде Кыргызской Республики», в соответствии с которыми предметом проверки органа конституционного контроля должны быть строго формализованные законы и иные нормативные правовые акты, принятые и введенные в действие с соблюдением установленных процедур, вопрос о конституционности оспариваемых декретов, не может быть решен Конституционным судом, по существу. Оспариваемые декреты приняты вне установленных нормотворческих процедур, не обладают формальными признаками нормативных правовых актов и не могут быть исследованы и разрешены юридическими способами, имеющимися в распоряжении Конституционного суда. Более того, именно по этой причине декреты не могут быть предметом рассмотрения и судов общей юрисдикции.

Оспариваемые на предмет конституционности декреты требуют исследования и проверки фактических обстоятельств, имеющих отношение к данному вопросу, кроме того принятие данных Декретов, было обусловлено также и причинами политического характера. Судебный конституционный контроль призван решать исключительно вопросы права и ни при каких обстоятельствах не должен отдавать предпочтение политической целесообразности, пытаться оценивать, чьи бы то ни было практические действия вне

их правовых форм. В связи с этим, Конституционный суд обязан воздерживаться от установления и исследования фактических обстоятельств во всех случаях, когда это входит в компетенцию других государственных органов. Данное ограничение пределов разрешения дела органом конституционного контроля является важным элементом конституционного принципа разделения государственной власти и корреспондирует общему ограничению права судебной власти рассматривать вопросы, требующие политической оценки. Сущность такого ограничения компетенции судебной власти заключается также и в необходимости оградить сферу правосудия от проникновения элементов идеологии и политических предпочтений.

Вместе с тем, исключительность и экстраординарность ситуации, в которой были приняты оспариваемые акты, равно как и сущность актов не должны служить абсолютным барьером к какому бы то ни было рассмотрению, и тем более служить абсолютным оправданием в случае возможных нарушений прав и свобод человека и гражданина.

Следовательно, органам государственной власти с целью детального изучения вопросов, затрагиваемых оспариваемыми декретами и обеспечения заинтересованных субъектов правом на доступ к правосудию, необходимо предпринять должные меры, разработать механизм разрешения спорных вопросов в рамках действующего правового поля.

Оспариваемые акты Временного Правительства затрагивали вопросы, касающиеся защиты права собственности и обеспечения прав собственников, Конституция относит такие вопросы к ведению исполнительной власти, которую осуществляют Правительство.

В связи с изложенным было поручено Правительству Кыргызской Республики создать правовые механизмы, обеспечивающие в разумные сроки разрешение спорных отношений по Декретам Временного Правительства Кыргызской Республики и возможность восстановления имущественных прав законных собственников.

Вышеуказанный кейс является обоснованным случаем проявления судебного активизма и разумной сдержанности Конституционного суда. Соответственно, в случаях, когда необходимо

исправить любую несправедливость, особенно когда другие конституционные органы не действуют, применение указанных подходов органами конституционного правосудия является объективной необходимостью.

Также Конституционным судом было рассмотрено представление председателя Верховного суда Кыргызской Республики о проверке конституционности нормы, регулирующей полномочие законодательного органа власти Кыргызской Республики (Жогорку Кенеш), касательно заслушивания ежегодной информации о деятельности судебной системы[4]. Ходатайствующий полагал, что Верховный суд не обязан ежегодно информировать парламент о деятельности судебной системы. Перечень полномочий Жогорку Кенеша Кыргызской Республики определен Конституцией и не может быть расширен законами или иными нормативными правовыми актами. Судебная власть принадлежит только судам в лице судей. Конституционные положения о независимости, неприкосновенности судей, подчинении их только Конституции и законам, запрете на вмешательство в деятельность по осуществлению правосудия определяют правовой статус судьи и закрепляют судебную власть как независимую и беспристрастную ветвь государственной власти. Принцип независимости суда, судей и в целом судебной власти имеет непосредственную связь с реализацией конституционного права на судебную защиту.

В рассматриваемом деле Конституционный суд признал Верховной суд Кыргызской Республики субъектом, обладающим правом обращения в орган конституционного контроля, хотя его в перечне субъектов, имеющих такое право, не было.

Это решение Конституционного суда также является ярким примером применение доктрины судебного активизма.

Аргументация признания высшего судебного органа в качестве субъекта обусловлена тем, что конституционным Законом Кыргызской Республики «О Конституционном суде Кыргызской Республики» предусматривается право Жогорку Кенеша Кыргызской

[4] Решение КСКР от 24 апреля 2019 года по делу о проверке конституционности пункта 35 части 1 статьи 3 Закона Кыргызской Республики «О Регламенте Жогорку Кенеша Кыргызской Республики» в связи с обращением председателя Верховного суда Кыргызской Республики.

Республики и Правительства Кыргызской Республики обращаться в орган конституционного правосудия не только в случаях нарушения прав и свобод, гарантированных Конституцией, но и в любых иных случаях обнаружения несоответствия Основному закону. Судебная власть, как одна из ветвей государственной власти, не преследует какие-либо частноправовые цели, а реализует наряду с законодательной и исполнительной ветвями власти публично-правовые функции, направленные на обеспечение верховенства закона и защиту конституционных основ государства. Верховный суд, исходя из его конституционно-правового статуса и возложенных на него задач, также, как и другие высшие органы государственной власти, вправе обращаться в Конституционный суд по вопросам компетенции органов государственной власти.

Вышесказанное указывает на демократический характер государственного устройства Кыргызской Республики, который обеспечивается, в том числе, посредством построения государственной власти на основе принципа ее разделения на законодательную, исполнительную и судебную власти и предоставление каждой из них равных прав, в частности, возможность обращения в Конституционный суд.

Кроме того, в отношении предоставления парламенту председателем Верховного суда информации о деятельности судебной системы, орган конституционного правосудия изложил следующую правовую позицию. Недопустимость эксплицитно выраженной оценки со стороны Жогорку Кенеша Кыргызской Республики информации о деятельности судебной системы не только позволяет сохранить баланс между законодательной и судебной ветвями власти, но и опосредовано свидетельствует об отсутствии необходимости непосредственного представления такой информации председателем Верховного суда Кыргызской Республики.

Таким образом, судебная власть, обеспечивающая верховенство закона, должна быть свободна от чьего бы то ни было влияния, чтобы иметь возможность быть объективной и беспристрастной. Ее конституционная модель продиктована идеей обеспечения правосудием прав и свобод человека, задана общепризнанным международным принципом верховенства права и не допускает ограничений полноты судебной власти и судебной независимости.

В своем решении Конституционный суд отметил, что регулятивное действие оспариваемой нормы, устанавливающее полномочие Жогорку Кенеша заслушивать ежегодную информацию о деятельности судебной системы, выходит за рамки полномочий Жогорку Кенеша, установленных Конституцией и приводит к нарушению таких конституционных ценностей как принцип независимости судебной ветви власти и принципа разделения властей. Оспариваемая норма была признана Конституционным судом неконституционной.

Вместе с тем Конституционный суд отметил, что, исходя из принципа открытости и ответственности государственных органов, судебная система не должна быть закрытой, и информация о ее деятельности должна быть доступной как для общественности, так и для Жогорку Кенеша.

В этой связи, форма и методы предоставления информации общественности о деятельности судебной системы должны быть определены Верховным судом Кыргызской Республики самостоятельно. Информация может предоставляться Жогорку Кенешу Кыргызской Республики исключительно по инициативе самой судебной ветви власти.

В своей практике Конституционный суд применил доктрину разумной сдержанности (самоограничения) при проверке на конституционность нормы конституционного Закона Кыргызской Республики «О приостановлении действия некоторых норм конституционного Закона Кыргызской Республики «О выборах Президента Кыргызской Республики и депутатов Жогорку Кенеша Кыргызской Республики»[5].

Для применения доктрины сдержанности послужили народные волнения после выборов, назначенных на 4 октября 2020 года.

Так, после объявления предварительных итогов выборов

[5] Решение КС Кыргызской Республики от 2 декабря 2020 года по делу о проверке конституционности конституционного Закона Кыргызской Республики «О приостановлении действия некоторых норм конституционного Закона Кыргызской Республики «О выборах Президента Кыргызской Республики и депутатов Жогорку Кенеша Кыргызской Республики» в связи с обращениями политической партии «Реформа» в лице ее председателя Сооронкуловой Клары Сыргакбековны, а также граждан Касымбекова Нурбека Айтыевича и Усубалиева Таалайбека Болотбековича.

депутатов Жогорку Кенеша (парламента), прошедших 4 октября 2020 года, ряд политических партий обратились с заявлением в Центральную комиссию по выборам и проведению референдумов об отмене его результатов.

В заявлении этих политических партий было указано, что выборы прошли с грубейшими нарушениями, массовым подкупом голосов избирателей, угрозами и давлениями на избирателей, а также нарушениями при подсчете голосов. Недовольство общества итогами выборов, сопровождавшееся массовыми беспорядками, привело к политической нестабильности в республике, в связи с чем Центральная комиссия по выборам и проведению референдумов признала недействительными итоги выборов депутатов Жогорку Кенеша Кыргызской Республики.

Оспариваемый конституционный Закон был принят в период тяжелой политической и экономической ситуации, после народных волнений и сложившихся событий 5-6 октября 2020 года. От вынесенного решения органа конституционного правосудия зависела стабильность как правопорядка и безопасности граждан по всей республике, а также недопущение каких-либо гражданских столкновений стране.

По данному делу субъект обращения утверждал, что оспариваемый закон был принят Жогорку Кенешем Кыргызской Республики в угоду интересам отдельных политических групп и лиц с грубейшими нарушениями порядка принятия законов, предусмотренного законами Кыргызской Республики «О Регламенте Жогорку Кенеша Кыргызской Республики» и «О нормативных правовых актах Кыргызской Республики». Заявитель приходит к выводу, что нарушен важный принцип осуществления государственной власти – принципа открытости и ответственности государственных органов перед народом и осуществления ими своих полномочий в интересах народа. Приостановив действие норм, регулирующих порядок проведения повторных выборов в Жогорку Кенеш, тем самым, оспариваемый закон парализовал действие положений Конституции, содержащих конституционные основы проведения выборов депутатов Жогорку Кенеша.

По мнению заявителя, в случае, если выборы признаны

недействительными и несостоявшимися, в силу конституционного Закона о выборах Центральной избирательной комиссией назначаются повторные выборы в течение одного месяца. Повторные выборы и основные выборы являются неразрывными циклами единого процесса, и повторные выборы есть органическое продолжение основных выборов.

Субъект обращения отмечал, поскольку выборы были признаны недействительными ввиду массовых нарушений законодательства о выборах, существенно повлиявших на свободу волеизъявления избирателя и исказивших принцип всеобщего равного избирательного права, повторные выборы являются важным правовым средством восстановления нарушенного права избирать и быть избранным, гарантированного Конституцией. Приостанавливая действия норм о выборах, государство прекращает взятые на себя обязательства обеспечения верховенства власти народа, представляемой и обеспечиваемой всенародно избираемым Жогорку Кенешем. Приостановление закона, затрагивающее фундаментальные политические права и свободы граждан, является ограничением этих прав в произвольно устанавливаемых временных пределах.

Субъект обращения ставил под сомнение легитимность предполагаемых конституционных изменений, ввиду участия в конституционной реформе Жогорку Кенеша, срок полномочий которого уже закончился.

Конституционный суд, аргументируя свою правовую позицию, отметил, что Кыргызская Республика является правовым, демократическим государством, что означает верховенство права во всех сферах общественной, политической и государственной жизни, подчинение всех субъектов правоотношений (человека и гражданина, общественных объединений, государственных и муниципальных органов) Конституции и законам.

Определяющим качеством закона как единственно возможного регулятора общественных отношений в правовом государстве является его процедурная легальность (законность), то есть его соответствие конституционным и законодательным предписаниям о нормотворческих правилах и процедурах его принятия и издания.

Конституция Кыргызской Республики содержит

основополагающие требования к порядку принятия, подписания, опубликования и введения в действие Жогорку Кенешем Кыргызской Республики конституционных законов и законов, а также гарантирует право на участие граждан в обсуждении и принятии законов и решений республиканского и местного значения.

Основной Закон не случайно придает особое значение участию граждан в обсуждении и принятии законов, закрепив в императивном порядке обязанность государства обеспечить воплощение в жизнь данного права. Это обусловлено неразрывной связью указанного конституционного положения с принципом народовластия. Конституция провозглашает народ Кыргызстана носителем суверенитета и единственным источником государственной власти в Кыргызской Республике, народ Кыргызстана осуществляет свою власть непосредственно на выборах и референдумах, а также через систему государственных органов и органов местного самоуправления на основе Конституции и законов. Данный принцип выступает основополагающим началом организации жизнедеятельности государства и общества в целом. В этом смысле не может быть исключением и правотворческая деятельность государства, посредством которой формируется его правовая система. Как совокупность взаимосвязанных, согласованных и взаимодействующих правовых средств, вырабатываемых в конкретных законах и иных нормативных правовых актах, правовая система устанавливает закономерность происходящих в обществе явлений и уровень правового развития страны. В этой связи, игнорирование роли общества как первоисточника власти в правотворческой деятельности государства не допустимо.

Конституционный суд привел также позицию Венецианской комиссии Совета Европы, указанную в Заключении CDL-PL(2020) 015 от 17 ноября 2020, где было отмечено, что верховенство права предполагает в отношении процедур законотворчества право граждан на участие в публичных делах и требует, чтобы общественность имела доступ к проектам законов и возможность внести свой вклад.

При этом орган конституционного контроля, соглашаясь с утверждением, что в жизнедеятельности государства могут возникать обстоятельства, требующие незамедлительных законодательных мер, считает допустимым отнесение к дискреции законодателя

установление исключительных случаев, когда законотворческий процесс может осуществляться в ускоренном режиме. При этом следует учесть, что всякие исключения, хотя и содержат иные, отличные от основного правила, регуляторы, остаются его неотъемлемой частью и не нарушают его истинного содержания, а лишь детализируют ввиду невозможности решения вопроса в общем порядке по очевидным и объективным причинам. Безусловно, эти причины должны быть существенными и отвечать принципу исключительной необходимости.

Таким образом, поскольку в особых случаях принятие законопроектов в ускоренном режиме возможно, то общественное обсуждение, как составная часть законодательного процесса, также не может препятствовать оперативному проявлению законодательной власти. В таких случаях согласие электората в легитимности такой формы нормотворческой деятельности выражается в том, что законодательная власть сама по себе осуществляется его представителями, избираемыми непосредственно на периодических, свободных и демократических выборах. Другими словами, не каждое действие может одобряться электоратом, поскольку в демократических государствах его согласие выражается преимущественно через представительство.

Неотложности законодательных решений в особых случаях не должны препятствовать и другие процедурные вопросы, занимающие временной промежуток, способный нивелировать смысл быстрого законодательного реагирования.

Общеизвестно, что в связи с объявлением Всемирной организацией здравоохранения пандемии новой коронавирусной инфекции COVID-I9 и выявлением массовых случаев заболевания на территории Кыргызской Республики в соответствии с Законом Кыргызской Республики «О Гражданской защите» и распоряжением Правительства Кыргызской Республики от 22 марта 2020 года №93 был введен режим чрезвычайной ситуации, который по настоящее время является действующим. Кроме того, события, произошедшие 5-6 октября 2020 года в городе Бишкек, обусловленные недовольством общества итогами выборов депутатов Жогорку Кенеша Кыргызской Республики, сопровождавшиеся массовым неповиновением и беспорядками, имели все признаки социальной нестабильности.

Дестабилизация (нестабильность) определяется как процесс нарушения и дезорганизации сложившихся в обществе способов политического и правового урегулирования общественной жизни. Политический кризис ведет к расшатыванию основ существования и функционирования политикоправовой системы и к смене способов разрешения политических конфликтов.

В условиях политического кризиса неизбежно возрастают угрозы как внутренней, так и внешней безопасности страны. Соответственно, к усмотрению законодателя может относиться определение сопутствующих социальных явлений при условии, если это связано с необходимостью стабилизации социальной, экономической ситуации, вопросами правопорядка и безопасности, обусловленной введением чрезвычайного положения, чрезвычайной ситуации или с обстоятельствами непреодолимой силы.

Принципы периодичности и обязательности выборов – это гаранты справедливого демократического устройства государства, означающие, что происхождение власти возможно только по волеизъявлению народа, выраженного на выборах. Эти принципы выражают меру свободы и справедливости в обществе и являются основой справедливой власти. В свою очередь, строгие промежутки между выборами обеспечивают, с одной стороны, стабильность работы выборных органов и должностных лиц, с другой, — гарантируют их сменяемость. Именно по этой причине Конституция Кыргызской Республики содержит различные сроки ограничения полномочий органов власти и должностных лиц.

По мнению Венецианской комиссии Совета Европы, приостановка избирательного процесса сказывается на гражданских и политических правах электората и может нанести ущерб демократии, поэтому перенос выборов в любых целях должен быть ограничен принципами пропорциональности и необходимости. Оценка «законной цели» и «пропорциональности» ограничения прав избирателей может проводиться в контекстуальном порядке с учетом фактического положения дел в стране. В весьма исключительных условиях власти могут отложить выборы с целью ослабления напряженности и предоставления избирателям возможности выразить свою волю в безопасном и хорошо организованном контексте. Перенос парламентских выборов на более поздний срок, определяемый

конституционной продолжительностью мандата уходящего парламента, а, следовательно, и пророгацией его полномочий, должен быть подкреплен специальными обоснованиями и чрезвычайными обстоятельствами.

Согласно Конвенции о стандартах демократических выборов, избирательных прав и свобод в государствах участниках Содружества Независимых Государств в условиях чрезвычайного или военного положения для обеспечения безопасности граждан и защиты конституционного строя в соответствии с Конституцией, законами могут устанавливаться ограничения прав и свобод с указанием пределов и срока их действия, а также может быть отложено проведение выборов.

Таким образом, перенос выборов, в том числе с точки зрения норм международного права, допустим, если это обусловлено исключительной необходимостью, вызванной глобальными кризисами, несущими в себе угрозу нанесения ущерба интересам всего общества.

Недовольство значительных групп граждан итогами выборов депутатов

Жогорку Кенеша Кыргызской Республики, состоявшихся 4 октября 2020 года, вылилось к их открытому выступлению против государственной власти, что привело к дезорганизации политической системы, обесцениванию государственной власти в глазах общества и не способности публичных органов осуществлять свои функции в надлежащем виде. Помимо этого, страна с 22 марта 2020 года не выходит из состояния чрезвычайной ситуации в связи с пандемией и массовым заболеванием населения коронавирусной инфекцией COVID-19.

В этих условиях отрицать очевидный факт нахождения Кыргызской Республики в состоянии масштабного социально-политического кризиса, невозможно. Соответственно, нет оснований считать, что у законодателя отсутствовали веские причины для признания обстоятельств, при которых принимались решения, чрезвычайными.

По сроку полномочий депутатов Жогорку Кенеша

Конституционный суд отметил, что Конституция Кыргызской Республики не только устанавливает конкретный срок, в течение которого депутаты Жогорку Кенеша правомочны осуществлять свои полномочия, но и обязательные условия, при которых эти полномочия могут быть прекращены. Предназначение этих конституционных установок заключается в том, чтобы они в своем системном единстве, с одной стороны, гарантировали демократический принцип сменяемости органов власти, с другой стороны, обеспечивали непрерывность жизнеспособности законодательной ветви в системе органов государственной власти. При этом Конституция не преследует цели пролонгации полномочий законодательного органа, а требует сохранения конституционной конструкции построения государственной власти на основе принципа разделения властей.

Иными словами, Основной Закон не исключает возможность политических кризисов, вследствие которых не удастся в установленные сроки сформировать законодательный орган, от деятельности которого прямо или косвенно зависит создание всего государственного механизма.

В подтверждение своей позиции орган конституционного контроля привел позицию Венецианской комиссии Совета Европы, которая отметила в своем заключении, что мандат Парламента начинается с момента принесения присяги депутатами и заканчивается через 5 лет. В этот период предыдущий законодательный орган все ещё продолжает функционировать, чтобы Кыргызская Республика никогда не была лишена парламента, способного в случае необходимости осуществлять свои полномочия. Цель части 3 статьи 71 Конституции состоит в том, чтобы предотвратить любую форму институционального вакуума. Функции государства должны обеспечиваться в любое время без задержек и перерывов.

Конституционный суд в своем Решении пришел к выводу, что перерывы в общей правоспособности Жогорку Кенеша, независимо от причин, не допустимы, соответственно, полномочия депутатов Жогорку Кенеша шестого созыва могут быть завершены только со дня первого заседания следующего созыва в порядке, установленном частью 3 статьи 71 Конституции Кыргызской Республики.

Относительно вопроса - насколько мандат законодательного

органа может быть полноценным в этот период, Конституционный суд отметил, что осуществление парламента деятельности по истечении конституционного срока полномочий не оправдывают ожиданий общества, сформировавшихся устоявшимся восприятием строгой периодичности смены власти, что подрывает доверие граждан к государственным институтам и наносит ущерб эффективному государственному управлению. По этому вопросу Венецианская комиссия Совета Европы в своем Заключении обратила внимание на то, что для предотвращения перерывов в работе законодательного органа действующий парламент должен иметь ограниченную дееспособность. Во время пророгации, которая происходит после истечения срока полномочий законодательного органа, парламенту разрешается выполнять лишь некоторые обычные функции, в то время как ему не разрешается утверждать чрезвычайные меры, в том числе конституционные реформы. В период пророгации уровень легитимности законодательных решений ниже.

В связи с чем, Конституционный суд особо отметил, что, сохраняя за собой мандат законодательного органа, тем не менее, парламент Кыргызской Республики обязан в период пророгации проявить высокий уровень политической ответственности перед обществом и руководствоваться в своей деятельности принципом разумной сдержанности. Другими словами, парламент может принимать решения, вызванные исключительной необходимостью и носящие безотлагательный характер, то есть направленные на стабилизацию социально-политической ситуации в стране, преодоление различного рода кризисов и социальной напряженности, обеспечение правопорядка, безопасности государства и населения, деятельности Правительства, а также на поддержание эффективного функционирования принципа разделения властей.

У ходатайствующих вызывало также обеспокоенность такое основание принятия оспариваемого конституционного Закона, как необходимость проведения конституционной реформы, и ставилось под сомнение легитимность предполагаемых поправок в Конституцию в случае участия в предполагаемой реформе действующего в то время созыва Жогорку Кенеша Кыргызской Республики.

Орган конституционного контроля подчеркнул особую значимость соблюдения принципа незыблемости Конституции

Кыргызской Республики, тем не менее, отметил, что оспариваемый конституционный Закон по своему предмету регулирования не является актом конституционной реформы. Иными словами, намерение Жогорку Кенеша Кыргызской Республики, изложенное в статье 1 оспариваемого конституционного Закона, не может расцениваться как самостоятельная норма права, содержащая веление или властное предписание о проведении конституционной реформы. То есть орган конституционного контроля не может давать оценку правомерности еще не совершенным действиям парламента Кыргызской Республики в рамках рассматриваемого дела, поскольку оспариваемый конституционный Закон не является юридическим основанием проведения конституционной реформы.

Таким образом, Конституционный суд признал оспариваемую норму конституционной, минимизировав негативные правовые последствия с учетом сложившейся социально-политической ситуации в стране, выполнив, при этом, свою миссию по обеспечению мира и стабильности в стране.

THE DEVELOPMENT OF JUDICIAL REVIEW IN MALAYSIA

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Abstract

The Federal Constitution is the supreme law in Malaysia. The superior courts are bestowed with the judicial power to ensure that the legislative and the executive operate within the parameters prescribed by the Federal Constitution under the doctrine of separation of powers. In this regard, the judicial power which forms as the basic structure of the federal constitution is exercised by way of judicial review. Judicial review affords individuals aggrieved to challenge the constitutionality of the legislative enactments or the unlawfulness of the decisions of the executive with the right to be heard. This article aims to demonstrate the current trend adopted by the Malaysian court in dealing with judicial review applications based on the recent judgments of the apex court (the Federal Court). This article expatiates on the pertinent legal principles and normative justifications on judicial review expressed by the courts in determining the legal breadth in reviewing legislative enactments and executive decisions. The methodology devised for this article is based on doctrinal research where the materials were obtained from textbooks, law reports, online resources and academic databases.

1.0 Introduction

This article examines the recent development of judicial review in Malaysia as a crucial instrument in upholding good governance in Malaysia. The discussion in this article features the relevant cases that had been recently decided by the apex court in Malaysia (the Federal Court). These cases serve as exemplars of how judicial review principles are currently applied in Malaysia and would be able to provide a general outlook on the approach adopted by the Malaysian courts in entertaining judicial review applications. The discussion begins with the discussion on the legal model applied by the Malaysian courts in judicial review applications, and the discussion elongates to the legal principles of judicial review. This article will then explain the bifurcated roles of judicial review in Malaysia by addressing recent legal discourse engaged by the Federal Court on the legal conundrums directly linked to judicial review, especially judicial power and the basic structure doctrine.

2.0 The Separation of Powers

Malaysia is a parliamentary democracy with a federal constitutional monarchy. The paramount Ruler commonly referred to as the Yang di-Pertuan Agong is the head of state. Legislative power is divided between the federal and state legislatures. The Federal power is vested in the government and the two chambers of the federal parliament. This parliament consists of two houses, the Senate (Dewan Negara) and the House of Representatives (Dewan Rakyat). Executive power lies in the cabinet led by the Prime Minister who must be a member of the House of Representatives and command a majority. The Cabinet is chosen from members of both Houses of the Parliament. The Prime Minister of Malaysia is appointed by the Yang di-Pertuan Agong who also appoints the Cabinet on the advice of the Prime Minister.

Each of 13 states has its own constitution which must be compatible with the FC. Each state has an executive council (exco), which deals with non-federal matters under a Chief Minister (Menteri Besar/ Ketua Menteri) answerable to the elected state assemblies.

Malaysia has two constituencies of law. One is for the entire nation and is set by the Parliament. The second is Shariah or Islamic law which applies to Muslims. The states normally determine Shariah.

As a democratic country, there are three organs of the government in Malaysia: the legislative, the executive, and the judiciary[1]. Each organ of the government is shouldered with distinct roles and responsibilities under the FC. Malaysia upholds constitutional supremacy as enshrined in Article 4(1) of the FC. Article 4(1) of the FC provides as follows:

> ***Supreme law of the Federation***
>
> *4(1) This Constitution is the supreme law of the Federation and any law passed after the Merdeka Day which is inconsistent with this Constitution shall, to the extent of the inconsistency, be void.*

Although the doctrine of separation of powers is nowhere to be expressly mentioned in the FC, its spirit could be derived from the finely crafted words of Article 39, Article 44 and Article 121 of the FC that outline the functions of the three branches of the government[2]. These Articles respectively read as follows:

> ***Article 39. Executive authority of Federation***
>
> *The executive authority of the Federation shall be vested in the Yang di-Pertuan Agong and exercisable, subject to the provisions of any federal law and of the Second Schedule, by him or by the Cabinet or any Minister authorized by the Cabinet, but Parliament may by law confer executive functions on other persons.*
>
> ***Article 44. Constitution of Parliament***
>
> *The legislative authority of the Federation shall be vested in a Parliament, which shall consist of the Yang di-Pertuan Agong and two Majlis (House of Parliament) to be known as the Dewan Negara (Senate) and the Dewan Rakyat (House of Representatives).*
>
> ***Article 121. Judicial Power of the Federation***
>
> *(1) There shall be two High Courts of co-ordinate jurisdiction and status, namely-*

[1] Abdul Hamid Mohamad, *No Judge Is A Parliament*, CLJ Publication, Selangor, 2018, p 123.
[2] *PP v Kok Wah Kuan* [2007] 6 CLJ 341.

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

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

(c) (Repealed)

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

These provisions had been carefully arranged in the FC to serve specific purposes and cannot be treated as meaningless with no legal consequences[3].

The separation of powers between the legislative, the executive and the judiciary is the hallmark of a modern democratic state.[4] Anything recognisable as a state must have an acknowledged means of constituting and specifying the limits upon the three forms of state power identified by Montesquieu: legislative power (making laws), executive power (implementing laws) and judicial power (adjudicating disputes under laws)[5]. In the same vein, the Federal Court in *Loh Kooi Choon v Government of Malaysia*[6] expounded that the constitution is the supreme law of the land embodying three basic concepts, namely the individual fundamental rights, the distribution of power between the States and the Federation and the distribution of power between the legislative, the executive, and the judiciary.

In this connection, Sufian, Lord President (LP)[7] in *Ah Thian v Government of Malaysia (Ah Thian)*[8] stated that Parliamentary supremacy

[3] Alma Nudo Atenza v PP & Another Appeal [2019] 5 CLJ 780.
[4] Ibid.
[5] W.J. Waluchow, *A Common Law Theory of Judicial Review the Living Tree*, Cambridge University Press, Cambridge UK, 2007, p 19.
[6] Loh Kooi Choon v Government of Malaysia [1975] 1 LNS 90.
[7] Lord President refers to the post of the head of the Malaysian Judiciary before 1994. However, after the Constitutional amendment in 1994, the term Lord President was replaced with the term Chief Justice.
[8] Ah Thian v Government of Malaysia [1976] 1 LNS 3.

does not apply in Malaysia and the power of the Parliament is limited by the Constitution. The applicability of the doctrine on separation of powers had been vividly pronounced by the Federal Court in *PP v Kok Wah Kuan (Kok Wah Kuan)*[9], wherein Abdul Hamid Mohammad, the President of the Court of Appeal as he then was, ruled that separation of power is a political doctrine under which the legislative, executive and judicial branches of government are kept distinct to prevent abuse of power, but this doctrine is not absolute.

Raja Azlan Shah LP in the case of *Pengarah Tanah dan Galian, Wilayah Persekutuan v Sri Lempah Enterprise Sdn Bhd* ruled that *every legal power must have legal limits, otherwise there is dictatorship…In other words, every discretion cannot be free of legal restraint; where it is wrongly exercised, it becomes the duty of the courts to intervene*[10].

Article 124 of the FC provides that judges are obliged to preserve, protect and defend the Constitution[11]. The superior civil courts in Malaysia are vested with the judicial power to ensure that public authorities

[9] *Supra.* at no. 3.

[10] Pengarah Tanah dan Galian, Wilayah Persekutuan v Sri Lempah Enterprise Sdn Bhd [1978] 1 LNS 143.

[11] *Supra.*, at no 2.

Article 124 of the FC provides :

"Article 124. Oath of office of judges.

(1) The Chief Justice of the Federal Court shall before exercising the functions of his office take and subscribe the oath of office and allegiance set out in the Sixth Schedule, and shall do so in the presence of the Yang di-Pertuan Agong.

(2) A judge of the Federal Court, the Court of Appeal or a High Court, other than the Chief Justice of the Federal Court, shall before exercising the functions of a judge take and subscribe the oath of office and allegiance set out in the Sixth Schedule in relation to his judicial duties in whatever office.

(2A) A person taking the oath on becoming the President of the Court of Appeal shall do so in the presence of the senior judge available of the Court of Appeal.

(3) A person taking the oath on becoming Chief Judge of a High Court shall do so in the presence of the senior judge available of that High Court.

(4) A person taking the oath on becoming a judge of the Federal Court shall do so in the presence of the Chief Justice or, in his absence, the next senior judge available of the Federal Court.

(4A) A person taking the oath on becoming a judge of the Court of Appeal shall do so in the presence of the President of the Court of Appeal or, in his absence, the next senior judge available of the Court of Appeal.

(5) A person taking the oath on becoming a judge of a High Court (but not Chief Judge) shall do so in the presence of the Chief Judge of that Court or, in his absence, the next senior judge available of that Court".

do not act beyond the parameters permitted by law. The FC vested the judiciary with the authority to determine the legitimacy of the acts of the executive and legislative branches of the government. The executive and legislative branches of the government are obliged to perform their duties in accordance with the constitution and the laws. The judiciary holds the ultimate authority in determining what is constitutional or lawful.

3.0 The Legal Models for Constitutional Review in Malaysia

Constitutional review can be derived from two models. The first model is based on the European model, where constitutional review is carried out by a dedicated court commonly known as the constitutional court. This model is often called the centralised system. The Constitutional Court is given the exclusive jurisdiction to review laws, executive decisions and actions. The Constitutional Court exercises its exclusive power where no other courts or body can engage in constitutional review[12]. However, the Constitutional Court does not possess the jurisdiction to preside over matters of civil or criminal nature. This system is the brainchild of Hans Kelsen and is familiar to civil law countries in Western Europe, Eastern and Central Europe, West Africa, South America and East Asia[13].

Whilst the second model is based on the American system, where there is no dedicated constitutional court to perform constitutional review. Instead, the superior courts are equipped with the jurisdiction to determine the constitutionality of any laws. This model is termed the 'diffused or decentralised model' and is universal to common law countries, including Malaysia. This model permits constitutional review to be carried out by a court with general jurisdiction over all civil, criminal and public law questions not limited to constitutional questions only[14]. The Federal Court in the case of *Datuk Seri Anwar Ibrahim v Government of Malaysia & Anor*[15] ruled that the High Courts should determine constitutional questions at first instance and the role of the Federal Court in constitutional adjudication is only as a court of final appeal or last resort.

4.0 Principles of Judicial Review

Judicial review is a very broad term to be accorded with a fixed

[12] A. Harding, 'The Fundamentals of Constitutional Courts', April 2017, *International Institute for Democracy and Electoral Assistance*, p 1.
[13] Ibid. at p 2.
[14] Ibid.
[15] Datuk Seri Anwar Ibrahim v Government of Malaysia & Anor [2020] 3 CLJ 593.

definition. Put simply, judicial review may be taken to refer to the safeguard which is essential to the rule of law in promoting the public interest, policing the parameters and duties imposed by the Parliament, guiding public authorities and securing that they act lawfully, ensuring that they are accountable to the law and not above it and protecting the rights and interests of those affected by the exercise of public authority power[16].

Malaysia is a common law country and its laws are developed from common law principles. Therefore, it would be helpful for this discussion to have a glimpse of the principles of judicial review developed by the English courts. In *R v Ministry of Defence, ex p Smith*[17], Sir Thomas Bingham MR ruled that judicial review forms part of the constitutional duty to ensure that the rights of citizens are not abused by the unlawful exercise of executive power. In this regard, it is apposite to emphasise that judicial review is the backbone of administrative law[18].

Black's Law Dictionary defines the term judicial review as the court's power to review the actions of other branches or levels of government, especially the power of the court to invalidate legislative and executive actions as being unconstitutional[19]. The court is vested with the judicial power to protect the rights of individuals from being abused by the unlawful exercise of the executive's power and not to shirk from its fundamental duty in doing right to all manner of people[20]. The judicial power vests the courts with supervisory jurisdiction to perform judicial review. Simply put, judicial review is concomitant to judicial power.

However, the term 'judicial review' is an indefinite term that necessitates some adumbration. The FC does not offer any definition of the phrase 'judicial review'. However, the Federal Court in the case of *SIS Forum (Malaysia) v Kerajaan Negeri Selangor & Majlis Agama Islam Selangor (Intervener) (SIS Forum)*[21] explained the phrase 'judicial power'. 'Judicial power' refers to powers possessed by the sovereign authority to

[16] M. Fordham QC, *Judicial Review Handbook*, 6th ed., Hart Publishing, London, 2012, p 1.1.

[17] R v Ministry of Defence, ex p Smith [1996] QB 517, 556 D-E.

[18] Ahmad Masum, 'The Doctrine of Judicial review: A cornerstone of Good Governance in Malaysia' (2010) 6 Malayan Law Journal, p cxiv.

[19] B.A. Garner, Black's Law Dictionary, 9th ed., Thomson Reuters, St. Paul, USA, 2009, p 924.

[20] R v Ministry of Defence, ex p Smith [1996] QB 517, 556D-E.

[21] SIS Forum (Malaysia) v Kerajaan Negeri Selangor& Majlis Agama Islam Selagor (Intervener) [2022] 1 LNS 218.

decide controversies between its subjects or between itself and its subjects, whether the rights relate to life, liberty or property. *SIS Forum* had adopted the classic explanation of judicial power from an Australian case in *Huddart Parker & Co Pty Ltd v Moorehead*[22] because the phrase judicial power mentioned in Article 121(1) of the FC prior to the 1988 amendment is akin to the phrase judicial power employed by sec.71 of the Australian Constitution. In *Huddart Parker & Co Pty Ltd v Moorehead,* Griffith CJ (Chief Justice of Australia)[23] ruled:

> *…"judicial power" as used in sec. 71 of the Constitution mean[s] the power which every sovereign authority must of necessity have to decide controversies between its subjects, or between itself and its subjects, whether the rights relate to life, liberty and property. The exercise of this power does not begin until some tribunal which has power to give a binding and authoritative decision (whether subject to appeal or not) is called upon to take action.*

There is no doubt that an important feature of judicial power is judicial review where the court is vested with the power to examine the actions of the legislature, executive and administrative arms of the government and to determine whether such actions are consistent with the constitution.

Previously, the law dictated that judicial review is a review of the manner in which the decision was made[24]. Traditionally, the courts applied the subjective test to entertain judicial review applications. The subjective test approach is reflected in the decision of the Federal Court in the case of *Karam Singh v Menteri Hal Ehwal Dalam Negeri (Minister of Home Affairs)*[25]. The subjective test limits the court's power to review the decision making process only. However, the legal landscape began to change in 1982 after the Federal Court's decision in *Merdeka University Berhad v Government of Malaysia*[26] ruled that the subjective test in judicial review is no longer applicable. Suffian LP in this case observed that:

[22] Huddart Parker & Co Pty Ltd v Moorehead [1908] 8 CLR 330.
[23] Ibid.
[24] Harpers Trading (M) Sdn Bhd v National Union of Commercial Workers [1991] 1 MLJ 417, p 419.
[25] Karam Singh v Menteri Hal Ehwal Dalam Negeri (Minister of Home Affairs) [1969] 2 MLJ 129.
[26] Merdeka University Berhad v Government of Malaysia [1982] 2 MLJ 243.

> *Subjective formula no longer excludes judicial review if objective facts have to be ascertained before arriving at such satisfaction and the test of unreasonableness is not whether a particular person considers a particular course unreasonable, but whether it could be said that no reasonable person could consider that course reasonable".*

In contrast, the objective test permits the court to evaluate the decision-making process and the merit of the decision. The Federal Court in *R Rama Chandran v Industrial Court of Malaysia & Anor* (*R Rama Chandran*)[27] had applied the objective test, whereby the decision of an inferior tribunal may be reviewed on the grounds of illegality, irrationality and proportionality, which permits the courts to scrutinise the decision not only for the process but also for substance. It allows the courts to go into the merits of the matter. However, in a later decision, the Federal Court had limited its power to exercise judicial review. In *Ranjit Kaur a/p S Gopal Singh v Hotel Excelsior (M) Sdn Bhd* (*Ranjit Kaur*)[28] the Federal Court held that cases that involve matters relating to public policy, national interest, public safety and national security are not amenable to judicial review.

In this regard, it would appear therefore that, the test for judicial review is an objective one. A host of authorities adjudicated by the apex court have endorsed the application of the objective test in judicial review applications. (see *Pengarah Tanah dan Galian, Wilayah Persekutuan v Sri Lempah Enterprise Sdn Bhd*[29], *John Peter Berthelsen v Director General of Immigration, Malaysia & Ors*[30], *Minister of Home Affairs, Malaysia v Persatuan Aliran Kesedaran Negara*[31], *YB Menteri Sumber Manusia v Association of Bank Officers, Peninsular Malaysia*[32] and *Titular Roman Catholic Archbishop of Kuala Lumpur v Menteri Dalam Negeri & Ors*[33]*).*

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[27] R Rama Chandran v Industrial Court of Malaysia & Anor [1997] 1 MLJ 145.
[28] Ranjit Kaur a/p S Gopal Singh v Hotel Excelsior (M) Sdn Bhd [1997] 2 CLJ 11.
[29] Pengarah Tanah dan Galian, Wilaya Persekutuan v Sri Lempah Enterprise Sdn Bhd [1978] 1 MLJ 135.
[30] John Peter Berthelsen v Director General of Immigration, Malaysia & Ors [1987] 1 MLJ 134.
[31] Minister of Home Affairs, Malaysia v Persatuan Aliran Kesedaran Negara [1990] 1 MLJ 351.
[32] YB Menteri Sumber Manusia v Association of Bank Officers, Peninsular Malaysia [1999] 2 CLJ 471.
[33] Titular Roman Catholic Archbishop of Kuala Lumpur v Menteri Dalam Negeri & Ors [2014] 6 CLJ 541.

5.0 The Bifurcated Roles of Judicial Review in Malaysia

The fundamental roles of judicial review can be dissected into two parts. The first part concerns constitutional judicial review, whilst the second part relates to the statutory judicial review[34]. The bifurcated roles played by the judicial review are explained below.

5.1 Constitutional Judicial Review

Constitutional judicial review is enshrined in Article 4(1) of the FC. The said provision stipulates that the FC is the supreme law of the Federation and any law passed after Merdeka Day which is inconsistent with the FC shall, to the extent of the inconsistency, be void. The constitutional judicial review deals with the invalidity of legislative and executive conduct to the extent that they are in excess of constitutionally permissible limits. The ultimate purpose of constitutional review is to strike down any legislation that runs *ultra vires* the FC. In this respect, the courts are empowered to strike down laws promulgated by the Parliament or the state legislatures that are in conflict with the constitution. The Federal Court in *SIS Forum*[35] ruled that there are two things corollary to Article 4(1) of the FC. Firstly, the superior courts are the only body capable of exercising review powers over the constitutional validity of laws as the final interpreter and independent protector of the FC. Secondly, the power to constitutionally review the validity of legislation is concomitant power to review executive action. The validity of any written laws can be challenged on three grounds as expounded by Sufian LP in *Ah Thian (supra)*:

> (a) firstly is on the competency of Parliament or the State legislature to make law;
>
> (b) secondly is the inconsistency of the Federal or the State written law with the Constitution; and
>
> (c) thirdly is when the State's written law is inconsistent with the Federal law.

[34] SIS Forum (Malaysia) v Kerajaan Negeri Selangor & Majlis Agama Islam Selangor (Intervener) [2022] 1 LNS 218.

[35] SIS Forum (Malaysia) v Kerajaan Negeri Selangor & Majlis Agama Islam Selangor (Intervener) [2022] 1 LNS 218.

5.1.1 Competency of Parliament or the State legislature to make law

The competency of the Parliament or the State legislature relates to the power to promulgate law as provided by Article 4(3) of the FC. Proceedings to challenge would require prior leave from the Federal Court based on the wordings of Article 4(4) of the FC. Article 4(3) and Article 4(4) of the FC read:

> Article 4(3)
>
> *(3) The validity of any law made by Parliament or the Legislature of any State shall not be questioned on the ground that it makes provision with respect to any matter with respect to which Parliament or, as the case may be, the Legislature of the State has no power to make laws, except in proceedings for a declaration that the law is invalid on that ground or—*
>
> *(a) if the law was made by Parliament, in proceedings between the Federation and one or more States;*
>
> *(b) if the law was made by the Legislature of a State, in proceedings between the Federation and that State.*
>
> Article 4(3)
>
> *(4) Proceedings for a declaration that a law is invalid on the ground mentioned in Clause (3) (not being proceedings falling within paragraph (a) or (b) of the Clause) shall not be commenced without the leave of a judge of the Federal Court; and the Federation shall be entitled to be a party to any such proceedings, and so shall any State that would or might be a party to proceedings brought for the same purpose under paragraph (a) or (b) of the Clause. 19."*

The application of this provision can be best illustrated in the decision of the Federal Court in the case of *SIS Forum*[36]. To provide context, it would be helpful to state briefly on the court system in Malaysia. Generally, there are two courts system in Malaysia namely the civil court and the Shariah court. The jurisdiction of the Shariah court is limited to Muslim matters stipulated in the State List, Ninth Schedule of the FC such as marriage, divorce and inheritance. Other matters that are outside the

[36] SIS Forum (Malaysia) v Kerajaan Negeri Selangor & Majlis Agama Islam Selangor (Intervener) [2022] 1 LNS 218.

parameters prescribed by the State List shall fall within the ambit of the Federal List and shall be subject to the powers of the civil courts.

In *SIS Forum*, the petitioner (SIS Forum Malaysia) had challenged the legality of the power of the State to include the power of judicial review to the Shariah Court by way of introducing section 66A of the Administration of the Religion of Islam (State of Selangor) Enactment 2003 (ARIE). The petitioner argued that the power to exercise judicial review falls within the exclusive jurisdiction of the superior civil courts under the FC. The State List does not confer the power to the State Legislative to make laws to give the power of judicial review to the Shariah Court. The Federal Court in this case ruled that Article 4(1) of the FC declares that FC is the supreme law of the federation and only the civil superior courts possess the judicial power to hear judicial review applications.

Similarly, in the case of *Iki Putra Bin Mubarrak v Kerajaan Negeri Selangor*[37], the petitioner was granted leave to file a petition under Article 4(3) and Article 4(4) of the FC to challenge the competency of the Selangor State Legislature to enact section 28 of the Shariah Criminal Offences (Selangor) Enactment 1995 (1995 Enactment). Section 28 of the 1995 Enactment reads:

> *"Any person who performs sexual intercourse against the order of nature with any man, woman or animal is guilty of an offence and shall be liable on conviction to a fine not exceeding five thousand ringgit or to imprisonment for a term not exceeding three years or to whipping not exceeding six strokes or to any combination thereof."*

The petitioner argued that the Selangor State Legislature had no power to legislate a law that is under the exclusive jurisdiction of the Parliament. Furthermore, section 20 of the 1995 Enactment had already been governed by sections 377 and 377A of the Penal Code. The Federal Court in this case ruled that the primary power of legislation in criminal law resides in the Parliament. The state is empowered to enact offences within the confinement of the State List and State law may allow it. The state does not have an overriding power of legislation on the subject of criminal law. Therefore, Federal Court in this case pronounced that section 28 of the 1995 Enactment is void.

[37] Iki Putra Bin Mubarrak v Kerajaan Negeri Selangor [2021] MLJU 211.

5.1.2 Inconsistency of the Federal or the State written law with the Constitution

The prominent issue regarding the challenge on the inconsistency of the federal or the state written law is whether prior leave is required from the Federal Court. In this respect, the Federal Court in both *Titular Roman Catholic Archbishop of Kuala Lumpur v Menteri Dalam Negeri & Ors (Roman Titular)*[38] and in *State Government of Negeri Sembilan & Ors v Muhammad Juzaili Mohd Khamis & Ors (Juzaili Khamis)*[39] had imposed a mandatory requirement for leave from the Federal Court before a challenge can be mounted on this ground. Brief facts of these two cases are discussed in the following paragraphs.

In *Roman Titular*[40], the Federal Court had dismissed the application for leave to appeal on the basis *inter alia* the applicant did not obtain prior leave to challenge the constitutionality of the law. Instead, the applicant had challenged the constitutionality of the law by way of collateral attack. In this case, the applicant was granted a publication permit by the Minister of Home Affairs to publish the "Herald - the Catholic Weekly" ('the Herald'). However, the publication permit was attached with three conditions: the publication must not be in Malay language and the word 'Allah' is prohibited from usage; the publication is only for circulation in churches, and the front page must display wordings that the publication is only for Christians. The Minister relied on section 9 of the Non-Islamic Religions (Control of Propagation Amongst Muslims) Enactment 1988 (Selangor Enactment No. 1/1988) in deciding that the applicant's Publication Permit for the period 1.1.2009 until 31.12.2009 is subject to the condition that the applicant is prohibited from using the word "Allah" in the Herald.

Dissatisfied with the decision of the Minister in prohibiting the use of the word "Allah" in the Herald, the applicant filed an application for judicial review under Order 53 rule 3(1) Rules of the High Court 1980. At the High Court, the applicant challenged the validity of section 9 of the Selangor Enactment No. 1/1988 on the ground that it ran against Article 11(4) of the FC. The High Court held that the impugned provision

[38] Titular Roman Catholic Archbishop of Kuala Lumpur v Menteri Dalam Negeri & Ors [2014] 6 CLJ 541.
[39] State Government of Negeri Sembilan & Ors v Muhammad Juzaili Mohd Khamis & Ors [2015] 8 CLJ 975.
[40] Titular Roman Catholic Archbishop of Kuala Lumpur v Menteri Dalam Negeri & Ors [2014] 6 CLJ 541.

was invalid, null and void and unconstitutional as it exceeds the object of Article 11(4) of the FC[41]. The Federal Court ruled that the High Court ought not to have entertained the challenge on the validity of the impugned provision in the absence of leave from the Federal Court. Therefore, the High Court's pronouncement on the unconstitutionality of section 9 of the Selangor Enactment No. 1/1988 was procedural non-compliance and for want of jurisdiction.

Meanwhile, in *Juzaili Khamis*[42] the respondents had experienced a similar fate for their failure to obtain prior leave from the Federal Court. In this case, the respondents had challenged the constitutionality of section 66 of the Shariah Criminal (Negeri Sembilan) Enactment 1992 (Negeri Sembilan Enactment 1992), and to that effect, the respondents sought a declaration from the High Court by way of judicial review. Section 66 of the Negeri Sembilan Enactment 1992 stipulated that any male person wearing a woman's attire or posing as a woman in any public place for the purpose of immoral act shall be liable for a fine not exceeding three thousand ringgit or imprisonment not exceeding two years or both. The respondents submitted that they were suffering from 'Gender Identity Disorder', and the impugned provision was inapplicable to a person who is psychologically a woman. The respondent claimed that section 66 of the Negeri Sembilan Enactment 1992 was inconsistent with the provisions of the FC, particularly Articles 5(1), 8(2), 9(2), 10(1)(a)[43].

[41] Article 11(4) of the FC reads:

> Article 11. Freedom of religion.
>
> (1) …
>
> (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.".

[42] State Government of Negeri Sembilan & Ors v Muhammad Juzaili Mohd Khamis & Ors [2015] 8 CLJ 975.

[43] Article 5(1) of the FC reads:

> "(1) No person shall be deprived of his life or personal liberty save in accordance with law".
>
> Article 8(2) of the FC reads:
>
> "(2) Except as expressly authorized by this Constitution, 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".
>
> Article 9(2) of the FC reads :

The High Court had dismissed the respondent's application for judicial review on merit. Aggrieved, the respondents filed an appeal before the Court of Appeal. The Court of Appeal ruled in favour of the respondents and declared that section 66 of the Negeri Sembilan Enactment 1992 was unconstitutional as being invalid and inconsistent with Articles 5(1), 8(2), 9(2), 10(1)(a) of the FC. The Federal Court had dismissed the leave to appeal by the appellants because the respondents had failed to follow the specific procedure laid down in Article 4 of the FC, where leave from the Federal Court must be obtained first before the High Court could entertain judicial review application to challenge the validity of any law. The Federal Court observed that the Court of Appeal and the High Court were in grave error in entertaining the respondents' collateral attack against the validity of section 66 of the Negeri Sembilan Enactment 1992 by way of judicial review. Both Court of Appeal and the High Court had no jurisdiction to entertain the respondent's application. Therefore, both proceedings before the Court of Appeal and the High Court were declared as void ab initio.

However, the Federal Court in *Alma Nudo Atenza v PP & Another Appeal (Alma Nudo)*[44] ruled that the decisions made in *Roman Titular* and *Juzaili Khamis* were *per incuriam* because both cases had accorded wide interpretations to Article 4(3) and (4) that ran against the clear wordings of both provisions. Consequently, the Federal Court in *Alma Nudo* had departed from the principles set out in *Roman Titular* and *Juzaili Khamis*. Richard Malanjum CJ, in delivering the unanimous decision of the court in *Alma Nudo,* opined that leave from the Federal Court under Article 4(4) of the FC is only applicable when the validity of the law is challenged on the ground that it makes provision with respect to a matter on which the Parliament or the State Legislature has no power to make laws. Other than the instances mentioned in Article 4(3) and (4) of the FC, any court has the jurisdiction to hear the application even without leave from the Federal Court.

"(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".

Article 10(1)(a) of the FC reads :

"(1) Subject to Clauses (2), (3) and (4)—

(a) every citizen has the right to freedom of speech and expression;".

[44] Alma Nudo Atenza v PP & Another Appeal [2019] 5 CLJ 780.

Based on the above cases, there are two distinct approaches adopted by the Federal Court on the issue of leave. The question is, which Federal Court decisions should be followed? The answer can be found in *Dalip Bhagwan Singh v Public Prosecutor (Dalip Bhagwan Singh)*[45], wherein the Federal Court ruled that when the decisions of the Federal Court are in conflict against each other on the point of law, the later decision shall prevail over the earlier decision. Applying this principle to the present context, the approach adopted by the court in *Alma Nudo* in interpreting Article 4(3) and (4) of the FC prevails over the approach adopted in *Roman Titular* and *Juzaili Khamis.* The pronouncement made in Alma Nudo had realigned the legal course towards the correct direction as guided by *Ah Thian.*

The Federal Court's decision in *Majlis Agama Islam Wilayah Persekutuan v Victoria Jayaseele Martin* (*Victoria Martin*)[46] is also worth to be cited here to illustrate the challenge on the inconsistency of the law with the FC. In this case, the applicant, Victoria Martin, made an application to be admitted as a Syarie lawyer in order to permit her to appear before the Shariah Court in the Federal Territory. The Federal Territory Islamic Council or commonly known as Majlis Agama Islam Wilayah Persekutuan (MAWIP), rejected her application on the ground that she is not a Muslim and only Muslims can be admitted as a Syarie Lawyer by virtue of rule 10 of the Shariah Lawyers Rules 1993. Dissatisfied, the applicant applied for a judicial review to quash the decision made by MAWIP. The applicant contended that rule 10 of the Shariah Lawyers Rules 1993 was unconstitutional as it contravened her right to life and liberty as guaranteed by Article 5 of the FC, her right to be treated equally under Article 8 of FC and deprived her right to freedom of speech, assembly and association under Article 10 of the FC.

The High Court held that MAWIP had the power under section 59(2) of the Administration of Islamic Law (Federal Territories) Act 1993 to make rules relating to the qualifications for admission of Syarie Lawyers, including imposing a restriction that an applicant must be a Muslim. On appeal, the Court of Appeal reversed the decision of the High Court and allowed the judicial review application on the basis that rule 10 of the Peguam Syarie Rules 1993 mandating that only Muslims can be admitted as Peguam Syarie *ultra vires* section 59(1) of the Administration of Islamic Law (Federal Territories) Act 1993. However, the Federal Court

[45] Dalip Bhagwan Singh v Public Prosecutor [1997] 4 CLJ 645.
[46] Majlis Agama Islam Wilayah Persekutuan v Victoria Jayaseele Martin [2016] 4 CLJ 12.

held that the impugned rule 10 of the Shariah Lawyers Rules 1993 was not in contravention with the FC, particularly Article 5, Article 8(1) and Article 10(1)(c) of the FC because section 59(2)(a) of the Shariah Lawyers Rules 1993 was general enough to accommodate MAWIP's action in imposing restriction under rule 10 of the Administration of Islamic Law (Federal Territories) Act 1993.

Another aspect that will be seriously considered by the courts in considering judicial review applications is the ground of the 'basic structure doctrine'.

5.1.3 Basic Structure Doctrine

Basic Structure Doctrine (BSD) is a controversial doctrine in Malaysia. This doctrine has not been unanimously accepted by the Federal Court. BSD refers to the fundamental feature of the constitution that cannot be altered or amended by the Parliament. In this regard, the courts are empowered to strike down any laws promulgated by the Parliament that violate the basic structure of the constitution. BSD was first developed by the Indian court in 1964 through the case of *Sajjan Singh v the State of Rajasthan*[47]. In this case, the presiding judge opined that the Parliament could not amend the fundamental features of the constitution *carte blanche*. On appeal, the idea of basic structure was rejected. The position lasted for eight years until the Indian Supreme Court in *Kasavananda Bharati v The State of Kerala*[48] endorsed the application of BSD in the Indian Constitution, and what constitutes the basic structure of the constitution would depend on the court's determination. This case was decided by a slim majority of 7 to 6.

On the contrary, the reception of BSD by the Malaysian courts is a chequered one. The former Chief Justice of Malaysia, Tun Abdul Hamid Mohamad, had ventilated his disagreement over BSD. According to him, the BSD accords the judges the power to encroach into the jurisdiction of the Legislature and rewrite or amend the FC or the law[49]. The unchecked expansion of the grounds for intervention by judges is not acceptable[50].

[47] Sajjan Singh v the State of Rajasthan [1965] AIR 845; [1965] SCR (1)933.
[48] Kasavananda Bharati v The State of Kerala [1973] AIR SC1461.
[49] Abdul Hamid Mohamad, 'Not For Judges to Rewrite the Constitution', https://www.tunabdulhamid.my/index.php/speech-papers-lectures/item/download/1484_82b3365352104a6cd2879f86cf7fd3a8 retrieved on 12 March 2022.
[50] Ibid.

BSD was initially disfavoured by the Federal Court through a series of cases. The issue of BSD was dealt with for the first time in *Loh Kooi Choon v Government of Malaysia (Loh Kooi Choon)*[51]. The Federal Court in *Loh Kooi Choon* held that the Parliament has the power to make any amendments to the constitution with the condition that all of the processes for constitutional amendment are fulfilled. Raja Azlan Shah FJ, in this case, had rejected the idea of the doctrine of implied restriction (in our case, the BSD) because the doctrine would make the courts possess more potent power of constitutional amendment through judicial legislation than the Parliament. The FC must be interpreted and applied in its own context. The wordings in the FC cannot be overridden by extraneous principles of other Constitutions. The framers of the FC realised that the FC would require changes to fit the needs of the future. Therefore, the Parliament is equipped with the power to make amendments to the FC[52].

The number of despondents over BSD began to grow in later cases. Sufian LP, in delivering the judgment of the Federal Court in *Phang Chin Hock v PP*[53] ruled that the Parliament possess the power to make constitutional amendments even if they were inconsistent with the FC, the Parliament may amend the Constitution as they think fit as long as the procedures prescribed by the FC are being satisfied and it is unnecessary for the court to consider whether the amendments made by the Parliament destroy the basic structure of the FC. Sufian LP in *Phang Chin Hock v PP* had this to say*:*

> *"If our Constitution makers had intended that their successors should not in any way alter their handiwork, it would have been perfectly easy for them to so provide; but nowhere in the Constitution does it appear that that was their intention, even if they had been so unrealistic as to harbour such intention… the Constitution should be a living document intended to be workable between the partners that constitute the Malayan (later Malaysian) policy, a living document that is reviewable from time to time in the light of experience and, if need be, amended"*[54].

[51] Loh Kooi Choon v Government of Malaysia [1975] 1 LNS 90.
[52] Ibid.
[53] Phang Chin Hock v PP [1979] 1 LNS 67.
[54] Ibid.

Once again, Sufian LP in *Mark Koding v Public Prosecutor*[55] reemphasised the position of basic structure doctrine against the Malaysian legal setting. Sufian LP pronounced that:

> *"...it was therefore unnecessary for us to consider the question whether or not Parliament has power to so amend the constitution as to alter its basic structure whatever that may be".*

The Federal Court's position over BSD began to change in recent years. The Federal Court's decision in *Sivarasa Rasiah v Badan Peguam Malaysia & Anor* (*Sivarasa Rasiah*) signifies an official endorsement of the application of BSD to the FC. In this case, the Federal Court had turned away from the principles enunciated in *Loh Kooi Choon* on the ground that the Federal Court in *Loh Kooi Choon* had erroneously relied on common law principles where the Parliament is supreme, whereas Malaysia upholds constitutional supremacy. Therefore, Gopal Sri Ram FC, in delivering the court's judgment in *Sivarasa Rasiah,* ruled that the Parliament cannot enact laws that violate the basic structure of the FC because the FC had been constructed with certain features that constitute its basic fabric. Any statute that offends the basic structure of the FC can be struck down as unconstitutional.

Similar sentiment was expressed in *Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat & Another Case (Semenyih Jaya)*[56]. In this case, the subject matter of contention was the constitutionality of section 40D of the Land Acquisition Act 1960 which gives the power to two assessors to determine the amount of compensation to be awarded for lands acquired by the government. The power was said to have usurped the power of the court in allowing other than a judge to decide on the reference before it. For the purpose of the present discussion, only the specific part of the judgment in this case is extracted, particularly on the controversial amendment made by the Parliament to Article 121(1) of the FC in 1988. After the 1988 amendment, Article 121(1) of the FC stipulated that the *judicial power of the federation* shall be vested in the two High Courts (High Court in Malaya and High Courts in Sabah and Sarawak). Unfortunately, the phrase *judicial power of the federation* had been removed by the

[55] Mark Koding v Public Prosecutor [1982] 2 MLJ 120.
[56] Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat & Another Case [2017] 5 CLJ 526.

Parliament in the 1988 amendment[57].

The Federal Court in *Semenyih Jaya* had departed from the narrow interpretation offered by the majority in *Kok Wah Kuan* on the phrase 'judicial power' because the implication of Article 121(1) of the FC should extend beyond the powers conferred by the federal laws. Even though the words judicial power had been removed from Article 121 of the FC, the judicial power of the court is inherent. The Parliament cannot limit or remove judicial power. The FC affirms that judicial power is exercised by judges sitting in the court of law, and that the judicial process is administered by them and no other.

Parliamentary supremacy has been consistently rejected by the apex court ever since the potent judgment delivered by the Federal Court in *Ah Thian.* Sir William Blackstone once described Parliamentary supremacy as *no authority upon earth can undo*[58]. Parliamentary supremacy runs against Article 4(1) FC, which accentuates constitutional supremacy. The amendment made by the Parliament to Article 121 had deliberately violated the basic structure of the FC. It was further held that the concepts of judicial power, judicial independence and the separation of powers are crucial as they are juxtaposed in the court's determination in judicial reviews. By implication, the decision in *Semenyih Jaya* had invalidated the constitutional amendment introduced in 1988 that clipped the wings of the judiciary for decades[59].

In the following year, Zainun Ali FCJ, in delivering the judgment of the Federal Court in *Indira Gandhi Mutho v Pengarah Jabatan Agama Islam Perak & Ors and Other Appeals (Indira Gandhi)*[60], once again ruled that judicial review is essential to the constitutional role of the court in exercising its judicial powers. It forms part of the basic structure that cannot be abrogated by the Parliament from the civil courts by way of the constitutional amendment. The principles in *Indira Gandhi* were countenanced by another judgment of the Federal Court in *Alma Nudo*.

[57] See amended provision of Article 121 of the FC at Part 1.0, p 2.

[58] W.J. Waluchow, A Common Law Theory of Judicial Review the Living Tree, Cambridge University Press, Cambridge UK, 2007, p 20.

[59] Po Jen Yap, 'Authoritarian Regimes' in The Oxford Handbook of Comparative Administrative Law, P. Cane, et al. (eds), Oxford University Press, Oxford, UK, 2021, p 343.

[60] Indira Gandhi Mutho v Pengarah Jabatan Agama Islam Perak & Ors and Other Appeals [2018] 3 CLJ 145.

In *Alma Nudo,* the Federal Court reiterated that despite the absence of any express terms on the basic structure doctrine in the FC, the court's ability to scrutinise the parliamentary enactment signifies that BSD is entrenched in the FC.

The acceptance over BSD came to a short hiatus after the majority decision in *Maria Chin Abdullah v Ketua Pengarah Imigresen & Anor. (Maria Chin)*[61] ruled that the BSD is not within the terms of the FC and the legislature is empowered to amend the constitution even if the amendment alters the basic structure of the FC. In *Maria Chin*, the Federal Court in the majority, had refused to accept the BSD because post-Merdeka laws could only be declared void under Article 4(1) of the FC if they are inconsistent with the FC alone and not whether the laws are inconsistent with any doctrine of law.

However, the decision of the majority in *Maria Chin* did not come without a fight. In a strong dissenting judgment in *Maria Chin,* the minority took a diametrically opposed view by holding that BSD is part of the FC and ruled that despite the deletion of the words 'judicial power of the federation' in Article 121(1) of the FC due to the 1988 constitution amendment, the said provision must still be read as it was prior to the amendment. Subsequently, in *Rovin Joty Kodeeswaran v Lembaga Pencegahan Jenayah & Ors and Other Appeals (Joty Kodeeswaran)*[62] the Federal Court negated the application of BSD and ruled that *Kok Wah Kuan* remains good law and the interpretation of Article 121(1) must be construed according to what had been pronounced by the majority in *Kok Wah Kuan* regardless what had been said by the minority in the same case.

Two months after the decision in *Joty Kodeeswaran*, the minority once again stood against the majority in *Zaidi Kanapiah v ASP Khairul Fairoz Rodzuan & Ors and other Appeal*[63] on the issue of judicial power. In this case, the Federal Court in the majority ruled that any attempt to challenge the validity of the law should be based on the existing (post amendment) Article 121 of the FC. Whereas the minority postulated that Article 121(1) of the FC should be read in its original form (pre-amendment) as if before the 1988 amendment. The reason being, Article 121(1) has to

[61] Maria Chin Abdullah v Ketua Pengarah Imigresen & Anor. [2021] 2 CLJ 579.
[62] Rovin Joty Kodeeswaran v Lebaga Pencegahan Jenayah & Ors and Other Appeals the Federal Court [2021].
[63] Zaidi Kanapiah v Asp Khairul Fairoz Rodzuan & Ors and other Appeal [2021] 5 CLJ 581.

be read together with the first and second limbs of Article 4(1) of the FC. The minority posited that the recent decisions of the Federal Court had overruled *Kok Wah Kuan* and grounded on the doctrine of *stare decisis*, the Federal Court's judgment in *Semenyih Jaya* and *Indira Ghandi* ought to be followed. In this respect, the courts maintain the judicial power to scrutinise state action, whether legislative, executive or otherwise. Therefore, any effort to oust the judicial power of the court from exercising judicial review is regarded as invalid and unconstitutional.

The status of BSD propounded in *Maria Chin* had lasted only for six months. In July 2021, all of the parties in *Nivesh Nair Mohan v Dato' Abdul Razak Musa, Pengerusi Lembaga Pencegahan jenayah & Ors (Nivesh Nair)*[64] had acknowledged BSD as part of the FC. Although the Federal Court in *Nivesh Nair* did not specifically make any rulings on BSD, the solidarity between the parties in *Nivesh Nair* at least showed that the legal fraternity appreciated BSD in our FC

At this point, it can be said that constitutional judicial review is confined to those violations of Article 4 of the FC. Judicial reviews that fall short of this category would fall under the second category of judicial review, which is termed as the statutory judicial review.

5.2 Statutory Judicial Review

Statutory judicial review refers to all other forms of judicial review other than constitutional judicial review[65]. A judicial review of this type is termed as a statutory judicial review because its inherent powers are derived from the statutory law, specifically, section 25(2) of the Courts of Judicature Act 1964 (CJA1964), which must be read together with paragraph 1 of the Schedule which allows the court to issue orders for *habeas corpus*, *mandamus*, prohibition, *quo warranto* and *certiorari*. Section 25 of the CJA 1964 reads:

> ***"Section 25. Powers of the High Court***
>
> (1) *Without prejudice to the generality of Article 121 of the Constitution the High Court shall in the exercise of its jurisdiction have all the powers which were vested in it immediately prior*

[64] Nivesh Nair Mohan v Dato' Abdul Razak Musa, Pengerusi Lembaga Pencegahan jenayah & Ors [2021] 8 CLJ 163.

[65] SIS Forum (Malaysia) v Kerajaan Negeri Selangor & Majlis Agama Islam Selangor (Intervener) [2022] 1 LNS 218.

to Malaysia Day and such other powers as may be vested in it by any written law in force within its local jurisdiction.

(2) *Without prejudice to the generality of subsection (1) the High Court shall have the additional powers set out in the Schedule*

Provided that all such powers shall be exercised in accordance with any written law or rules of court relating the same".

Meanwhile, paragraph 1 of the Schedule reads:

"1. Prerogative writs

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

The procedure for statutory judicial review is regulated by the Rules of Court 2012, particularly Order 53 (ROC 2012). ROC 2012 is a set of rules governing all of the proceedings in the Magistrates' Court, the Sessions Court and the High Court[66]. For the purpose of the application for judicial review, Order 53 Rule 3(1) of ROC 2012 provides that the application shall not be made unless with the leave from the court. Whilst Order 53 Rule (2) of ROC 2012 stipulates that the leave application must be made *ex parte* to a Judge in Chambers supported by a statement setting out the name and description of the applicant, the relief sought and the grounds on which it is sought, and by affidavits verifying the facts relied on.

Statutory judicial review permits the court to review decisions made by the lower tribunal on administrative law grounds. In technical terms, it is known in Administrative Law as natural justice or the concept of fairness. It is part of a procedural safeguard for those whose rights are affected by administrative action[67]. The distinction between statutory judicial review and constitutional judicial review is straightforward because statutory

[66] Order 1, Rule 2 Rules of Court 2012.

[67] M.P. Jain, 'Judicial Review of Administrative Action', *Malacca Law Seminar*, ITM Law Society in association with the School of Administration and Law and the Malacca State Government, March 9-10 1985, Malacca, p 7.

judicial review involves the court's supervisory role over the exercise of public law powers without the petitioner's prayer to invalidate any statutory provision[68]. The courts in Malaysia have always considered the principles laid down by the English Court in *Associated Picture Houses Ltd v Wednesbury Corporation (Wednesbury)*[69] and *Council of Civil Service Unions and others v Minister for the Civil Service* (*CCSU*)[70] in dealing with statutory judicial review. In *Wednesbury*, Lord Greene MR had emphasised reasonableness where the court may set aside decision for unreasonableness when the authority's decision is so unreasonable that no reasonable authority could ever have come to it. Meanwhile, in *CCSU*, Lord Diplock ruled that there are three grounds on which administrative action is subject to control by judicial review, namely illegality, irrationality and procedural impropriety.

The practical aspect of statutory judicial review can be seen from a celebrated case in *Pengarah Tanah dan Galian, Wilayah Persekutuan v Sri Lempah Enterprise Sdn Bhd*[71]. In this case, the Federal Court had quashed the discretionary decision of the Land Executive Committee when it had acted beyond the power conferred on it by the Parliament. The Land Executive had unreasonably exercised its power or an ulterior purpose that no reasonable authority could have arrived at it. Similarly, the Federal Court in *Peguam Negara Malaysia v Chin Chee Kow & Another Appeal*[72] had applied the test in *Wednesbury* and *CCSU* to rule that discretionary power is not absolute and must be subject to legal limits. Discretionary power is always amenable to judicial review. In this case, the respondent had applied for Attorney General (AG)'s consent under section 9(1) of the Government Proceedings Act 1956 so that the respondent's Association could be made as a trustee in addition to or to replace the existing trustee. However, the respondent's application was rejected by the AG. The respondent applied to the High Court for leave to commence judicial review for an order of certiorari to quash the decision of the AG. The High Court had issued a mandamus compelling the AG to issue consent to the respondent. The

[68] SIS Forum (Malaysia) v Kerajaan Negeri Selangor & Majlis Agama Islam Selangor (Intervener) [2022] 1 LNS 218.
[69] Associated Picture Houses Ltd v Wednesbury Corporation [1948] 1 KB 223.
[70] Council of Civil Service Unions and others v Minister for the Civil Service [1984] 3 ALL ER 935.
[71] Pengarah Tanah dan Galian, Wilaya Persekutuan v Sri Lempah Enterprise Sdn Bhd [1978] 1 MLJ 135.
[72] Peguam Negara Malaysia v Chin Chee Kow & Another Appeal [2019] 4 CLJ 561.

AG appealed but was dismissed by the Court of Appeal. The central issue before the Federal Court was whether the court could review a decision of the AG in granting or refusing consent. The Federal Court ruled that AG's prerogative power is not immune from judicial review except those unfettered discretion granted to the AG in relation to criminal offences by virtue of Article 145 of the FC. The Federal Court further observed that with the progressive development of judicial review, the courts have been more willing to review the exercise of discretionary power, whether derived from statute or a prerogative power.

In a more recent decision, Federal Court's decision in *Sundra Rajoo Nadarajah v Menteri Luar Negeri, Malaysia & Ors*[73] had also deliberated on the question of whether discretionary powers are amenable by away of judicial review. In this case, the appellant was the former director of the Asian International Arbitration Centre (AIAC). The appellant was charged with the offence of criminal breach of trust for using AIAC's fund to purchase copies of his books entitled 'Law, Practice and Procedure of Arbitration'. The appellant had foreseen that the respondents would not respect his immunity status under Part II of the Second Schedule of the International Organizations (Privileges and Immunities) Act 1992. Therefore, the appellant sought from the High Court declaratory and prohibitory reliefs to give effect to his legal immunity status and to halt any criminal proceedings against him. Meanwhile, the respondents had requested the Secretary General of Asia-African Legal Consultative Organization (AALCO) to waive the immunity enjoyed by the appellant. The AG proceeded to issue his consent to prosecute the appellant in spite of the letter from the Secretary General of AALCO denying the request to waive the appellant's immunity.

The High Court had found in favour of the appellant but was reversed by the Court of Appeal. The main argument submitted before the Federal Court was whether the AG's powers stipulated by Article 145(3) of the FC are amenable to judicial review. The Federal Court, in this case, had reemphasised the application of the two-step test where firstly, the burden of proof lies on the applicant to show the legal basis to challenge the decision based on the traditional grounds for judicial review, including illegality, procedural impropriety, irrationality and mala fide. Once the first step has been fulfilled, the applicant has to adduce compelling and prima

[73] Sundra Rajoo Nadarajah v Menteri Luar Negeri, Malaysia & Ors [2021] 6 CLJ 199.

facie proof that the decision falls within those grounds. The Federal Court ruled that the appellant had correctly identified illegality as a ground of judicial review, and the AG had acted in contravention of the International Organizations (Privileges and Immunities) Act 1992, in exercising his powers under Article 145(3) of the FC. Therefore, the powers of the AG are amenable to judicial review in appropriate circumstances by the court in exercising its inherent supervisory jurisdiction.

6.0 Challenges on Judicial Review

There are certain matters that are said to be beyond the powers of the court to exercise judicial review as otherwise, it would result in an abuse of the court's supervisory jurisdiction. The discussion this section will discuss the doctrine of non-justiciability and ouster clauses that have been regarded as impediments in judicial review.

6.1 Non-Justiciability

The doctrine of non-justiciability intends to protect the court from entering into areas of prerogative power that the democratically elected Legislature and Executive are entrusted to take charge of, and not the Judiciary[74]. The application of this doctrine can be vividly seen in the Federal Court's decision in *Teng Chang Khim v Badrul Hisham Abdullah & Anor*[75]. In this case, the first respondent was absent from the State Legislative Assembly for six days. The first respondent cited 'traditional medical treatment in Pahang' as the reason for his absence. The Speaker rejected the first respondent's leave of absence, and the Speaker declared the first respondent's Constituency vacant. The Federal Court held that the power of the Speaker of the State Legislative Assembly to make decisions to disqualify the respondent as a member of the State Legislative Assembly falls within the purview of Article 72(1) of the FC, which is non-justiciable before the courts.

A similar expression could also be seen in the decision of the Federal Court in *Jabatan Pendaftaran Negara & Ors v A Child & Ors (Majlis Agama Islam Negeri Johor, intervener)*[76]. In this case, the child is

[74] Md Raus Sharif, 'Judicial Review: The Malaysian Experience' (July, 2017) *Journal of the Malaysian Judiciary*, p 22.
[75] Teng Chang Khim v Badrul Hisham Abdullah & Anor [2017] 9 CLJ 630.
[76] Jabatan Pendaftaran Negara & Ors v A Child & Ors (Majlis Agama Islam Negeri Johor, intervener) [2020] 2 MLJ 277.

the illegitimate son of the second and the third respondents. Consequently, the child was ascribed with 'bin Abdullah' as his surname. The appellants and the intervener contended that ascribing 'bin Abdullah' was in accordance with Islamic law, and the issue of the legitimacy of Muslims is non-justiciable before the Civil courts. The Federal Court, in this case, had accepted that the issue of legitimacy falls within the exclusive jurisdiction of the Shariah Courts, which is beyond the judicial powers of the superior civil courts.

6.2 Ouster Clauses

An ouster clause or private clause represents a specific provision that excludes the jurisdiction of the court to exercise judicial review. The traditional approach to the ouster clause was set out by the Privy Council in the case of *South-East Asia Fire Brick Sdn Bhd v Non-Metallic Mineral Products Manufacturing Employee's Union*[77]. The issue in this case was particularly on section 33B of the Industrial Relations Act 1967, which had extinguished the power of the court to exercise judicial review. The Privy Council made a distinction between jurisdictional error and mere error of law. It was held that the court could only interfere if the decisions were made in the error of law.

In this regard, it is pertinent to highlight here that the courts in Malaysia have consistently refused to acknowledge ouster clauses until the Federal Court in *Pihak Berkuasa Negeri Sabah v Sugumar Balakrishnan (Sugumar)*[78] gave recognition to the ouster clause. In *Sugumar*, the impugned section 59A was introduced in the Immigration (Amendment) Act 1997, wherein it stipulated that any decision made by the Minister or the Director General is immunised from judicial review except on the grounds of non-compliance with the Act. The Federal Court in *Sugumar* ruled that section 59A of the Immigration (Amendment) Act 1997 extinguishing judicial review was constitutional and the actual intention of the legislation must be given effect.

However, the current position on the ouster clause appears to have changed after the recent decision in *Maria Chin*. In *Maria Chin*, the Federal Court had deliberated on the constitutionality of section 59A of the Immigration Acts 1959/63 on the exclusion of judicial review. Tengku

[77] South-East Asia Fire Brick Sdn Bhd v Non-Metallic Mineral Products Manufacturing Employee's Union [1983] 1ILR 77, PC.
[78] Pihak Berkuasa Negeri Sabah v Sugumar Balakrishnan [2002] 3 MLJ 72.

Maimun CJ in *Maria Chin* had pronounced that the impugned section was invalid and unconstitutional because no act of any public body is immune from the scrutiny of the court pursuant to Article 4(1) of the FC. The Judiciary is the organ tasked with interpreting the law under Article 121(1) of the FC, the medium in which Article 4(1) operates. Ouster clauses can never oust, diminish or exclude the judicial power of the courts and its vehicle - judicial review -no matter how cleverly and wisely crafted[79].

7.0 Conclusion

Judicial review is the major instrument in Malaysia to control and ensure that the executive and legislative arms of government's actions are in line with the FC and equally ensure that the right of individual and public in Malaysia is protected against aggression of lawlessness. Judicial review is recognised as a basic structure of the FC where under Article 121(1) of the FC, the civil court's constitutional function is a check and balance mechanism. As seen from the decided case, the Malaysian Courts have taken a dynamic approach in developing principles on judicial review in interpreting the FC as well as the statutory laws in order to ensure that the legislative and the executive powers are exercised within the limits of the law.

[79] *Maria Chin Abdullah v Ketua Pengarah Imegresen & Anor* [2021] MLJU 15.

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ПРАВОВОЕ РЕГУЛИРОВАНИЕ ЮРИДИЧЕСКОЙ ОТВЕТСТВЕННОСТИ ВЫСШИХ ГОСУДАРСТВЕННЫХ ДОЛЖНОСТНЫХ ЛИЦ

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Абстракт

В данной статье рассмотрены проблемы возникающих при возложении ответственности высшим государственным должностным лицам.

На основе проведенного исследования автором предлагается исследовать различие, грань между политической и юридической ответственностью, и определить какое место занимает конституционная ответственность в системе юридической ответственности.

Ключевые слова: *Высшие государственные должностные лица, юридическая ответственность, конституционно-правовая ответственность, политическая ответственность.*

Введение

Президент (бывший) Монголии в своей речи пленарного заседания Великого государственного хурала (Парламент Монголии), проходившего в 27 апреля 2017 года об обсуждении проекта Закона о правонарушениях в первой чтений сказал нижеследующее: “Самое главное, что – это сначала создать ответственность в государству. Имеются ли случаи когда высшые государственные должностные лицы уплачивают штраф? Имеется ли положения законодательства о возложении ответственности высшему государственному должностному лицу при невыполнении их обещании, данных народу? Не существует такое положение законодательства. Сначала необходимо утвердить Закон об ответственности, регулирующие ситуации о возложении ответственности высшему государственному должностному лицу. И Закон об ответственности должен создать систему ответственности. Необходимо утвердить и выполнить правила этики государственных служащих. А также нужно создать систему возложения ответственности лицам, совершающих неэтические поступки”[1].

Оценивал ситуацию таким образом тогдашный Президент Монголии в рамках своего права законодательного инициатива он вынес Великому государственному хуралу проект[2] “Закона об ответственности выбираемых и назначаемых высших государственных должностных лиц” (2016 г).

В концепции данного законопроекта указаны три причины о составлении законопроекта.

Во-первых, Положение дисциплинарной ответственности Закона о государственной службе фактически действует к иерархической системе государстве и основания возложения ответственности государственным (политический) должностным лицам, осуществляющих деятельность в горизонтальной системе государстве остались неопределенно. В Законе о государственной

[1] Ц.Элбэгдорж. Пока не утвердили закон об этики, закон об ответственности нельзя предпринимать действия, попытки, направленные на введение граждан в заблуждения. См. Ежедневняя газета. 2017.04.28 №095 (5662). Вторая страница.

[2] Этот законопроект не утвержден. А также в прошлом, было попытка разработать законопроект «Об этике высших государственных должностных лиц», но не увенчалась успехом.

службе, Законе об противодействии коррупции, Законе о регулировании публичных и частных интересов и профилактики конфликтов интересов указаны основания возложения ответственности государственным должностным лицам, однако в этих законах не нашли свои отражения некоторые общие положения. Основания возложения ответственности, указанные в Законе о государственной службе относится настоящему государтственному служащему и положения этого закона не распространяется другим служащим. Поэтому, до вынесения вступившего в законную силу судебного решения о совершении преступления выбираемым и назначаемым высшим государственным должностным лицам неявляется возможным возложения ответственности, иными словами положения о возложении ответственности являются неопределенными.

Во-вторых, положения, основания об отзыве, отречении выбираемых государственных должностных лиц также не являются определенными. Общее регулирование Конституции Монголии, Закона о президенте, Закона о Великом государственном хурале, Закона о Конституционном суде о том Конституционный Суд в своем заседании рассматривает, решает и выносит постановление по вопросу об отзыве, отречении Президента, Председателя и члена Великого государственного хурала Монголии в связи с нарушением Конституции в своем заседании не является достаточным законным регулированием.

В третьих, в законодательстве не регулированы вопросы о возложении политической ответственности. Так как политическая ответственность воспитывает культуру о самостоятельном признании ответственности государственного должностного лица, увеличивает уровень ответственности путем отзыва, импичмента, ограничения права быть избранными в определенное время выбираемых, назначаемых высших государственных должностных лиц. В развитых демократических странах система политической ответственности является неотъемлемой частью регулирования государственной службы.

Поэтому, представляется необходимым четко определить основания, порядок возложения ответственности высшим государственным должностным лицам и создать систему

политической ответственности горизонтального уровня государству[3].

Так, в статье 5 законопроекта "Об ответственности выбираемых и назначаемых высших государственных должностных лиц" было указано, что виды ответственности устанавливается дисциплинарной, моральной и политической.

Особенности норм, регулирующих правовое положение высших государственных должностных лиц

В Конституции Монголии прямо неопределено понятие высшего государственного должностного лица, но в ней указаны основания статус высшего государственного должностного лица. В частности в Третьем разделе Конституции "Государственное устройство" определены компетенции Великого государственного хурала (статья 20, 21, 22, 25, 27, 28), членов Великого государственного хурала (статья 23, 24, 26, 29), Президента (статья 31-37), Правительства Монголии (статья 38, 40, 41, 43, 44, 45), Премьера министра (статья 39, 41, 42, 43, 45), Члена Правительства Монголии (статья 42, 43, 45), Суда (статья 47, 48, 49, 50, 52, 53, 54), Судьей (статья 49, 51), Генерального прокурора (статья 56.2), Заместителя Генерального прокурора (статья 56.2), в четвертом разделе Конституции "Административно-территориальные единицы и их управления" указаны компетенции Правления представителей населения (Публичное собрание граждан) и Засаг дарга (губернатор) (статья 57-63), а Пятый раздел Конституции "Конституционный суд" регулирует компетенции Конституционного суда (статья 64, 66, 67) и судьей Конституционного суда (статья 64, 65).

В законе о государственной службе указано понятие "высшие государственное должностное лицо"[4]. В особенности в ст 17 Закона о государственной службе оговоривается, что "ранк, чин высшего государственного должностного лица, и приравненного и относящегося к ранку высшего государственного должностного лица определяется Великим Государственным Хуралом на основе предложения Центрального управления государственных служащих. А также согласно статье 16.3 этого закона государственного должностного лица, занимавшего ранее высшую государственную

[3] Концепция законопроекта об ответственности выбираемых и назначаемых высших государственных должностных лиц //forum.parliament.mn/projects/81. (2017 г).
[4] Понятие "высшие государственное должностное лицо" неопределено.

должность, и приравненной ранку, чину высшего государственного должностного лица зарегистрирует в учете должности руководителей. В статье 57.9 этого закона "систему заработной платы высшего государственного должностного лица, и приравненного и относящегося к ранку высшего государственного должностного лица определяется Великим государственным хуралом на основании предложения Правительства Монголии".

Поэтому, в 2019 году было утверждено Постановление Великого Государственного Хурала "Об установлении высшего государственного должностного лица, и приравненного ранку, чину высшего государственного должностного лица" №19[5]. В приложении этого постановления прямо было указано сфера высшего государственного должностного лица и не дано основного определения.

Так как не существует единого определения высшего государственного должностного лица Монголии и не нашли развитие понятия, относящееся к высшему государственному должностному лицу на уровне юридической науки и не имеются исследования, научные работы касательно этих вопросов.

В п.1 ст.4 проекта "Закона о возложении ответственности выбираемым, назначаемым высшим государственным должностным лицам", инициированным тогдашным Президентом и выданному в Великому Государственному Хуралу в качестве высшего государственного должностного лица определели Президента Монголии, Председателя и вице председателя Великого государственного хурала, члена Великого государственного хурала, Премьера министра Монголии, члена Правительства Монголии, должностного лица, назначаемого Великим государственным хуралом в соответствии с законом и Председателя Правления представителей собрания населения аймаков и столицы.

Данное определение вышеназванного законопроекта и определения вышестоящего государственного должностного лица, указанного в Постановлении Великого государственного хурала "Об установлении высшего государственного должностного лица, и приравненного ранку, чину высшего государственного должностного лица" между собой несовпадают. Иными словами, в Постановлении

[5] Ранее это отношение регулировалось Постановлением Великого государственного хурала от 31 июля 1995 года № 41; от 8 ноября 2002 года №73.

Великого Государственного Хурала указаны более широкий круг должностных лиц. В Постановлении Великого Государственного Хурала "Об установлении высшего государственного должностного лица, и приравненного ранку, чину высшего государственного должностного лица" названы множество по количеству субъектов по признаку "тождества" высшему государственному должностному лицу. Так как в названию постановлению указан "приравненное должностное лицо к высшему государственному должностному лицу".

Из вышеназванного, в частности из положений Закона о государственной службе Монголии и Постановления Великого Государственного Хурала "Об установлении высшего государственного должностного лица, и приравненного ранку, чину высшего государственного должностного лица" неявляется возможным прямо и четко разграничить различия двух понятий "высшие государственное должностное лицо" и "приравненное должностное лицо к высшему государственному должностному лицу", невозможно сделать вывод о том являются ли эти понятия одинаковыми, или двумя разными государственными должностными лицами. Поэтому, неопределенность этих положений могут повлечь спор, путаницу на практике (особенно в сфере возложения ответственности)[6].

[6] В особенности, хотя в названии проекта "Закона о возложении ответственности выбираемым, назначаемым высшим государственным должностным лицам" определено "о возложении ответственности на высшего государственного должностного лица", в соответствии со ст 4.1.4 законопроекта "назначаемое должностное лицо Великим Государственным Хуралом согласно закону", ст. 4.1.5 законопроекта "Председатель Правления представителей населения аймака и столицы", ст.4.1.6 законопроекта "Засаг дарга (губернатор) аймака и столицы" относятся высшему государственному должностному лицу. Однако, в Постановлении Великого Государственного Хурала вовсе неуказаны Председатели Правления представителей населения аймак и столицы. Также Главный аудитор, Председатель Совета государственного совещания, назначаемые на должность Великим государственным хуралом и Засаг дарга (губернатор) аймака, столицы относятся к категории "приравненных должностных лиц к высшим государственным должностным лицам". В ст.4.2 законопроекта указано "отношения о возложении ответственности государственным служащим за исключением ст.4.1 настоящего закона регулируются Законом о государственной службе". Государственые должностные лиц, и приравненные к высшим государственным должностным лицам" при обладании компетенцией являются высшими государственными должностными лицами, а в случае возложении ответственности они неявляются

Поэтому, необходимо тщательно исследовать понятие высшие государственное должностное лицо, а также определить, исследовать правовые положения каждого должностного лица, относящиегося к высшему государственному должностному лицу, указанных в Постановлении Великого Государственного Хурала. Если правовые положения высших государственных должностных лиц будут неопределеными это следовательно окажет влияние пониманию юридической науки о правовом положении этих лиц.

Понятие "правовое положение" означает одинаковое значение международного понятия "статус". Слово статус от латины "Status" (положение) при соединении с "правом" означает "правовое положение" (legal status), т.е правовое положение означает основные, неотъемлемые права, обязанности субъекта в обществе. Также понятие статус было определено как положение, правоспособность и неспособность личности, других лиц в обществ[7]. В особенности, профессор Б.Чимид считал что, например, правовое положение Президента Монголии во первых, является Конституционным понятием, во-вторых, означает неотъемлемая основа определения компетенции Президента[8].

Некоторые авторы утверждают, что правовое положение состоит из следующих основных элементов:

- Полномочия или компетенция (права, обязанности)
- Гарантия осуществления компетенции
- Основания ответственности за неисполнение или ненадлежащее исполнение возложенных на него полномочий
- Ограничение и запрет[9].

Из названного можно сделать вывод, что одним из основных элементов определения правового положения высшего государственного должностного лица является проблема ответственности при выполнении должностной обязанности.

как таковыми, что создает условие невозложении равной ответственности как и высшему государственному должностному лицу.

[7] Б.Чимид. Төр, нам, эрх зүйн шинэтгэлийн эгзэгтэй асуудал. Нэгдүгээр дэвтэр. Уб., 2008. С.136.

[8] Б.Чимид. Төр, нам, эрх зүйн шинэтгэлийн эгзэгтэй асуудал. Нэгдүгээр дэвтэр. Уб., 2008. С.136.

[9] М.С.Трофимов, К проблеме правового статуса главы муниципиального образования. Государство и право, 2010. №11. С.39.

Основания возложения ответственности высшему государственнему должностному лицу

В широком смысле государственная служба находится под контролем гражданского общества, обеспечивает принцип верховенства закона и упорядоченность аппарата государственного управления. За реализацию этой деятельности нужно нести ответственность перед гражданским обществом (особенно политическую ответственность[10])[11].

С точки зрения юридической науки Монголии можно разделить юридической ответственности на виды гражданской, уголовной, дисциплинарной, административной и материальной ответственности[12].

Профессор Б.Чимид писал, что "ответственность является комплексным понятием состоящего из политики, этики, права, кроме

[10] Гражданское общество определяется тремя такими основными признаки как экономика, политика, идеология ... В рамках политической жизни основным признаком гражданского общества является свободная личность, демократия, плюрализм, правовое государство. //Ч.Нямсүрэн. Эрх зүйн ерөнхий онол: үндсэн ойлголт, тулгамдсан асуудал. Уб., 2010. С.437.

Гражданскому обществу решить какого правительство оно хочет. Потому что, правительству подлежит обслуживать гражданское общесто. //Б.Чимид. Төр, нам, эрх зүйн шинэтгэлийн эгзэгтэй асуудал. Хоёрдугаар дэвтэр. Уб., 2008. С.235.
Гражданское общество является социальной основы государственного строя и считается "родителями" политического системы. С 1990-х годов в Монголию пришла демократия. В преамбуле Конституции Монголии гласит "Народ Монголии мы ставим главной целью развития демократического и гуманного гражданского общества на родине" и что является ярчайщим проявлением гражданского общества. //Б.Чимид. Өнөөгийн улс төр хуульчийн нүдээр. Уб., 2006. С.86.

[11] А.А.Гришковец. Государственная служба и гражданское общество: правовые проблемы взаимодействия (практика России). Государство и право, 2004., №1, С.29-30.

[12] Ч.Нямсүрэн. Эрх зүй, төрийн ерөнхий онол. Уб., 1998. С.356-359. Ч.Нямсүрэн. Эрх зүйн ерөнхий онол: үндсэн ойлголт, тулгамдсан асуудал. Уб., 2010. С.398-400. Ч.Нямсүрэн. Эрх зүйн ерөнхий онол: үндсэн ойлголт, тулгамдсан асуудал (хоёр дахь хэвлэлт). Уб., 2017. С.360-362.

Доктор Д.Баярсайхан утверждал, что бывают следующие виды юридической ответственности "наказание (уголовная ответственность), административная ответсвенность, договорная ответственность (гражданско правовая ответственность), дисциплинарная ответственность, другие правовые ответственности". Д.Баярсайхан. Эрх зүйн онол. Уб., 1996. С.91-93. Д.Баярсайхан. Эрх зүйн онол. Уб., 2010. С184-186.

политической ответственности в свою очередь делится на уголовную, административную, материальную, дисциплинарную (этическую) и других множеств видов ответственности. К сожалению нет “храброго лица”, небоящего возложить ответственность на высшие должностные лицы. Есть закон, но нет человека”[13].

Однако, неимеются весомые исследования, работы о том являются ли дисциплинарная, этическая и политическая ответственности правовой ответственностью.

А также в Конституции Монголии имеются положения об отзыве, отречении от должности высших государственных должностных лиц. Например:

Статья двадцать четвёртая	2. Срок полномочий Председателя и Вице-председателя Великого Государственного Хурала составляют четыре года. До истечения этого срока они могут быть освобождены и отстранены от должности на основаниях, установленным в законе.
Статья двадцать девятая	3. Основанием для отзыва и отстранения является нарушение членом Великого Государственного Хурала, а также нарушение присяги при исполнении своих полномочий. Вопрос о члене Великого Государственного Хурала, причастном к преступлению, рассматривается и решается на пленарном заседании Великого Государственного Хурала о приостановлении его/её полномочий. Если суд установит, что такой член виновен в совершении преступления, то Великий Государственный Хурал отстраняет и отзывает его/её от должности своего члена. */Эта часть отредактирован Поправками и изменениями к Конституции Монголии, принятом 14-го Ноября 2019 г./*

[13] Б.Чимид. Төр, нам, эрх зүйн шинэтгэлийн эгзэгтэй асуудал. Хоёрдугаар дэвтэр. Уб., 2008. С.213.

Статья сорок третья	*/Эта статья пересмотрена и дополнена поправками и изменениями к Конституции Монголии, принятыми 14-го ноября 2019 года./* 1. Если не менее одной четверти членов Великого Государственного Хурала официально выступили с официальным предложением об отставке Премьер-министра, Великий Государственный Хурал рассматривает этот вопрос по истечении трехдневнего срока и принимает решение в течение десяти дней. В случае поддержки данного предложения большинством членов Великого Государственного Хурала, постановление Великого Государственного Хурала об отставке Премьер-министра считается принятым, и в течение тридцати дней назначается новый Премьер-министр. 2. В случае отставки Премьер-министра, Правительство уходит в отставку в полном составе.
Статья сорок четвёртая	*/Эта статья отредактирован Поправками и изменениями к Конституции Монголии, принятыми 14-го Ноября 2019 года/.* 1. Если Премьер-министр вносит проект постановления в виде вотума доверия ему по отдельным вопросам государственного бюджета и государственной политики, то Великий Государственный Хурал в трехдневный срок рассматривает его и принимает решение в десятидневный срок большинством голосов. голосов всех членов Великого Государственного Хурала. 2. Если Великий Государственный Хурал принимает такое решение, считается, что Великий Государственный Хурал поддержал такой вопрос и вопрос и утвердил вотум доверия Премьер-министру. Если это постановление не принято, то Премьер-министр считается ушедшим в отставку, и в течение тридцати дней назначается новый Премьер-министр.

Статья сорок девятая	6. Дисциплинарная судебная комиссия осуществляет функции по отстранению от должности судьи, освобождению от должности судьи, а также наложению иных дисциплинарных взысканий на основаниях и в порядке, предусмотренных законом, и ее полномочия, организационная структура, регламент деятельности, а также требования к его членам и порядок назначения устанавливаются законом. */Эта часть включен Поправками и изменениями к Конституции Монголии, принятыми 14-го Ноября 2019 года/.*
Статья шестьдесят первая	1. Засаг дарга наряду с реализацией решений своего Хурала, как представитель государственной власти отвечает перед Правительством, вышестоящим Засаг даргой за обеспечение выполнения на своей территории законодательства, решений Правительства и вышестоящих органов.

И согласно ст 66.2, 67 Конституции Монголии Конституционный Цэц (суд) дает заключение по спорным вопросам, допущено ли нарушение Конституции Президентом, Председателем и членами Великого Государственного Хурала, Премьер-министром, членами Правительства, Главным судьей Верховного суда или Генеральным прокурором; имеется ли основание для отставки Президента, Председателя Великого Государственного Хурала, Премьер-министра, или для отзыва членов Великого Государственного Хурала. Решения Конституционного Цэца (суда) вступают в силу с момента их принятия.

Интересным является, что этот вид ответственности относится к какому правовому отраслью, но до сих пор этот вопрос полностью не решен на уровне теории права.

Так как непредставляется возможным относить этот вид ответственности ни гражданскому, ни уголовному, ни дисциплинарному, ни административному и ни материальному виду ответственности, названных выше исследованных, изученных литератур.

Заключение

Касательно ответственности высшего государственного должностного лица Монголии, во-первых, остается неопределенным различие, грань между политической и юридической ответственностью, во-вторых, не четко определено какое место занимает конституционная ответственность в системе юридической ответственности. В некоторых случаях это делает сложным возложение ответственности высшему государственному должностному лицу. Поэтому, представляется необходимым глубокое исследование этой проблемы в теоретическом уровне.

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THE PROPORTIONALITY PRINCIPLE IS ONE OF IMPACT OF THE CONSTITUTIONAL COURT DECISIONS

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ABSTRACT

The purpose of this paper is not to study the topic in detail, but to explore, introduce and localize the experience of leading countries in the field of constitutional law and practice. In this paper, I have focused on research on theoretical topics, rather than on processes and the possibility of the use of proportional test counties such as Mongolia which have no experience with the proportional test.

Keywords: *Constitutional Court, proportional principle, legitimacy, suitability necessity, balancing*

1. INTRODUCTION

The paper briefly discusses the nature and character of the principle of proportionality and its development in Asian countries including Korea and Mongolia. The paper proceeds as follows: the first part surveys the basic theories, concepts, and doctrinal in Germany and Canada. Proportionality has different meanings in various contexts, but I'm focusing on the limitation of human rights on a constitutional right by law or statute.

Proportionality is a general principle in constitutional law. Under the Constitution, fundamental rights may be restricted when necessary for national security, and public welfare only by law. The proportionality test has been applied since the late 1950s in Germany and spread to other countries.

Proportionality as a doctrine developed by courts, as in Canada, has provided a stable methodological framework, promoting structured, transparent decisions even about closely contested constitutional values[1].

Most European countries as well as Canada and other counties of Latin America. The second part considers the development of the constitutional judicial review and the use of proportionality in Korea and Mongolia. Asia is proportionality's new frontier, and courts in jurisdictions as diverse as South Korea, Taiwan, Hong Kong, and Malaysia have adopted proportional analysis as their basic approach to adjudicating constitutional rights[2]. The German and Canadian proportionality tests differ slightly in their terminology but look more or less alike in substance. However, a closer comparison reveals some significant differences in how the tests are applied. Perhaps the most conspicuous difference is that in Canada, most laws that fail to meet the test do so in the second step so that not much work is left for the third step to do, whereas, in Germany, the third step has become the most decisive part of the proportionality test. An examination of the difference can shed some light on the strengths and weaknesses of the two approaches[3].

[1] Vicki C.Jackson "Constitutional Law in an Age of Proportionality" The Yale Law Journal (2015): Vol.124 N8.

[2] Alec Stone Sweet. "Proportionality and Rights Protection in Asia: Hong Kong, Malaysia, South Korea, Taiwan – Whither Singapore?" Journal of the Singapore Academy of Law Vol. 29 (2017) Pages 774 - 779.

[3] Dieter Grimm "Proportionality in Canadian and German constitutional jurisprudence" University of Toronto Law Journal (2017), Page 384.

Despite the differences in the national and regional legal systems, principles, especially the principle of proportionality, have transcended the borderlines of countries, at least within the Western Legal Tradition, in both Civil Law and Common Law families, and even have provided a means of reconciling the growing global concerns towards human rights protection with other important local considerations in the process not only of balancing competing rights but also of justifying their limitations[4]. The German Basic Law contains only a few safeguards applying to any limitation of a fundamental right, the most important ones being that every law limiting a fundamental right must be a general law (art.19(1)) and that no limitation may affect the very essence of the fundamental right (art.19(2))[5]. The Basic Law then attaches special limitation clauses to most rights and freedoms in the Bill of Rights. Some of these clauses content themselves with a statement that limitations are only allowed 'by law or pursuant to law,' without adding further constraints[6].

Most developed form, Proportionality analysis proceeds through 4 tests: legitimacy, suitability, necessity, and balancing. If a government measure fails one of them the proportionality principle, then it is unconstitutional.

In essence, both jurisdictions follow the same path when they apply the proportionality test. Since the test requires a means-ends comparison, both courts start by ascertaining the purpose of the law under review. Also, see some of the implications of the case studies for understanding. The Constitutional Court of Korea adopted a version of the familiar four-part test. Article 37 of the Constitution, rights and freedoms may be restricted "only when necessary for national security, the maintenance of law and order, or for public welfare," and that in no event shall an "essential aspect of the freedom or right" be violated. Proportionality is now among the principles that the Constitutional Court of Korea has identified as basic standards of judicial review.

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[4] Alexy, Robert, A Theory of Constitutional Rights, trans. Julian Rivers, Oxford, Oxford University Press, 2002; Barak, Aharon, Proportionality: Constitutional Rights and their Limitations, Cambridge, Cambridge University Press, 2012; and Möller, Kai, The Global Model of Constitutional Rights, Oxford, Oxford University Press, 2012.

[5] Basic Law for the Federal Republic of Germany https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html

[6] Dieter Grimm "Proportionality in Canadian and German constitutional jurisprudence" University of Toronto Law Journal (2017), Page 384.

The Constitution of Mongolia states that "The Constitutional Tsets of Mongolia is the body which has full powers to exercise supreme supervision over the implementation of the Constitution, to render decisions on the infringements of its provisions, to settle constitutional disputes, and is the guarantor for the Constitution to be strictly observed" The principles, methods, forms, and organization of the activity and the powers of the Tsets shall be determined by the Constitution and by The law of Mongolia on the Constitutional Tsets (1992) and The law of Mongolia on the Constitutional court procedure, 1997.

The last part of the paper describes the constitutional culture and adopting Proportionality as a benefit and negative precedent. In this part, I try to argue do we need to adopt proportionality as a general principle in Mongolia or not.

Proportionality may play a different role in these 2 countries and has several potential benefits. Two countries show different sets of arguments use of proportionality.

2. PROPORTIONALITY IN THE CONSTITUTION

The principle of proportionality first arose in Germany. It was an important instrument for the introduction of individual rights into an authoritarian legal system that, historically, had provided only a limited textual basis for such rights. By insisting that the government choose only such means that were least harmful to individual rights, the use of proportionality set a formal limitation on the exercise of police powers, thus introducing the notion of rights into German positive public law[7].

The concept of proportionality in all law (constitutional, criminal, civil, and international) is making a decision between disputed sides. The principle of proportionality plays an important role in the protection of human fundamental rights. Every country tries to protect citizens' rights and applied its own jurisdictions which assess Constitutions. Constitutional law is nowadays being globalized. However, countries have their own specific forms but judicial review in general for the adjudication is similar. Nowadays, proportionality has been applied to European Court and it is a general principle of European law. The principle is set down in the Treaty on

[7] Moshe Cohen-Eliya, Iddo Porat "American balancing and German proportionality: The historical origins" International Journal of Constitutional Law, Volume 8, Issue 2, April 2010, Pages 263–286.

European Union Article 5, which states: "…The use of Union competences is governed by the principles of subsidiarity and proportionality. … Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties."[8]. That means the European Union shall take the action it needs.

Constitutions stated most rights but, are usually limited to other laws. As mentioned before I would see for example Germany, Canada, Korea, and Mongolia.

> Basic Law for the Federal Republic of Germany (Grundgesetz für die Bundesrepublik Deutschland) article 2.1 states that "Every person shall have the right to free development of his personality insofar as he does not violate the rights of others or offend against the constitutional order or the moral law."[9];
>
> Canadian Constitution Acts' section 1 declares that: "The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."[10]
>
> Article 37(2) Constitution of the Republic of Korea provides 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."[11]
>
> Article 19(2) of The Constitution of Mongolia In case of a state of emergency or war, 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

[8] Treaty on European UnionConsolidated version of the Treaty on European Union (europa.eu).
[9] Basic Law for the Federal Republic of Germany.
[10] Canadian constitution act, 1982, Untitled (justice.gc.ca).
[11] Constitution of the Republic of KoreaStatutes of the Republic of Korea (klri.re.kr).

treatment."[12]

Here aims its original intention to protect and guarantee citizens' rights through state activities. Proportionality is as a legal principle and a government goal method for judicial review.

Barak Aharon remarked, that despite the differences in the national and regional legal systems, principles, especially the principle of proportionality, have transcended the borderlines of countries, at least within the Western Legal Tradition, in both Civil Law and Common Law families, and even have provided a means of reconciling the growing global concerns towards human rights protection with other important local considerations in the process not only of balancing competing rights but also of justifying their limitations[13].

2.1. THE CONCEPT OF PROPORTIONALITY

The theory of proportionality is traced to Aristotle, and the practice of proportionality jurisprudence, developed over several centuries as a historical evolution refining and modifying Aristotle's original theory along the way. The general principle of proportionality (which means end rational review with strict scrutiny for suspect classes) represents a key aspect of contemporary legal thought. It is the methodological capstone of the current post-positivist neo-naturalist perspective on the law which unites both positive and natural law (post-positivist integration)[14]. Aristotle's idea of justice as proportional equality contains a fundamental insight. His idea "offers a framework for a rational argument between egalitarian and non-egalitarian ideas of justice, its focal point being the question of the basis for adequate equality. Both sides accept justice as proportional equality. Aristotle's analysis makes clear that the argument involves the features deciding whether two persons are to be considered equal or unequal in a distributive context"[15].

If you see the history of the idea principle it designates equal output is demanded with equal input and it comes from the Administrative law of

[12] The Constitution of Mongolia Монгол Улсын Үндсэн хууль (legalinfo.mn).

[13] Barak, Aharon, Propotionality: Constitutional Rights and their Limitations, Cambridge, Cambridge University Press, (2012).

[14] Eric Engle, "The History of the General Principle of Proportionality: An Overview" Dartmouth Law Journal (2012): Pages 1-11.

[15] Stanford Encyclopedia of Philosophy: Equality (Stanford Encyclopedia of Philosophy/ Winter 2004 Edition).

Prussia, especially Police law at the end of the 18th century. In a notable case year of 1882, Kreuzberg (police adopted such measures "necessary for the maintenance of public order" The court held that to test this reliance, it had to examine whether the police measures exceeded in intensity what was required by the pursued objective.) thus, the proportionality doctrine originated in administrative law, not in private law.

Early twentieth-century German liberals, such as Max Weber and Hans Kelsen, regarded the formalistic analysis of the kind mentioned above as, on the one hand, a crucial means for ensuring a more effective governmental system and, on the other, as an important tool for maximizing individual freedom, since it set clear limits on state actions and thus afforded the individual wider scope for activity[16]. The proportionality may require the reviewing court to assess the balance that the decision maker has struck, not merely whether it is within the range of rational or reasonable decisions.

Dieter Grimm defined the German and Canadian proportionality tests differ slightly in their terminology but look more or less alike in substance. However, a closer comparison reveals some significant differences in how the tests are applied. Perhaps the most conspicuous difference is that in Canada, most laws that fail to meet the test do so in the second step so that not much work is left for the third step to do, whereas, in Germany, the third step has become the most decisive part of the proportionality test. An examination of the difference can shed some light on the strengths and weaknesses of the two approaches[17].

2.2. PROPORTIONALITY IN GERMANY AND CANADA

GERMANY As Moshe Cohen-Eliya and Iddo Poart concluded "proportionality was an instrument by which the idea of rights was introduced into German law. Consequently, the principle of proportionality stands in Germany for the protection of rights. The effect of proportionality was to enhance the protection of political and economic rights, which were considered at that time to be "natural" rights. Obviously, the liberal bourgeoisie had a fundamental interest in ascertaining that such a legal development takes place. The legal doctrine of proportionality was not

[16] Moshe Cohen-Eliya, Iddo Porat "American balancing and German proportionality: The historical origins" International Journal of Constitutional Law, Volume 8, Issue 2, April 2010, Pages 263–286.

[17] Dieter Grimm Proportionality in Canadian and German Constitutional Jurisprudence University of Toronto Law Journal 57 (2007), Pages 383-397.

related to realistic or pragmatic theories of law, such as those championed by the Freirechtschule and American legal realist schools. Its origins are in the formalistic approaches that are deeply embedded in the German legal tradition. Proportionality was a prerequisite for improving the law's administration and making it more effective, and this improvement could be achieved by focusing on the means-ends nexus rather than by ad hoc balancing of opposing interests"[18].

The Federal Constitutional Court of Germany, which was established after World War II, adopted and developed the proportionality principle. It had three elements:

(1) Suitability: the measure should be suitable for the purpose of facilitating or achieving the desired objective; It suggests that a public action be regarded at least as suitable for attaining its aim. The examination of this filtering element is limited only to the question of whether the means chosen are considered 'unsuitable for the purpose' or 'completely unsuitable' at the time of the legislation. A judicial decision with hindsight or even a false interpretation of the legislature does not automatically render a measure unsuitable and unconstitutional[19].

(2) Necessity: the measure should be necessary (and, at this stage, I am not going to say anything about how far it had to be necessary), This means that the administrative authority must choose the least restrictive among equally effective means. The degree of scrutiny depends on such factors as the nature of the rights to be protected and the serious effect of interference on individuals. The most stringent form of review is disclosed when either the legislature or administration is required to demonstrate the existence of the least harmful measure[20].

(3) Fair balance: the measure should not be disproportionate to the restriction which it involved. - The third element is the idea of proportionality in the narrow sense. This demands a proper balance between the injury to an individual and the public interest in the course of an administrative measure. It prohibits those measures where the disadvantage to the

[18] Moshe Cohen-Eliya, Iddo Porat "American balancing and German proportionality: The historical origins" International Journal of Constitutional Law, Volume 8, Issue 2, April 2010, Pages 263–286.
[19] Yutaka Arai Takahashi "Proportionality a German approach".
[20] Ibid.

individual outweighs the advantage to the public or the third person[21].

Another German term often used as a synovium "adequate" term which qualifies a burden placed on a person as being of such a kind that, in view of the reasons justifying it, the person in question may reasonably be expected to bear it. It is frequently asserted that the Legitimacy of the objective is a separate element of the proportionality, to be checked in the very first place before you go into the 3 above-mentioned requirements[22].

The Basic Law is silent on how to balance and evaluate conflicting interests of different natures, but an examination of the case law identifies certain variables determining the standard of judicial control. These include the nature of the area concerned, the value of the purpose to be aimed at, the extent of the interference, as well as the nature of the constitutional rights affected[23].

The German constitution contains a bill of rights that grants individuals a wide variety of rights and freedoms. At the same time, the constitution empowers the legislature to limit these rights and freedoms and intrude upon them[24]. Thus, the laws must be proportional.

The German Basic Law contains only a few safeguards applying to any limitation of a fundamental right, the most important ones being that every law limiting a fundamental right must be a general law (art. 19(1)) and that no limitation may affect the very essence of the fundamental right (art. 19(2)). The Basic Law then attaches special limitation clauses to most rights and freedoms in the Bill of Rights. Some of these clauses content themselves with a statement that limitations are only allowed 'by law or pursuant to law,' without adding further constraints. This is true, for instance, for rights as important as the right to life and physical integrity (art. 2(2)). Other limitation clauses contain further checks on purpose, conditions, or means of limitation. But not many laws are found to be unconstitutional because they violate the written limitation clauses. Instead, it is the unwritten principle of proportionality that carries the main burden of fundamental rights protection in Germany[25].

[21] Ibid.

[22] Getrude Lubbe-Wolff The principle of Proportionality in the case-law of the German Federal Constitutional Court Human rights law journal.

[23] Yutaka Arai Takahashi "Proportionality a German approach".

[24] Bernhard Schlink Proportionality in constitutional law: why everywhere but here? 2011.

[25] Dieter Grimm Proportionality in Canadian and German Constitutional Jurisprudence University of Toronto Law Journal 57 (2007), Pages 383-397.

CANADA In this part I would focus on the Canadian case because Canada is one leading country haven't been influenced by German constitutional law. In Canada, South Africa, and Israel, the proportionality framework was unknown prior to the initiation of the rights review, and the rights review was unknown until quite recently. Once rights and review were established, the high courts of the respective systems quickly adopted PA[26].

Until the Canadian Charter of Rights and Freedoms of 1982, the Canadian Supreme Court did not recognize the concept of proportionality as part of Canadian human rights law. Initially, the Canadian Constitution, included in the Constitution Act of 1867, did not include a chapter on human rights. In 1960, when the Canadian Bill of Rights was enacted, it was devised as a regular statute; the bill did not enjoy a constitutional status, and its interpretation did not include the concept of proportionality. All that changed in 1982, when the Canadian Charter of Rights and Freedoms was constituted. The Charter is now constitutional. It contains an explicit provision rendering any legislation conflicting with the Charter as "of no force and effect" which the Canadian courts may declare and enforce[27].

Article 1 of the Charter includes a general limitation clause, as follows: the Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

The Canadian Charter of Rights and Freedoms had been in force for not more than four years when the Supreme Court of Canada ultimately found the answer to the question of how to interpret the limitation clause in s. 1. The answer given in R. V. Oakes was in short: legality and proportionality. The first component, legality, had a clear basis in the text of s. 1 ('prescribed by law), whereas the second, proportionality, appears to be a genuine interpretation of the words 'reasonable limits [. . .] as can be demonstrably justified in a free and democratic society.' In his opinion, Chief Justice Dickson offered a full conceptual framework for the requirement of proportionality, even though most doctrinal innovations develop over time until they find their ultimate shape. This framework, the so-called Oakes test, has been applied by the Supreme Court for two decades,

[26] Ibid.

[27] Barak, Aharon, Propotionality: Constitutional Rights and their Limitations, Cambridge, Cambridge University Press, (2012).

although its components were clarified or modified later on, and its original rigour was mitigated in certain types of cases. Justice Iacobucci had an important part in this development. The question of whether Chief Justice Dickson, in writing the Oakes opinion, was aided by foreign examples or developed the test completely on his own appears open. It is true that some of the languages in Oakes resemble us Supreme Court opinion in Central Hudson Gas & Electric Corp. v. Public Service Commission of New York, a commercial speech case decided in 1980. But Central Hudson was not a trend-setting decision that gained much influence outside commercial speech problems, nor is its proportionality test as elaborated and complete as the one suggested by Chief Justice Dickson[28].

2.3. STEPS OF THE PROPORTIONALITY

The idea of "proportionality" evokes an "appropriate relationship" between diverse things that makes it "reasonable" by being "harmonic" and materially "just". In its classic formula, the principle of proportionality (lato sensu) comprises the examination of three aspects that must observe the (legislative, political, or administrative) limits so as to lawfully intervene within the scope of fundamental rights. The most developed form of Proportionality proceeds through 4 tests

1. Legitimacy
2. Suitability
3. Necessity
4. Balancing

The principle of proportionality applies in a four-prong test. In step 1, the judge has to ascertain whether the law under review has a legitimate purpose, "legitimate" meaning that the purpose is not prohibited by the constitution. Step 2 requires an examination as to whether the means employed by the legislature are suitable to reach the law's purpose. In step 3, the question is asked whether the means is necessary to reach the purpose, "necessary" meaning that there are no alternative means that would reach the purpose likewise but affect the fundamental right less severely. Step 4 requires a balancing of the loss for the fundamental right that is limited by the law under review on the one hand, and the gain for the good in whose

[28] Dieter Grimm Proportionality in Canadian and German Constitutional Jurisprudence University of Toronto Law Journal 57 (2007), Pages 383-397.

interest the fundamental right is limited, on the other hand.

The criteria apply in this order. If a law fails to meet one criterion, the following criteria are no longer applied.

In Germany, it is rather rare that laws fail already on steps 1 and 2. More frequently, laws fail on step 3 if the Federal Constitutional Court ascertains an alternative means that would less restrict the fundamental right, but reach the purpose of the law equally well. The majority of laws that fail the proportionality test do so in step 4. Government measure that fails any one of these tests violates the proportionality principle and is therefore unconstitutional.

Canadian cases rarely turn on this third step, generally finding laws unconstitutional on minimal impairment grounds." Other jurisdictions, however, sometimes find that a statute that passes minimal impairment nonetheless fails "proportionality as such." In Germany, for example, "proportionality as such" has been used more often than in Canada.

The principle of proportionality itself operates at a high level of abstraction, but this must not be confused with moral neutrality. It states, for example, that only legitimate (as opposed to illegitimate) goals can be used to justify an interference with the right; this is a moral statement. Similarly, the claims that an interference must be suitable, necessary, and not disproportionate are obviously moral statements about the conditions under which an interference with a right is justified[29].

3. THE ROLE OF PROPORTIONALITY AND EXPERIENCE IN SOME COUNTRIES

The Proportionality principle has become the subject of literature and scholars argue that, favors that normative grounds. As Kai Moller remarks, "proportionality is a doctrinal tool for the resolution of conflicts between a right and a competing right or interest, at the core of which is the balancing stage which requires the right to be balanced against the competing right or interest. Thus, there are two distinct ways to criticize proportionality. The first argues that the special normative force which rights hold lends them an absolute or near-absolute priority over competing considerations, which is such that it makes any talk of balancing, at the

[29] Kai Möller Proportionality: Challenging the critics International Journal of Constitutional Law, Volume 10, Issue 3, July 2012, Pages 709–731.

very least, misleading. Such an approach is defended, in particular, by scholars broadly following Ronald Dworkin's theory of rights as trumps: according to that theory, rights are not, as proportionality would seem to have it, balanced against conflicting interests; rather, they (normally) trump them; or so the proponents of that theory see it."[30].

3.1. KOREAN PRACTICE

The constitutional and statutory foundations of proportionality in South Korea date back to the founding of the Republic of Korea and have a distinctly German flavor[31]. In Korea, the powers of constitutional adjudication had been assigned to different agencies at different times: the Constitutional Committee in the 1948 Constitution, the Constitutional Court in the 1960 Constitution, and the Supreme Court in the 1962 Constitution. The present Constitutional Court was created by the 1987 Constitution that followed the democratic transition in 1987 and is based on the European model of centralized constitutional adjudication[32] The Constitutional Court of Korea applied and consolidated proportionality test which assesses legitimate purpose, suitable means, minimum restriction and balance of interests as a general constitutional principle since its inception in 1988. In the case of 88Hun-Ka13 made on December 22, 1989[33], the Court opined that Article is a clause that not only delegates but also restricts the legislature's right to impose limitations on basic rights.

> Article 37 (2) of the Constitution of Korea says "The freedom 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"[34].

In practice, the Court assessed legitimacy and necessity at the same time instead of taking steps for each and did not place much significance on the balance of interests[35].

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[30] Ibid.

[31] Francesca Bignami, David Zaring Comparative Law and Regulation: Understanding the Global Regulatory Process (2016), Page 313.

[32] Constitutional court of Korea "30 years of Constitutional court of Korea", 2019.

[33] Constitutional court of Korea "30 years of Constitutional court of Korea", 2019.

[34] The Constitutional Court of Korea (ccourt.go.kr).

[35] Constitutional court of Korea "30 years of Constitutional court of Korea", 2019.

Above mentioned Article prescribes a series of essential principles to abide by should the freedom rights be restricted, which includes the principle of statutory reservation ("freedom and rights of citizens may be restricted by Act"), the principle against excessive restriction ("...only when necessary for...") and the rule against violation of essential aspects ("...no essential aspect of the freedom or right shall be violated"). As shown, the Constitution grants legislators the right to restrict freedom rights, but also at the same time explicitly imposes their duty to legitimize such action.

Rights to freedom may only be restricted in so far as legal interests, such as public interests, cannot be reached with any other possible measures. Even when such restriction is imposed, freedom rights should be limited to a minimum extent. Here, the proportionality test specifies that "basic rights cannot be restricted far more than is needed for the sake of public interest" when adjudicating the constitutionality of an Act that allegedly restricts the rights to freedom.

The Constitutional Court generally examines the remaining criteria as a supportive means to strengthen its legal reasoning. In a 1992 decision, the Korean Constitutional Court explicitly declared that any legislation that limits "basic rights" must respect "the proportionality principle which naturally stems from the principle of rule of law".

Lately, the Constitutional Court rendered landmark decisions for the basic rights of people including conscientious objectors and pregnant women in the case of "Conscientious Objectors"[36] and "Crime of Abortion"[37]. The decisions, in particular, requested the legislative to put its utmost effort to seek the coexistence of conflicting constitutional values, and if impossible, the degree of restriction on one value should not go beyond the minimum extent necessary to achieve the legislative purpose.

3.2. CASE STUDY OF KOREA

The Constitutional Court of Korea claimed the proportionality test based on Article 37(2) of the Constitution not only stands as a basic principle governing limitations on basic rights but also draws limits to state action. Every state action is to be exercised only to the extent necessary to achieve its legitimate purpose. The Court, therefore, made it clear that the

[36] 2011Hun-Ba379 et al., June 28, 2018 Constitutional Court of Korea > Decisions > Case Search (ccourt.go.kr).
[37] 2017Hun-Ba127 e2017b127_2.pdf (ccourt.go.kr).

proportionality test shall apply in the review of the constitutionality of a provision at issue. As shown, the proportionality test is becoming a central doctrine of constitutional review in the Constitutional Court. Based on this article Constitutional Court of Korea applies a four-step proportionality test for review.

First, the law shall have a legitimate purpose, second shall be suitable to reach the purpose of the law, third the law shall minimally impair the fundamental rights (less intrusive means shall not exist), and last is the public interest protected by the law shall outweigh the seriousness of the infringed right (balance test, narrow sense of proportionality).

(i) Legitimacy in Purpose (Legitimacy)

The criterion of legitimacy is applied to find out whether a statute or provision at issue against basic rights has sought a legitimate purpose within the framework of the Constitution and legal order, that is to say, whether the purpose pursued by legislators is granted by the Constitution. The Court examines whether the concrete purpose of legislation offends the value determination of the Constitution.

For instance, in the "Local Soju Compulsory Purchase System" case (96Hun-Ka18, December 26, 1996), the Constitutional Court examined whether the instant provision is appropriate as a means to achieve the legislative purpose of "public interests in economic order" and "public welfare" as prescribed in Article 37 (2) of the Constitution. To this end, the Court explored the presence of both subjective legislative purpose (securing liquor tax revenues, reducing the amount of traffic arising out of transportation of goods) and objective legislative purpose (preventing monopoly, promoting regional economic development, protecting small-to-midsize enterprises).

(ii) Suitability in Means (Adequacy)

The criterion of adequacy examines whether the means employed by the legislature is suitable to reach the statute's purpose. Based upon setting a legislative purpose and making a predictive judgment about a future event, the legislature makes law as a means of achieving such a purpose. In doing so, some uncertainty inherently underlies the legislature's predictive judgment. To examine whether the means chosen by the legislature can cause its intended effect and thus reach the legislative end is closer to a

matter of an empirical judgment based upon the prediction of a future event rather than a normative value judgment. Therefore, to what extent the Constitutional Court can examine the predictive judgment made by the legislature will be a key point.

The Constitutional Court sees the predictive judgment by legislators as the significant element of their legislative formation power and thus respects their discretionary judgment. The Court considers the meaning and importance of the restricted area of freedom and reviews the effect it has upon limiting fundamental rights. Against this backdrop, the Court does not expect the means employed by legislators to be the "best" or the "most ideal" one to reach the statute's purpose. Adequacy will be recognizable as far as the means chosen by legislators can contribute, to some degree, to the achievement of the statute's purpose.

The adequate means are rarely denied. In the recent "Case on Conscientious Objectors", for example, the Court found adequacy in the "Categories of Military Service Provision" which did not stipulate an alternative service program for conscientious objectors. It stated that "the categories serve a purpose of ensuring national security and therefore the provision itself is an adequate means to fulfill the reasonable legislative purpose" (2011Hun-Ba379 et. al, June 28, 2018).

(iii) Minimum Intrusion (Necessity)

The criterion of necessity indicates that, among the equally appropriate means of reaching a legislative end, the one chosen to serve the law's purpose should involve the minimum possible intrusion into the individual's freedom. In other words, if it is possible to line up the available means in the order of their "limitation of basic rights," lawmakers should cherry-pick the one that interferes the least with basic rights. For example, if both of the following provisions are available, such as:

- ✓ discretionary and mandatory provisions,
- ✓ provisions with exceptions (partial prohibition) and with no exception (comprehensive prohibition)
- ✓ provisions of how to exercise fundamental rights and whether to exercise fundamental rights, Precedence should be given to the former one. The Constitutional Court identifies and suggests

an alternative to the means chosen by legislators to judge the less intrusion into fundamental rights. To take 1~3, the Court illustrates that "the former option is available" and "the former option serves the legislative purpose" in the case that a challenged law is involved in the latter option and concludes that the law offends against necessity accordingly.

In the case of the Crime of Abortion (2017Hun-Ba127, April 11, 2019), the Constitutional Court also applied the minimum intrusion test to find if the "Self-Abortion Provision," created by the State with the purpose of protecting the life of a fetus, impinges on a pregnant woman's right to self-determination. In deliberation, the Court comprehensively reasoned *(1)* complete and indiscriminate ban on all abortions throughout all stages of gestation, *(2)* choice by a pregnant woman to continue or terminate the pregnancy as an exercise of her right to self-determination, *(3)* scope and means of 'legislation to protect fetal life' in relation to the stage of viability and the exercise of the right to self-determination, *(4)* means of life protection in consideration of the special relationship between the pregnant woman and the fetus, *(5)* effectiveness of the Self-Abortion Provision, *(6)*limitations and problems arising from banning and criminalizing abortions, and *(7)* severity of the conflict of determining the abortion based on the social and economic determinants. Finally, the Court found the Self-Abortion Provision to restrict the pregnant woman's right to self-determination beyond the minimum extent on the grounds that unless categorized as an exceptional case under the Mother and Child Health Act, the provision completely and indiscriminately bans all abortions throughout all stages of gestation regardless of the fetus's stage of viability or ability to survive.

(iv) Proportionality Stricto Sensu (Balancing)

The criterion of balancing requires an appropriately proportional balance to exist between the harms caused by a limitation on basic rights and the benefits gained by the fulfillment of the purpose through the use of adequate and necessary means. This stage relates the means to the purpose of each other and in turn, the balance of interests or the proportionality test in the narrow sense is performed

The Constitutional Court has referred to "the proportionality test

in the narrow sense "as" the balancing of legal interests". The Court held that in balancing benefits and harms through the use of legislative means, public interests protected by that means should outweigh competing for private interests. A balancing test indeed is at the core of the principle of proportionality because this stage takes the legislative purpose itself into consideration and balances the weight of the purpose against that of limited fundamental rights. The Court reviews the extent of the weight or significance a legislative purpose carries.

Also, the Court examines the particular content of individual rights of freedom by way of a balancing test. Given the specific circumstances under which individual cases are, the Court undertakes a balancing between the public effects accomplished specifically by a legislative means and the effects limited specifically thereby. At this point, the more effects the legislative means has on limiting fundamental rights, the more significant purpose it requires, and thus limitations on fundamental rights are examined in a more strict way.

In rendering a decision about the "Case on Conscientious Objectors" (2011Hun-Ba379 et al., June 28, 2018), the Constitutional Court held that the "Categories of Military Service Provision" runs against the proportionality stricto sense. It stated that *(1)* public interests can also be accomplished fully enough by adding an alternative service system to Categories of Military Service Provision, that *(2)* not introducing the system leaves conscientious objectors to suffer immense disadvantages, and that *(3)* assigning conscientious objectors to public service work will have the broader meaning of realizing national security and provide more efficient ways to accomplish public interests than just imprisoning the objectors for punishment[38].

In the "Case on the Crime of Abortion" (2017Hun-Ba127, April 11, 2019), the Constitutional Court opined that the "Self-Abortion Provision" impinges on a pregnant woman's right to self-determination beyond the minimum extent necessary to achieve its legislative purpose and violates the proportionality stricto sensu. The Court held that the provision at issue is unconstitutional on the grounds that it restricts a pregnant woman's right to self-determination and thereby violates the principle of proportionality.

[38] Constitutional court of Korea "30 years of Constitutional court of Korea", 2019.

4. CONCLUSION

The principle of proportionality has recently become the subject of research, and scholars have argued that it supports its normative basis.

Section 2 of the Nineteenth Article of the Constitution of Mongolia states that "In case of a state of emergency or war, the human rights and freedoms as prescribed in the Constitution and by other laws may be subject to limitation exclusively by law. Such law shall not affect the right to life, the freedom of thought, conscience, and religion, as well as the legal provisions concerning the right not to be subjected to torture, inhuman, degrading, or cruel treatment". In the 3rd section of the above-mentioned Article says "In exercising his/her rights and freedoms, a person shall not breach national security, the rights, and freedoms of others, or breach public order". I believe that, due to the situation in Mongolia today, it is possible to solve many disputes about the violation of human rights using the proportionality test.

In other words, any measures taken by the government and administrative organizations in the direction of ensuring human rights must be proportionate.

Appropriateness can be checked by the proportionality test. In that way, it will be checked whether it is suitable for the given situation and whether it is really balanced. Compared to Germany and the Republic of Korea, the principle of proportionality is not directly stated in the Constitution, but it is widely used in judicial practice.

Disputes arising in political and economic relations, not aimed at individual rights, are resolved using the principle of proportionality.

I believe that the Constitutional Court of Mongolia can use the proportionality test to tailor its decision to suit its own circumstances.

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IMPLEMENTATION OF CONSTITUTIONAL REVIEW: CHALLENGES AND DEVELOPMENT TRENDS

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Introduction

In this paper, it is going to be examined what is constitutional review, how to implement such review, and while practicing its implementation what would be the challenges regarding review processes, and what tendencies might be faced in its development.

The constitutional review under the constitution of the democratic political system, a structural design of the sovereign power, such as legislature, executive and judiciary must be functioned by the system of reciprocal control on its mechanism, performances, and products of each institutions in order to conformity with the legal frame setting in the Constitution.

Furthermore, it is required to investigate which kind of institution should have the power of constitutional review. Review on constitutionality check in many countries in the world were varied under the political system emerged from democracy. The above items will be going to observe in this paper together with what the challenges are and how to promote its development trend briefly.

Keywords: *Constitutional Review, Challenges, Development Trends*

I. Implementation of Constitutional Review

1. 1. What is Constitutional Review?

In the first place, to make clarification of the wordings of "Constitutional review," it means that "**Constitutional review, or constitutionality review or constitutional control, is the evaluation, in some countries, of the constitutionality of the laws**."[1]

From the above expressions it is presumable that 'constitutional review' is the action which is taken for the purpose of constitutional control on laws and actions of the government, i.e., both legislative bodies and executive authorities. Actually, the word 'constitutional review' should be covered wide range in its essence. Thus, constitutional review should enclose all the functions relating to constitutionality check of bills, existing laws, legislative actions, executive actions, and judiciary functions and decisions by which it may carry out justice under the legal frame of the constitution.

The constitutional review system is basically related to "Check and Balance System"[2] with reciprocal control over each other. The legality and constitutionality of products of respective three branches of power is the major problematic categories of constitutional review. However, it is in fact scarcely in its practical mechanism.

In hybrid or semi-authoritarian democracy entities, their practical mechanism of reciprocal control is rarely effective under the respective party politics structure. Whether they choose a bi-party system or multi-party system, the winner of the elected party takes all authorities and powers, like the executive, legislative, and judiciary. Three separated powers are under one unitary control. It is also true that state governance system may be downturned in every aspects of social, economic, political state of affairs in addition if the opposition party is also weak. Legislative reflections might not be genuine that it is not the power divided system but power collaboration system which comes from merely the voices of the ruling party[3]. In fact, essential pillar of check and balance system for the democracy polity must be indispensable tool for good governance. Based on Myanmar experiences, the 2008 Constitution expressed its State's basic principles as that of "reciprocal control, check, and balance among three sovereign powers."[4]. The products of each power must be assessed by adjudication[5] process that those products are whether constitutionality,

legality, just or not.

In the next sub-heading, the model relating to system of constitutional review will be discussed, and it will need to clarify that which kind of judicial body can exercise the constitutional review under the 2008 Constitution.

1.2. Which kind of Judicial Body can exercise Constitutional Review?

In this portion, it is going to examine which kind of institution can exercise the function of constitutional review under written constitution. Be depend upon the abundance of research works on "constitutional review" conducted by the constitutional, legal and judicial scholars, the institutional structures of each Models, their review systems and review mechanism may be prescribed under the setting;-

Sr.	Name of the Model	Exercising Institutions	Method or System of Reviewing	Specific Adjudication Body
1	Decentralized Model	Highest Court Or Ordinary Courts of certain level in Judiciary	Diffused System	Supreme Courts and Certain level of Judicial Courts
2	Centralized Model	Constitution based Institutions	Concentrated System	Constitutional Courts Constitutional Tribunals Constitutional Councils
3	Hybrid Model	Constitution based Institution and Judicial Institutions	Diffused and Concentrated System	Judicial and Constitutional Courts or Tribunals
4	Political Model	Legislature	Quasi- Judicial System	Quasi-Judicial Organs

Figure 1. Models, exercising institutions, method of reviewing, and specific body of adjudication for constitutional review

From the above description, "constitutional review" is carrying out particularly by two types of institutional settlement, one is constitutional courts, and the other is judicial courts within the authority of courts of justice. The systems of constitutional review are also variables, for example, such as, diffused system, concentrated system, diffused and concentrated mixed system, quasi-judicial system, etc. It seems that systems are linked to their institutionalized model. One outstanding model which is a political model may be confusing in its effectiveness, i.e., binding force of final resolution.[6]

Agreeing to the point of view of stability of constitution and effectiveness of its vision and mission of the constitution, constitutional matters should be adjudicated by the institution separately formed under the constitution may be the better way of loads sharing, close attention, and effectiveness of settlement. Thus, the institutions, such as constitutional courts, constitutional tribunals, and constitutional councils established under the centralized model may more concentrate on the development of the system of constitutional review within the frame of the Constitution.

Here, it is analyzed the model of constitutional review based on the Myanmar practice subject to the provision[7] of the 2008 Constitution, the constitutional tribunal was established for the purpose of settling the constitutional dilemma, and it was formed under the mainstay of Judiciary, having the separated adjudicative power[8].

From the perception of the table above, Myanmar may be in line with serial number 2. This is a right choice of the Myanmar practice that Tribunal shall have the skill of conscience of settlement subject to the supreme law of the land, the constitution. It is a little bit of difference with the conscience of courts of law where it has a resolving skill in accord with fair and justice. For such difference, constitutional review should not be overlap with practice of judicial review in the ordinary lawsuits.

Still working as a prominent authority of the Union, 10 years of democracy atmosphere produced outstanding challenges to the Tribunal of the Union, yet much more lessons will be learned under the time consuming.

1.3. Functions of Constitutional Review

Normally, the functional matters of constitutional review includes scrutinizing bills, laws enacted by Legislature and various legislative bodies, vetting the constitutionality of measures and actions of the legislature and legislative bodies and the executive authorities of various level of Government, constitutional disputes between each branches[9], and judicial guarantees to the constitutional rights stipulated by the constitution itself, and lastly legitimacy or legality of elections and its results[10]. These may be globally recognized functions and powers of constitutional review, nevertheless may be much more than these. Thus, in order to exercise specific undertaking to implement the main purpose of power balancing system constitutional court is the unique way of distribution of work functions[11].

Under the IDEA[12] research work, it is fairly expressed the specific categories applying to the constitutional courts. At this juncture, it is going to be analyzed the system of constitutional review particularly attested by IDEA framed[13]. Expressions in Figure 2 show assumption of potential constitutional dilemma, well-faced challenges, and future potentials.

Sr.	Controlling Mechanism	Reviewing Matters	Potential of Dilemma	Challenged
1.	Controlling Constitution itself	Constitution making process	Need referendum or not	Having Potential
		Constitutional amendment	Constitutionality of bill or law by Legislature	Challenged
2.	Controlling legislature	Reviewing Constitutionality of Bills (ante factum)		Challenged
		Reviewing Constitutionality of laws (ex post facto)		
		Reviewing Constitutionality of actions of legislative body (impeachment process)	Legitimacy of impeachment	Challenged
		Adjudication of Constitutional Disputes between each level of legislative bodies		
3.	Controlling executive	Constitutionality of executive actions and decisions		
		Constitutionality of impeachment proceedings against Executive Authority (mostly corruption)		Challenged
		Qualifications of executive authority	Overruled by decision of ruling Government	Not challenge in The Tribunal
		Adjudication of Qualification of Public Authority		
		Adjudication of disputes between executive organs (between Ministries)		
4.	Controlling Judiciary itself	Constitutionality of laws applied in Court		
		Adjudication on Judicial remedies concerning constitutional rights		Challenging
		Qualifications of member of the Constitutional Tribunal		Challenged
5.	Controlling Election	Adjudication of the dissolution or merger of Political Parties		Having Potential
		Constitutionality of actions of the Political Party		Future Potential
		Legality of Elections and Election Results		Future Potential

Figure 2. Functions of constitutional review experienced in Myanmar

1.4. Who has the right of *locus standi* to request Constitutionality Assessment?

In this portion, it is going to be discussed who may lodge the petition concerning constitutionality assessment by referencing respective official channels. The submission of request for constitutional review can bring limited numbers Heads of respective institutions.

Subject to the section 325 of the 2008 Constitution, and section 13 of the Tribunal Law, **it is mentioned the** persons entitled to lodge the petition directly to the Tribunal, i.e., those persons who have *locus standi* for constitutional review directly[14]. Moreover, the persons and organizations prescribed in section 14 of the Tribunal Law[15] are entitled to lodge petition indirectly to the Tribunal[16].

<table>
<tr><th>Sr.</th><th>Having locus standi in constitutional court/ tribunal/ councils</th><th>Kinds of Petitions</th><th>Products of Adjudication</th><th>Effects</th></tr>
<tr><td>1.</td><td>President for Executive</td><td rowspan="2">Request for Interpretation</td><td rowspan="4">Resolution</td><td rowspan="4">Final and Conclusive</td></tr>
<tr><td>2.</td><td>Speakers for Legislature</td></tr>
<tr><td>3.</td><td>Chief Justice for Judiciary</td><td rowspan="2">Request for Opinion</td></tr>
<tr><td>4.</td><td>Election Management Chairman for Election Matters</td></tr>
<tr><td colspan="3">Petition for Decision</td></tr>
</table>

Figure 3. Eligibility of Petitioner who lodge constitutional review to the Tribunal

It should be stated importantly that the eligibility of individual direct petition may be far beyond the extent of the ability of constitutional tribunal. It is also true that even most of the contemporary democratically elected governments have no ability to fulfill each and every individual desire, since the rule of law and public safety must also be highest democracy norm of every community of the people of the world[17].

All human rights experts and organizations typically claimed that individuals should be able to submit a competent judicial organ for obtaining their remedies when their fundamental, civil, or political rights have been infringed. It is one of the challenges in actual practices that whatever expressed the rights for human being, such as fundamental rights recognized in the respective States' constitution, or other rights relating to

his or her own personal rights, etc., are unexhausted.

Individual direct standing in constitutional court will be considered together with the legal and judicial notion of *locus standi*. What about the *locus standi* problem in the field of courts of law for constitutional review?[18]. Can individual direct petition to competent court for constitutional review be how far successful? Such questions are further learning for immature experience of one decade old democracy polity, the Myanmar. Moreover, judicial administration of original jurisdiction of courts of law shall be treated as one way of modus operandi, i.e., litigation[19] , and on the other hand constitutional adjudication is treated by another way of judicial skill explicitly vested in constitutional based institution like constitutional tribunal in centralized model.

From the above table shows that individual entitlement of direct petition on constitutional review did not appear based on Myanmar practice. Up till now the constitutional remedies for breach of fundamental rights of the citizens were granted by submitting an application of writs to the Supreme Court for redress[20]. The decision of the Supreme Court shall be conclusive without appeal yet no indication for constitutional review. It is a considerable matter concerning the constitutional review. Actually, the remedies granted by writs are as constitutional remedies; therefore the constitutional review on writs applications should be made final evaluation in the place of the Tribunal by constitutional assessment which is slightly different from judicial review.

1.5. What is the reliable way of implementation to the Constitutional Review?

In this portion, it will be demonstrated how to implement constitutional review effectively based on Myanmar constitutional review practices.

At this point, it needs to clarify what is the difference between judicial review and constitutional review. In defused model, the power or function of constitutional review is vested in the highest judicial courts of law which can declare the acts of legislative, executive, and administrative are unconstitutional. However, the traditional practice of judicial review is that it is a form of appeal from an administrative body to the courts of law for review of either the findings of fact, or of law, or of both. It is a kind of judicial superintending power having the superior courts to administrative

bodies. Constitutional review is more than that extent of judicial review exercised by the courts of law. For the purpose of establishing constitutional court or tribunal under the scheme of the constitutional adjudication, i.e., the way of constitutional settlement, is fair to the concentrated system of constitutional review.

Therefore, reliable way of implementation operation should be placed on two significant ends, one is initial stage of the review, and the other is the review product's climax stage, which means the outcome of the review must be final and conclusive under the context of the constitution, and the outcome of the resolution shall also be effective and coming into force respectively. Here, it makes a brief description of effectiveness and reliable implementation of the above two stages of 'constitutional review' operation.

A. The Initial Stage of Constitutional Review

In the initial stage, it is not too much complicated problems. The only problem is because of the six petition channels by which the eligible Heads were entitled to submit petition on behalf of the respective channel[21]. This means that only Heads are the responsible person to submit the petition to the Tribunal when constitutionality assessment arises from the executive[22]. There were two petitions, one is arisen in 2014, the petition no. 1/2014[23]. The other petition arose in 2020, the petition no. 1/2020[24].

channels for submission of petition to the Tribunal for constitutional review	potential challenges
President for Executive	impeachment of executive officials
Speakers for Legislature (Pyithu and Amyotha Hluttaw)	interpretation of provisions of the constitution itself
Chief Justice for Judiciary	abstract review of applicable laws in courts of law
Election Management Chairman for Election	political party dissolution, constitutionality of party actions, legitimacy of democratic election

Figure 5. Person eligible to submit petition and potential challenges

B. Effect of settlement of Constitutionality Assessment

One way or another effectiveness or binding force of the outcome of settlement must be significantly considered for the safeguarding the context of the constitution. Since 2013 the Tribunal Law has been amended and substituted by law No. 4 of the Pyidaungsu Hluttaw dated January 21, 2013. Although the substituted subsection was approved by the Legislature, it has a complaint from the then time President U Thein Sein[25], by which His Excellency made comment on unconstitutionality of such amended provisions which have no democracy norm and disparage of the freedom of adjudication of all the members of the Tribunal and secrecy of individuality and the vigorous of the nature of the Tribunal[26].

In fact, the very original enactment of the Constitutional Tribunal Law was appeared in 2010 in which it is firmly stipulated the effectiveness and binding force of the resolution of the Tribunal. The provisions are stipulated as followings;

The Effect of the Resolution of the Constitutional Tribunal of the Union		
The Tribunal Law 2010 (the very first provisions)	The Tribunal Law (2013 Amendment)	Amendments
Sec. 23 The resolution of the Constitutional Tribunal of the Union shall be final and conclusive[27].	Sec. 23 The resolution relating to the matter of the section 12 (h) by which a Court submit to the Constitutional Tribunal of the Union shall be applied to all cases.	Replaced by sec. 24, and sec. 23 was deleted by law no. 4/2013 Amendment law
Sec. 24 The resolution relating to the matter of the section 12 (h) by which a Court submit to the Constitutional Tribunal of the Union shall be applied to all cases[28].	Sec. 24 The resolution made by the Constitutional Tribunal under section 23 shall be final.	Substituted by law no. 4/2013 amendment
	Sec. 24 The resolution of the Constitutional Tribunal of the Union shall be final and conclusive.	Substituted by law no. 46/2014 Amendment law
Sec. 25 The resolution of the Tribunal shall effect and shall be coming into force to respective Government Department, Organ, Personnel, and all the rest respectively[29].	Sec. 25 section 25 shall be deleted.	Deletion by law no. 4/2013 Amendment law

Figure 6. The Amendments made to the Constitutional Tribunal Law 2010.

In considering that if the outcome of the Tribunal has no effectiveness, i.e., no binding force on the specific party of the petition or no worthiness as a precedent having the norm of constitutionality, it shall be disparage for the Tribunal itself and also worthless for the State.

II. Challenges

The explanation in this portion might be the potential challenges for centralized model of the constitutional review. Under the 2008 Constitution, actions or measures taken by the legislature and legislative bodies were not counted in the scrutiny functions of the Tribunal. Unfortunately, it may be the potential challenges in the Tribunal in forthcoming progresses, if laws, rules, regulations, and procedures enacted by the legislature and legislatives bodies are not comprehensive enough in practical usage. For example, if there is a need to impeach to Chief Minister of the State and region level, the procedures of impeachment is if not comprehensive enough in its legality it may be arisen arbitrary disagreements between Executive and Legislature[30].

2.1. Need to be vetting control on measures or actions of legislative authorities

On the other hand, in the 2008 Constitution, the Constitutional Tribunal may scrutinize laws promulgated by the Legislative Authority of respective level, yet the Tribunal has no authority on vetting the measures or actions of legislative authorities. In 2020 reported case, there is one issue among others raised that measures or actions of the legislative body are not comprised in the functional duties of the Tribunal, thus, the Constitutional Tribunal of Union may vetting laws promulgated by the Legislative Authority of respective level, yet the Tribunal has no authority on vetting the measures or actions of legislative authorities[31].

This is a kind of challenge which will be potentially face in future democracy based Constitutionalism. For the reason that legislatures take privilege a beautiful slogan like…… "of the people, for the people, by the people" as they shield themselves by the people.

2.2. Ambiguous constitutional control on bill drafted by the Legislature

Another instance of challenge concerning abstract 'constitutional review' arisen under section 322(b) of the 2008 Constitution[32]. Under

section 322 (b) of the 2008 Constitution, it is unclear that the wording used in the provision may invite controversial for constitutional review. In the practical application of the above provision, the phrase" …. **The laws promulgated** …" means whether it is intended to mean only enacted law or a draft law/a bill as well. That kind of ambiguous provision may be led to the argument in real disputes. Such kind of miscomprehension should be avoided by inserting unequivocal word made under the constitutional amendment scheme.

The instance of abstract 'constitutional review' arisen in 2015 Petition No. 1/2015 [33]. In that petition, it is asked for the constitutionality of specific provision stipulated in the bill which is not yet promulgated. Therefore, it is a little bit of gap between the constitutionality of the Bill and the constitutionality of the provision described in the Bill. It is not the argument on the Bill itself, yet it is asked for the constitutionality of one of the provisions in the Bill. It may say that it is also the petition under the frame of abstract constitutional review.

If it is supposed to be the request for constitutional review on certain bill in forthcoming, for example, it may be constitutionality assessment on bill or law on new PR electoral system in approaching the democracy transition. Therefore, it will need to prepare for the clarity of the phrase "vetting whether **the laws promulgated** by the Pyidaungsu Hluttaw" onto the phrase " vetting whether **bills and laws drafted and enacted** by the Pyidaungsu Hluttaw" by constitutional amendment scheme.

2.3. Abstract constitutional review

Myanmar's abstract 'constitutional review' system is linked to the problem of certain laws applied in ordinary judiciary of courts of law. If the disputes arisen from the certain provisions by which its legal assumption is unclear or equivocal in the applicable case, the Tribunal will come into settle by its method of interpretation or giving opinion trusted by the genuine context of the constitution[34]. Till at present, there is no dispute arisen in this kind of challenge.

III. Development Trends

The systems of constitutional review are also variables, for example, such as, diffused system, concentrated system, diffused and concentrated mixed system, quasi-judicial system, etc. Among these systems Myanmar

is based on centralized model with the application of concentrated system by which constitutional review is assessed by the context of the 2008 Constitution consecutively.

3.1. System must be linked to model

Under the setting of the constitution, if it says that Myanmar model of constitutional review is centralized model, why not constitutional writs application shall not be under the control of the Tribunal. Actually, the whole provisions comprised in Chapter 8 of the 2008 Constitution[35] are the fundamental rights of the citizens, i.e., the constitutional guarantee of citizens' rights together with duties. If these rights are anyhow infringed, judicial remedies must be redressed under the constitutional guaranteed. Unfortunately, this mechanism is under the jurisdiction of the apex courts of law.

Concerning the filing of writs application for rights of the citizens guaranteed under the constitution shall be applied to Supreme Court[36]. Under the setting of the 2008 Constitution, the Supreme Court of the Union have the power to issue writs, i.e., writs adjudication are under the jurisdiction of the Supreme Court. In fact, writs are constitutional remedies if there might be unsatisfactory answer from the Supreme Court, it is supposed to be obtainable constitutionality assessment from the Constitutional Tribunal.

Thus, for the consideration concerning the development trend for the constitutional review may one way to another that writs application process should be the direct access to the Tribunal for constitutionality assessment. Nevertheless constitutional writs are exercised by the highest court of laws, the Supreme Court[37], is based on the tradition of the judiciary of Myanmar since writs application has been set in the 1947 Constitution, and Supreme Court has having writs jurisdiction during the then time of 1948 to 1979 [38].

Thus, Myanmar Model of constitutional review may say, on the other hand that it is a decentralized model being applied by defused constitutional review system because of this misleading role of the constitutional writs. It is a significant consideration remained in question for the development trend of the constitutional review[39].

3.2. Individual Direct Access to the Constitutional Tribunal

Although human rights are top priority in the world today, the

individual direct access to competent court for claiming its rights is still rare[40]. Considering the loading of individual's direct petition which might be problematic for adjudication of the Tribunal's constitutional review process, the institution like Human Rights Commission of Myanmar which functioning like the Omdurman's[41] should be the eligible for submission of petition on behalf of the individual.

On the one hand, individual direct access is now unavailable at this moment of time, yet on the other hand, the elected representatives of Hluttaws, both Pyithu Hluttaw and Amyotha Hluttaw (Peoples and National Parliament) can have direct access to the Constitutional Tribunal for the sake of constitutionality assessment or interpretation of the provisions of the Constitution[42]. These kinds of Petition were found in petitions lodged directly to the Constitutional Tribunal in 2011, 2014, 2015, 2017, and 2019[43] respectively.

Therefore, elected representatives shall be serving as according to the slogan like "of the people, for the people, by the people" that the voices of the people must also be heard by the representatives of the legislature and guaranteed by the laws of the respective legislature more thorough. This kind of people's direct access must be more polished to community by the people's representatives of the Legislature and various levels of legislative bodies.

Individual direct access may consider another way round that the Supreme Court decision on writs application is not the absolute one for the expression of the 2008 Constitution context[44]. According to the text of the constitution the Supreme Court judgments under the original jurisdiction only include no right of appeal but not exclude constitutional review[45]. Therefore, all the constitutional review analysis shall show means and ways based on fairness and just for every community on the world.

Presently, all the constitutional matters are grounded upon ideas, considerations, negotiation, and consultation of the preparatory works of the 2004 National Conventions and Conferences for the democratic State of Myanmar.

3.3. Own motion power for constitutional review

One decade of the democracy political structure is now over, individuals have not entitled to submit petition to the Tribunal directly or

indirectly. Even writs applications are guaranteed as the right of the citizens in the 2008 Constitution, certain institutionalized mechanism under the democracy setting are not enough to perform perfectly. Thus, every facet for the development trend particularly to constitutional review will be examined for future good.

The own motion power of the Court or Tribunal should be considered for new trend for constitutional review. This is because party politics is imported to every state by the global democratization[46], and therefore the constitutional frame must not have loopholes. When current situations of democratization on the globe shall have to make rethinking for the people worthy, the institutionalization of democracy system must be significantly assessable. If institutionalized mechanism is not enough in its effectiveness of implementation, the function of, and control to respective institutions shall be tools for fixers.

The own motion power of the Tribunal, i.e, *motu proprio*, should be added into its functional duties of the Tribunal, in order to safeguarding the sustainability and effectiveness constitutional control of its review mechanism. It may be self-executing assessment like Tribunal own motion function. It is one of the challenges found in Myanmar practice on constitutional review.

4. Conclusion

In conclusion, many scholars and political leaders from western hemisphere merely thought that the democratic political system established in their continent shall be anyhow imported into eastern continent in any cost. Nevertheless, they never consider whether this side of the world may easily collapse if misusing the very concept of democracy. Therefore many criticisms should be relaxed and a profound research shall be needed to conduct according to the actual situations faced in each and every countries of the eastern world.

Only one decade of its life time of democracy of Myanmar is now facing unstable and social turmoil being destroyed by the extremists of partisan politics ideology. Lessons will be learned by the certain defect of party political system and internal and external influences by favoring protection of minority's rights regardless of majority citizens' will. Under these circumstances, the Tribunal of the Union is trying to analysis its constitutional review mechanism based on new development trend under the situation of emergency settings.

Endnotes:

1. Source: https://en.m.wikipedia.org. ; visited on 26 February 2022. It is supposed to be a system of preventing violation of the rights granted by the constitution, assuring its efficacy, their stability, and preservation.

2. The American's power balancing system of "checks and balances system" is stated as that "no branches of three powers have too much power. The system of checks and balances is a part of our Constitution." It guarantees that no part of the government becomes too powerful. For example, the legislative branch is in charge of making laws. The executive branch can veto the law, thus making it harder for the legislative branch to pass the law. The judicial branch may also say that the law is unconstitutional and thus make sure it is not a law. The legislative branch can also remove a president or judge that is not doing his/her job properly. The executive branch appoints judges and the legislative branch approves the choice of the executive branch. Again, the branches check and balance each other so that no one branch has too much power. The legality and constitutionality of laws and actions of three branches is the major problematic categories of constitutional review. http://www.mcwdn.org/GOVERNMENT/ChecksBalances.html. All three branches have "checks and balances" over each other to maintain the ... Typically this was accomplished through a system of "checks and balances", http://en.wikipedia.org/wiki/ Separation_of_powers.

3. That is why the Economist Intelligence Unit (EIU) collected and compilation on the Democracy Index on the State of democracy in 167 countries of sovereign states among them 164 are United Nations Member States. The index has been published since 2006. The index is measuring on pluralism, civil liberties, and political culture. The index categorizes 167 Countries into one of four regime types. They are, full democracies, flawed democracies, hybrid regimes and authoritarian regimes. There will be found two types of democracies and two types of regimes. The 2017 of the Democracy Index has been globally the worst year of democracy. Asia region became the largest declination of democracy to an authoritarian. https://en. wikipedia.org/wiki/ Democracy _Index.

4. Section 11 of the 2008 Constitution stated as that: (a) The three branches of sovereign power namely, legislative power, executive power and judicial power are separated, to the extent possible, and exert reciprocal control, check and balance among themselves. (b) The three branches of sovereign

power, so separated are shared among the Union, Regions, States, and Self-Administered Areas.

5. The word "Adjudication" is a legal ruling or judgment, usually final, but can also refer to the process of settling a legal case or claim through the court or justice system. It is different from the word" litigation", which is a process of taking "legal action" similar to the "lawsuit".

6. This is because, the exercising institution is Legislature, within which specific quasi-judicial organs, for example, senate hearing committee, and the reviewing system is quasi -judicial system within quasi-judicial function, what about the judicial essence of the outcome. The legislative branch of government makes the laws. At the national level, the Congress is the legislative body in charge of making the laws for our land. Congress is made up of two parts - the Senate and the House of Representatives. These lawmakers are elected. See also, Congress's Authority to Influence and Control Executive Branch Agencies. May 12, 2021. http://crsreports.congress.gov. Under the Constitution, the House of Representatives has the power to impeach a government official, in effect serving as prosecutor. The Senate has the sole power to conduct impeachment trials, essentially serving as jury and judge. Since 1789 the Senate has tried 20 federal officials, including three presidents.

7. The 2008 Constitution, Chapter VI, Judiciary, Formation of Courts , section 293 provided that "Courts of the Union are formed as follows : (a) Supreme Court of the Union, High Courts of the Region, High Courts of the State, Courts of the Self-administered Division, Courts of the Self-administered Zone, District Courts, Township Courts and the other Courts constituted by law; (b) Courts-Martial; (c) Constitutional Tribunal of the Union.

8. The 2008 Constitution, section 294 stated that " In the Union, there shall be a Supreme Court of the Union. Without affecting the powers of the Constitutional Tribunal and the Courts -Martial, the Supreme Court of the Union is the highest Court of the Union.

9. Section 322 of the Constitution 2008, prescribed as that: "The functions and the duties of the Constitutional Tribunal of the Union" are as follows : (a) interpreting the provisions under the Constitution; (b) vetting whether the laws promulgated by the Pyidaungsu Hluttaw, the Region Hluttaw, the State Hluttaw or the Self-Administered Division Leading Body and the Self-Administered Zone Leading Body are in conformity with the Constitution or not; (c) vetting whether the measures of the executive authorities of the Union,

the Regions, the States, and the Self-Administered Areas are in conformity with the Constitution or not; (d) deciding Constitutional disputes between the Union and a Region, between the Union and a State, between a Region and a State, among the Regions, among the States, between a Region or a State and a Self-Administered Area and among the Self-Administered Areas; (e) deciding disputes arising out of the rights and duties of the Union and a Region, a State or a Self-Administered Area in implementing the Union Law by a Region, State or Self-Administered Area; (f) vetting and deciding matters intimated by the President relating to the Union Territory; (g) functions and duties conferred by laws enacted by the Pyidaungsu Hluttaw.

According to section 56 of the 2008 Constitution provides that Self-administered Divisions and Zones are delineated altogether (6) in numbers. "Naga", "Danu", "Pa-O", "P-Laung","Kokang", were given Self-administering Divisions and Zones of Ethnics Nationals.

10. Andrew Harding, The Constitution Brief, the Fundamentals of Constitutional Courts, International IDEA Institute for Democracy and Electoral Assistance, April 2017, pdf . Source: http://www.idea.int , visited on 23.2.2022.

11. Andrew Harding, The Constitution Brief, the Fundamentals of Constitutional Courts, International IDEA Institute for Democracy and Electoral Assistance, April 2017, pdf. Source: http://www.idea.int, visited on 23.2.2022. For acknowledgement to Andrew Harding, his expressions, here quotes "The main motivation in establishing constitutional courts is to create a strong and specialized judicial-type body capable of enforcing a new constitution or a new constitutional deal. Reforming an existing apex court or giving it powers of constitutional review, as in the diffused system, has not generally been considered adequate to the task." P.2.

12. Source: www.idea.int, April 2017: visited on Feb, 10th, 2022.

13. Ibid, p.3.

14. Ibid, p. 3.

15. Under section 325 of the 2008 Constitution, submission to obtain the interpretation, resolution, and opinion of the Constitutional Tribunal of the Union provides 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.

16. Section 14 of the Tribunal Law stated that "The following persons or the organizations are entitled to submit to the Constitutional Tribunal to obtain the interpretation, decision and opinion of the Constitutional Tribunal in accord with the manner contained in section 15: (a) the Chief Minister of the Region or State;(b) The Speaker of the Region or State Hluttaw;(c) The Chairperson of the leading body of Self-administered Division or the Self-administered Zone; (d) the number of representatives being at least of 10 percent of all the representatives of the Pyithu Hluttaw (Upper House) or Amyotha Hluttaw (Lower House).

17. Section 15 of the Tribunal Law stated that "In respect of the matters to obtain the interpretation, decision and opinion of the Constitutional Tribunal: (a) If he is a Chief Minister of the Region or States, his petition shall be sent to the Tribunal through President;(b) If he is a Speaker of the Region or States, his petition shall be sent to the Tribunal through Speaker of the Pyidaungsu Hluttaw (Parliament); (c) If he is a Chairperson of the leading body of Self-administered Division or the Self-administered Zone his petition shall be sent to the Tribunal through relevant Chief Minister of the Region or State and the President; (d) If it is a number of representatives being at least 10 percent of all the Pyithu Hluttaw or Amyotha Hluttaw representatives, their petitions shall be sent to the Tribunal through the relevant Speaker of the Hluttaw.

18. In American Convention on Human Rights, it is provided the competence to lodge petition to Inter-American Commission on Human Rights are stated in article 44 and 45. Article 44 says that " Any person or persons, or any nongovernmental entity legally recognized in one or more member states of the organization, may lodge petitions with the commission containing denunciations or complaints of violation of this Convention by a State Party. There is no individual direct petition to the inter-American court of human rights. Thus, in article 61 (1) of the said Human Rights Convention says that "Only the States Parties and the Commission shall have the right to submit a case to the Court.

19. Locus Standi: locus standi means A place of standing; standing in court. The right or ability to bring a legal action to a court of law, or to appear in a court. (Cambridge Dictionary)A right of appearance in a court of justice, or

before a legislative body on a given question. In order for a person to have a locus standi in commencing action in Malaysia, the person must show that he has special or substantial interest, or in other words his legal rights has been adversely affected. Source:http://www.slideshare.net . Sometime, the diversity of citizenship is present and the amount in controversy requirement is met, plaintiffs may bring their claim(s) originally into federal court and defendants may remove suits from state court to federal court. Source: http://www.law.cornell.edu The answer of the question of who can file a constitutional review is that "Anyone who satisfies general 'standing' requirements for litigation can raise a constitutional issue in court. It is only available in the judicial institutions established by the decentralized model under the defused system of constitutional review.

20. Litigation is the process of engaging in a legal proceeding, such as a lawsuit. https://www.dictionary.com. Litigation is the act or process of bringing or contesting a legal action in court; a judicial proceeding or contest; the act or process of carrying on a lawsuit.https://www.collinsdictionary.com. visited on the April 12, 2022.

21. Section 377 of the 2008 Constitution provides that "In order to obtain a right given by this Chapter, application shall be made in accord with the stipulations, to the Supreme Court of the Union. Section 378 of the Constitution again said that " (a) In connection with the filing of application for rights granted under this Chapter, the Supreme Court of the Union shall have the power to issue the following writs as suitable : (1) Writ of Habeas Corpus; (2) Writ of Mandamus; (3) Writ of Prohibition; (4) Writ of QuoWarranto; (5) Writ of Certiorari. (b) The right to issue writs by the Supreme Court of the Union shall not affect the power of other courts to issue order that has the nature of writs according to the existing laws."

22. Section 325 of the 2008 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.

23. Section 326 of the 2008 Constitution states that "The following persons and organizations shall have the right to submit matters to obtain the interpretation,

resolution and opinion of the Constitutional Tribunal of the Union in accord with the prescribed procedures : (a) the Chief Minister of the Region or State; (b) the Speaker of the Region or State Hluttaw; (c) the Chairperson of the Self-Administered Division Leading Body or the Self-Administered Zone Leading Body; (d) Representatives numbering at least ten percent of all the representatives of the Pyithu Hluttaw or the Amyotha Hluttaw." For this purpose, the Tribunal Law stipulated in section 15(a) it was stated that "…if he is a Chief Miniter of the Region or State, his petition shall be sent to the Tribunal through the President.

24. Petition No. 1/2012, The President (Attorney General of the Union on behalf of His Excellency's President) (Petitioner) and Speaker of the Pyidaungsu Hluttaw, Speaker of Pyithu Hluttaw, and Speaker of Amyotha Hluttaw (Petitionee). Petition No. 2/ 2012 The President (Petitioner) and Dr Aye Maung & (23) Representatives of the Amyotha Hluttaw (Petitionee). The first one was in petition no. 1/2014, Daw Dwebu and 50 (Representative of the Pyithu Hluttaw) and The Republic of the Union of Myanmar, where it was a question that when the petitionee was the State itself, whether the President of the State shall also be as the joint Petitionee or not. The very first issue of the Tribunal on that petition is that whether it is constitutionality or not since "the President shall not be answerable to any Court for the exercise of the powers and functions of his office or for any act done……..." subject to the section 215 of the 2008 Constitution. Section 215 of the 2008 Constitution says that," the President shall not be answerable to either any Hluttaw or to any Court for the exercise of the powers and functions of his office or for any act done or purported to be done by him in the exercise of these powers and functions in accord with the Constitution or any law."

25. In the decision of the Tribunal in the petition no. 1/2020 of U L. Phone Shoel (Chief Minister of Kayah State/State Government) the Petitioner (on his behalf the President submit the petition to the Union Tribunal) and Speaker of the Kayah State Hluttaw (State highest Legislative Body), Speaker of the Kayah State Hluttaw made in his argument that " …. the Constitutional Tribunal shall need to insert the Union President as a joint petitioner or in the status as the Petitionee."

26. The President U Thein Sein did not sign the amended law but after 14 days of limited period the bill shall deem to be signed by the President and the bill shall become law under the section (Article) 105 of the Constitution 2008.

27. The Constitution Tribunal Law amended by 2013 stated in section 6 that "The President shall submit the candidature list of total nine persons, three member nominated by him, three members nominated by the Speaker of the Pyithu Hluttaw and three members nominated by the Speaker of the Amyotha Hluttaw, and shall nominate the Chairperson of the Constitutional Tribunal of the Union whom the president shall be chosen by the negotiation with both the Speaker of the Pyithu Hluttaw and the Speaker of the Amyotha Hluttaw, and also to submit to the Pyidaungsu Hluttaw for its approval". Again in section 12(i) stated that "Each three members of the Constitution Tribunal shall report back, relating to the functions and duties assigned to them, to those who nominates them respectively the President, the Speaker of the Pyithu Hluttaw and the Speaker of the Amyotha Hluttaw." This has been a new adding provision since 2013 of the Tribunal Law.

28. That section was renumbering by section 24 by the amendment of Law No. 4/2013, and section 23 was deleted.

29. Previous Section 24 was substituted by law no. 4/2013 amendment law. (The above section 24 which has been substituted by law No. 4/2013 amendment was deleted and new section 24 which was the previous one of section 23 was re-substituted again by Law no. 46/2014 amendment law.)

30. Previous section 25 was deleted by law no. 4/ 2013 amendment law.

31. Find in the petition no. 1/2020.

32. The dilemma is arisen from the measures performed by the legislative body of Kayah state regarding to the procedures of impeachment against Chief Minister of the Kayah State who committed corruptions. The dilemma is arisen from the measures performed by the legislative body of Kayah state regarding to the procedures of impeachment against Chief Minister of the Kayah State who committed corruptions. The Case was trialed by e-court system in 2020 dated (27-10-2020). U L. Phone Shoel (Chief Minister of Kayah State/State Government) vs. Speaker of the Kayah State Hluttaw (State highest Legislative Body), Petition No. 1, 2020, 2020 Precedent , The Constitution Tribunal of the Union, The Republic of the Union of Myanmar, p. 1-47. American Congress made impeachment on the former President Donald Trump for criminal conspiracy in the Capital Hill Riots unconstitutionality after the end of the term of Presidency, i.e., His Excellency' is not a sitting President. The Congress action is constitutionality of the provision of impeachment to President of America has been facing with the question of of

facts and Laws has criticized within legal scholars.

33. Section 322 (b) stated as that "The functions and the duties of the Constitutional Tribunal of the Union are as follows: (b) vetting whether the laws promulgated by the Pyidaungsu Hluttaw, the Region Hluttaw, the State Hluttaw or the Self-Administered Division Leading Body and the Self-Administered Zone Leading Body are in conformity with the Constitution or not;

34. With the submission by the Representatives of the Amyotha Hluttaw (National Parliament) 25 in number, who requested for the constitutionality of the provision of section 11 (a) Referendum law for the approval of the bill amending 2008 Constitution. In such petition, it is asked for the constitutionality of specific provision stipulated in the bill which is not yet promulgated. After the tribunal has declared that the provision is unconstitutional in referencing to the article 38 (a) and article 391 (a) and (b), the Legislature amended by new provision. The matters are already discussed in another paper which is only based on Myanmar Practice.

35. Section 323 of the 2008 Constitution stated that "In hearing a case by a Court, if there arises a dispute 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. This provision is inserted to one of the functions of the Tribunal by (4/2013) 2013 amendment of Tribunal Law with section 12(g) stated as that "deciding on a dispute submitted under section 323 of the Constitution and section 17 of this law in relation to a pending trial of the Court.

36. The Title of the Chapter VIII of the 2008 Constitution shows "Citizen, Fundamental Rights, and Duties of the Citizens", and there are altogether 46 articles with not only rights, but also duties. Thus, it may say that the provisions under this Chapter are stipulated only for the purpose of citizens.

37. Section 378 (a) of the 2008 Constitution provides as " In connection with the filing of application for rights granted under this Chapter, the Supreme Court of the Union shall have the power to issue the following writs as suitable : (1) Writ of Habeas Corpus; (2) Writ of Mandamus; (3) Writ of Prohibition; (4) Writ of Quo Warranto; (5) Writ of Certiorari.

38. Like tradition is also see in the precious research paper by the great author Ignacio Borrajo Iniesta Constitutional Tribunal, Spain, LIMITS OF FACT, LAW AND REMEDIES: MYTHS AND REALITIES OF CONSTITUTIONAL REVIEW OF JUDICIAL DECISIONS CONSTITUTIONAL COURT OF SPAIN EXPERIENCE (REPORT), European Commission for Democracy Through Law,(VENICE COMMISSION),in co-operation with THE CONSTITUTIONAL COURT OF THE CZECH REPUBLIC, THE LIMITS OF CONSTITUTIONAL REVIEW OF THE ORDINARY COURT´S DECISIONS IN CONSTITUTIONAL COMPLAINT PROCEEDINGS Brno, Czech Republic, 14-15 November 2005. Acknowledgement to Great Author: Knowing very well that quoted the author's paragraph here is inappropriate, yet because of the constraint of the length of the paper with asking for forgiveness and mentioned here " The topic to be addressed is the constitutional review of judicial decisions in individual complaints procedures. Why is this matter an issue? Why is the Conference devoted to the "limits" posed to this constitutional review? An obvious answer to this questions is offered by the fact that constitutional courts are new institutions: the Spanish court was created in 1980; the Czech court, in 1993. Both have been added to an existing judicial structure: a constellation of judicial bodies forming a pyramid, which is headed by a Supreme Court, different to the new Constitutional Court. The 1978 Constitution adopted in Spain and the 1992 Constitution of the Czech Republic do no introduce changes into the pre-existing judicial powers other than this addition at the summit. And the new constitutional courts have been entrusted with a supervisory function: to oversee the decisions adopted by all public authorities, judicial authorities included, in regard to the fundamental rights and freedoms of the people."

39. Prof. Dr. Marlar Aung, Reported Cases of Writs Application with Judgment Summary (1948 to 1971), 1st edt,1st edt, 2011, 2nd edt, 2019, www.skccmyanmarbook.com.

40. Ignacio Borrajo Iniesta Constitutional Tribunal, Spain, LIMITS OF FACT, LAW AND REMEDIES: MYTHS AND REALITIES OF CONSTITUTIONAL REVIEW OF JUDICIAL DECISIONS CONSTITUTIONAL COURT OF SPAIN EXPERIENCE (REPORT), European Commission for Democracy Through Law,(VENICE COMMISSION),in co-operation with THE CONSTITUTIONAL COURT OF THE CZECH REPUBLIC, THE LIMITS OF CONSTITUTIONAL REVIEW OF THE ORDINARY COURT´S DECISIONS IN CONSTITUTIONAL COMPLAINT PROCEEDINGS

Brno, Czech Republic, 14-15 November 2005. (by referencing to read the whole document where priceless expressions are abundance without able to quote with spot.

41. The American Human Rights Convention, CHAPTER VII-INTER-AMERICAN COMMISSION ON HUMAN RIGHT stated in its Article 44 that "Any person or group of persons, or any nongovernmental entity legally recognized in one or more member states of the Organization, may lodge petitions with the Commission containing denunciations or complaints of violation of this Convention by a State Party." According to this, individual direct petition to the Court did not allow. Yet Under 34 of the European Convention on Human Rights, it is stated the individual applications to the Court states that" The Court may receive applications from any person, non-governmental organization or group of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right. Here, honoring to express the Constitution of the Turkey that "Everyone 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. " Note: article 148 of the Republic of Turkey Constitution 1982.

42. U Win Myint Oo, Informative Knowledge of Ombudsman's, Journal of the Constitutional Tribunal of the Union of Myanmar, 2019.

43. Section 326 of the 2008 Constitution provides that "The following persons and organizations shall have the right to submit matters to obtain the interpretation, resolution and opinion of the Constitutional Tribunal of the Union in accord with the prescribed procedures : (a) the Chief Minister of the Region or State; (b) the Speaker of the Region or State Hluttaw; (c) the Chairperson of the Self-Administered Division Leading Body or the Self-Administered Zone Leading Body; (d) Representatives numbering at least ten percent of all the representatives of the Pyithu Hluttaw or the Amyotha Hluttaw. In line with this constitutional provision, The Constitutional Tribunal Law 2010 was also stipulated in its section 14(d) stated as that "The following persons or the organizations are entitled to submit to the Constitutional Tribunal to obtain the interpretation, decision and opinion of the Constitutional Tribunal in accord with the manner contained in section 15: the number of representatives being at least of 10 percent of all the representatives of the Pyithu Hluttaw

or Amyotha Hluttaw. Again in section 15(d) stated as that " In respect of the matters to obtain the interpretation, decision and opinion of the Constitutional Tribunal: if it is a number of representatives being at least 10 percent of all the Pyithu Hluttaw or Amyotha Hluttaw representatives, their petitions shall be sent to the Constitutional Tribunal through the relevant Speaker of the Hluttaw. Note: This provision was substituted by Pyidaung su Hluttaw Law No. 46/2014 amendment.

44. Petition no.2/2011 Dr Aye Maung and 23 Representatives of the Amyotha Hluttaw, vs. The Republic of the Union of Myanmar, Petition no. 1/2014, Daw Dwebu and 50 (Representative of the Pyithu Hluttaw) and The Republic of the Union of Myanmar, Petition no. 5/2014, U Aung Kyi Nyunt and 26 (Representative of the Amyotha Hluttaw), Petition no. 5/2014, Dr Aye Maung and 24 (Representative of the Amyotha Hluttaw), The petition no. 1/2017, U Sai Than Naing and 23 Representatives of the Amyotha Hluttaw vs. Pyidaung su Hluttaw, the petition no. 2/2017, Brigadier General Maung Maung and 50 Pyithu Hluttaw representatives being Defence Services Personnel vs. Pyidaungsu Hluttaw, the petition no. 1/2019, Daw Nan Ni Ni Aye and 25 representatives of the Amyotha Hluttaw vs. Pyidaungsu Hluttaw, and petition no. 2/2019 Dr Sai Sain Kyauk Sum and 25 Representatives of Amyotha Hlittaw vs. Pyidaungsu Hluttaw.

45. Section 378 (b) of the 2008 Constitution stated that, "The right to issue writs by the Supreme Court of the Union shall not affect the power of other courts to issue order that has the nature of writs according to the existing laws."

46. Section 295 (c) of the 2008 Constitution provides that "The judgments of the Supreme Court of the Union are final and conclusive and have no right of appeal."

47. "Democratization" is the transition to a more democratic political regime, including substantive political changes moving in a democratic direction. http://en.m.wikipedia.org>wiki, visited on April 21st, 2022.

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IMPLEMENTATION OF CONSTITUTIONAL REVIEW IN MYANMAR

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Introduction

The model of Constitutional review, one of the basic structures of Constitution, is the power of the court or constitutional tribunal or constitutional council or chamber to decide the constitutionality of any law enacted by the Legislature and any act of the Executive. In a global context, there are basically two prominent models of constitutional review; American model and the European model (Kelsenian model). After the World War II, based on the growing awareness and demand of constitutional review, it was widely spread out and implemented by the States, within the framework of respective Constitutions, in various ways such as European model, American model, Mixed: European-American model and other forms of constitutional review. In recent years, the implementation of constitutional review and its challenges have been rather explosive questions and different States have faced different challenges. In this article, an attempt will be made to trace the progressive reforms of constitutional review models, including its implementation, challenges and development trends on the base of the Constitutions of Myanmar in three constitutionals' eras after independence of 1948.

1. The General Conception and Practice of Constitutional Review

Before we discuss the constitutional review in Myanmar, it will be useful to consider the general conception, models and practice of constitutional review in a global standpoint. As you all know, the constitutional review plays in the main role to maintain the supremacy of Constitution, separation of powers, check and balance system, the rule of law and to ensure the consistency of Constitution in every States. Tom Ginsburg, the Professor of International Law and Political Science at the University of Chicago and a member of the American Academy of Arts and Sciences, appears to be the expert of the view that constitutional review is the court's power to supervise implementation of the constitution and to set aside legislation for constitutional incompatibility.

The constitutional review was originated in the United States of America after the case of *Marbury V. Madison* (5, U.S. 137, 1803.) and it was typically exercised within the ordinary judiciary. Then, the great Austrian Legal Philosopher, Hans Kelsen designed a new approach to constitutional review in 1920 to trace the validity of every official act of the ultimate authority of the original Constitution of the State.

Here, it is very appropriate to explore the case of England which is more primitive than Marbury case (1803) as the source of the evolution of judicial review in England before the American Revolution. Therefore, we now come to one of the most important cases decided by the England Court of Common Pleas, Boham's case (1610). In that case, the Chief Justice of England Sir Edward Cobe asserted;

> "the supremacy of the common law in England, noting that the prerogatives of Parliament were derived from and circumscribed by precedent. He declared that "when an act of parliament is against common right or reason, or repugnant, or impossible to be performed, the common law will control it and adjudge such act to be void."[1]

In view of the light of this decision, the opinion of Chief Justice Cobe had been foreshadowed in order to implement the Judiciary as a check body for controlling the abuse power of Legislature and Executive

[1] See Boham's Case (1610), available at https://www.britannica.com/event/Bonhams-Case.

when the Constitution of United States was drafted in 1787.

At the down of the twenty- first century, constitutional review has become one of the pillars of the primacy of law and, more generally, of constitutional law. Since the constitutional review was exercised in very different historical and political circumstances, the role of constitutional review and the type of jurisdiction differ from States to States.

According to a comparative Analysis of Hanns Seidel Stiftung Foundation[2] on judicial review systems in West Africa[3], there are four kinds of models of constitutional review. They are –

(1) The American or Diffuse Model[4] or Decentralized Model[5]

(2) The European or Concentrated Model[6] or Centralized Model[7] or Kelsenian Model

[2] The German party-associated and taxpayer-money funded political research foundation established in 1967.

[3] The authors of the book are Markus Böckenförde (Centre for Global Cooperation Research), Babacar Kante (Gaston Berger University) and Kwasi Prempeh (Seton Hall Law School).

[4] The definition of diffuse model by the author Ori Aronson, Assistant Professor, Bar-Ilan University Faculty of Law is that "a diffuse system treats judicial review like other normal judicial acts, in the sense that all courts within the system are in principle authorized to review legislation for constitutionality" See in the article on "BETWEEN DIFFUSE AND CONCENTRATED JUDICIAL REVIEW: AN ISRAELI HYBRID AND ITS ALTERNATIVES", at p- 3. Electronic copy is available at http://ssrn.com/abstract=1863104. See also generally ALLAN R. BREWER-CARÍAS, JUDICIAL REVIEW IN COMPARATIVE LAW 127-35 (1989); MAURO CAPPELLETTI. THE JUDICIAL PROCESS IN COMPARATIVE PERSPECTIVE 133-35 (1989); Alec Stone Sweet, Why Europe Rejected American Judicial Review and Why it May Not Matter, 101 MICH. L. REV. 2744, 2770-71 (2003).

[5] Decentralized constitutional review is the control of constitutionality is exercised by the ordinary judiciary and can be performed by all courts of law. See in Constitutional Review at AACC Members (2019) published by AACC SRD, Constitutional Court of Republic of Korea.

[6] The definition of concentrated model or centralized model by the author Ori Aronson, Assistant Professor, Bar-Ilan University Faculty of Law is that "concentrated, or centralized, systems of judicial review, locate the power to strike down legislation for constitutional reasons with a single tribunal, often a separate specialized constitutional court." See supra note 3 at p- 4.

[7] Centralized constitutional review is the control of constitutionality is exercised by a specialized institution which usually operates separately from the ordinary judiciary. See in supra note 4.

(3) The Hybrid Model[8] and

(4) The Political Model.

In the actual practice of American or Diffuse model or Decentralized model, based on the Marbury Case (1803), the Supreme Court reviews the constitutionality of statutes and administrative measures in specific proceedings using common procedural rules. This model has influenced numerous countries in Central and South America.

When the Constitutional Courts or Constitutional Tribunal or Constitutional Council or Chamber exercise exclusive jurisdiction over constitutional matters, this system is often called the "centralized" system or the "European" system which was invented by the Austrian Legal Scholar Hans Kelsen. Bodies exercising the review of the constitutionality of statutes in special proceedings may be the specialized Constitutional Courts or High Courts or their special chambers or the Constitutional Councils. In such model, judges of the Constitutional Courts or Councils or Chambers are appointed in principle by bodies of political power.

On the basic of a comparative analysis on Judicial Review Systems in West Africa by Hanns Seidel Stiftung Foundation[9], it should therefore be defined as the hybrid model that it has two key characteristics that reflect aspects of both of the concentrated and diffused models. One is the existence of a specialized chamber within the ordinary judiciary that has exclusive jurisdiction over constitutional review, specifically in the Supreme Court. The other is that ordinary court may have the power to review and refuse to apply an unconstitutional statute, much like their counterparts in the decentralized review model. However, they lack the power to declare the law invalid or unconstitutional, the effect of the decision is limited to the parties to the specific dispute. The power to strike down the statute mostly belongs to one court – usually a Supreme Court, or in systems with the

[8] The hybrid model is the combination of elements of both centralized and decentralized systems of constitutional review. See also in Judicial Review Systems in West Africa, A Comparative Analysis by the authors Markus Böckenförde (Centre for Global Cooperation Research), Babacar Kante (Gaston Berger University) and Kwasi Prempeh (Seton Hall Law School), Hanns Seidel Stiftung, 2016, published by International IDEA, pp- 46, 47. Electronic copy is available at https://www.idea.int/ sites/default/files/publications/ judicial-review-systems-in-west-africa.pdf.

[9] See at the supra notes 2 and 3.

concentrated models of review, a constitutional court or council[10].

In the nature of the political model, political institution such as parliament or a (sometimes quasi-judicial) designated organ within it) rather than judicial institutions is the chief authorities for reviewing constitutionality. No institutions can therefore review its actions[11].

2. Implementation of Constitutional Review under 1947 Constitution of Myanmar

Having briefly covered the general conception and how constitutional review came to be treated as an international practice, then, it should be examined the system of constitutional review in Myanmar, by using historical and political approaches.

In May 1947, the AFPFL (Anti-Fascist Peoples' Freedom League)[12] held its first Constituent Assembly at Jubilee Hall in Rangoon where a 111-member committee was appointed to draw the first draft of the Constitution. The Constitution of the Union of Burma was adopted in 1947. The Constitution of the Union of Burma, 1947 was frequently based on the Constitution of the Republic of Ireland and India also helped in the drafting.

In accordance with the Section 151 of the Constitution of the Union of Burma, 1947, the judicial review was exercised by the Supreme Court. If it appeared any constitutional problem, the President could undertake to refer the question officially to obtain the legal opinion of the Supreme Court that was the highest judicial body under 1947 Constitution. There were many landmark decisions of the Supreme Court with respect to Section 151

[10] Judicial Review Systems in West Africa, A Comparative Analysis by the authors Markus Böckenförde (Centre for Global Cooperation Research), Babacar Kante (Gaston Berger University) and Kwasi Prempeh (Seton Hall Law School), Hanns Seidel Stiftung, 2016, published by International IDEA, p- 46. Electronic copy is available at https://www.idea.int/ sites/default/files/publications/judicial-review-systems-in-west-africa.pdf.

[11] Judicial Review Systems in West Africa, A Comparative Analysis by the authors Markus Böckenförde (Centre for Global Cooperation Research), Babacar Kante (Gaston Berger University) and Kwasi Prempeh (Seton Hall Law School), Hanns Seidel Stiftung, 2016, published by International IDEA, p- 47. Electronic copy is available at https://www.idea.int/ sites/default/files/publications/judicial-review-systems-in-west-africa.pdf.

[12] The AFPFL was established from 1945 to 1958 and led by General Aung San, the founder of Myanmar Armed Forces and the national leader of Myanmar, the then Burma. The AFPFL led the negotiation for independence in London in January 1947. After winning the 1947 election, the AFPFL's leadership drafted the new Constitution of sovereign Burma.

of the Constitution of the Union of Burma, 1947.

In the case of *State Vs Government of the Union of Myanmar Supreme Court's Reference Case No.1/1948* [13], the President of the Union requested the Supreme Court to hear and to check upon the question "Whether or not the Land Nationalization Act of 1948 (Act No.60,1948) enacted by the Union Parliament has become binding into force on the States under the Constitution."

The Supreme Court reviewed that "the main objectives of the Act are to prohibit the ownership of land to those who do not actually work farming and to limit the number of acreages for the ownership. The Act is aimed to acquire the land from those who have no legitimate right for land ownership. The activities that carry out by authorities of the respective States, particularly to prohibit ownership of land to those who do not work farming and to limit the acreage of land ownership are bound within the legislative matters of the Parliament."

In the next, case of referral on the question of resignation of *Parliamentary Membership of U Ba Oo Reference No. 1/1958* [14], a member of the Chamber of Deputies Maubin (North) Township Constituency, U Ba Oo, dispatched a letter on 19-5-1958 by registered post to the President of the Union through the Speaker of the Chamber of Deputies proposing resignation as a candidate for the said Constituency. Consequently, he submitted again a letter to the President in order to withdraw his previous letter on 21-5- 1958. The President took decision based on these two letters from U Ba Oo by declaring the vacancy of the member of Maubin (North) Constituency, Chamber of Deputies commencing from 19-5-1958. In this regard, the President requested the Supreme Court for the interpretation of Section 73(2) (b) of the State Constitution.

Section 73 (2) (b) of the Constitution states that:

> "If a member of either chamber - by writing under his hand addressed to the President resigns his seat, his seat shall thereupon become vacant."

The Supreme Court held that there is no right to withdraw the letter of resignation if this resignation of member was made in accordance with

[13] 1952 B.L.R.(S.C.) 135.
[14] 1958 B.L.R.(S.C.) 94.

Section 73(2) (b) of the Constitution. Due to these reasons, it is decided that the authority is not imposed on the President either to permit or to refuse the resignation of U Ba Oo.

Another case is *Referral on the question of acquiring decision concerning the appointment of State Ministers Reference No.2/ 1958* [15]. In such case, the two members of Union government, the Minister for Karen State and the Minister for Kachin State resigned from their position on 4.6.1958. The Prime Minister submitted to the President to appoint the other two Ministers for the vacancy of the Minister of Karen State and Minister of Kachin State.

The President ordered that the appointment of these two State Ministers without coordination and consultation with the State Council in accordance with the Section 181 (1) of the Constitution. But, at that time, the State Council could not work its regular functions and meetings.

Section 181(1) of the Constitution states as follows;

> "A member of the Union Government to be known as the Minister for the Karen State shall be appointed by the President on the nomination of the Prime Minister acting in consultation with the Karen State Council from among the members of the Parliament representing the Karen State."

Therefore, the President of the Union, with reference to Section 151 of the Constitution, requested the Supreme Court to render opinion on the appointment of the State Ministers without coordination and consultation with the State Council is in accordance with the Constitution or not.

The Supreme Court answered that the submission of the names of the candidates by the Prime Minister of the Union is not contradict with the Constitution.

At that tenure, the unstable situation is occurred in the entire State and consequently the regular functions of the Government Bodies are not fully operated. The State Council is unable to organize and set for the regular meetings. As a result, the Prime Minister is not in the position to consult with State Council to obtain its approval. The term "consult" is not to be interpreted as the necessity of consent but to be interpreted as to seek the opinion of the concerned authorities. The process of consultation with

[15] 1958 B.L.R.(S.C.) 81.

the State Council is deterred by the then unstable situation of the country.

Under the structure of 1947 Constitution, the Supreme Court historically has resolved constitutional disputes in three main areas: the relations between the states and the national government, the interpretation of Constitution and individual rights and freedoms. The model of constitutional review under 1947 Constitution is practiced on Diffuse model.

3. Implementation of Constitutional Review under 1974 Constitution of Myanmar

On 2nd March 1962, the Revolutionary Council Government took the sovereign power and the 1947 Constitution became defunct. On 3 January, 1974, the Constitution of the Socialist Republic of the Union of Myanmar, 1974 was adopted by means of Referendum. Under Section 200 and 201 of this Constitution, interpretation power of the Constitution is exercised by the Pyithu Hluttaw, which is unicameral legislature.

Section 200 and Section 201 of the 1974 Constitution provided as follows:

> (a) In interpreting the expressions contained in this Constitution, reference shall be made to the Interpretation Law promulgated by the Revolutionary Council of the Union of Burma.
>
> (b) Amendments to and further interpretation of expressions contained in the Law mentioned in Clause (a) shall only be made by the Pyithu Hluttaw.
>
> (c) The validity of the acts of the Council of State, or of the Central or Local Organs of State Power under this Constitution shall only be determined by the Pyithu Hluttaw.[16]

The Pyithu Hluttaw may publish interpretation of this Constitution from time to time as may be necessary.[17] Therefore, the authority of interpretation of the Constitution was vested in the Pyithu Hluttaw. There was only one landmark case in which the Pyithu Hlattaw interpreted the provision of 1974 Constitution.

On the sixth day of the Fourth Meeting of First Pyithu Hluttaw held on 21st October, 1975, Pyithu Hluttaw firstly interpreted the Section

[16] Section 200 of the Constitution of the Socialist Republic of the Union of Myanmar, 1974.

[17] Ibid, Section 201.

73 (h) and 73 (i) of the Constitution. The original provision of Section 73, Subsection (h) had stipulated those decisions with regard to entering, ratifying, annulling or withdrawing International Treaties should be performed with the approval of Pyithu Hluttaw.

Its provisions interpreted by the Pyithu Hluttaw and promulgated by the State Council as Notification No.4/75 on the date of 12th November, 1975 are as follows:-

1. (a) Under Sub- Article (h) of Article 73, the following treaties are included among other international treaties requiring approval of the Hluttaw for entering, ratifying, annulling and withdrawal from the treaty.

    (1) Boundary emending or adjustment Treaty;

    (2) Peace Treaty;

    (3) Treaty requiring to adopt the domestic law;

    (4) Treaty concerning defense and security of the State;

    (5) War Reparation Treaty;

    (6) Treaty relates to the contribution or spending of the State budget with the exception of the specific matters approved by the Hluttaw for budget allotment or budget funding;

    (7) Treaty adopting the International Instrument or International Agreement

Likewise, the original meaning of Subsection (i) was related to the decisions on Bilateral Treaties. Its provisions were interpreted by the Pyithu Hluttaw as follows: -

(b) Under Sub-Article(i) of Article 73, the following are included among bilateral or multilateral treaties which require the decision of the State Council: -

    (1) Treaty of Friendship;

    (2) Non-Alignment Treaty;

    (3) Non-Aggression Treaty;

    (4) Treaty for the Protection of Air and Water Pollution;

(5) Treaty on a Tariffs;

(6) Treaty Prohibiting Germ warfare.

(7) Treaty on Non-Use of Poison Gas in Military Operation;

(8) Nuclear Test Ban Treaty;

(9) International Agreement on Asylum;

(10) Treaty Prohibiting Ariel Hijacking and Air

(11) Treaty on Protection of War Victims;

(12) Treaty on Cultural Exchange;

(13) Agreement on Extraction of Energy and Natural Resources;

(14) Agreement on Economic, Technical Assistance and Cooperation;

(15) Protocol arising out of the Main Treaty which has already obtained approval of the Hluttaw or State Council;

(16) Trade or Commercial Agreement Treaty;

(17) Loan Agreement implementing with the permission of the Hluttaw;

(18) Treaty on Air and Sea Traffic;

(19) Treaty on Communications by Post, Telegraph and Telephone.

2. In the event arises in the future to institute the treaties that are not embodied in the above paragraph 1, such matter shall be submitted to Pyithu Hluttaw by the State Council for seeking the decision whether it is comprehended in Sub Articles 73(h) or Sub-Article(i).

3. Pursuant to sub paragraph 1 of paragraph 1, the following Agreement are inclusive in the International Agreements that urgently need the decision of the State Council as well as the authorization granting to the Council of Ministers in order to conclude the said Agreement.

(a) Protocol arising out of the Main Treaty which has already obtained approval of the Hluttaw or State Council;

(b) Trade Agreement;

(c) Loan Agreement instituted by virtue of approval of the Pyithu Hluttaw;

(d) Traffic Agreement by Sea and by Air;

(e) Treaty on Communications by Post, Telegraph and Telephone.

Under 1974 Constitution, Myanmar implemented the political model of constitutional review and the Parliament is the highest political organ to interpret the Constitution. In this design, the Constitution mentioned the basic principles and ensured the fundamental rights of its citizens. The body to safeguard these fundamental rights of the citizens was the State Council under the Article 73 (m) which said that the State Council shall abrogate the decisions and orders of the Central and Local Organs of State Power if they are not consistent with the law. And also, under this Constitution, Pyithu Hluttaw promulgated the Protection of Citizens' Rights Law to protect and safeguard the rights and privileges of the people. Under the law and Article 112 (b) of the Constitution, the Council of People's Attorneys was the safeguarding body to protect and safeguard the rights and privileges of the working people. Therefore, there was no "Writs" under the Socialist era of Myanmar.

4. Halt of the Constitutional Review System in Myanmar

In the 1980s, Myanmar faced many crises and difficulties in economic, social, and political affairs. Although Myanmar practiced a Single Party System which is called the Myanmar Way to Socialism under the 1974 Constitution, the general situation occurred in 1988. Thus, the State Law and Order Restoration Council (SLORC) took the State's Power for peace, tranquility, Law and order in Myanmar on September 18, 1988. Since then, the 1974 Constitution is no longer practiced and it is Defunct as Death Letter Law.

During the SLORC rule in Myanmar, the Constitutional Review System is no longer used because the States' Power, i.e., Executive and Legislative power was exercised by the SLORC, and Judicial power was

conferred to Supreme Court under the Judicial Law which was promulgated by the State Law and Order Restoration Council Law No. 2/88.

5.Revival of the Constitutional Review System

However, SLORC took the view on the long term, and laid down the seven-road map towards the Multi-Party Democratic System. According to that Road map, the National Convention was held in 1993 to draft the new constitution with the People's will for establishing the Multi-Party Democracy System. In that National Convention, the thousands of delegates from the 8 Groups that Political Parties Representatives Group, Elected Representatives Group, Civil Service Representatives Group, Group of Ethnic Representatives, Farmers' Representatives Group, Workers' Representatives group, Professional Representatives Group, and Group of other invited person, participated and discussed the basic principles for the draft Constitution.

On 11th January 1993, there was a discussion about the Judiciary that is the judicial principles and the judicial system in order to promote righteous judicial proceedings and how to form the judicial structure, how to entrust the jurisdictions to the Highest court, and when the problems relating to the constitution arises, whether the jurisdiction should confer the highest court or should be formed separately to determine that problem[18].

Regarding the upholding of the Constitution, the participants of each group discussed that the Constitution will be needed to protect by the sound judicial system; when disputes arise the provisions of the Constitution will be needed to interpret, and when legal disputes between the Union government and the state government will also be needed to resolve. Therefore, a Constitutional Court should be formed to resolve power-sharing disputes, whether between one Executive authority to another or between the federal government and the state government; and to decide the Constitutionality of Law enacted by the Pyidaungsu Hluttaw (Parliament) or State Hluttaw and so on[19].

On September 16, 1993, the basic principle was adopted in respect with the safeguarding of the Constitution, that is "A Constitutional Tribunal will be formed to interpret the provision of the Constitution, to scrutinize laws enacted by the Pyidaungsu Hluttaw (Parliament), the Region, and

[18] Myanmar National Convention Records, Vol.I, page 265.
[19] Myanmar National Convention Records, Vol.II, page 553-556.

the State Hluttaws, and to scrutinize the Constitutionality of functions of executive authorities of Pyidaungsu, Regions, States and Self-Administered Areas, to decide on constitutional disputes between Pyidaungsu and Regions and States, among Regions and States, and between Regions or States and Self-Administered Areas, and among Self-Administered Areas themselves, and to perform other duties prescribed in this Constitution." Based on the above discuss matters Article 46 of the 2008 Constitution of Myanmar was adopted[20].

Then, the delegates of each group in the National Convention discussed setting up detailed principles of the allocation of the State's Judicial Power. The State's Judicial Power was allocated by

(a) Courts-Martials Supreme Court of the Union, High Court of the Region, High Court of the States, Courts of the Self-Administered Divisions, Courts of the Self-Administered Zones, District Courts, Township Courts and other courts established by the Laws;

(b) Courts-Martials

(c) The Constitutional Tribunal.

In above courts were formed separately and their nature of jurisdiction were also discussed.

Regarding the establishment of the Constitutional Tribunal of the Union, the delegates of the National Convention discussed about the functions of the tribunal, how many members should be set, how the member should be systematically selected, the qualifications of the members should have, and the tenure of membership. As the result of the discussion, the detailed principles for the establishment of the Constitutional Tribunal of the Union were adopted[21]. In line with these detailed principles, it was adopted, from Article 320 to Article 336 of 2008 Constitution, relating to the Constitutional Tribunal of the Union.

6. Implementation of Constitutional Review under 2008 Constitution of Myanmar

The Constitution of the Republic of the Union of Myanmar was adopted in 2008 and the Constitutional Tribunal came into being for the first

[20] Myanmar National Convention Records, Vol.II, page 708.
[21] Myanmar National Convention Records, Vol. XIII.

time in the history of Myanmar. It was established on the date 30th March 2011. The authority and organizational structure have been regulated by the Constitution.

The Constitutional Tribunal of the Union is formed with nine members including the Chairperson[22]. The President submitted the candidature list of total of nine persons, three members chosen by him, three members chosen by the Speaker of the Pyithu Hluttaw (House of Representatives) and three members chosen by the Speaker of the Amyotha Hluttaw (House of Nationality), and one member among nine members to be assigned as the Chairperson of the Tribunal , and their assignments shall be approved by the Pyidaungsu Hluttaw (Parliament)[23].

The adjudication of Tribunal shall be formed with full members i.e. 9 members. The hearing of the petition may perform with full members. However, if a member unable to sit the hearing of public sitting cause of any other assigned duty, the hearing can sit with the minimum number of six members of the Tribunal with the Chairperson. Although the full-fledge member of the Tribunal shall pass the resolution or decision of the Tribunal. If the Chairperson or one of the members is not available, we may say that the composition of the Tribunal becomes incomplete. It means that the adjudication of proceedings is performed by all members of Tribunal without oversighted.

6.1 Appointment of the Chairperson and Members of the Tribunal

From Section 327 to Section 335 of the Constitution provided the appointment of the Chairperson and members of the Tribunal, their qualifications, appointment of new members, selection of members, the term of the Tribunal and also causes of their impeachment.

The President appoints the Chairperson and members of the Constitutional Tribunal of the Union after the approval of the Pyidaungsu Hluttaw (Parliament)[24].

When the President nominated the members of the Constitutional Tribunal of the Union, the Pyidaungsu Hluttaw (Parliament) has no right

[22] Section 320 of the 2008 Constitution of Myanmar.
[23] Section 321 of the 2008 Constitution of Myanmar.
[24] Section 327 of the 2008 Constitution of Myanmar.

to refuse unless it can be proved that they are disqualified[25], and if the Pyiduangsu Hluttaw has not approved the person who nominated by the President, the President will have the right to submit new nominated person again in line with the provision of the Constitution[26].

6.2 The Functions and Duties of the Constitutional Tribunal of the Union

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

(a) interpreting the provisions under the Constitution;

(b) vetting whether the laws promulgated by the Pyidaungsu Hluttaw (Parliament), the Region Hluttaw, the State Hluttaw or the Self-Administered Division Leading Body and the Self-Administered Zone Leading Body are in conformity with the Constitution or not;

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

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

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

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

(g)functions and duties conferred by laws enacted by the Pyidaungsu Hluttaw (Union Parliament)[27].

In case of arising a dispute with the trial before any Court, that

[25] Section 328 of the 2008 Constitution of Myanmar.
[26] Section 329 of the 2008 Constitution of Myanmar.
[27] Section 322 of the 2008 Constitution of Myanmar.

dispute 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 that matter, the 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 that matter, the resolution of the Constitutional Tribunal of the Union shall be applied to all similar cases[28].

6.3 Adjudication Procedure of the Constitutional Tribunal

Access to the Constitutional Tribunal of the Union

Entitled to submit the matters directly to the Tribunal are the President, Speaker of the Pyidaungsu Hluttaw (Union Parliament), Speaker of the Pyithu Hluttaw(House of Representatives), Speaker of the Amyotha Hluttaw(House of Nationality), the Chief Justice of the Union Supreme Court and the Chairperson of the Union Election Commission[29]. And then, the Chief Minister of the Region or State, Speaker of the Region Parliament or State Parliament, the Chairperson of the Self-Administered Division Leading Body or the Self-Administered Zone Leading Body, and the Representatives numbering at least ten percent of all the representatives of the Pyithu Hluttaw (House of Representatives) or the Amyotha Hluttaw (House of Nationality) are entitled to submit to the Tribunal indirectly by means of the prescribed means[30].

Under the 2008 Constitution and the Constitutional Tribunal of the Union Law, the only above-mentioned persons can submit to the Tribunal. It seems like an individual citizen cannot access to the Tribunal. Although the individual citizen who exhausted his rights can access to the Tribunal through his concerned representatives. If his loss or grievance may affect the interests of other citizens or public interest, the Concern Representative can present and discuss the other Representatives in the House and then, the 10 percent of the Representatives submit the petition to the Tribunal with the manner prescribed by the Tribunal Law.

In the World, most of the Constitutional Courts play as a guardian of the Constitutional order and protect the Human Rights of Individuals and the Constitutional Rights of Legal entities. In Myanmar, the individual

[28] Section 323 of the 2008 Constitution of Myanmar.
[29] Section 325 of the 2008 Constitution of Myanmar.
[30] Section 326 of the 2008 Constitution of Myanmar.

rights or citizens' rights can be requested to the Supreme Court of the Union by the Individual citizen. The Supreme Court of the Union is vested the power to issue the five kinds of Writs, that are Writ of Habeas Corpus, Writ of Mandamus, Writ of Prohibition, Writ of Quo Warranto, and Writ of Certiorari by the 2008 Constitution[31]. While the Supreme Court of the Union sit the case on the Citizens' rights, there is need to decide whether on constitutionality or not, it may apply a case to the Constitutional Tribunal of the Union by means of prescribed manner.

Submission of a petition

When a petition was submitted to the Tribunal, the Chairperson set up a Scrutiny Body of Petition under Section 18 of the Law. The Scrutiny Body examined whether it is complete or not under Rule 4. When the Scrutiny Body found out that the petition is not complete in accordance with Rules of Procedure, the Scrutiny Body shall notify the petitioner to resubmit with the requirements of the petition. If the petition is complete, the Scrutiny Body shall notify the respondent or interested person or department or organization to submit the explanatory statement during the prescribed period. When the petition is complete with the required documents, the Scrutiny Body submits the proceeding with their reports it to the Chairperson for a hearing.

When the Chairperson received the proceeding, the Chairperson shall form the Order of formation of the Tribunal under Rule 15 to be heard and decided. The case shall be heard by the plenary session. In the case of unable to sit Full Bench in public sitting for hearing with assigned duty or any other matters of any other members, the case may be heard by the Tribunal with at least six members including the Chairperson[32].

During the hearing of a case, the Tribunal can have the opinion and advice of the expert and any other requirements, if necessary. And also, may call upon the findings and remarks of the relevant Hluttaw Committees, Commissions and Bodies through their respective Speakers of the Hlattuw vetting on the matter submitted under subsection 1 of the section 17A of the Law.

The Tribunal shall be heard in public sitting, it may expect the matter of State secrets and security of the Union. The Tribunal can be without

[31] Section 378 of the 2008 Constitution of Myanmar.
[32] Section 20 of the Law of the Constitutional Tribunal.

disclose state official secrets matters and deliberation of the members of the Tribunal on the case, except all other matters shall be heard in the public sitting. The deliberation carried out within the Tribunal with respect to the final decision of a case shall be recorded and kept confidential. The Tribunal shall decide interpretation and opinion with the consent of majority vote of the members and decision with the consent of majority vote of the members including the Chairperson.

The Constitutional Tribunal can apply the relevant provisions of the Code of Civil Procedure, the Code of Criminal Procedure and the Evidence Act whenever it is deemed to be relevant and appropriate with an aimed to settle disputes.

Under Section 324 of the Constitution and Section 24 of the Law, the resolution of the Tribunal is final and conclusive.

7. Legal Challenges in Constitutional Adjudication

The processes of implementation of Constitutional Review can face the challenges and problems. Yet these challenges can lead to the development trends.

The role of the Tribunal is to determine the constitutional validity of the Laws enacted and executed by the two pillars of the government. Section 13 of the Law states that the persons who directly submitted the petition to obtain the interpretation, decision and opinion of the Constitutional Tribunal. Moreover, Section 14 describes the submitted persons who were submitted through the prescribed manners. Apart from the persons who are accessed to the Tribunal under Section 13 and 14 of the Law of the Constitutional Tribunal, remaining all persons are seemed to be limited for submitting the constitutional complaint to obtain the interpretation, decision and opinion of the Constitutional Tribunal. However, every citizen or all citizens can request to submit through their concerned representatives of Hluttaw.

The duties of the Hluttaw representatives include the safeguarding the Constitution and the existing laws and aiming at and carrying out to enable to obtain and enjoy the fundamental rights of the citizens[33]. In respect of the duties of the Hluttaw representatives under their Hluttaw Laws, citizens can request to submit the Hluttaw representative for getting

[33] Section 9 (a) and (f) of the Pyithu Hluttaw Law and Amyotha Hluttaw Law.

the constitutional remedies due to matter of constitutional issues. Then the Hluttaw representatives convinced on the citizen's request, he or she lobbies within their group of Hluttaw representatives on that constitutional issues for collecting the 10 percent of total number of the respective Hluttaw representatives. After that, they will continue with two paths, one path is proposing the constitutional issues in their respective Hluttaw and remaining way is 10 percent of the Hluttaw representatives can submit the petition to the Tribunal for getting the constitutional remedies through in accordance with the Rules of procedure.

Relating to the remedies of constitutional fundamental citizen rights, Myanmar has long experience with Myanmar's Constitution, since she gained the independence. Section 25 of the 1947 Constitution protected the citizen's rights to constitutional remedies by issuing the writs by the then Supreme Court. Moreover, citizen's rights to constitutional remedies is vested the Supreme Court of the Union under the 2008 Constitution. Instead of the Constitutional Tribunal, the power to adjudicate such matters shall be vested in Supreme Court, i.e., the Supreme Court can issue writs (constitutional writs or prerogative writs) and to review the issues of violation of the citizens' rights and remedy their rights and guarantee under the Constitution of the Judicial Power in the Chapter 8 of the Constitution.

In this regard, we would like to mention our opinion, writs system is only used Common Law Legal system as a judicial review for the safeguarding of the fundamental citizen rights. That is why, all of the writ jurisdiction are empowered by the Supreme Court as Diffuse constitutional review system. And then, meanwhile, the Constitutional Tribunal simultaneously exercises the jurisdictions on the constitutional disputes as mentioned as concentrated or specialized system mostly which were exercised in Civil Law countries. But, Myanmar practiced likewise as a Constitutional Court of Civil Law countries. So, we might say Myanmar practices as Hybrid system.

According to Section 323 of the Constitution, during a hearing of a case before a court, if there arises a dispute on whether the provisions contained in any law contradict or is conform to the Constitution, and if no resolution has been previously 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 accordance 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". So, any level of courts including Supreme Court can submit the petition under Section 323 of the Constitution.

Regarding this section under that provision, the first case of the Constitutional Tribunal is submission No 1 of 2011. The Chief Justice of the Union Supreme Court submitted the submission to the Constitutional Tribunal questioning the legality of conferring the first class magistrate power to the sub-township Administrative Officers as requested by the Ministry of Home Affairs[34]. The Constitutional Tribunal issues that whether it is of constitutionality or not to confer the power of criminal jurisdiction to the sub-township administrative officers of the General Administration Department, Ministry of Home Affairs by the Supreme Court of the Union.

The Constitutional Tribunal considered that the provisions of the 2008 Constitution clearly stipulate that the legislative power, the executive power and the judicial power of the Union shall be separately exercised. The Judicial power empowered to the Courts and Judges are clearly prescribed in the Constitution. Therefore, the exercise of the judicial power is permitted only to those Judges who are empowered by the Constitution.

So, the Constitutional Tribunal held that the conferring of the judicial power to administrative officers of the General Administration Department of the Ministry of Home Affairs is not in conformity with the

[34] Facts: Ministry of Home Affair informed the Supreme Court of the Union to empower the first-class Magistrate power to 27 sub-township administrative officers as judicial officers, as required.

It is submitted by the Chief Justice of the Union to obtain the interpretation, decision and opinion of the Tribunal in accordance with section 325 (e) of the Constitution of the Republic of the Union of Myanmar whether the following matters are consistent with the Constitution:

- To appoint the sub- township administrative officers, the General Administration Department, Ministry of Home Affairs as judicial officers to try the criminal cases which come to court in the sub- township concerned by the Supreme Court of the Union under Section 293 and 317 of the Constitution;
- To confer sub- township administrative officers with the first-class power of Magistrate under Section 32 (1) (a) of the Criminal Procedure Code (Cr P C) and Magistrate power to try summarily under Section 260 of Cr P C by the Supreme Court of the Union;
- To appoint sub- township administrative officers as juvenile judges and to empower them to try the juvenile cases under Section 40 (a) of the Child Law,1993.

Constitution.

After deciding the submission No 1 of 2011, the Supreme Court repealed the empowering the power of criminal jurisdiction to the sub – township administrative officers of the General Administration, Ministry of Home Affairs by Notification No. 232/ 2011 in order to conformity with the 2008 Constitution and the decision of the Constitutional Tribunal of the Union.

Relating to the citizen right to vote, Constitutional Tribunal decided the case relating citizen right to vote stipulated under the 2008 Constitution[35]. It can be found in the submission No 1 of 2015.

Dr. Aye Maung and 23 MPs from Amyotha (National) Hluttaw brought the submission to the Tribunal, for requesting to check the constitutionality of the Referendum Law for the approval of the Draft Law on amending the Constitution (2008). They questioned one of the provisions of the Referendum Law specifically mentioned in Section 11(a) that the expression "the holders of Temporary Identity Cards" according to the Referendum Law by which shall have the right to vote in the Referendum.

Pursuant to all these provisions, the Tribunal views that the expression "constitutional right to vote" includes every citizen who has attained 18 years of age on the day which the election commences and person who get this right by Law.

It is noteworthy, that under the Presidential Notification, the validity of the cast votes under Referendum Law, it is not in accord with the provision of the Constitution, particularly with regard to Section 38 (a), Section 391(a) and Section 391(b). Therefore, the Tribunal ordered that Section 11 (a) of the Referendum Law for amending the Constitution (2008) which permits holders of the Temporary Identity Cards are not in accordance with the Constitution.

After passing the judgment, it was stated that the above law

[35] Section 391(a) and (b) of the Constitution of the Republic of the Union of Myanmar, 2008 describes that in electing people's representatives to the Hluttaws:

(a) every citizen who has attained 18 yeares of age on the day on which the election commences, who is not disqualified by law, who is eligible to vote, and person who has the rigth to vote under the law, shall have the right to vote;

(b) every citizen who is eligible to vote and person who has the right to vote under the law shall cast a vote only for each Hluttaw at a constituency in an election.

was incompatible with the Constitution, and then on 25 June 2015 the Pyidaungsu Hluttaw (Union Parliament) amended the law. According to this amendment, Sub-section (a) of Section 11 of **"the Law Amending the Referendum Law for the Approval of the Draft Law on amending the Constitution of the Republic of the Union of Myanmar, (2008)"** shall be substituted as following provision:

"(a) Each of every citizen, associate citizen and naturalized citizen who has completed the age of eighteen years on the day of referendum shall have the right to vote at the referendum. Such each and every person who is entitled to vote shall be mentioned in the voting roll."

According to the functions and duties of the Constitutional Tribunal, it can exercise the scrutinizing the laws which are enacted by the respective Hluttaw[36]. But the Constitutional Tribunal cannot examine the bills before enacting the Law. Furthermore, the Constitutional Tribunal cannot adjudicate the cases by own motion[37].

In 2012, there was a rare incident for the Constitutional Tribunal. It is the submission No 1 of 2012.

The Attorney-General for and on behalf of the President presented the submission questioning that the constitutionality of the interpretation of term the "Committees, Commissions and Bodies formed by each Hluttaw" should be regarded as "Union Level Organizations".

In Judgement that case, it is stated that "Taking into consideration of the preceding discussion and also has taken into account on the interpretation of the Chapter IV of the Constitution under the heading of Legislature, "any of the Union Level Organizations formed under the Constitution" and "Organizations or Persons representing any of the Union Level Organization formed under the Constitution" shall be defined as "the Union Level Organizations or persons appointed by the President with the

[36] Section 322 (b) states that vetting whether the laws promulgated by the Pyidaungsu Hluttaw, the Region Hluttaw, the State Hluttaw or the Self- Administered Division Leading Body and the Self- Administered Zon Leading Body are in conformity with the Constitution or not.

[37] Submission No 1 of 2017 of the Constitutional Tribunal of the Union, p-17; "The activities of the Tribunal are the Judicial Process because the Tribunal is one of the formation of Courts established under Section 293 (c) of the Constitution. There is no legal provision that the Tribunal has the power to decide the Law which is enacted by the Legislature without submission.

approval of the Pyidaungsu Hluttaw (Union Parliament). But Committees, Commissions and Bodies formed by each Hluttaw shall be regarded as organizations of Hluttaw."

Therefore, it may be interpreted that "any of the Union Level Organizations formed under the Constitution" and "Organizations or Persons representing any of the Union Level Organization formed under the Constitution" are the Union Level Organizations or Persons appointed by the President with the approval of the Pyidaungsu Hluttaw.

For all these reasons, the submission of the President is granted and "The status granted to Committees, Commissions and Bodies formed by each Hluttaw as Union Level Organizations is unconstitutional".

The affected bodies unsatisfied, disapproved and unfollowed on the decision of Tribunal that the two difference between such Committees, Commissions and Bodies which were formed under the Constitution and the relevant Law are not same as Union Level Organization. Due to that unsatisfied decision, then the Parliament alleged to the Tribunal under the section 334 (a) (ii) and (v) of the Constitution " breach of any of the provisions under the Constitution and inefficient discharge of duties assigned by law", by means of impeachment.

Followed by that the unfollowed decision, the Parliament amended the Law of Constitutional Tribunal in 2013. One of the amendments of the Tribunal Law in 2013, Section 24 is amended that the provision is "the resolution of the Tribunal decided under Section 23 shall be final and conclusive". Section 23 prescribes that "The decision passed by the Constitutional Tribunal relating to the matter submitted by a Court under sub-section (g) of section 12 shall be applied to all cases." Moreover, the deleted provision of Section 25 is "the decisions of the Tribunal shall have an effect on the relevant Government departments, organizations, and persons or the respective region."

As the amended sections, the intention of the amending law is, we can see comparative studies between which were deleted provisions and substituted clause.

The meaning of impeachment mentioned in the Section 334 of the 2008 Constitution. The Chairperson and members of the Constitutional Tribunal of the Union may be impeached on any of the following reasons:

(i) High treason;

(ii) Breach of any of the provision under the Constitution;

(iii) Misconduct;

(iv) Disqualification of the qualifications of member of the Constitutional Tribunal of the Union prescribed under Section 333;

(v) Inefficient discharge of duties assigned by law.

The grounds for impeachment are high treason, bribery, high crimes and misdemeanours in United States of America. Impeachable high crimes and misdemeanours are not limited to indictable criminal offences: the definition includes attempting to subvert the laws and liberties of the realm, corruption and a variety of other forms of misconduct in office[38]. In this regard, the Parliament tried to proceed the impeachment on all the nine members of the Tribunal because they think that the Constitutional Tribunal perform their power which is excess the functions and duties. The Constitutional Tribunal faced the challenge of the exercising of powers. So, the Constitutional Tribunal were unfortunately faded away from on the important pillar of the Judiciary within the democracy political system and faced the threaten of the independence and impartiality of Constitutional Judiciary system.

Since the establishment of the Constitutional Tribunal, the Constitutional Tribunal decided a small number of cases. The Constitutional Tribunal accepted and decided the 17 cases till 2020. Even though the Constitutional Tribunal faced the challenges in progress of development of constitutionalism in Myanmar, there are many landmark decisions of the Constitutional Tribunal.

One of the landmark decisions of the Constitutional Tribunal is the submission No 2 of 2011. This submission determined and interpreted the status of Ministers of the National Races Affairs who are protected and preserved the rights of National Races and Ethnic minorities.

Dr. Aye Maung and 22 MPs of the Amyotha Hluttaw (National Parliament) presented the submission questioning whether the term "Minister of the National Races Affairs" under Section 5 of the Law of

[38] Judicial Tenure, Removal, Immunity and Accountability, International IDEA Constitution-Building Primer 5, Elliot Bulmer, First published in 2014 by International IDEA, p-11.

Emoluments, Allowances and Insignia for Representatives of the Region or State is excluded from the term of the "Ministers of the Region or State" and the exclusion of "Ministry of the National Races Affairs" among the "Ministers of the Region or State" under the Section 4 (c) of the said Law of constitutionality or not.

The Constitutional Tribunal issues that whether the status of Ministers of the National Races Affairs is equal to that of the Ministers of the Region or State concerned; or whether they are entitled to the emoluments, allowances and insignia of office as the Ministers of the Region or State.

The Constitutional Tribunal considered that Section 262(a) (iv) and 262(e) of the Constitution defines the "Minister of the National Races Affairs" as the "Minister of the Region or State" concerned. Consequently Section 262(g) (ii) of the Constitution allows the President to assign duties to the Hluttaw representatives who are the Ministers of the Region or State, to perform the affairs of National Races concerned.

Tribunal examines the basic principles of the Constitution and any other laws.

Therefore, the submission of 23 representatives of the Amyotha Hluttaw including Dr. Aye Maung, is allowed. It is decided and interpreted that since the Ministers of National Races Affairs of the Regions or States are Ministers of the Regions or States concerned and they are the persons defined by Section 4 (c) of the Law of Emoluments, Allowances and Insignia of Office for Representatives of the Regions or States. Hence, Section 5 and Section 17 of the said Law are unconstitutionality.

The Tribunal decided that Sections 5 and 17 of the Law of Emoluments, Allowances and Insignia of Office for Representatives of the Region or State is not in conformity with Section 262 of the Constitution of the Republic of the Union of Myanmar.

After passing the judgment, the above law was incompatible with the Constitution, thus the Pyidaungsu Hluttaw (Union Parliament) amended the law on 8 March 2013. According to this amendment, the Minister of the National Races Affairs and the other Ministers of the Region or State possess an equal status without any discrimination.

It is important that the process to development and formulate for resolving and considering the challenges that we are facing. So, it should add the provision of the Law that any person that is exhaustion of all

other judicial remedies should submit the constitutional compliant for constitutional remedies. And also, should add the functions and duties of the Constitutional Tribunal that scrutinizing the bills before promulgating and signing of the President.

Conclusion

To sum up the whole subject, there are different models of constitutional review all over the World and types of review on constitutionality vary from states to states. The extent of review of constitutionality can also be limited and this limitation varies depending upon the jurisdiction of the constitutional review body. In the same way, the scope of jurisdiction of constitutional review bodies such as Constitutional Courts, Constitutional Tribunals and Constitutional Council, may be drawn wider or narrower.

Therefore, from a review of different Constitutions in Myanmar's history, we may conclude that the implementation of constitutional review is quite different in their specific application. The Constitution of the Union of Burma, 1947 designed the diffuse and centralized model of constitutional review and the Supreme Court is the highest judicial organ to interpret the Constitution and to protect the fundamental rights of the citizens. The High Court shall have exclusive original jurisdiction in all disputes between the Union and a unit or between one unit and another.

The political model of constitutional review was implemented by the Constitution of the Socialist Republic of the Union of Myanmar, 1974. It is obvious, therefore, that the Parliament is only the highest organ for the interpretation of Constitution.

The current 2008 Constitution enshrines the centralized and concentrated model of constitutional review as a basic principle by establishing the separate Constitutional Tribunal in order to interpret the Constitution, to examine the constitutionality of law promulgated by the Legislatures and functions of executive authorities, to decide the constitutional disputes between the Union Government and State or Region Government, among Regions, among States and between Regions or States and Self-Administered Areas and among Self-Administered Areas themselves. It can readily be seen that the constitutional jurisdiction of the current Constitutional Tribunal is wider and more comprehensive than the previous Supreme Court in 1947 and the Parliament in 1974.

At present, the Supreme Court is the only one of the highest judicial organs of State without interference of the constitutional jurisdiction of the Tribunal. It is the court of final appeal from all ordinary courts within the Union and granting the writ. Under the respective provisions of the 2008 Constitution, the Supreme Court of the Union has the power to issue five kinds of writs: Habeas corpus, Mandamus, Prohibition, Quo Warranto, and Certiorari. Thus, every citizen of Union of Myanmar shall have the right to apply writs for the protection of their fundamental rights given by Constitution to the Union Supreme Court directly.

In view of the aforesaid cases and facts of the law, the Constitutional Tribunal overcame the challenges that are usually faced in the countries with immature democracy practice. But one of the greatest results of the Constitutional Tribunal of the Union of Myanmar in its milestone of victory, Tribunal can legally define the separation of powers treasured in the 2008 Constitution and determine the status of Union Government, State and Regions Governments. Tribunal always preserves the traditions of constitutionalism in accordance with the 2008 Constitution.

We believe that the Tribunal needs further exploration in the matters of individual rights protection under the Constitution. We hope the readers to be available a useful knowledge of our progressive development of constitutional review with the recourse of frequent changes in Myanmar's legal history.

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IMPLEMENTATION OF CONSTITUTIONAL REVIEW: CHALLENGES AND DEVELOPMENT TRENDS "CONSTITUTIONALITY OF CONSTITUTIONAL AMENDMENT"

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Abstract

Judicial review of the constitutionality of constitutional amendments has been a challenging issue in Pakistan. At the heart of the problem lies the question of the nature and scope of constitution amending powers of the Parliament. Caselaw suggests at times references were made to 'permanent features of the Constitution', 'constitutional conscience' and 'grund norm', however, we do not see any consistency or uniformity in the trend. Rather, it was held that the judiciary cannot declare any provision of the Constitution to be invalid on the basis of any abstract concept and the validity of a constitutional amendment can only be challenged if it is adopted in a manner different to the one prescribed by the Constitution. A significant development took place in jurisprudential thought in 1990s when the Supreme Court made a limited application of 'basic structure' theory to save prominent features of the Constitution. However, it was undone within a decade till the issue was authoritatively settled by the Full Court in 2015 when it held that the judiciary can review the substance of constitutional amendments and the Parliament cannot repeal, abrogate or substantively alter the Constitution or any of its salient features.

Pakistan has a written constitution. The Parliament in addition to passing ordinary legislation has the power of amending the Constitution. There is, however, a difference in the procedure of amending the Constitution and passing ordinary legislation. According to Article 239 of the Constitution, a bill to amend the Constitution may originate in any of the houses of the bicameral legislature. It needs to be passed by both the houses by two-third majority. The bill is then presented to the President for assent. A bill altering the limits of a province needs to be passed by the Provincial Assembly of that province by two-third majority as well. There is no express limitation on the Parliament's power to amend the Constitution except the one relating to changing the boundaries of a province. Nevertheless the Parliament is a creation of the Constitution[1]. Thus, questions over the extent of the powers of the Parliament to amend the Constitution are bound to arise.

The Constitution does not confer any explicit power of review of constitutional amendment on the judiciary. Nor are there any express 'eternal clauses' in the Constitution. The Courts of Pakistan for a long time did not accept the theory of basic structure or basic features of the Constitution. Earlier case law developed on the subject reflects that some constitutional provisions were called into question on the ground of being repugnant to other constitutional provisions or Objectives Resolution[2] or Preamble to the Constitution. Later, constitutionality of constitutional amendments also began to be challenged before the Constitutional Courts. And, so, began the accumulation of substantial case law on the subject.

The Supreme Court in *Fazlul Quader Chowdhry v Muhammad Abdul Haque*[3] and *Jhamandas v Chief Land Commissioner*[4] recognized the principle of trichotomy of powers and so also the equality clause of the Constitution which was described as the constitutional conscience of Pakistan. Thereafter, in *Asma Jilani v Government of the Punjab*[5], the Court appeared to have accepted the Objectives Resolution as the grund

[1] Article 50 of the Constitution of Islamic Republic of Pakistan, 1973.

[2] 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. 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.

[3] PLD 1963 SC 486.

[4] PLD 1966 SC 229.

[5] PLD 1972 SC 139.

norm of the Constitution. However, the Supreme Court in *State v Zia-ur-Rehman*[6], said that it was a creature of the Constitution from which it derived its powers and jurisdictions; it was thus to confine itself within the limits set by the Constitution. The Court, it was held, did not have the right to strike down any provision of the Constitution. It was further held that the Objectives Resolution was not the grund norm, rather, the grund norm was the doctrine of legal sovereignty accepted by the people of Pakistan. This view was followed by the Court in *Federation of Pakistan v Saeed Ahmed Khan*[7]. The Court then observed in *Islamic Republic of Pakistan v Wali Khan*[8] that the judiciary could not declare any provision of the Constitution to be invalid or repugnant to the national aspirations of the people and the validity of a constitutional amendment could only be challenged if it was adopted in a manner different to the one prescribed by the Constitution or was passed by a lesser number of votes than those specified in the Constitution.

A challenge was posed to the Fourth Constitutional Amendment in *Federation of Pakistan v United Sugar Mills Limited*[9]. The Supreme Court reiterated the view expressed in *Zia-ur-Rahman*[10] and held that a constitutional provision could not be challenged on the ground of being repugnant to an 'abstract concept' so long as the provision was passed by the competent legislature in accordance with the procedure laid down by the Constitution. The Court did not accept the theory of basic structure of the Constitution in *Fauji Foundation v Shamimur Rehman*[11]. In *Hakim Khan v Government of Pakistan*[12], the Supreme Court held that no provision of the Constitution could be declared ultra vires on the ground that the same was in conflict with Article 2A[13] of the Constitution.

We come across some development in jurisprudential thought on the subject in *Mahmood Khan Achakzai v Federation of Pakistan*[14]. Some significant observations with respect to the Parliament's power to amend

[6] PLD 1973 SC 49.
[7] PLD 1974 SC 151.
[8] PLD 1976 SC 57.
[9] PLD 1977 SC 397.
[10] PLD 1973 SC 49.
[11] PLD 1983 SC 457.
[12] PLD 1992 SC 595.
[13] Objectives Resolution was made a substantive part of the Constitution through the insertion of Article 2A in the Constitution.
[14] PLD 1997 SC 426.

the Constitution and recognition of basic features of the Constitution were made. Eighth Constitutional Amendment which had been at the center of political controversy, particularly in relation to the discretionary powers of the President to dissolve the National Assembly and to dismiss the federal government, was challenged in this case. The Supreme Court upheld the validity of the Eighth Amendment but observed that though Article 239 of the Constitution conferred unlimited power on the Parliament to amend the Constitution, it could not amend the Constitution in complete violation of Islam, nor could it convert democratic form into undemocratic. Similarly, courts could not be abolished through an amendment in the Constitution. The salient features of the Constitution as reflected in the Objectives Resolution were federation and parliamentary form of government blended with Islamic provisions. As long as such salient features were retained and not altered in substance, amendments could be made as per procedure provided in Article 239 of the Constitution. The Court held that the Eighth Amendment did not alter the basic features of the Constitution.

Chief Justice Sajjad Ali Shah observed that the Objectives Resolution had to be read for the purpose of proper interpretation in order to find out as to what scheme of governance had been contemplated. "Let us assume that it does not authoritatively provide grund norm and also it does not describe specifically the basic structure of the Constitution, even then also it does help in interpreting and understanding the scheme of governance and salient features of the Constitution which are described therein including Islamic provisions, federalism and Parliamentary form of Government and fully securing independence of Judiciary. Islamic provisions are very much embedded in the Constitution of 1973 as Article 2 thereof envisages that Islam shall be the State religion of Pakistan and Article 227 provides that all existing laws shall be brought in conformity with the Injunctions of Islam as laid down in the Holy Quran and Sunnah. Further, Article 228 provides for setting up Council of Islamic Ideology. Similar provisions existed in Articles 197 and 198 of the Constitution of 1956 and Articles 199 to 207 of the Constitution of 1962. Similar Islamic provisions existed in the Interim Constitution of 1972 from Articles 251 to 259. In nutshell it can be said that basic structure as such is not specifically mentioned in the Constitution of 1973 but Objectives Resolution as preamble of the Constitution and now inserted as the substantive part in the shape of Article 2A when read with other provisions of the Constitution reflects salient features of the Constitution highlighting federalism, Parliamentary form of Government

blended with Islamic provisions". He observed that the freedom bestowed upon the Parliament to amend the Constitution does not include power to amend those provisions of the Constitution by which would be altered salient features of the Constitution, namely federalism, parliamentary form of Government blended with Islamic provisions. "As long as these salient features reflected in the Objectives Resolution are retained and not altered in substance, amendments can be made as per procedure prescribed in Article 239 of the Constitution". "Clause (6) of Article 239 provides for removal of doubt that there is no limitation whatsoever on the power of Parliament to amend any provision/provisions of the Constitution. It, therefore, follows that Parliament has full freedom to make any amendment in the Constitution as long as salient features and basic characteristics of the Constitution providing for Federalism, Parliamentary Democracy and Islamic provisions are untouched and are allowed to remain intact as they are".

Justice Saleem Akhtar acknowledged that the theory of basic structure has completely been rejected in Pakistan. However, he observed, "every Constitution has its own characteristics and features which play important role in formulating the laws and interpreting the provisions of the Constitution. Such prominent features are found within the realm of the Constitution. It does not mean that I impliedly accept the theory of the basic structure of the Constitution. It has only been referred to illustrate that every Constitution has its own characteristics". "Apart from the fact that Constitution confers and guarantees fundamental rights, Article 8 prohibits the Federal Government, Majlis-e-Shoora (Parliament), a Provincial Government and a Provincial Assembly from making any law which takes away or abridges such fundamental rights. It further declares that the law made to the extent of such contravention shall be void. This by itself is a limitation on the Legislature. Clause (2) of Article 8 reads as follows:-

> '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.'

Significantly by employing the words 'any law', the intention of the Constitution seems to be that Article 8 will apply to all laws made by the Majlis-e-Shoora (Parliament) be it general or any law to amend the Constitution. Likewise no enactments can be made in respect of the provision of the Constitution relating to Judiciary by which its independence

and separation from Executive is undermined or compromised. These are in-built limitations in the Constitution completely independent from political morality and force of public opinion." By recognizing certain basic features and characteristics of the Constitution, it did not mean that the Supreme Court had impliedly accepted the theory of the basic structure of the Constitution. Only a limited application of the theory had been made to save prominent features found within the realm of the Constitution itself. It was observed, "What is the basic structure of the Constitution is a question of academic nature which cannot be answered authoritatively with a touch of finality but it can be said that the prominent characteristics of the Constitution are amply reflected in the Objectives Resolution which is now substantive part of the Constitution as Article 2A inserted by the Eighth Amendment."

The next important case before the Supreme Court related to the Thirteenth Constitutional Amendment which, among other things, stripped the President of Pakistan of his discretionary powers to dissolve the National Assembly, dismiss the Prime Minister and trigger new elections. A petition to challenge the amendment was filed in the Supreme Court and a three member Bench of the Court suspended the operation of the Amendment on 2 December 1997[15]. However, the order was suspended by a ten member Bench of the Court[16]. The petition was eventually dismissed for non-prosecution[17].

The validity of Fourteenth Constitutional Amendment was assailed before the Supreme Court in *Wukala Mahaz Barai Tahafaz Dastoor v Federation of Pakistan*[18]. The Parliament, in order to put an end to the problem of floor crossing and defections from parliamentary party, unanimously passed Fourteenth Amendment. A new article i.e. 63-A was added to the Constitution. It provided that a member of a parliamentary party could be disqualified if he committed a breach of the party discipline, violated the code of conduct and the party's declared policies, or voted contrary to any direction issued by the parliamentary party to which he belonged or absented from voting in the House against the party policy or in relation to any Bill following a declaration to that effect by the disciplinary committee of the party. The amendment was suspended by the Supreme

[15] Syed Iqbal Haider v Federation of Pakistan 1998 SCMR 181.
[16] Syed Iqbal Haider v Federation of Pakistan 1998 SCMR 179.
[17] Syed Iqbal Haider v Federation of Pakistan 1998 SCMR 1318.
[18] PLD 1998 SC 1263.

Court in October 1997 restraining party heads from taking adverse actions against members who spoke their minds and expressed an independent opinion in the Parliament. A seven member Bench of the Supreme Court finally declared the Fourteenth Constitutional Amendment as intra vires and valid under the Constitution by a six to one majority judgment.

The majority held that there had been a consistent view from the very beginning in Pakistan that a provision of the Constitution cannot be struck down by holding that it was violative of any prominent feature, characteristic, or structure, and that it has no application to strike down a Constitutional Amendment. "We may observe that in Pakistan instead of adopting the basic structure theory or declaring a provision of the Constitution as ultra vires to any of the Fundamental Rights, this Court has pressed into service the rule of interpretation that if there is a conflict between the two provisions of the Constitution which is not reconcilable, the provision which contains lesser right must yield in favour of a provision which provides higher rights". As regards the argument that the Fourteenth Amendment had abridged fundamental rights and violated Article 8 which prohibited the federal government, parliament, a provincial government, and a provincial assembly, from making any law which took away or abridged such fundamental rights and declared that lawmaking to the extent of such contravention shall be void, the Court held that such limitation was on the legislation. However, quoting Article 8(2) of the Constitution of Pakistan, Chief Justice Ajmal Mian observed that by employing the words 'any law in the provision', the intention of the Constitution seemed to be that Article 8 of the Constitution would apply to all laws made by the parliament be it general or any law to amend the Constitution. Likewise, no enactment could be made in respect of the provisions of the Constitution relating to the judiciary by which the independence of the judiciary or its separation from the executive was undermined or compromised. These were built-in limitations in the Constitution, completely independent from political morality and force of the public.

Justice Mamoon Kazi dissented from the majority judgment and declared the amendment as violative of the fundamental rights and, therefore, void and unenforceable. He observed that if a constitutional amendment is found to be repugnant to any of the fundamental rights, the Court shall have power to go behind the same and declare it unenforceable or void. "The same rule should apply if the amendment is found to be irreconcilable

with any other essential feature of the Constitution. Although, there is no express provision in the Constitution to provide guidance to the Courts in this regard, as in the case of fundamental rights, but the basic structure doctrine, though an abstract concept, has been referred to by the Courts in the countries where it is applied as an extension of the principle of judicial review."

The Supreme Court in *Zafar Ali Shah v Pervez Musharraf*[19] validated the extra constitutional takeover of October 1999 and held that the Chief Executive for an interim period of three years was entitled to amend the Constitution but no amendment could be made in the salient features of the Constitution, i.e. independence of judiciary, federalism, and parliamentary form of government blended with Islamic provisions.

The constitutionality of the Seventeenth Constitutional Amendment was brought in question in *Pakistan Lawyers Forum v Federation of Pakistan*[20]. The Court held that an amendment to the Constitution, unlike any other statute, could only be challenged on one ground, viz. it had been enacted in a manner not stipulated by the Constitution itself and that the Supreme Court would have no jurisdiction to strike down provisions of the Constitution on substantive grounds. The Court said that there was a significant difference between the position that the Parliament could not amend salient features of the Constitution and the position that if Parliament did amend those salient features, it would then be the duty of the superior judiciary to strike down such amendments. It was noted that the superior courts of Pakistan had consistently acknowledged that while there may be a basic structure to the constitution, and while there may also be limitations on the power of the Parliament to make amendments to such basic structure, such limitations were to be exercised and enforced not by the judiciary as in the case of conflict between a statute and Article 8 but by the body politic i.e. the people of Pakistan. The theory of basic structure or salient features as far as Pakistan was concerned, had been used only as a doctrine to identify basic features. No constitutional amendment could be struck down by the superior judiciary as being violative of those features. The remedy lay in the political and not the judicial process. The appeal in such cases was to be made to the people. Constitutional amendments always pose a political question, which could be resolved only through the normal mechanisms of parliamentary democracy and free elections.

[19] PLD 2000 SC 869.
[20] PLD 2005 SC 719.

In this case, the Supreme Court demolished the doctrine of basic structure or basic features of the Constitution and rendered all amendments to the Constitution, howsoever, violative of and repugnant to the basic features of the Constitution beyond the pale of judicial scrutiny. The Court thus undid the doctrine of basic features of the Constitution recognized by the Supreme Court in *Mahmood Khan Achakzai*[21].

Vires of Article 175-A[22] of the Constitution introducing changes in the procedure of appointment of judges of superior courts were challenged on the ground that the constitutional amendment was violative of one of the salient features of the Constitution i.e. independence of judiciary in *Nadeem Ahmad v Federation of Pakistan*[23]. The Supreme Court declined to express its opinion on the merits of the issues and arguments addressed and deferred to the parliamentary opinion qua Article 175-A on reconsideration by it in terms of the present order of the Supreme Court regarding the issue of appointment process of Judges of the Superior Courts in the light of the concerns/reservations expressed and observations/suggestions made and observed that the Court would thereafter decide all petitions adverting to all the issues raised therein yet till such time Article 175-A had to be given judicial enforcement by way of a construction which was in consonance with the other constitutional provisions underpinning judicial independence. The Parliament heeded the observation of the Supreme Court and passed another constitutional amendment to allay the apprehensions of the Court.

The most important case on the subject and one of the most important constitutional law decisions in the history of Pakistan is *District Bar Association Rawalpindi v Federation of Pakistan*[24]. Constitutionality of Eighteenth, Nineteenth and Twenty-first Constitutional Amendments – providing for a new appointment mechanism for superior judiciary and trial of a specified class of civilians before military courts – was challenged before the Supreme Court. Considering the enormity of the issue, a Full Court comprising all seventeen judges was constituted to hear the matter. The judgment that came up offered a rich and diverse jurisprudential

[21] Hamid Khan, Constitutional and Political History of Pakistan (Oxford University Press Second Paperback Edition 2009) 502.
[22] Article 175A was added to the Constitution by virtue of Eighteenth Constitutional Amendment.
[23] PLD 2010 SC 1165.
[24] PLD 2015 SC 401.

thought. Ten different opinions were authored. A majority of thirteen judges settled that the Supreme Court was vested with the jurisdiction to scrutinize the amendments made by the Parliament in the Constitution. Their answer to the question whether the judiciary could review the substance of constitutional amendments was in the affirmative. The majority judges held that the Court could strike down a constitutional amendment if it repealed, altered or abrogated the salient features of the Constitution.

The majority offered multiplicity of opinions to explain judicial review of constitutional amendment. Justice Sheikh Azmat Saeed, in his leading opinion, held that salient features defined the Constitution. "At the time of enactment of a Constitution, the framers thereof have to answer some fundamental questions relating to the State, its Government and the Institutions. The status and the rights of its citizens. It needs to be determined whether the country will be a democracy or a dictatorship, whether it will have a Presidential or a Parliamentary Form of Government, and whether it will be a Federation or be a Unitary State. The question of Sovereignty needs to be addressed as well as how such sovereign powers are to be distributed among its fundamental Institutions i.e. the Legislature, the Executive and the Judiciary along with their inter se relationship and the extent and manner in which such powers are to be exercised. In Democratic States sovereignty vests in the people and the Institutions are delegates thereof through and in terms of the Constitution which also identifies conditions and limitations of such delegations and the powers retained by the people in the form of rights which are guaranteed and protracted. The answers to the aforesaid questions as reflected in the Constitution are its prominent Characteristics and Salient Features. All the aforesaid questions are answered in the Constitution of the Islamic Republic of Pakistan, 1973. . . A bird's eye view of the Constitution reveals that it is self evident that Pakistan is a Democracy with the ultimate sovereignty vesting in Almighty Allah and delegated to the people of Pakistan (and not to any individual or group of persons who may seize power by force of arms). It has a Parliamentary Form of Government. The Fundamental Rights are guaranteed to all Citizens, including minorities. There is a Trichotomy of Power with a judiciary with its independence fully secured. Rule of Law, Equality and Social and Economic Justice are embodied in no uncertain terms. The aforesaid are the prominent Characteristics which defines our Constitution."

It was held that the amending powers of the Parliament were subject

to implied limitations based on salient features. The Parliament could not substantively alter, repeal or abrogate salient features of the Constitution. The Court said that the word amendment as used in Articles 238 and 239 of the Constitution had a restricted meaning. As long as the amendment had the effect of correcting or improving the Constitution and not of repealing or abrogating the Constitution or any of its salient features or substantively altering the same, it could not be called into question. The salient features of the Constitution have been identified as Democracy, Federalism, Parliamentary Form of Government blended with the Islamic Provisions, Independence of Judiciary, Fundamental Rights, Equality, Justice and Fair Play, Protection and Preservation of the Rights of Minorities, both as equal citizens of Pakistan and as minorities etc. Implied limitation upon the power of the Parliament to amend the salient features of the Constitution does not imply that such salient features are forbidden fruit in respect whereof the Parliament could not exercise its amendatory powers. Factually and legally what is prohibited is for the Parliament to repeal or abrogate the salient features of the Constitution or substantively alter i.e. to significantly affect its essential nature. Furthermore, it is not the correctness of the Amendment or its utility, which can be ruled upon by the Court but only its constitutionality.

Justice Jawwad S. Khawaja did not recognize the basic structure theory but recognized some unalterable features of the Constitution based on holistic and organic interpretation informed by preamble/Article 2-A. He was of the view that the Parliament is not sovereign as its power to amend the Constitution is constrained by limitations which are clear from the reading of the Constitution as a whole and these limitations are not only political but are subject to judicial review and, as a consequence, the Court has the power to strike down a constitutional amendment which transgresses these limits. "In the Pakistani context, judges do not need to make subjective speculations about the basic structure of the Constitution in order to exercise judicial review over constitutional amendments. We possess, in the shape of the Preamble to the Constitution, the surest possible grounds for examining constitutional amendments. The Preamble of the Constitution is a charter comprising nine commands ordained by the people of Pakistan for all instrumentalities of the State, including the Parliament and the Judiciary. The Preamble says that "it is the will of the people of Pakistan to establish an order". Justice Khawaja noted that the members of the Constituent Assembly were fully aware of the constitutional question before them at

the time of passage of the Objectives Resolution. "What is important is that twenty four years later, while adopting the Preamble, changes were made in the text of the Objectives Resolution which recognized the primacy of the People and as a consequence, the People were placed above the State and their chosen representatives, as a constitutional principle. The Preamble does, therefore, act as the 'key' to our understanding of the Constitution in terms of defining the legal relationship between the People, the State and the chosen representatives of the People. . . The language of the Preamble makes it clear that Parliament being a grantee of authority is a fiduciary of the People of Pakistan who are the source of temporal power in this country, and it can exercise only such authority as is delegated to it. Such authority being a grant of the Constitution, by definition, cannot be untrammeled. The Preamble records and reflects the extent of that delegation by giving the commands noted above. The people have given to Parliament the power to make laws for the fulfillment of their nine directives stated in the Preamble. Just like any delegate cannot exceed the terms of his grant, Parliament does not have the power to make any lawful amendments to the Constitution that manifestly defy any of the commands contained in the Preamble. If such amendments are indeed made, it would then be the duty of the judiciary to strike them down so as to ensure that the will of the people embodied in the Constitution prevails over that of one of the instrumentalities of the People viz. Parliament."

Justice Sarmad Jalal Osmani, who agreed with Justice Sheikh Azmat Saeed, in his additional note said that indeed there is a basic structure/grund norm/salient feature or whatever other term may be used i.e. the constitutional conscience etc. which is embodied in the Objectives Resolution particularly the declaration that sovereignty over the entire universe belongs to Almighty Allah alone. He came to the conclusion that "the Objectives Resolution which is now a substantial part of the Constitution by virtue of Article 2A embodies the will of the people which is a sacred trust unto the elected representatives of the people which yet again represents the sovereignty of Almighty Allah over the entire universe and is to be exercised within the limits prescribed by him per Islamic doctrines. . . any amendment to the Constitution which would deny the people of this country their freedom per their fundamental rights or the form of Government which they had chosen or the independence of the judiciary could never be condoned. We may look for our philosophies, our existence and our way of life here and there but it is all embodied in the

Constitution of which the objective resolution, so to speak, is in short form its crux."

Justice Ejaz Afzal Khan also recognized basic structure theory. The Constitution "is amenable to amendment so long as the amendment sought to be made does not alter the parts forming its basic structure. What are the parts forming the basic structure of the Constitution need not be explored as it is writ large on the face of the Objectives Resolution. . . We, therefore, hold that we have jurisdiction to examine the vires of any amendment in the Constitution and annul it, if it impairs, undermines or alters any of the parts forming basic structure of the Constitution and that clauses 5 and 6 of Article 239 of the Constitution cannot curtail such power and jurisdiction of this Court."

Justice Dost Muhammad almost recognized basic structure argument. "Reading the scheme of our written Constitution, a system of trichotomy is provided where, the powers of Executive, the Legislature and the Judiciary has been clearly and squarely defined and demarcated. All the three organs are coordinate bodies and collectively act to run the affairs of the State, strictly according to the provisions of the Constitution, without encroaching upon the power and authority of one another. If such plea is allowed and this practice is faithfully adopted, there would be no disorder amongst the three organs, rather, harmony would establish true rule of law and supremacy of the Constitution."

Justice Qazi Faez Isa recognized existence of certain basic or salient features which are derived from the text of the Preamble of the Constitution. "The Preamble has been derived from the Objectives Resolution, but with a very important difference. The opening words of the Objectives Resolution state that, 'Sovereignty over the entire universe belongs to Allah Almighty alone and the authority which He has delegated to the State of Pakistan, through its people' whereas the Preamble states that, 'Sovereignty over the entire Universe belongs to Almighty Allah alone, and the authority to be exercised by the people of Pakistan'. The substitution of the inanimate 'State' with 'the people' is immensely significant and reveals the nucleus of the Constitution. And 'the people' take precedence over their representatives because what follows (in the Preamble) 'is the will of the people of Pakistan to establish an order – wherein the State shall exercise its powers and authority through the chosen representatives of the people.' The people, each and every member of the nation, effectually enacted the Preamble

and then granted to their chosen representatives, some, and not all of the State's powers and authority. The people made it absolutely clear that they did not want their representatives to dilute their fundamental rights. It was categorically stated that the fundamental rights 'shall be guaranteed.' "

Four judges were of the view that the Court lacked power to examine the validity of constitutional amendments. Twelve judges dismissed the petitions while five judges held various parts of the Eighteenth and Twenty-first Amendments unconstitutional.

Conclusion

It appears that the Supreme Court has eventually embraced the global trend[25] of accepting the idea of implied limitations on constitutional amendment powers of the Parliament. Doctrine of salient features of the Constitution has been firmly established in the jurisprudential landscape of Pakistan. Judges have given different reasoning based on holistic and organic interpretation, Preamble, Objectives Resolution, basic structure, constitutional conscience or trichotomy principle to explain salient features of the Constitution. The standard of review while judging constitutionality of constitutional amendment would be a thing to watch for in future cases because recognition of an implied eternity clause regarding the fundamental nature of the Constitution yet requires a determination of its boundaries[26].

[25] Yaniv Roznai, 'Unconstitutional Constitutional Amendments – The Migration and Success of a Constitutional Idea' (2013) 61 Am. J. Comp. L. 657, 658.
[26] Aharon Barak, 'Unconstitutional Constitutional Amendments' (2011) 44 Isr. L. Rev. 321, 338.

JUDICIAL REVIEW AND LEGITIMATE EXPECTATIONS IN PAKISTAN: A HISTORICAL PERSPECTIVE

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In the constitutional jurisprudence, "legitimate expectation" refers to a reasonable expectation of being treated in a certain way by administrative authorities owing to some uniform practice or an explicit promise made by the concerned authority. This expectation may arise from previous practice, promise, assurance, or policy of the public authority. Therefore, "When such a legitimate expectation is obliterated, it affords locus standi to challenge the administrative action and even in the absenteeism of a substantive right, a legitimate expectation may allow an individual to seek judicial review of a wrongdoing and in deciding whether the expectation was legitimate or not, the courts may consider that the decision of public authority has breached a legitimate expectation and if its proved then the court may annul the decision and direct the concerned authority/person to live up to the legitimate expectation."[1].

The doctrine of legitimate expectation[2] is different from vested

[1] Uzma Manzoor and others v. Vice-Chancellor Khushal Khan Khattak University, Karak and others (2022 SCMR 694), Union of India v. Hindustan Development Corporation. (1993) 3 SCC 499.

[2] The doctrine can provide locus standi for judicial review (Union of India v. Hindustan Development Corporation (1993) 3 SCC 499) and the relief that may be of procedural or substantive nature.

right[3], locus poenitentiae[4] and promissory estoppel[5]. The principle of 'estoppel' protects an already created right,[6] whereas legitimate expectation is not a right[7] but a potential or expected benefit (in between 'no claim' and 'legal claim') which can be translated into right and the courts in review process protect these expectations/benefits. Further, these expectations/benefits may either be of procedural or substantive nature.[8] The importance of the doctrine can be illustrated by the fact that it has been incorporated in the Constitution of South Africa,[9] the most modern Constitution of the world. In Pakistan, unlike United Kingdom and India, nothing more than a lip service has been paid to such an important doctrine. In the present essay an attempt has been made to comprehend the philosophy embedded in the doctrine and various aspects of its application in Pakistan.

Halsbury's Laws of England[10] explains the "doctrine of legitimate expectations" is the following terms:

[3] The rights which have been recognized by law or based on law, thus the scope is wider than legitimate expectation---being equitable relief.

[4] *"a point at which it is not too late for one to change one's position; the possibility of withdrawing from a contemplated course of action, especially a wrong , before being committed to it."* Garner, Bryan A. (editor), Black's Law Dictionary, eighth edition, (St. Paul: Thomson West, 1st reprint 2004), p. 959

[5] *"The doctrine of promissory estoppel is applicable where an entrepreneur alters his position pursuant to/in furtherance of a promise made by state to grant inter alia tax exemption. Even a right can be preserved by invoking the doctrine of promissory estoppel. Said doctrine gives rise to cause of action. It indisputably creates a right and also acts on equity."* Southern Petrochemical Industries Co. Ltd. V. Electricity Inspector E.T.I.O. (2007) 4 MLJ 723.

[6] Clive Lewis, 'Fairness, Legitimate Expectations and Estoppel' (1986) 49 The Modern Law Review 251 <http://www.jstor.org/stable/1096299>.

[7] Ram Pravesh Singh and Others v. State of Bihar and Others [(2006) 8 SCC 381]; Navjyoti Co-Op. Group Housing Society V. Union of India (1992) 4 SCC 477.

[8] For detail see nn. 23-27 infra.

[9] Section 24 of the Interim Constitution provides that:

> "[E]very person shall have the right to:
>
> (a) lawful administrative action where any of his or her rights or interests is affected or threatened;
>
> (b) procedurally fair administrative action where any of his or her rights or interests or legitimate expectations is affected or threatened;
>
> (c) be furnished with reasons in writing for administrative action which affects any of his or her rights or interests unless the reasons for such have been made public; and
>
> (d) administrative action which is justifiable in relation to the reasons given for it where any of his or her rights is affected or threatened" (emphasis added)

[10] *Halsbury's Laws of England*, Fourth Edition, Volume1(1) p. 151.

> "**Legitimate expectations:** A person may have a legitimate expectation of being treated in a certain way by an administrative authority even though he has no legal right in private law to receive such treatment. *The expectation may arise either from a representation or promise made by the authority, including an implied representation, or from consistent past practice.* The existence of a legitimate expectation may have a number of different consequences; it may give locus standi to seek leave to apply for judicial review, it may mean that the authority ought not to act so as to defeat the expectation without some overriding reason of public policy to justify its doing so; or it may mean that, if the authority proposes to defeat a person's legitimate expectations, it must afford him an opportunity to make representation on the matter[11]. The courts also distinguish, for example in licensing cases, between original applications, to renew and revocations; a party who has been granted a licence may have legitimate expectation that it will be renewed unless there is some good reason not to do so, and may therefore be entitled to greater procedural protection than a mere applicant for a grant."

There are divergent opinions regarding the jurisprudential basis of the doctrine, whether the doctrine is based on the principles of reasonableness and fairness[12], or it flows from the principle of 'estoppel'. In this regard **Gabriele Ganz** after examining the views expressed in the cases decided by eminent judges concludes that different interpretations of the doctrine lead to conflicting judgments, or sometimes conflicting views

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[11] Uzma Manzoor and others vs. Vice-Chancellor Khushal Khan Khattak University, Karak and others 2022 SCMR 694

[12] See e.g. R v Secretary of State of Home Department ex p Khan [[1984] 1 WLR 1337. In R v Inland Revenue Commissioners ex p Unilever [1996] STC 681, 695 where Simon Brown LJ suggested "I regard [abuse of power cases exemplified by R v Inland Revenue Commissioners ex p MFK Underwriters [1990] 1 WLR 1545] as essentially but a head of Wednesbury unreasonableness, but not essentially exhaustive of the grounds upon which a successful substantive unfairness challenge may be based." See also; R v Inland Revenue Commissioners ex p MFK Underwriting [1990] 1 WLR 1545, 1570 per Bingham LJ; in CCSU v Minister of Civil Servants [1985] AC 374, 415 Lord Roskill described legitimate expectation as a "manifestation of the duty to act fairly". See further, Mullan, D.J. "Fairness: The New Natural Justice?" The University of Toronto Law Journal, Vol. 25, No. 3. (Summer, 1975), pp. 281-316.

in the same decision[13].

The concept of legitimate expectation first stepped into the English Law in *Schmidt v. Secretary of State for Home Affairs*[14] wherein Lord Denning observed that an alien who had been given leave' to enter the United Kingdom for a limited period had a legitimate expectation of being allowed to stay for the permitted time and if that permission was revoked before the time expires, that alien ought to be given an opportunity of making representations.

Sine then, slow but steadily the concept has been considered in a number of cases[15]. In *A.G. of Hong Kong v. Ng Yeun shiu*[16], Lord Fraser said that the principle that public authority was bound by its undertakings as to the *procedure* it would follow, provided they did not conflict with its duty, was applicable to the undertaking given by the government. Later on in *Council of Civil Service Unions and others v. Minister for the Civil Service* (*GCHQ case*)[17], a question arose whether the decision of the Minister withdrawing the right to trade union membership without consulting the staff which according to the appellant was his legitimate expectation arising from the existence of a regular practice of consultation was valid. It was contended that the Minister had a duty to consult the staff as per the existing practice and that though the employee did not have a legal right; he had a legitimate expectation that the existing practice would be followed. On behalf of the Minister on the basis of the evidence produced, it was contended that the decision not to consult was taken for reasons of national security. The Court held that an aggrieved person(s) has right to peruse judicial recourse when a public body changes its past and consisting practice detrimental to the interest of such a person. Therefore, prior to taking any decision consultation with the aggrieved person(s) was held necessary.

The role of the doctrine up to the *GCHQ case*[18] appears to provide opportunity of hearing before taking adverse decision. However, the scope

[13] Ganz, G. "Legitimate Expectation: A Confusion of Concepts", in C. Harlow (ed.), *Public Law and Politics*, London: Sweet & Maxwell, 1986, pp. 145-150.
[14] (1969) 2 Ch. 149.
[15] For example, Breen v. Amalgamated Engineering Union and Others 1971] 2 Law Reports Queen Bench Division 175.
[16] [1983] 2 A.C. 629.
[17] (1984) Vol. 3 All E.R. 359.
[18] Ibid.

of the doctrine found further expansion in *R v. Secretary of State for the Home Department. ex parte Ruddock and others*[19], Taylor, J. after referring to the ratio laid down in some of the above cases came to the conclusion that the application of the doctrine cannot be only to the extent of 'Right to be heard' and substantive relief, particular to the facts of the case may also be granted.

After analysing some of the above discussed cases **H.W.R. Wade**, observes:

> "These are revealing decisions. They show that the courts now expect government departments to honour their published statements or else to treat the citizen with the fullest personal consideration. Unfairness in the form of unreasonableness here comes close to unfairness in the form of violation of natural justice, and the doctrine of legitimate expectation can operate in both contexts. It is obvious, furthermore, that this principle of substantive, as opposed to procedural, fairness may undermine some of the established rules about estoppel and misleading advice, which tend to operate unfairly. Lord Scarman has stated emphatically that unfairness in the purported exercise of a power can amount to an abuse or excess of power, and this seems likely to develop into an important general doctrine."[20]

It may be said that the doctrine has its roots in rule of law, natural justice and estoppel, simultaneously. The doctrine is much focused on the principle of 'legal certainty'[21] rather than on 'principle of legality'. It is used against statutory bodies and government authorities on whose representations or promises, parties or citizens act and some detrimental consequences ensue because of refusal of authorities to fulfil their promises or honour their commitments. In this context, Supreme Court of India in the case *Chanchal Goyal (Dr) v. State of Rajasthan*[22] observed that the principle at the root of the doctrine is Rule of Law, which requires regularity, *predictability*, and certainly the government's dealing with the public.

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[19] [1987] 2 All E R 518.

[20] Wade, H.W.R., Administrative Law, Sixth Edition, Oxford Universty Press. 1988, p.424.

[21] See nn. 32,61 infra.

[22] (2003) 3 SCC 485.

Procedural and Substantive Legitimate Expectations:

The doctrine has remained in baffling and bewildering position in the past, since the jurisprudential footings have become crystallised, the Courts acknowledge it as an important doctrine in developing the law of judicial review. Legitimate expectation can provide a sufficient interest to enable one who cannot point to the existence of a *substantive/procedural right* to obtain the leave of the court to apply for judicial review. In *R v North and East Devon Health Authority, ex parte Coughlan (Coughlan)*[23], the landmark decision in the development of doctrine, Lord Woolf identified three categories of legitimate expectations:

> 1. Whether it was necessary for the public authority to bear in mind its previous policy? Here the court will be confined to determine the *rationality of the decision*[24].
>
> 2. When the court considers that promise or practice of such authority induced legitimate expectation the court will, by itself presume that 'right to be heard' is there, until *overriding public interest* is established by said authority.
>
> 3. When the court considers that a lawful promise or practice has induced a legitimate expectation of a benefit which is substantive, not simply procedural, authority now establishes that here too the court will in a proper case decide whether to frustrate the expectation is so unfair that to take a new and different course will amount to an abuse of power. Here, once the legitimacy of the expectation is established, the court will have the task of weighing the requirements of fairness against any overriding interest relied upon for the change of policy.

The Court of Appeal also considered the aforementioned concept in *R (on the application of Bibi) v London Borough of Newham*[25], and accepted that it had jurisdiction to protect a substantive legitimate expectation but adopted a somewhat different approach from the approach taken in Coughlan case[26]. In a joint judgment the court said:

[23] [2001] 1 QB 213.

[24] In Union of India & Others v. M/s Graphic Industries Co. & Others, it has been held that the letter written by an authority to the private persons cannot give rise to a legitimate expectation.

[25] [2001] EWCA Civ 607.

[26] See n 23 supra

> "In all legitimate expectation cases, whether substantive or procedural, three practical questions arise. The first question is to what has the public authority, whether by practice or by promise, committed itself; the second is whether the authority has *acted or proposes to act* unlawfully in relation to its commitment; the third is what the court should do." (emphasis added)

In *M/s. Motilal Padampat Sugar Mills Co.Ltd. v. State of Uttar Pradesh & Ors*.[27] Supreme Court of India, while granting *substantive legitimate expectations*, emphatically ruled that the Government is neither exempted from liability to carry out a representation made nor can it claim to be the judge of its own obligation to the citizen on an ex parte appraisement of the circumstances in which the obligation has arisen.

Legitimate Expectations---Grounds of Refusal

1. Overriding Public Interest

In public law in certain situations, relief to the parties aggrieved by action or promises of public authorities can be granted on the doctrine of 'legitimate expectations' but when grant of such relief is likely to harm larger public interest; the doctrine cannot be allowed to be pressed into service.[28]

2. Change in Statutory Law

The doctrine of legitimate expectation being a concept of equity can not outweigh the statutory law; hence the change in statute can extinguish such expectations. In the case of *Madras City Wine Merchant Association V/s State of Tamil Nadu*[29], the matter related to the renewal of liquor licenses rule which were statutorily altered. It was therefore held that the repeal being a result of a change in the policy by legislation, the principle of non-arbitrariness was not invokable.

3. Ultra Vires

There has been established rule that an authority can not do more than its statutory power. The competence of the authority is always a key

[27] [(1979) 2 SCC 409]; Southern Petrochemical Industries Co. Ltd. V. Electricity Inspector E.T.I.O. (2007) 4 MLJ 723 (SC)
[28] Kuldeep Singh v. Govt. of NCT of Delhi (2006) 5 SCC 702
[29] (1994) 5 SCC 509.

factor in the determination of legitimacy of expectations and valid ground for the same refusal of the same. According to Peter Gibson L.J., in *Rowland v. Environmental Agency*[30], the action must fail as legitimate expectations could only be granted against lawful claims.

However, in U.K. where the applicant was granted a lease for 22 years by an authority that did not have the power to do so. It was only made known to the applicant at the time of renewal of the lease, when negotiations had already reached an advanced stage. While the court of appeal accepted the argument that the option to renew the lease could not be exercised (as beyond the local authority's power), it noticed that it was unjust that such authorities could take advantage of their own wrong.[31] The European Court of Human Rights however did not accept this argument and awarded damages as it found on facts that this action did not in any way go against public interest, nor did it prejudice the statutory duties of the authority[32].

4. Legislative Instruments

The other important and settled limitation on the doctrine is that it being the principle of equity can not be invoked against legislative instruments[33].

5. Doctrine of Balancing

When the expectations pleaded are legitimate then the 'balancing test' is applied and the consequences of grant and refusal of the relief are assessed, and overriding public interest can out weigh the relief sought, no matter being legitimate. In this context, in *Rowland v. Environmental Agency*[34] involved a part of the Thames River, known as 'Hedsor Water', which the relevant authorities declared open for exercise of public navigation rights. Initially however, the authorities by regular and consistent practice had accepted that such rights did not exist. The Court of Appeal said that although the expectations were legitimate, the action must fail. According to Peter Gibson L.J., the action failed as legitimate expectations could only be granted against lawful claims. Although May L.J., (like Menace L.J.)

[30] [(2003) EWCA Civ. 1885].
[31] Compare Indian Supreme Court's view n. 27 supra.
[32] Stretch v. U. K. [(2004) 38 EHRR 12].
[33] 2000 SCMR 112.
[34] [(2003) EWCA Civ. 1885].

came to the same conclusion, they refused to accept legal incapacity as an automatic answer against legitimate expectation (amounting to convention right). They sought a kind of a balance where while allowing the Hedsor water to be open to rights of navigation, such use would not be actively encouraged by the authority. It was held that, however, there was no need to restrict such 'balancing' to cases where the right was one protected under the convention. It could be extended to all cases where the unlawful action was not adverse to public interest. The same test was considered by the Supreme Court of India in *MRF Ltd., Kottayam v. Asstt. Commissioner (Assessment) Sales Tax & Ors*.[35], wherein the State of Kerala issued notification granting exemption for expansion in the manufacture of certain products including rubber-based goods. The assessee manufacturer relying on that introduction of exemption commenced commercial production after investing huge amount. This concession was granted for a fixed period of seven years. But during the currency of the period of exemption the State Government issued another notification excluding the formation of a compound rubber from the definition of "manufacture" for the purpose of the original exemption notification this Court after review of the cases on the subject invoked the principle of promissory estoppel and also the legitimate expectation and found that the revocation of the exemption granted for a period of seven years by the State Government was arbitrary, unjust and unreasonable and was liable to be quashed. It was observed as follows:

> "This Court in E.P. Royappa v. State of T.N.[36] observed that where an act is arbitrary, it is implicit in it that it is unequal both according to political logic and constitutional law and is therefore violative of Article 14. Equity that arises in favour of a party as a result of a representation made by the State is founded on the basic concept of "justice and fair play".

Doctrine of Legitimate Expectations in Pakistan

It is quite clear from the above discussion that the doctrine is so broad and nebulous that its application has been very much puzzling and uncertain until *Coughlan case*.[37] However in Pakistan, early on the situation has been puzzling and ambiguous as the courts assumed vested right and

[35] [(2006) 8 SCC 702].
[36] [(1974) 4 SCC 3]. See also, J.P. Bansal v. State of Rajasthan [(2003) 5 SCC 134.
[37] See n. 23 supra.

legitimate expectations something analogous with different terminology[38]. In some instances terms like 'unreasonable legitimate expectations' or 'legitimate expectations have no backing of law'[39] have been used. In some cases legitimate expectations have been equated with vested right[40]. An oft cited passage from the ratio decidendi of the case *Shafique Ahmed and others v. Government of Punjab and others*[41] is worth quoting:-

> The *legitimate expectation* set up by the petitioners is *neither reasonable nor has the backing of any law*. It also cannot be based on any rule or the prospectus of the Government Medical Colleges in the Punjab because the same is revised yearly to update the changes and contains in-built provisions to the effect that the students of the medical colleges shall be bound to abide by the rules and regulations laid down therein and the changes issued by the Government of the Punjab from time to time and the Government of the Punjab reserves the right of additions and alterations of any rule in the prospectus at any stage.

Firstly, expectations can be legitimate/reasonable or illegitimate/unreasonable[42], and when according to the Court *expectations* are *legitimate*

[38] Mian Farooq Ahmad v. Privatization Commission 2006 C L D 1; Amir Gul v.University Of Health Sciecnes, P L D 2008 Lahore 211. Pakistan Telecommunication Employees Trust (Ptet) Through M.D., Islamabad And Others v. Muhammad Arif and Others 2015 SCMR 1472.

[39] Shafique Ahmed and others v. Government of Punjab and others PLD 2004 SC 168; Muhammad Umar Wahid and others v. University of Health Sciences Lahore and other PLD 2006 SC 300.

[40] Mian Farooq Ahmad v. Privatization Commission 2006 C L D 1, wherein it was held; the doctrine of legitimate expectations exists in public law to safeguard vested rights conferred by law. In the present case, however, the plaintiff has been unable to show any statutory or legal instrument conferring the claimed legal right. Same view was taken in Miss Farzana Qadir v. Province of Sindh 2000 P L C (C.S.) 225. Contrary view: Khan M. Mutiur Rahman and Others v. Government of Pakistan through Secretary, Ministry of Finance (Revenue Division), Government of Pakistan, Islamabad and others, 2006 P L C (C.S) 564; Salman Adil Siddiqui v. Province Of Sindh 2008 P L C (C.S.) 220.

[41] PLD 2004 SC 168; Rashid Nawaz and 7 others v. University of the Punjab through Vice-Chancellor, Lahore and 3 others; PLD 2007 Lahore 78; Adnan Tariq v. Vice-Chancellor of the University of Punjab, PLD 1993 Lahore 341. It may be ccompared with Lord Scarman's view that the controlling factor in determining whether the exercise of prerogative power is subject to judicial review is not its source but its subject matter'. In re: Preston, 1985 AC 835 (HL).

[42] Lord Diplock attempted to differentiate legitimate expectation from reasonable expectations in GCHQ(n. 17 supra) at pp. 408-409.

then, what we have learnt from the above discussed cases, can only be denied on the ground of overwhelming public interest, by analysing the given proposition, using 'balancing test'. Secondly, when the *expectations* are *legitimate* then why they are unreasonable---has not been explained anywhere in the judgment. According to **Wade**[43], policy statements can create as well as extinguish the legitimate expectations. Therefore, in effect when an express provision in the prospectus itself declares that it is subject to change it ends to legitimately expect that it will never be changed. Thirdly, the grounds for the pleading legitimate expectations are available in some cases where the expectant has an interest in the matter prayed for but such interest is short of right. Therefore, to say that expectations have no backing of law (rather than representation, promise or consistent past practice of the public authority) has no relevance to the application of doctrine of legitimate/reasonable expectations[44].

On other occasions, once again the difference between expectations and vested right became meaningless and it might give rise to detrimental effects[45]. Sabihuddin Ahmad J. (Chief Justice Karachi High Court) in *Miss Farzana Qadir v. Province of Sindh*[46] somewhat overlooked the difference between legitimate expectations and vested right, as he held:-

> "[The referred] judgments clearly indicate that when posts, under statutory rules, are required to be filled on the recommendation of the Public Service Commission, the advice of the commission *confers a vested right* upon the nominated candidate. Moreover, even if the commission be authorized to recall its advice, such authority can only be exercised for a valid reason." [emphasis added]

However, there are certain decisions that give healthy and optimistic gesture about the future and further development of the doctrine. The

[43] See n. 20 supra.

[44] The doctrine only comes into play when expectant expects some sort of benefit or interest short of 'Right', see n. 11 supra.

[45] All power is in Madison's phrase, of an encroaching nature..... Judicial power is not immune against this human weakness. It also must be on guard against encroaching beyond its proper bounds and not be less so since the only restraint upon it is sell restraint.

[46] 2000 P L C (C.S.) 225; Compare Khan M. Mutiur Rahman and Others v. Government of Pakistan through Secretary, Ministry of Finance (Revenue Division), Government of Pakistan, Islamabad and others, 2006 P L C (C.S) 564.

case *Muhammad Shakeel v. Vice-Chancellor, University Of Agriculture Faisalabad*[47], wherein promotion criteria to the next class was altered when the student had already appeared in the examinations, in this case Saqib Nisar J. was of the view that the petitioner had acquired a vested right and also the legitimate expectation for his promotion to the next semester, on the basis of previous notification which was in vogue at the time of his appearing in the examination and passing the same and any subsequent change in the criteria would not affect the right of the petitioner which has earned by obtaining the required marks.

The classical application of the doctrine appears in the case *Khan M. Mutiur Rahman and Others v. Government of Pakistan through Secretary, Ministry of Finance (Revenue Division), Government of Pakistan, Islamabad and others*[48] where the decision of the Service Tribunal was not implemented by the public authority, Sabihuddin Ahmed J. while delivering the opinion of Division Bench observed:-

> "It cannot be overlooked that even *in the absence of strict legal right there is always a legitimate expectancy* on the part of a senior, competent and honest career civil servant to be promoted to a higher position which can only be denied for good and proper reasons. As held by the Honourable Supreme Court in Independent Newspaper Corporation v. Chairman, Fourth Wage Board and Implementation Tribunal (1993 SCMR 1533), conferment of statutory power on a public functionary itself implies a restraint in operating that power and excessive use of lawful power is itself unlawful." [emphasis added]

In this case doctrine was applied to its spirit justly and properly as opposed to their previous judgments[49]. On another occasion the same Court emphatically applied the doctrine in the case *Salman Adil Siddiqui v. Province Of Sindh*[50]. This time the Court fortified its decision by holding:-

> "With profound respects, we are unable to uphold the view that the recommendations of the Public Service Commission are

[47] 2005 C L C 1.
[48] 2006 P L C (C.S) 564; Rana Saqlain Mahmood v. Secretary Local Government and 2 Others, 2006 P L C (C.S) 596.
[49] Miss Farzana Qadir v. Province Of Sindh2000 P L C (C.S.) 225 wherein difference between legitimate expectations and vested right was obliterated. See also n. 40 supra.
[50] 2008 P L C (C.S.) 220.

> meant to be utterly meaningless unless approval is accorded by the appointing authority at his sweet will and pleasure in his own time. *Though such recommendations may not create the strict vested right at least they give rise to a legitimate expectation* and it is well-settled that the commendations of such a body ordained by the Constitution cannot be brushed aside except for very good reasons as repeatedly held by the superior Courts." [emphasis added]

On the other hand the most oblivious application of doctrine can be depicted in a recent case *Amir Gul v.University Of Health Sciecnes, Lahore through Vice-Chancellor and another*[51], wherein a student was asked to appear in different subjects in the supplementary examination than the subjects in which he had appeared in the previous examination. The Division Bench of Lahore High Court refused to grant his legitimate expectation relying upon *Shafique Ahmad* and *Rashid Nawaz* cases. Both the cases relied upon as discussed above[52] have different facts and the ratio decidendi than the instant case and, by any stretch of imagination they do not appear to be extendable to the present case. The basic role of doctrine is to pose a constant check on the administrative bodies that they should act fairly and above board while dealing with the public. However, there has not been a single reported case in which the jurisprudential footings of the doctrine of legitimate expectations have ever been discussed or guidelines have been set by the superior courts that under what circumstances the doctrine can be invoked/ refused. Most of the cases have been dealt separately based on facts and coherent approach has not been developed so far.

It is only in 2007, Zahid Hussain Bukhari J. (now the Chief Justice Lahore High Court) has made a informal attempt to explore the spirit of the doctrine in a case where the Chief Minister approved a 'Road widening Scheme,' included it in Annual Development Programme, budget allocations was made and orders were issued to this effect. Therefore, it was held

[51] P L D 2008 Lahore 211. See also, Maria Saeed v. Vice-Chancellor, University of Health Science, Lahore, 2006 M L D 25, the case comes in sharp contrast with the present case, wherein one of the judge (in the above referred case) being the member of Division Bench in this case too, allowed the petitioner to take another attempt in the examination from which she was deprived by the changed policy, mainly relying on the Doctrine of Legitimate Expectations.

[52] See n. 39 supra.

that the scheme in the circumstances was not to be dropped, cancelled or substituted. Convenience, public good and welfare of people being the main objective of democratic set-up and any such scheme aimed at development of area was to be implemented and carried out. Approval of scheme had given rise to *hopes and expectation* not only to petitioner but to the local population about its implementation.[53] The doctrine was applied to save the 'public interest' whereas its proper domain is to 'save individual's interest' that is short of right and not in conflict with the overriding public welfare. In another case, *Federation of Pakistan through Secretary, Government of Pakistan Establishment Division, Islamabad and another v. Flt. Lt. Farrukh Rashid (R) and another*[54], termination of the petitioner was set aside by the service tribunal and upheld by the Supreme Court both on the grounds of *legitimate expectation* and *constitutional right of equality*. In this case legitimate expectation was considered an independent and valid ground along with other grounds and substantive relief was given.

There other important issue is the refusal of legitimate expectations, in such cases in India and United Kingdom court recognised the legitimacy or reasonableness of the expectations but refused on the grounds overriding public interest, ultra vires and change in statutory law or by using balancing test. In Pakistan, in most of the cases, the Court considered it sufficient to declare that petitioner has no legitimate expectations[55]. Whereas in the Indian context, we have observed that while granting substantive relief Supreme Court of India remarked that once public servant has exercised his (lawful) authority in such a way that it created legitimate expectations in the mind of the expectant then it would amount to be (Government) judge in its own cause, therefore matter would not be referred to the public authorities for reconsideration but it will be decided by the court.[56]

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[53] Makhdoom Muhammad Mukhtar, Member Provincial Assembly, Punjab v. Province Of Punjab Through Principal Secretary To Chief Minister, Punjab, Lahore and 2 Others, P L D 2007 Lahore 61.

[54] 2008 SCMR 544.

[55] Exceptions are only few cases, Muhammad Ilyas v. Baha-ud-Din Zikria University, Multan and another 2005 SCMR 961; Rashid Nawaz and 7 others v. University of the Punjab through Vice-Chancellor, Lahore and 3 others, PLD 2007 Lahore 78; Miss Sarah Malik v. Federation of Pakistan through Ministry of Education, Islamabad and others, 2001 MLD 1026 and Muhammad Iqbal Rafi and 2 others v. Province of Punjab, 1986 SCMR 680.

[56] See n. 27 supra. See also Shand Vijay & Co. v. Princess Fatima Fouzia, (1980) 1 SCR 459: (AIR 1980 SC 17).

In another case where Government had expressly granted exemption from certain import duties for a definite period but later on withdrew. The Court upheld such withdrawal and refused to grant legitimate expectations of the petitioner.[57] Further, change in the statute can extinguish any legitimate expectations because it being the doctrine of equity can not work against the statute.[58] In a recent case, *Aatir Mahmood v. Federation of Pakistan through Secretary, Ministry of Petroleum and Natural Resources, Islamabad and another,*[59] where the petitioner was contract employee and his service was dispensed with in accordance with terms and conditions of the contract. Plea raised by petitioner that he had legitimate expectation to be absorbed in service after having successfully completed training period was held not sustainable.

Conclusion

The latest case law development suggests that the constitutional courts in Pakistan have expanded the scope of judicial review of administrative actions. The courts protect not only the vested rights but also procedural and substantive legitimate expectations.

[57] Government of Pakistan through Ministry of Finance and Economic Affairs And Another V. Facto Belarus Tractors Limited, 2000SCMR112. Compare, Raja Industries (Pvt.) Ltd. Through General Manager v. Central Board of Revenue, Government of Pakistan, Islamabad through Chairman and 4 others, wherein competent authority issued a special notification exempting certain goods from duty and sale tax, later on withdrawing it by another (general) notification without notice - was struck down by the Court on the basis of legitimate expectations along with other grounds (i.e. promissory estoppel and locus poenitentia).

[58] Zaman Cement Company (Pvt.) Ltd. V. Central Board of Revenue, 2002 S C M R 312

[59] 2008 P L C (C.S.) 127; see also, Dr. Mrs. Chanchal Goyal V/s State of Rajasthan (2003) 102 RJR 788, Indian Supreme Court observed that in a service matter unless there was specific waiver of conditions attached to the original appointment order, mere continuance in service did not imply such waiver. No legitimate expectation could be founded on such unfounded impressions.

THIRTY YEARS OF THE CONSTITUTIONAL COURT: IMMUTABILITY OF GOALS AND DYNAMISM OF LEGAL MEANS[1]

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Abstract

The article is dedicated to 30 years anniversary of the work of the Constitutional Court of the Russian Federation. It discusses the evolution of legal image of the Court within this period of time, and the influence it had on the legal system, state institutions and society.

The article concludes that the primary objective of the Constitutional Court of the Russian Federation has been and remains to ensure social consent, to support the trust into the state and overcome unfair social differentiation.

[1] The present article is an edited translation of the original publication: Маврин, С.П. Тридцать лет Конституционному Суду : Неизменность целей и динамизм правовых инструментов /С. П. Маврин// Журнал конституционного правосудия. – 2021. - № 5. - С. 1 – 9.

The 30th anniversary of the Constitutional Court of the Russian Federation, of course, can be regarded in different ways: for example, not to attach any special importance to it (after all, the Constitutional Court does not function for the anniversaries). But it can also be regarded as solemn event, which is a worthy reason for summing up some of the results of its activities, which in addition, allows us to make certain assessments and predictions not only in relation to this Court, but also in relation to socio-legal climate in our country as a whole.

The first mention of the Constitutional Court was made in 15 December, 1990 in the Constitution of the RSFSR[2]. In fact, it started its work on 30 October, 1991, when the first working meeting of the Constitutional Court of the RSFSR took place. The forerunner of the Constitutional Court of Russia was the Constitutional Supervision Committee of the USSR, which nevertheless did not have the status of a judicial authority and functioned as a specialised body of parliamentary control. However, in the configuration of public power, created in the new Russia, it was necessary to have an independent judicial body that could resolve constitutional and legal disputes under conditions of the principle of separation of powers, allowing it to function on an independent basis and determine the vector of legal development of the country at the critical historical milestone, while being guided exclusively by requirements of the Constitution as main and the supreme law of the country.

The status of the highest body of judicial power given to the Constitutional Court of Russia predetermined its independent and non-politicised approach to resolving legal disputes on the basis of the Constitution, which prohibits anyone from usurping power (even with good intentions). However, at the early stage of its functioning, some of the political strata had expectations that Constitutional Court, as a new authority with no roots in the Soviet government system, would primarily become an instrument of decommunisation and a tool to fight against the Communist Party and its nomenclature, thereby clearing path to power in the country for those who were faster than others in renouncing communism and calling themselves democrats. However, these expectations were not to become true, and the Constitutional Court did not become a tool in this political struggle, which could be destructive for society and the country. The most significant in this regard is the Judgement of the Constitutional

[2] Russian Soviet Federative Socialist Republic.

Court of the Russian Federation of 30 November 1992 No. 9-P «On the case of checking the constitutionality of the Decrees of the President of the Russian Federation of August 23, 1991 No. 79 "On Suspension of the Activities of the Communist Party of the RSFSR", of August 25, 1991 No. 90 "On the Property of the CPSU[3] and the Communist Party of the RSFSR" and of November 6, 1991 No. 169 "On the activities of the CPSU and KP RSFSR", as well as on checking the constitutionality of the CPSU and the CP of the RSFSR[4]», which was essentially a peacekeeping decision aimed at overcoming the split in society and preventing its rooting or expansion. With this goal in mind, this decision recognised that merging of political party structures with state power in our country in the past was unacceptable, but at the same time it also stated that in a democratic state it is impossible to ban peaceful (including communist) ideology and the unification of people with certain peaceful beliefs into an organisation. These fundamental principles for legal democracy have become foundations of constitutional system of Russia in accordance with the current Constitution.

From this point of view, as the Chairman of the Constitutional Court of the Russian Federation V.D. Zorkin rightly points out, the enduring role of the Constitution is that it lays legal foundations for social harmony in Russia, which is based on such principles uniting the whole society as the priority of human rights, separation of powers, the legal, social and federal nature of the state, equality of all citizens without exception before the law and the court, and so on[5].

In turn, part 1 of Article 125 of the Constitution of Russia states that the Constitutional Court of the Russian Federation is the highest judicial body of constitutional supervision in the Russian Federation, exercising judicial power through constitutional proceedings in order to protect the foundations of the constitutional system, fundamental human and civil rights and freedoms, ensuring supremacy and direct effect of the Constitution throughout the Russian Federation. Although this definition appeared in the constitutional text only in 2020 in reality it adequately reflects the essence of this judicial authority throughout the entire time of its functioning, since the Constitutional Court of the Russian Federation, being a defender of the

3 Communist Party of the Soviet Union.

4 Communist party of the RSFSR.

5 Зорькин В.Д. Проблемы конституционно-правового развития России (к 20-летию Конституции Российской Федерации) // Журнал конституционного правосудия. 2014. № 2. С. 1–9.

Constitution, has always been and remains a conductor of ideas of social harmony embedded therein, overcoming social division and unfair social differentiation.

At the same time, it should be borne in mind that this role did not automatically fall to the Constitutional Court of Russia; from the moment of its establishment it was forced to seek its place in the system of state authorities and assert itself therein. Accordingly, the institution of constitutional justice had to take root in the Russian legal system, which, in principle, was not familiar with judicial control over activities of state authorities. Let me remind that for the USSR, administrative justice novel, therefore a significant part of public law disputes was excluded from judicial jurisdiction. The very appearance of at least some practical possibility of judicial protection in this sphere of relations took place not earlier than the end of the 80s, with adoption of the USSR Law "On procedure for appealing to the Court against unlawful actions of officials infringing on the rights of citizens" (June 30, 1987). The modern scope of the right to this type of protection was first enshrined in the Declaration of Human Rights and Freedoms adopted on September 5, 1991, i.e. shortly before the start of the Constitutional Courts' work.

The process of finding a place for the Constitutional Court in the system of state authorities was not easy for all its participants, but today we can say that it has been successfully completed through amendment to the Constitution of the Russian Federation adopted in 2020[6].

At the initial stage of this process, the Constitutional Court was authorised to intervene in the process of protecting rights of a citizen already at the earliest stage of resolving a conflict with the public authorities in broadest sense, when the very first law enforcement decision based on the disputed law took place. At the same time, to apply to the Court it was enough to obtain a not a judicial, but even an administrative decision. Probably, by fixing such an order, the constitutional legislator believed that in order to protect the Constitution in the material socio-legal conditions there was need for a kind of "constitutional emergency switch" since the tasks of constitutional renewal of the legislative system, as well as institutional, organisational and personnel reform of the judicial system

[6] Law of the Russian Federation on amendment to the Constitution of the Russian Federation of 14 March 2020 No. 1- FKZ "On Improving the Regulation of Certain Issues of the Organisation and Functioning of Public Power" // СЗ РФ. 2020. № 11. Ст. 1416.

had yet to be solved, but it was impossible to allow supremacy and supreme legal force of the Constitution to be questioned at the same time. After all, Russia was just beginning to learn how to live under the new Constitution.

However, at the current level of development of the legal and judicial systems of our country, there seems to be no urgent need for unlimited opportunity to use such "emergency brake"; therefore, there is a requirement for consistent passage of judicial instances within the system of ordinary courts before applying to the Constitutional Court, which, in my opinion, increases the Courts' effectiveness, as it gets the opportunity to study constitutional and legal problems in their "crystallised" form, and not to invoke full power of constitutional justice to solve all legal problems, including those that may well be solved by ordinary courts. At the same time, citizens were also granted additional rights to challenge constitutionality of normative acts other than laws that were previously subject to appropriate verification only at the request of public authorities.

Along with this, the logic of development of legal and political systems has led to the endowment of the Constitutional Court with new constitutional powers. In accordance with the amendment to the Constitution of the Russian Federation in 2020, the Constitutional Court of the Russian Federation has become authorised to: verify the constitutionality of draft laws of the Russian Federation on the amendment to the Constitution of the Russian Federation, draft federal constitutional laws and federal laws, as well as laws before they are signed by the President of the Russian Federation and laws of the subjects of the Russian Federation before their promulgation by the highest official of the subject of the Russian Federation; to resolve the issue of the possibility of execution of decisions of interstate bodies adopted on the basis of the provisions of international treaties of the Russian Federation in their interpretation contrary to the Constitution of the Russian Federation, as well as the possibility of execution of a decision of a foreign or international (interstate) court, foreign or international arbitration court (arbitration) imposing obligations on the Russian Federation, if this decision contradicts fundamentals of public law and order of the Russian Federation.

The creation of these powers in the Constitutional Court is not accidental. It can even be said that they were "hard won" by the public authorities, who felt the need to create high-quality judicial mechanisms for resolving legal disputes arising within the public authorities themselves, as

well as within the framework of the fulfilment of international obligations assumed by Russia. As a result, the constitutional and legal modernisation of domestic legal system carried out with direct participation of the Constitutional Court led to modernisation of both the Constitutional Court itself and the constitutional justice.

The thirty years that have passed since the beginning of the work of the Constitutional Court have been marked by many events in the life of our country, and the Constitutional Court has not remained an indifferent observer. All significant socio-legal and political reforms (reform of political parties, reform of electoral system, cancellation and return of direct elections of heads of subjects of the Russian Federation, numerous local government reforms, monetisation of benefits, pension reforms, 2020 constitutional reform etc.) were in one way or another assessed by the Constitutional Court in the system of constitutional and legal coordinates. At various times, the Constitutional Court of the Russian Federation focused on issues that affected interests of an individual, society and the state in different spheres of life. At the same time, decisions of the Constitutional Court of the Russian Federation on relevant issues in fact laid foundations of new codified tax legislation, formed procedural legislation that meets modern standards.

A significant number of decisions were devoted to issues of social protection, labor and pension rights. Much has been done in the field of citizens' exercise of their political rights. We can confidently say that today there is no such sphere of socio-political, economic, social life that would not be affected by the Constitutional Court of the Russian Federation in some way.

The Constitutional Court has considered large number of cases and issued many judgements and decisions containing most important legal positions subject to consideration by both legislative and law enforcement bodies. However, the positive effect and creative potential of activity of the Constitutional Court is not limited only to the number of complaints considered and decisions issued as a result of their consideration seen as the main "product" of constitutional proceedings. It is more significant in my opinion that constitutional standards and principles formulated in decisions of the Constitutional Court of the Russian Federation fill the legislation, direct law enforcement practice in the right direction and thereby contribute to constitutionalisation not only of the national legal system, but also of

public life in our country.

In this regard, it makes sense to dwell in more detail on some constitutional standards and principles that are of paramount importance in the practice of the Constitutional Court of the Russian Federation.

The supremacy of the Constitution

The work of the Constitutional Court of the Russian Federation and, in fact, its very existence is based primarily on the principle of supremacy of the Constitution. The Constitution of the Russian Federation has the highest legal force in the domestic legal system, direct effect; it is applied throughout the territory of the Russian Federation (Part 1 of Article 15 of the Constitution). This short wording is not just a legal declaration, but a statement that the content of the Constitution has direct regulatory significance that cannot be ignored in the legal system of Russia, which includes, in accordance with Part 4 of Article 15 of the Constitution, as its constituent part also generally recognised principles and norms of international law and international treaties of the Russian Federation.

In turn, with regard to, conventionally speaking, the "international" part of the Russian legal system, Article 79 of the Constitution of Russia was supplemented during the constitutional reform of 2020 by the norm that decisions of interstate bodies adopted on the basis of the provisions of international treaties of the Russian Federation in their interpretation contrary to the Constitution of the Russian Federation are not subject to execution in the Russian Federation.

This change has its source in the legal positions of the Constitutional Court of the Russian Federation, specifying the principle of supremacy of the Constitution[7] and the special regulation based thereupon provided for by

[7] Judgement of 6 December 2013 No. 27-П/2013 "In the case on the review of constitutionality of the provisions of Article 11 and Items 3 and 4 of Section 4 of Article 392 of the Civil Procedure Code of the Russian Federation in connection with the request of the Presidium of Leningrad Circuit Military Court"; Judgement of the Constitutional Court of the Russian Federation of 14 July 2015 No. 21-П/2015 "In the case concerning the review of constitutionality of the provisions of Article 1 of the Federal Law "On Ratification of the Convention for the Protection of Human Rights and Fundamental Freedoms and Protocols thereto", Items 1 and 2 of Article 32 of the Federal Law "On International Treaties of the Russian Federation", Sections 1 and 4 of Article 11, Item 4 of Section 4 of Article 392 of the Civil Procedure Code of the Russian Federation, Sections 1 and 4 of Article 13, Item 4 of Section 3 of Article 311 of the Arbitration Procedure Code of the Russian Federation, Sections 1 and 4 of Article 15, Item 4 of Section 1 of Article

the Federal Constitutional Law "On the Constitutional Court of the Russian Federation". The transfer of relevant regulation directly to the level of the Constitution is a natural step towards purely legal resolution of conflicts arising during the perception by the domestic constitutional legal order of the decisions of supranational bodies for the protection of human rights, which contain, in fact, a new interpretation of international human rights treaties in relation to obligations of the Russian Federation in a particular case. It is for such cases that the Constitution has established a transparent, predictable model for resolving specific legal conflict, corresponding to principle of legal certainty, whereas in a number of European states that have also encountered relevant conflicts, similar procedures are formulated most often only in decisions of national constitutional courts and legal doctrine.

At the same time, the very appeal to the Constitutional Court regarding possibility of implementing certain supranational acts of interpretation in the Russian Federation is a *sui generis* last resort when political or ordinary law enforcement procedures become insufficient. By 2021, there were two such situations in the Court's practice related to the decisions of the European Court of Human Rights. They concerned possibility of executing, in accordance with the Constitution, the judgements of the European Court of Human Rights on the complaints of *Anchugov and Gladkov v. Russia*[8] and *OAO "Neftyanaya kompaniya" Yukos v. Russia*[9].

In the Judgement of 19 April 2016 No 12-P the Constitutional Court of the Russian Federation has recognised execution of the judgement of the European Court of Human Rights in the case *Anchugov and Gladkov v. Russia* as possible insofar as "in accordance with Article 32 (Part 3) of the Constitution of the Russian Federation and the detailing provisions of the Criminal Code of the Russian Federation generally exclude punishment in the form of deprivation of liberty and thereby disenfranchisement of convicts

350 of the Administrative Judicial Proceedings Code of the Russian Federation and Item 2 of Section 4 of Article 413 of the Criminal Procedure Code of the Russian Federation in connection with the request of a group of deputies of the State Duma". // http://www.ksrf.ru

[8] Зорькин В.Д. Проблемы конституционно-правового развития России (к 20-летию Конституции Российской Федерации) // Журнал конституционного правосудия. 2014. № 2. С. 1–9.

[9] Зорькин В.Д. Проблемы конституционно-правового развития России (к 20-летию Конституции Российской Федерации) // Журнал конституционного правосудия. 2014. № 2. С. 1–9.

who have committed minor crimes for the first time; while deprivation of liberty for crimes of medium gravity and grave crimes as more severe types of punishment from among those provided by the Special Part of this Code for commission of corresponding crime, is imposed by a court sentence and therefore entails disenfranchisement only if a less severe type of punishment cannot ensure achievement of the goals of punishment."

Thus, although constitutional and legal obstacles have arisen for the execution of judgement of the European Court of Human Rights by authorised authorities in the Russian Federation, the Constitutional Court of the Russian Federation nevertheless proposed a version of such execution acceptable for Russian legal order. As a result, in 2019 the Committee of Ministers of the Council of Europe considered the said ECtHR ruling executed (Resolution CM/ResDH(2019)240 of 25 September 2019). The resolution of CMCE testifies to legal recognition of *bona fide* nature of the actions of the Constitutional Court of the Russian Federation to resolve the conflict between an act of interpretation of an international agreement and the provision of Article 32 of the Constitution of Russia.

It is necessary to note the very important position that the Constitutional Court expressed at the same time in relation to the concept of supremacy of the Constitution in Russia. He pointed out that decisions of the ECtHR based on the interpretation of the Convention for the Protection of Human Rights and Fundamental Freedoms, including those containing proposals regarding any changes to national legal norms, do not cancel priority of the Constitution of the Russian Federation for the Russian legal system, and therefore – in the context of its Article 15 (Part 1 and 4) – are subject to implementation on the basis of the principle of supremacy and supreme legal force of the Constitution of the Russian Federation in the legal system of Russia, of which international legal acts are an integral part. Among such acts, by the way, was the Convention for the Protection of Human Rights and Fundamental Freedoms itself, which, as an international treaty of the Russian Federation, had greater legal force in the law enforcement process than federal law, but not equal or greater than the legal force of the Constitution of the Russian Federation.

At the same time, the Constitutional Court of the Russian Federation noted that the interaction of the European conventional and the Russian constitutional legal orders is impossible in conditions of subordination, since only dialogue between different legal systems serves as the basis for

their proper balance; and the effectiveness of the norms of the Convention in the Russian constitutional legal order largely depends on respect of the national constitutional identity by the ECtHR. Recognising fundamental importance of the European system for the protection of human rights and freedoms, to which the judgements of the European Court of Human Rights are part, the Constitutional Court of the Russian Federation was ready to search for legitimate compromise in order to maintain this system, reserving the determination of the degree of its readiness for it, since it is the Constitution of the Russian Federation that outlines the boundaries of compromise in this matter.

At the end of 2020, the Constitutional Court considered the case at the request of the Ministry of Justice of the Russian Federation for clarification of the Judgement of the Constitutional Court of the Russian Federation of 27 March 2012 No. 8-P[10]. The subject of consideration was the question regarding possibility of temporary application of such provisions of international treaties of the Russian Federation, that provide for transfer of disputes between the Russian Federation and foreign investors to international arbitration and thereby for exclusion of these disputes from jurisdiction of Russian courts.

Scholars note[11] that it is the national regulation that plays key role in the implementation of the mechanism of temporary application of international treaties. At the same time, the national practice of temporary application of international treaties before their entry into force or ratification is quite diverse. Accordingly, the Ministry of Justice of the Russian Federation had a reasonable question about how to solve the problem of guaranteeing the protection of the right to fair trial in absence of clear mechanism for interaction of national and international norms on this issue.

Based on requirements of supremacy of the national Constitution and

[10] Decision of the Constitutional Court of the Russian Federation of 24 December 2020 No. 2867-O-P/2020 on Clarification of the Judgement of the Constitutional Court of the Russian Federation of 27 March 2012 No. 8-П in the Case on the Review of Constitutionality of Article 23, para. 1 of the Federal Law "On International Treaties of the Russian Federation" in connection with the application of the Government of the Russian Federation // http://www.ksrf.ru

[11] Зорькин В.Д. Проблемы конституционно-правового развития России (к 20-летию Конституции Российской Федерации) //Журнал конституционного правосудия. 2014. № 2. С. 1–9.

presumption of guaranteed protection of rights and freedoms by the Basic Law, the Constitutional Court came to the following conclusions. Firstly, it was noted that possibility of temporary application of an international treaty is conditioned by fulfilment of requirements established by the Constitution of the Russian Federation as regards procedure for its implementation into the Russian legal system; the strict observance of which is associated with the acquisition of binding force by provisions of international treaty. Secondly, within the meaning of Articles 15 (Parts 1 and 4), 79 and 125 (Part 6) of the Constitution of the Russian Federation, Russia has no right to conclude international treaties that do not comply with the Constitution of the Russian Federation, and the rules of an international treaty, if they violate constitutional provisions (which are undoubtedly of particular importance), cannot and they should not be applied in its legal system based on the supremacy of the Constitution of the Russian Federation.

Further, interpreting the principle of supremacy of the Constitution of the Russian Federation, the Court concluded that signing on behalf of the Russian Federation under decision of the Government of the Russian Federation of an international treaty subject to ratification and providing for its temporary application, obviously cannot mean the consent of the Government of the Russian Federation to extend provisions on temporary application of an international treaty to its norms affecting exclusive powers of the federal Parliament. Accordingly, the first factor influencing the mechanism of temporary application of international treaties in the Russian Federation is the operation of the principle of separation of powers. The second factor is the obligation of the State to guarantee protection of rights, including the right to judicial protection. In this regard, the Court stated as follows: The Russian Federation is obliged to ensure, through justice that meets the requirements of justice, effective protection of constitutional rights and freedoms exercised on its territory by both Russian and foreign persons. At the same time, the right of State to exercise judicial jurisdiction within its territory with respect to legal disputes arising therein and the resulting legislative prerogative to allow resolution of such disputes in foreign and international jurisdictions are integral components of State sovereignty.

Constitutional capacity of the state

Currently, various legal researches often reproduce arguments about the priority value of law, which is often opposed to the value of state,

which, by the way, is one of the active creators of considerable volume of modern law. Within this approach it seems that the topic of value of state still does not receive proper coverage, or is simply silenced. However, both law and state are inseparable and equally great achievements of human development. Only a capable State can be legal, democratic and social, providing its citizens with opportunities for development of their human potential. Thomas Hobbes, one of the outstanding thinkers of the XVII century, warned against destruction of state capable of curbing open war of all against all and preventing return to a natural, pre-political state.

In this sense, it can be argued that any state authority faces the task of uniting people capable of living together and living under the law. This is especially important for Russia, because here the state has always played such consolidating role. In this regard, the importance of state power for preserving the unity of the country and saving Russia as the highest value of its people can hardly be overestimated. The provisions of Article 67.1 of the Constitution of the Russian Federation are also consonant to this, emphasising special role of state unity preserved throughout millennial history of our Motherland.

The Russian state as an organisation of the entire multinational people of Russia, is a special value that requires adequate protection, strong and capable state institutions. At the same time, a strong state is not identical with conservation and stagnation; it should not be reduced to prohibitions and restrictions. On the contrary, the state power functioning in full force is the one that does not take away the space for free breathing from society. Only under such conditions consistent progress is possible, taking into account the formula of liberal measures and strong government that is still relevant today. Thus, the protection of strong statehood becomes urgent task of society that strives to ensure that all its members are able to exercise their rights and freedoms.

At the same time, the idea of a strong State does not mean that State power shall be beyond the rule of law principle. It is important to remember that it is valuable to preserve not Russia as such, but the legal democratic Russian Federation as prescribed by the Basic Law. We must not forget that strong government, which is so necessary for Russia, cannot be equated with “totalitarian power”. On the contrary, as I. A. Ilyin noted, it should be not extra-legal or super-legal, but formalised by law, serving under the law

and with its help[12]. Understood in this way, a strong state power is thereby opposed to arbitrariness. The Constitution of the Russian Federation was and remains a barrier to all kinds of its negative manifestations.

Consistently implementing this idea, the Constitutional Court of the Russian Federation in its practice has always supported measures aimed at strengthening capacity of the state and public authorities at one or another historical stage so that they can fulfil their constitutional purpose and duty to recognise, observe and protect human and civil rights and freedoms (Article 2 of the Constitution of the Russian Federation). Here it is appropriate to recall the most diverse decisions of the Constitutional Court of the Russian Federation: on cancellation and return of direct elections of the heads of constituent entities of the Russian Federation[13], on compensation of kindergarten fees[14], on housing for victims of political repression[15], and others. In all these decisions, the Court proceeded from

[12] Ильин И.А. О сильной власти // Ильин И.А. О грядущей России. Избранные статьи / под ред. Н.П. Полторацкого. М.: Воениздат, 1993. С. 281, 283.

[13] Judgement of the Constitutional Court of the Russian Federation of 21 December 2005 No. 13-П/2005 "In the case concerning the review of constitutionality of certain provisions of the Federal Law "On Fundamental Principles of Organization of Legislative (Representative) and Executive Bodies of State Power of the Subjects of the Russian Federation" in connection with complaints of a number of citizens".; Judgement of the Constitutional Court of the Russian Federation of 24 December 2012 No. 32-П/2012 "In the case concerning the review of constitutionality of individual provisions of Federal Laws "On General Principles of Organization of Legislative (Representative) and Executive Bodies of State Power of the Subjects of the Russian Federation" and "On Fundamental Guarantees of Electoral Rights and the Right to Participate in a Referendum of Citizens of the Russian Federation" in connection with the request of a group of deputies of the State Duma." // http://www.ksrf.ru

[14] Judgement of the Constitutional Court of the Russian Federation of 15 May 2006 No. 5-П/2006 in the case concerning the review of constitutionality of the provisions of Article 153 of the Federal Law of 22 August 2004 No. 122-ФЗ "On Amendments to the Legislative Acts of the Russian Federation and Recognition as Having Lost Force of Certain Legislative Acts of the Russian Federation in Connection with Adoption of the Federal Laws "On Amendments to the Federal Law "On General Principles of Organization of Legislative (Representative) and Executive Bodies of State Power of the Subjects of the Russian Federation" and "On General Principles of Organization of the Local Self-Government in the Russian Federation" in connection with the complaint of the Head of the City of Tver' and the Tver' City Duma. // http://www.ksrf.ru

[15] Judgement of the Constitutional Court of the Russian Federation of 10 December 2019 No. 39-П/2019 "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

the fact that none of the levels of public power exists in isolation, only their coordinated functioning can ensure realisation of citizens' rights, and the distribution of powers and expenditure obligations between them should not make the realisation of citizens' rights dependent solely on the presence or absence necessary resources for this at particular level of public power, since ensuring the realisation of citizens' rights is a common task of all levels of public authority.

This idea was clearly reproduced by the Constitutional Court of the Russian Federation and also in Opinion of 16 March 2020 No. 1-Z "On compliance with the Provisions of Chapters 1, 2 and 9 of the Constitution of the Russian Federation, of the Provisions of the Law of the Russian Federation on the Amendment to the Constitution of the Russian Federation "On Improving the Regulation of Certain Issues of the Organisation and Functioning of Public Power" that have not entered into force, as well as on the conclusion on compliance with the Constitution of the Russian Federation of the procedure for entry into force of Article 1 of this Law in connection with the request of the President of the Russian Federation", which literally stated the following: in its functional purpose, the unity of public power is also expressed in the fact that a person, his rights and freedoms are the highest value, the rights and freedoms of a person and a citizen determine the meaning, content and application of laws, the activities of legislative and executive authorities, local self-government (Articles 2 and 18 of the Constitution of the Russian Federation), which in any case assumes the coordinated action of various levels of public authority as a whole for the benefit of citizens.

Maintaining mutual trust between citizens (society) and the state

A strong, capable State power, of course, cannot exist without the constitution and the laws that develop it, without justice and respect for law and State institutions. These elements of the State are always in the focus of attention and are often discussed. However, there is another fundamentally important element, without which the state is unthinkable. In this case, we are talking about trust between the state and society, and about mutual trust. In this regard, A. D. Gradovsky rightly noted that "the attitude of the state to society is not the attitude of the winner to the defeated; society takes part in the administration not because it has won any rights for itself, the

Moscow" in connection with complaints of A.L. Meissner, E.S. Mikhaylova and E.B. Shasheva" // http://www.ksrf.ru

state promotes the implementation of various public interests not in the name of its supreme rights, which it once took away from society. All these forces act in the name of solidarity of all state and public goals and in the name of the insufficiency of each of them individually"[16]. Consequently, only if there is mutual trust between society and the state, the consistent development of both is possible.

It should be noted that trust has no little role in ensuring compliance with the laws. In this context precisely the Constitutional Court of the Russian Federation has repeatedly referred to principle of maintaining mutual trust between society and state, considering particularly issues of legislative regulation of elections[17], the constitutional status of public associations[18]. Now the fundamental nature of the principle of mutual trust between the state and society has found its constitutional consolidation in Article 75.1 of the Constitution of the Russian Federation. By the way, the Constitutional Court of the Russian Federation has already addressed this constitutional novel in its recent decisions[19].

[16] Градовский А.Д. О современном направлении государственных наук / Собрание сочинений А.Д. Градовского : в 9 т. СПб. : Типография М.М. Стасюлевича, 1899–1904. Т. 1. С. 33. URL: https://www.prlib.ru/item/446348 (дата обращения: 13.04.2021).

[17] Judgement of the Constitutional Court of the Russian Federation of 22 April 2013 No. 8-П "In the case concerning the review of constitutionality of Articles 3, 4, Item 1 of Section 1 of Article 134, Article 220, Section 1 of Article 259, Section 2 of Article 333 of the Civil Procedure Code of the Russian Federation, Sub-Item «з» of Item 9 of Article 30, Item 10 of Article 75, Items 2 and 3 of Article 77 of the Federal Law "On Fundamental Guarantees of Electoral Rights and the Right to Participate in a Referendum of Citizens of the Russian Federation", Sections 4 and 5 of Article 92 of the Federal Law "On Elections of Deputies of the State Duma of the Federal Assembly of the Russian Federation" in connection with the complaints of A.V.Andronov, O.O.Andronova, O.B.Belov and others, the Commissioner for Human Rights in the Russian Federation and Regional Department of the Political Party "Spravedlivaya Rossia" in Voronezh Region". // http://www.ksrf.ru

[18] Judgement of the Constitutional Court of the Russian Federation of 8th April, 2014 No. 10-П/2014 "In the case concerning the review of constitutionality of the provisions of Item 6 of Article 2 and Item 7 of Article 32 of the Federal Law "On Non-Commercial Organizations", Section 6 of Article 29 of the Federal Law "On Public Associations" and Section 1 of Article 19.34 of the Administrative Offences Code of the Russian Federation in connection with complaints of the Commissioner for Human Rights in the Russian Federation, the Foundation "Kostroma Centre of Support of Public Initiatives", citizens L.G.Kuz'mina, S.M.Smirensky and V.P.Yukechev". // http://www.ksrf.ru

[19] Judgement of the Constitutional Court of the Russian Federation of 26 November 2020 No. 48-П/2020 "In the case on the review of constitutionality of Article 234, para. 1 of the Civil Code of the Russian Federation in connection with the complaint of V.V. Volkov" and the Judgement of the Constitutional Court of the Russian Federation 26 March 2021

Strengthening the principle of social solidarity

One of the most significant novelties of the Constitution of the Russian Federation was the inclusion in its text the mentioning of principle of social solidarity. Based on constitutional values given in provisions of the preamble to the Constitution of the Russian Federation, the constitutional legislator has fixed in its Article 75.1 that social solidarity (among other things) is ensured in the Russian Federation. In this regard, it is appropriate to recall that the Constitutional Court of the Russian Federation in its Opinion of 16 March 2020 already mentioned above noted that this norm specifies the provisions of the Basic Law with regard to social state, and is consistent with the principle of unacceptability of violating the rights and freedoms of others in the exercise of their rights and freedoms. In addition, this constitutional novel emphasizes the role of the Constitution of Russia as a special legal form of displaying consent on those issues that unite the whole society. In this sense, the Constitution acts as a kind of social contract, in which the principle of social solidarity is one of the most important legal foundations of the existence of Russian society and the state.

Today, the principle of social solidarity is undergoing a very serious test in connection with the pandemic of new coronavirus infection (COVID-2019). It is known that challenges of such scale require not only coordinated and effective interaction of government institutions. In many ways, the effectiveness of measures aimed at countering such dangerous disease is based on unification of society, responsible attitude of citizens both with regard to their own health and the health of others. With this in mind, the Constitutional Court of the Russian Federation in its Judgement of 25 December 2020 No. 49-P "In the case of checking constitutionality of sub-item 3 of item 5 of the Decree of the Governor of the Moscow Region "On the introduction of a high-alert regime in the Moscow Region for the Management Bodies 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) in the Moscow Region" in connection with the request of the Protvinsky Town Court of the Moscow region" stressed that the adoption by the State of constitutionally permissible and urgently required restrictive measures in relation to the right to freedom of movement is aimed primarily at self-organisation of

No. 8-П/2021 "In the case on the review of constitutionality of Article 1109, para. 3 of the Civil Code of the Russian Federation in connection with the complaint of V.A. Nosaev" // http://www.ksrf.ru

society before emergence of a common threat, and thus is a manifestation of one of the forms of social solidarity based on mutual trust between state and society.

Maintaining balance of private and public interests

In numerous assessments of activities of the Constitutional Court of the Russian Federation, one can often find accusations that it protects only the state and does not take into account private interests. This understanding seems to be very simplistic and one-sided.

First of all, one should remember that the Basic Law declares the rights and freedoms of man and citizen to be supreme value in the Russian Federation, determining meaning and content of all activities of public authorities. In this respect, a person cannot be considered as an object of state activity and is always an equal subject, in other words – a person exists as an end in itself, and not only as means.

Accordingly, any public interest, including the interest in strengthening the State, should be considered as derivative of the rights and freedoms of individual, which nevertheless lose their significance outside the state. In other words, being deprived of state protection, rights and freedoms turn into *nudum jus* ("naked right") at best, and at worst they disappear completely. It follows that attempts to reproach Constitutional Court of the Russian Federation for subordinating rights and freedoms to certain state interests, as a rule, are based on the substitution of concepts, and the opposition — often artificial — of public and private interests. In fact, the Constitutional Court of the Russian Federation is an impartial arbitrator who never acts out of principle of preference for one to the detriment of the other, and the entire activity of the Constitutional Court is permeated with desire to find balance of private and public interests, which, as is known, is not described by the expression "either - or".

The search for such balance is predetermined by provision of Part 3 of Article 55 of the Constitution of the Russian Federation, which allows restriction of rights and freedoms only to the extent necessary to protect other public values. The initial determination of balance of private and public interests lies, of course, with the legislator, who is presumed to be acting in good faith[20] and consequentially in accordance with the

[20] See e.g.: Judgement of the Constitutional Court of the Russian Federation of 2 April 2002 No. 7-P "In the case on checking constitutionality of certain provision of the Law of

Constitution of the Russian Federation. However, the final word on the state of this balance is expressed by the Constitutional Court of the Russian Federation, which is authorised to check the proportionality of the legal restrictions imposed by the legislator.

And the activity of the Constitutional Court of the Russian Federation to harmonise mutual rights and obligations of individual and public authorities within judicial sphere by ensuring a balance of private and public interests actually creates so-called peaceful environment, which presupposes peace, interdependence and community of interests[21].

Social justice

In my opinion, the part of the practice of the Constitutional Court of the Russian Federation that is related to protection of the social rights of citizens deserves special attention, since it reflects the existing demand for social justice in society to a greater extent than other parts of the Constitutional Court's case-law. The very existence of this request means that judiciary as a whole, and especially its constitutional branch, is entrusted with the function of not just *legal* dispute resolution, but also the function of their *fair* resolution, so that they do not escalate into extra-legal conflicts. In this sense, it should be borne in mind that while the Constitutional Court of the Russian Federation by virtue of its purpose and position within the system of state authorities is called upon resolving disputes within its competence exclusively in the constitutional field, at the same time it must find answers to very difficult issues arising upon resolution of relevant disputes; those constitutional and legal responses to the maximum extent should satisfy the citizens' longing for fair justice, i.e. in fact, be guided in their resolution by the principle of social justice.

In this regard it appears relevant to recall, by way of illustration, the judgement of the Constitutional Court of the Russian Federation of 1 February 2021 No. 3-P «In the case on checking constitutionality of

the Krasnoyarsk Region "On the order of revocation of the deputy of the representative municipal authority of self-government" and the Law of the Koryak Autonomous Region "On the order of revocation of the deputy of the representative municipal authority, elected official of the municipal authority of local self-government in the Koryak Autonomous Region" in connection with the complaints of A. G. Zlobin and Yu. A. Khnayev" // http://www.ksrf.ru

[21] Ковалевский М.М. Сравнительно-историческое правоведение и его отношение к социологии. Методы сравнительного изучения права // Сборник по общественно-юридическим наукам. Вып. 1. СПб., 1899. С. 3.

Article 57, part 2 item 3 of the Housing Code of the Russian Federation and Article 17, part three of the Federal Law "On social protection of invalids in the Russian Federation" in connection with complaint of citizen G». In this Judgement, the Constitutional Court had to determine a fair order of provision of housing to an invalid person suffering from a severe disease excluding living in the same premises with the person, and was in need of constant care. The applicant thought to obtain housing for such person – her daughter; the relevant housing (apartment) was to be granted taking into account the need her daughter to live with her parents, who provided constant care to her, in terms of living space. Ordinary courts believed that legislative provisions allowed for provision of housing only to the invalid himself, i.e. that communal living with him or her of caretakers (parents) was possible only in cramped conditions.

The Constitutional Court confirmed that generally the legislation affords the right to be provided with housing for the citizen suffering from a severe chronic disease and not to his or her relatives. At that, being motivated by fairness and aims of social policy of the Russian Federation (including those established constitutionally) the Court underlined that if due to objective reasons a person cannot independently ensure dignified quality of life he or she has the right to expect support from state and society. The Constitution of the Russian Federation requires protecting of human dignity as an important condition and base for other inalienable rights and freedoms, condition of their recognition and observing.

This support is necessary for those citizens (including invalids) who suffer from diseases excluding joint living with them in single living premises. They need special conditions to be ensured for satisfying their special needs and requirements, and due to their health conditions many of them also need constant care, presence of other persons and help from them. This is all the more true for persons recognised as legally disabled, as it was the case of the applicant's daughter.

Basing itself on these considerations the Constitutional Court decided that the circumstances in which citizens of the category in question find themselves when they are provided with housing without taking into account their real need to live with their caretakers (guardians), may lead to violation of constitutional provisions. Such violation may take the form of practical forcing of persons to live in cramped conditions, when housing provided is suitable for only one person suffering from a severe chronic

disease, but is intended for living of both such person and the caretaker, despite the legislative statement that it is not possible to live with a person suffering from certain severe disease in one living premise. Another form of such violation is forcing to discharge caretaker's (guardians) obligations in clearly unacceptable living conditions, where violation of rights of the disabled person and also his or her guardian is probable or certain. Of course, the interpretation of law leading to this conclusion would deprive of its meaning the establishment of right to obtain social housing in urgent order, and could hardly be recognised as meeting the fairness requirement.

In resolving this situation, the Constitutional Court has given a constitutional interpretation of legislative provisions that excluded violation of citizen's rights. In particular, the Court pointed to the need of provision of housing for the said category of citizens with due regard of the space that would be needed to ensure not only separate living, but also proper care, including (where needed) constant presence of a guardian; this can be done by utilising possibility to provide living premises of increased space. The Constitutional Court underlined that the challenged norms as such cannot be used as grounds for refusal to provide living premises to such citizen on the basis of space calculated for living his or her family members (including guardian) to live together if these people take care of such person together, and where a public entity has factual capability of providing living premises of relevant space.

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As a conclusion to this article, we can say that for thirty years the role of the Constitutional Court of the Russian Federation has remained unchanged as the guardian of the Constitution of Russia and the fundamental constitutional values enshrined therein, and the conductor of underlying ideas of peace and social harmony, mutual trust of society and the state, social justice. I hope that this will continue to be the case.

MUTUAL INFLUENCE OF NATIONAL CONSTITUTIONAL JUDICIARY AND INTERSTATE COURT: THE EXAMPLE OF THE CONSTITUTIONAL COURT OF THE RUSSIAN FEDERATION AND THE EUROPEAN COURT OF HUMAN RIGHTS IN THE HISTORICAL CONTEXT[1]

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I. Introduction

Within the Russian legal system, international treaties, along with the Constitution of the Russian Federation, play a paramount role in the protection of human rights and fundamental freedoms. In accordance with the Constitution, human rights in the Russian Federation are recognised and guaranteed in accordance with universally recognised principles and norms of international law. At the same time, the Constitution dominates the hierarchy of the legal system of the State. Therefore if there is a conflict between norms of an international instrument as interpreted by an interstate court and the Constitution, the latter has unconditional supremacy.

Where citizens aim to protect their rights they sometimes resort to simultaneous use of both constitutional and interstate judicial mechanisms. Such situation (as well as situation where relevant bodies encounter similar legal issues) may result in certain discrepancy between positions of the national constitutional jurisdiction and interstate body responsible for interpreting the human rights instrument.

In this regard, regardless of membership of the Russian Federation in the Council of Europe, the experience of the Russian Constitutional Court can be useful for all members of the AACC given the proliferation of interstate bodies for the protection of human rights.

[1] The present article presents further elabouration of the presentation made by Justice V. Yaroslavtsev at the 3rd International Symposium held by the AACC Secretariat for Research and development on 10-11 November 2021, taking into account subsequent events.

II. Overview

Legal concept of sovereignty has undergone major changes over recent decades. The States frequently take part in integrative associations which in turn *inter alia* establish their own judicial bodies in order to ensure compliance with the legal acts of associations (European Union, Eurasian Economic Community, etc.). Following development of international human rights law, the practice of interstate human rights judicial bodies (the European Court of Human Rights, the Inter-American Court of Human Rights, etc.) also continuously expands. As a result, states undertake obligations seriously affecting the national legal systems. This also applies to the implementation of judicial protection mechanisms at the national level.

The experience of the Russian Federation during the quarter-century of participation in the Convention for the Protection of Human Rights and Fundamental Freedoms will be of interest in two aspects: 1) the methodological approach (e.g. in order to use this experience to analyse decisions of a quasi-judicial interstate body such as the UN Human Rights Committee); 2) the future application (e.g. in case of creation of a new human rights court in Asia or Eurasia).

For the judiciary, harmonising of positions is particularly important. Where an interstate human rights body considers a case, the conflict can be provoked, for example, by filing a constitutional complaint in parallel with an appeal to an interstate judicial body. This is particularly so in a situation where exhausting constitutional complaint is not a preliminary condition to pursue protection at the international level.

In the Russian Federation, such situations have occurred repeatedly. A constitutional complaint in Russia does not imply direct assessment of the factual circumstances, and was not recognised as effective remedy subject to mandatory exhaustion by the European Court of Human Rights (ECtHR). So, when citizens invoked both the constitutional and interstate legal mechanisms, or when similar issues were brought before respective courts there appeared possible instances of divergence of views between the national constitutional jurisdiction and the interstate body responsible for the interpretation of the human rights. The practice of the Constitutional Court of the Russian Federation demonstrates several avenues to resolve such a conflict:

1) when the decision of the ECtHR became a reason for the Constitutional Court to review its own approaches in relation to the content of the law;

2) when the Constitutional Court was forced to identify an *ultra vires* act of the ECtHR, to determine constitutionally acceptable limits for the execution of its decision.

At the same time, from the point of view of protecting the rights of citizens, the most effective way would be not the simultaneous consideration of cases by the judicial bodies, but sequential, allowing these bodies the opportunity to take into account each other's practice in a timely manner. In this regard further we will also illustrate a situation when application of constitutional judicial mechanism for the protection of the rights ensured effective restoration of the applicant's right before consideration of his complaint by the ECtHR.

III. Case study.

1) The *Khoroshenko* case: an update of approach by the Constitutional Court of the Russian Federation

n 1995, A. Khoroshenko was sentenced to capital punishment, which by way of pardoning was replaced with life imprisonment. While serving his sentence, he repeatedly applied both to interstate bodies for the protection of human rights (the UN Human Rights Committee) and to the Constitutional Court of the Russian Federation.

One of his complaints related, in particular, to the strict regime of serving the sentence. Persons sentenced to life imprisonment in the Russian Federation are placed in so-called strict conditions. This regime is applied at least for the first ten years of serving sentence, and can be further relaxed depending on the behaviour of an inmate. The restrictions applied *inter alia* restrict long visits of relatives, which was challenged by the applicant.

By Decision No. 257-O of May 24, 2005, the [2]Constitutional Court refused to accept his complaint for consideration. In particular, the Court

[2] Decision of the Constitutional Court of the Russian Federation of 24 May 2005 No. 257-O "On refusal to accept for consideration the complaints of Andrey Anatolyevich Khoroshenko as regards violation of his constitutional rights by provisions of Article 412, part one of the Criminal Procedure Code of the Russian Federation, Article 125, part three and Article 127, part three of the Penal Code of the Russian Federation".

formulated the following position:

> When establishing criminal punitive measures with differentiated set of restrictions corresponding to severity of crime committed by convicted person and the punishment imposed on him, as well as in determining procedure for serving this punishment, the legislator must proceed from the fact that convicts in general have the same rights and freedoms as other citizens, with exemptions related to the peculiarities of their personality and the crimes they committed. The conditions of serving a sentence set out both in articles 125 and 127 of the Penal Code of the Russian Federation, and in a number of its other norms, are aimed at individualising punishment, differentiating penalties and their application, and creating prerequisites for achieving the goals of punishment, which, according to Article 43, part two of the Criminal Code of the Russian Federations are the restoration of justice, correction of convict and prevention of new crimes.

Even before the start of the constitutional proceedings, the applicant applied to the European Court of Human Rights, thus availing himself of an interstate legal remedy. His application was disposed of 10 years later. On 30 June 2015 the ECtHR adopted the judgement *Khoroshenko v. Russia* (no. 41418/04)[3].

The ECtHR established violation of Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms (the Convention) in respect of A. Khoroshenko as regards his right to respect of family life to respect for family life due to 15 years of application of excessively strict conditions of serving the sentence (in terms of visits and other contacts with relatives) in a special regime correctional colony.

It was taken into account that restrictions applied to the applicant, including the possibility of holding only two short-term visits per year (each for no more than 4 hours with a limited number of visitors) in conditions that preclude privacy (separation of the meeting room by partition, presence of a security guard), the ban on telephone conversations (except in emergencies) had their basis in national legislation. At the same time, it was considered that these restrictions are disproportionate, since, due to

[3] https://hudoc.echr.coe.int/eng?i=001-156006.

excessive severity and duration of application they cannot be considered an inevitable or integral part of the punishment in the form of deprivation of liberty, do not contribute to reformation, correction and (in the event of release) to social reintegration of the convict person, and do not take into account the interests of his relatives. It was noted that according to legislation of the Russian Federation the relevant severe restrictions are applied to all persons sentenced to life imprisonment without taking into account of individual situation and behaviour of each prisoner; for excessively lengthy period (10-year) during which these restrictions cannot be mitigated (despite the fact that they can be extended for violation of the established procedure for serving a sentence). It was indicated that such harsh measures cannot be introduced automatically, but should be applied (extended) only for certain short period, each time on the basis of a special decision and only in response to specific situation (behaviour of prisoner, risk of his contacts through relatives with criminals, security threat to the institution, etc.).

It was emphasized that norms of Russian legislation challenged by the applicant do not comply with international standards, and that Russia had remained at that time the only country among the members of the Council of Europe where visits to persons sentenced to life imprisonment were regulated by combination of their extremely low frequency, aggravated by additional unreasonably strict restrictions, and excessive duration of application of the relevant restrictions.

The judgment of the ECtHR was carefully studied by the Constitutional Court of the Russian Federation, and ultimately served as basis to change its position upon new assessment of constitutionality of provisions of the Penal Code.

In Judgement of 15 November 2016 No. 24-P[4] adopted upon complaint of applicants who found themselves in the same situation as A. Khoroshenko, the Constitutional Court analysed possible ways of harmonising Russian legislation with the ECtHR approaches.

First of all, the Constitutional Court assessed the possibility, in

[4] Judgment of the Constitutional Court of the Russian Federation of 15 November 2016 No. 24-P "In the case on assessment of constitutionality of Article 125, part three, paragraph "b" and Article 127, part three of the Penal Code of the Russian Federation in connection with the request of the Vologda Regional Court and the complaint of citizens N.V. Koroleva and V.V. Korolev».

derogation from the usual practice, to return to the consideration of an issue that had previously been resolved in constitutional proceedings. In this regard, the court stated the following:

> ... the presence of a decision of the Constitutional Court of the Russian Federation concluding that there is no violation of the constitutional rights of the applicant by the challenged legal provisions applied by the court in his particular case, does not exclude the appeal to the Constitutional Court of the Russian Federation in the due process of any of the subjects entitled to do so with the requirement to verify the constitutionality of those same provisions. At the same time, the Constitutional Court of the Russian Federation emphasised that it decides on the case evaluating both the literal meaning of the challenged provision, and the meaning attributed to it by official and other interpretation or established law-enforcement practice, as well as on the basis of its place in the system of legal norms; therefore the final judgment of the European Court of Human Rights finding that the rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms have been violated by the provisions of Russian law applied in the applicant's particular case may point to uncertainty as regards compatibility of these legal provisions with the Constitution of the Russian Federation and – if there is a proper application – become the basis to initiate constitutional proceedings.

The Constitutional Court took into account the dynamics of legal regulation in foreign states, as well as the development of practice of the ECtHR, and came to the conclusion that it is possible to change its position regarding the challenged provisions.

Upon the new consideration of the issue, the Constitutional Court of the Russian Federation made reference *inter alia* to international documents, including those that are by nature recommendations: The UN Standard Minimum Rules for the Treatment of Prisoners (Nelson Mandela Rules) adopted by UN General Assembly Resolution 70/175 of 17 December 2015; the Doha Declaration approved by UN General Assembly Resolution 70/174 of December 17, 2015; Recommendation Rec(2006)2 of the Committee of Ministers of the Council of Europe of 11 January 2006 on the European Prison Rules (this recommendation was subsequently updated

in 2020); memorandum of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment of 27 June 2007.

These documents emphasise importance of preserving (supporting, strengthening) where possible of family relationships and ties that are in danger as a result of the application of life or long-term imprisonment, including by ensuring availability of family visits, the absence of which can adversely affect mental health of a convict.

The Constitutional Court of the Russian Federation also assessed the argument of the ECtHR according to which the restriction of right to long visits for a period of ten years does not follow from the essence of life imprisonment, since the conditions for granting this right to the applicant were expressed in such a combination of restrictions that significantly worsened his situation compared to with the position of an ordinary inmate in Russia who is serving long term sentence of deprivation of liberty, which cannot be considered inevitable or inherent to the very concept of punishment in the form of deprivation of liberty.

Finally, relying on its legal positions, the Constitutional Court emphasised that coexistence of the European and national legal orders would be unacceptable if it was based in terms of subordination[5]. However, the Court came to a conclusion that in this case it was necessary to determine which interpretation (is better in terms of ensuring human and civil rights and freedoms in the legal system of the Russian Federation the one given by the Constitutional Court on the basis of the provisions of the Constitution of the Russian Federation or the one offered by the European Court of Human Rights on the basis of the provisions of the Convention for the Protection of Human Rights and Fundamental Freedoms), taking into account the balance of constitutionally protected values and international

[5] Judgment of the Constitutional Court of 14.07.2015 No. 21-P "In the case concerning the review of constitutionality of the provisions of Article 1 of the Federal Law "On Ratification of the Convention for the Protection of Human Rights and Fundamental Freedoms and Protocols thereto", Items 1 and 2 of Article 32 of the Federal Law "On International Treaties of the Russian Federation", Sections 1 and 4 of Article 11, Item 4 of Section 4 of Article 392 of the Civil Procedure Code of the Russian Federation, Sections 1 and 4 of Article 13, Item 4 of Section 3 of Article 311 of the Arbitration Procedure Code of the Russian Federation, Sections 1 and 4 of Article 15, Item 4 of Section 1 of Article 350 of the Administrative Judicial Proceedings Code of the Russian Federation and Item 2 of Section 4 of Article 413 of the Criminal Procedure Code of the Russian Federation in connection with the request of a group of deputies of the State Duma"

legal regulation of the status of the individual, meaning not only persons who directly applied for their protection, but also all those whose rights and freedoms may be affected by the challenged regulation. Having accepted that the position of the ECtHR was consistent with providing a greater level of legal protection to Russian citizens in this situation, the Constitutional Court agreed that the approach taken by the ECtHR does not conflict with constitutional provisions. At the same time, the conclusions regarding the absence of uncertainty in the issue of compliance with the applicable provisions of the Criminal Procedure Code and the Criminal Executive Code of the Russian Federation, previously made in the rulings of the Constitutional Court, were not an obstacle for improving the level of protection of the rights of persons serving sentences of life imprisonment, all the more that in itself such regulation did not conflict with constitutional provisions.

Therefore, the Constitutional Court ordered the federal legislator to amend the current legal regulation, and also established that until the change in legislation, persons sentenced to life imprisonment are provided with one long-term visit with close relatives per year. Corresponding changes were made to the Penal Code of the Russian Federation in October 2017.

The provisional procedure for the execution of the decision of the Constitutional Court and the measures taken subsequently for its execution was appraised by the ECtHR which rejected similar complaints without resolving them on the merits. Thus, by decision of 5 February 2019 in the case *Aleksey Mikhaylovich Voevodin v. Russia and 9 other applications* (nos. 6558/18, 7355/18, 29755/18, 30043/18, 46573/18, 46831/18, 49524/18, 49797/18, 51587/18, 54594/18)[6] the ECtHR declared inadmissible complaints regarding violation of the right to respect family life in the form of ban on visits of relatives and friends to the applicants serving sentences of imprisonment. In consideration of opportunities provided by law for maintaining family relations (social ties) the ECtHR took into account that according to the Judgement of the Constitutional Court of 15 November 2016 No 24-P the inmates serving their sentence under strict conditions are afforded one long visit per year.

The example above therefore not only illustrates possibility to change the stance of the higher constitutional supervisory judicial body

[6] https://hudoc.echr.coe.int/eng?i=001-196654.

on the basis of decision of an interstate court. The Constitutional Court of the Russian Federation actually emphasised the key importance of the subsidiarity principle, since the method of executing the decision of an interstate body lies exclusively with the competence of state, and the interstate court does not have the right to dictate specific measures in this regard. Finally, in the decision of the Constitutional Court, he objectively assessed the options of further regulation, and chose the one providing for the best protection of the rights and lawful interests of citizens.

2) The *Anchugov and Gladkov* case: determination of constitutionally acceptable limits for execution of the ECtHR judgment criticising the Constitution of the Russian Federation

The applicants who applied to the ECtHR were convicted of especially serious crimes and sentenced to death, later replaced by long terms of deprivation of liberty by way of pardon.

When detained on remand, the applicants were entitled to participate in the elections of deputies of the State Duma of the Federal Assembly of the Russian Federation. However, after being convicted they lost this right (for the period of serving their sentence) under Article 32, part 3 of the Constitution of the Russian Federation. One of the applicants attempted to challenge the constitutional provision with the Constitutional Court of the Russian Federation; by the Decision of 27 May 2004[7] the Court refused to accept for consideration his complaint due to its lack of jurisdiction.

On 16 February 2004 and 27 February 2005 the applicants applied to the ECtHR stating that being convicted serving a sentence of deprivation of liberty, they were deprived of the opportunity to vote in the elections. Their complaints were satisfied; by its judgment of 4 July 2013 that became final on 9 December 2013 *Anchugov and Gladkov v. Russia* (nos. 1157/04 and 15162/05)[8] the ECtHR established a violation by the Russian authorities of Article 3 of Protocol No. 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms.

The ECtHR agreed that the impugned measure in itself was aimed

[7] Decision of the Constitutional Court of the Russian Federation of 27 May 2004 No. 177-J "On refusal to accept for consideration the complaints of citizen Gladkov Vladimir Mikhailovich with regard to violation of his constitutional right by Article 32 (part 3) of the Constitution of the Russian Federation".

[8] https://hudoc.echr.coe.int/eng?i=001-122260.

at strengthening civil liability of the perpetrators of crimes, instilling in them respect for rule of law, as well as ensuring proper functioning and preservation of civil society and the democratic order. Nevertheless the ECtHR considered the undifferentiated, automatic deprivation of applicants' active suffrage to be disproportionate to the achievement of the stated goals. In the Courts' view, the ban on participation in voting in relation to persons deprived of liberty under a court sentence, established by Article 32 (part 3) of the Constitution of the Russian Federation was automatic and non-selective. The right to vote is automatically stripped from all persons deprived of liberty under a court sentence for the entire period of punishment regardless of the gravity of the crime committed, term of the sentence imposed, type of guilt (including negligence) etc.

The ECtHR rejected the Russian authorities' argument that restriction of electoral right of persons deprived of their liberty by a court verdict was established directly by the Constitution of the Russian Federation, which is an act of supreme legal force in the Russian legal system. The Court pointed out that in accordance with Article 1 of the Convention the States Parties are responsible for any acts and omissions of their authorities, regardless of whether such acts are due to the provisions of domestic or international law. The ECtHR thus concentrated on interpreting content of electoral rights (in this case, the restrictions on these rights of the applicants) ignoring the limits of its own competence and fundamental nature of the constitutional norms challenged by the applicants.

Article 46 of the Convention is interpreted as obligation of the respondent State found to be in breach of Convention provisions to undertake measures executing the judgement delivered in the case to which it was a party, *inter alia* with the aim to prevent similar violations in the future, including, where necessary, by changing the law and law enforcement practice.

Thus, the execution of the ECtHR judgment actually implied not just a change in federal legislation (Federal laws "On the Election of Deputies of the State Duma of the Federal Assembly of the Russian Federation" (part 4 of Article 5) and "On the Basic Guarantees of Electoral Rights and the Right to Participate in a Referendum of Citizens of the Russian Federation" (Part 3 of Article 4), but also introduction of amendments to the Constitution of the Russian Federation, since the existing legal regulation of the issue of restricting voting rights of persons serving sentences of imprisonment in

the Russian Federation was based on the provisions of Part 3 of its Article 32. Since this norm is enshrined in Chapter 2 of the Constitution of the Russian Federation, by virtue of the provisions of its Article 135 these provisions could not be revised by the Federal Assembly of the Russian Federation and would be subject to change only upon adoption of a new Constitution.

A constitutional norm cannot be cancelled by an interstate court decision; and moreover such a decision cannot prescribe or presuppose development and adoption of a new Constitution against the will of the only source of power, i.e. the people of the Russian Federation.

Thus, the ensuing contradiction created a threat of complete negation of the execution of the ECtHR judgment, therefore the competent state bodies (including those authorised to monitor law enforcement and develop methods for the implementation of ECHR judgments) could not overcome the supreme legal force of the Constitution and its direct prescription (not to mention that they did not share the position expressed by the ECtHR). The situation required impartial and objective resolution that would take into due account the supreme legal force of the Constitution of the Russian Federation, as well as the State's international obligations that existed in the relevant period.

To resolve the situation, a special mechanism was deployed with the aim to eliminate or confirm the doubts regarding possibility of implementing decisions of an interstate body for the protection of human rights. This mechanism, provided for by Chapter XIII.1 of the Federal Constitutional Law "On the Constitutional Court of the Russian Federation", provides that if competent state bodies come to an agreed opinion on the impossibility of implementing the ECtHR judgment in accordance with the Constitution of the Russian Federation due to an unforeseen or broadened interpretation of provisions of an international treaty, the issue of possibility to execute such a decision may be resolved by the Constitutional Court of the Russian Federation.

The corresponding request was sent to the Constitutional Court by the Ministry of Justice of the Russian Federation, which in the material time was responsible for coordinating the work on the execution of ECtHR judgments. Based on the results of examination the Constitutional Court of

the Russian Federation adopted it Judgement of 19 April 2016 No. 12-P[9].

In particular, it recalled the following recurring position:

> <...> the interaction of the European convention and Russian constitutional legal orders is impossible in terms of subordination, since only dialogue between different legal systems is the basis for their proper balance, and the effectiveness of the norms of the Convention for the Protection of Human Rights and fundamental freedoms in the Russian legal order; recognising the fundamental importance of the European system for the protection of the rights and freedoms of man and citizen, of which the judgments of the European Court of Human Rights are part, the Constitutional Court of the Russian Federation is prepared to search for legitimate compromise in order to maintain this system, reserving to itself the determination of degree of its acceptance, since it is the Constitution of the Russian Federation that defines limits of compromise in this issue.

Based on this approach, the Constitutional Court examined the practice of the ECtHR in cases of prisoner voting rights, in particular, the decisions *Hirst v. the United Kingdom (No. 2)* (no. 74025/01)[10] and *Scoppola v. Italy (no. 3)* (no. 126/05)[11] pointing out that the ECtHR has not applied consistently uniform approaches when considering relevant complaints (the so-called discretionary and legal approaches). With regard to the approach implemented by the ECtHR in its decision upon complaint against the Russian Federation, the Constitutional Court stated that the ECtHR changed the interpretation of relevant norm of the Convention as compared with that which took place at the time of the accession of the Russian Federation to this instrument. With this in mind, the Constitutional Court stated:

> <...> the conclusion about the violation by the Russian Federation of Article 3 of Protocol No. 1 to the Convention

[9] Judgement of the Constitutional Court of the Russian Federation of 19 April 2016 No. 12-P "In the case concerning the resolution of the question of the possibility to execute in accordance with the Constitution of the Russian Federation the Judgment of the European Court of Human Rights of 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».

[10] https://hudoc.echr.coe.int/eng?i=001-70442.

[11] https://hudoc.echr.coe.int/eng?i=001-111044.

> which the European Court of Human Rights came to, is based on an interpretation of its provisions that is at odds with their meaning from which the Council of Europe and Russia proceeded as party to this international instrument upon its signature and ratification. Under such circumstances, the Russian Federation has the right to insist on the interpretation of Article 3 of Protocol No. 1 to the Convention and its implementation in the Russian legal space in the understanding applicable at the time when this international instrument of the Russian Federation came into force as integral part of the Russian legal system.

Based on this interpretation and the Constitution provisions, the Constitutional Court found it impossible to implement the ECtHR judgement to the letter by changing the constitutionally established restriction of the right to vote as applicable only to certain categories of convicts serving sentences in places of deprivation of liberty (for example, for those convicted of crimes of medium gravity, grave and especially grave crimes provided for by Russian criminal law).

At the same time, the Constitutional Court did not exclude finding of a compromise solution relying on constitutional provisions. As a possible way to implement the judgment of the ECtHR, the optimisation of the system of criminal penalties was identified, including through the transfer of certain regimes of serving deprivation of liberty into alternative types of punishment, related to restriction of liberty of convicts, but not entailing restrictions on their voting rights, and through appropriate law enforcement practice. The legislative embodiment of this approach was expressed in the altering punishment in the form of compulsive labour, which in some cases replaced actual deprivation of liberty in its criminal (penal) meaning.

This Judgement of the Constitutional Court and its subsequent implementation effectively eliminated the controversy provoked by the ECtHR. In September 2019, at the 1355th meeting of the Committee of Ministers of the Council of Europe (DH) dedicated to the execution of judgments of the ECtHR, the judgment *Anchugov and Gladkov v. Russia* and essentially similar judgement *Isakov and Others v. Russia* (nos. 54446/07, 51229/08, 16824/10, 44423/10, 43115/11, 77991/11, 78379/11, 78381/11, 78387/11, 1735/12, 2866/12, 10883/12, 18632/12, 31455/12 , 35559/12, 69342/12, 73777/12, 78747/12, 5023/13 , 10131/13, 3376/14, 14407/14,

32634/14, 68565/14)[12] have been declared successfully executed.

Analysing the measures taken by the Russian authorities, the CMCE Secretariat assessed the approach developed by the Constitutional Court in its Judgment No. 12-P of 19 April 2016 as regards the possibility of partial execution of the *Anchugov and Gladkov v. Russia* judgment in accordance with the Constitution as harmonising its provisions with the provisions of the Convention as interpreted by the ECtHR.

The approach applied by the Constitutional Court of the Russian Federation, therefore, did not lead to a denial of the competence of the ECtHR, the danger of which was pointed out by some who opposed the creation of a mechanism for constitutional judicial review of the possibility of executing ECtHR judgments. On the contrary, the Constitutional Court ensured harmonious coexistence of the conventional and constitutional systems in accordance with the principle of subsidiarity, which subsequently has been reflected in the Preamble to the Convention.

It appears that the position on the need to adhere to interpretation of an international instrument existing at the time of its conclusion is of fundamental importance from the point of view of public international law, which recognises the concerted will of states as main source of treaty law. This position should be a natural constraint for an interstate court, especially for a human rights body that faces temptation to expand its competence based on its own understanding of the content of particular right. Otherwise, there is a danger of excessive judicial activism leading to distortion of the essence of obligations voluntarily assumed by a state. Unfortunately, the ECtHR eventually took this activist path intensifying the discrepancies between the obligations voluntarily assumed by the state and its own understanding of these obligations changing over time.

3) The *Blyudik* and *D.A.* string of cases: harmonious development of constitutional judicial practice and preventive resolution of the issue

Activist tendencies do not necessarily have destructive effect on the relationship between constitutional and supranational courts. If development of case-law and practice is progressive, there is sufficient margin for gradual development in the legislation with effective guaranteeing of citizens' rights. An example of this may be consistent development of practice of the ECtHR and the Constitutional Court of the Russian Federation in relation

[12] https://hudoc.echr.coe.int/eng?i=001-174990

to the issue of compensation for placement in detention centres for juvenile offenders.

In June 2019, the ECtHR adopted the judgment in *Blyudik v. Russia* (no. 46401/08)[13] which *inter alia* established a violation related to placement of the applicant's daughter K. in a special closed educational institution in violation of requirements established by national legislation and with no possibility to obtain compensation for the harm caused by this violation. The ECtHR took into account that the decision to place K. in a special educational institution of a closed type was quashed by the Supreme Court of the Russian Federation by way of supervisory review, but indicated that the applicant's daughter had in fact been kept in that institution for six months. The ECtHR concluded that Russian law did not allow the applicant and his daughter to obtain compensation for illegal placement in a special closed educational institution, since according to the provisions of the Civil Code of the Russian Federation (Articles 1070 and 1100) unintentional harm caused by a state body can be compensated only in cases of unlawful conviction, unlawful criminal prosecution, unlawful application of a measure of restraint in the forms of detention on remand or obligation not to leave place of residence, unlawful bringing to administrative responsibility in the form of administrative arrest. At that, there was no indication in the judgment of the ECtHR of the need for legislative elimination of this shortcoming.

Judge D. Dedov (Russia) presented a concurring opinion with regard to this judgment. He believed that the issue of possibility to obtain compensation in the situation considered by the ECtHR is not directly regulated, but in the light of the previous Judgement of the Constitutional Court of the Russian Federation of 16 June 2009 No. 9-P there were no grounds to conclude that there is no possibility of obtaining compensation in the absence of proven intention or guilt.

Almost simultaneously, a substantially similar problem was considered by the Constitutional Court in Judgement No. 38-P of 29 November 2019[14]. The Judgement *inter alia* gave constitutional legal

[13] https://hudoc.echr.coe.int/eng?i=001-194058

[14] Judgement of the Constitutional Court of the Russian Federation of 29 November 2019 No. 38-П "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."

interpretation of the provisions of the Civil Code of the Russian Federation as involving compensation for harm inflicted, including moral damage, regardless of the fault (intention) of law enforcement officials and courts, if his or her placement in a temporary detention centre for juvenile offenders has been recognised illegal.

Despite the lack of reference to the ECtHR judgement, the Constitutional Court actually based its conclusions on considerations similar to positions of the ECtHR as regards the obligation of state to provide compensation for illegal deprivation of liberty, even if the authority did not act under criminal illegal intention.

Thus, relying on the case-law of the ECtHR, the Constitutional Court of Russia noted that the placement in the temporary detention centre for juvenile offenders of the internal affairs actually entails deprivation of liberty, and the concept of "deprivation of liberty" in this case acquires autonomous meaning in its constitutional sense, which is similar to detention, arrest or apprehension in the sphere of criminal and administrative prosecution.

The court noted:

> <…> proceeding from constitutional principle of equality and constitutional principle of fairness closely connected thereto, examining specific measure of state coercion as a ground for state compensation for harm caused by illegal acts of law-enforcement authorities and courts, even though [such measure] was not conditioned by criminal or administrative responsibility but represented essentially deprivation of liberty in its constitutional sense, one should take account of the essence of relevant measures and consequences for citizens produced thereby. Placing into the centre for temporary content for minor offenders of the interior is subject to a unified mode of guarantees envisaged by the Article 22 of the Constitution of the Russian Federation with regard to the right to liberty and personal security that presupposes also a common compensation mechanism to be used where illegality is established of this measure and measures similar to it from the point of view of grounds or conditions of application.

Based on the foregoing, the Constitutional Court interpreted contested provisions as providing for compensation for harm inflicted to an

adolescent (including moral damage) regardless of the fault or intention of law enforcement officials and courts, if it is recognised as illegal to place him or her in a temporary detention centre for juvenile offenders of the internal affairs bodies. It was also pointed out that when determining the amount of compensation for non-pecuniary (moral) damage the court must take into account the length of stay in the specified centre, the conditions of detention therein, and the conditions in the family of adolescent, possibility of continuing his studies, contacts with parents, as well as other circumstances regarding applied legal restrictions, taking into account their negative or positive influence on the adolescent.

Thereby the Constitutional Court indirectly confirmed the similarity between the constitutionally and conventionally guaranteed rights of citizens, and also performed a harmonious interpretation of Russian legislation, *inter alia* given the context of the practice of the ECtHR. Despite the absence of special indications in the *Blyudik* judgement as regards the need to take general measures, the approach of the Constitutional Court virtually eliminated doubts as regards quality of Russian legislation (noted also in the concurring opinion of D. Dedov).

The legitimacy of conclusions of the Constitutional Court was subsequently confirmed in the Council of Europe. Thus, on 8 April 2021 upon the complaint of the same applicant the ECtHR adopted a decision *D.A. v. Russia* (no. 17262/19)[15], which declared the applicant's complaint inadmissible on account of the loss of her victim status with regard to a violation of the Convention. As stated in the decision, after the Judgement of the Constitutional Court, the court decisions in the case of *D.A.* were quashed due to new circumstances. The ECtHR noted that decisions to which the applicant's complaint was linked were set aside; her case was re-examined with confirming the violation and the award of compensation to her, the amount of compensation being consistent with the practice of the ECtHR.

Thus, the decision of the Constitutional Court based on similar approaches to the content of the right to liberty and personal security not only made it possible to identify a potential issue with the national legal framework, but also eliminated it before the same applicant activated the supranational remedy.

[15] https://hudoc.echr.coe.int/eng?i=001-209395

It seems that this very approach represents the optimal model for interaction between supranational and national justice in terms of determining ways to improve and develop the legislation. The key to the success of this model is the existence of mechanisms for mutual informing of higher courts, and naturally mutual respect for each other's activities.

IV. Conclusion

Participation in international treaties aimed to protect human rights is a reality of any modern state. Such participation imposes certain obligations on the states, ensures progressive development of national legal systems, increases effectiveness of protection of rights of citizens.

At the same time, the implementation of supranational legal standards – especially in a situation where their observance is controlled by an interstate judiciary – should not occur automatically, without regard to national legal traditions. A prerequisite for implementation of such standards is a mutually respectful dialogue between highest judicial bodies as equal partners.

The constitutional judiciary is best suited to the role of a participant in such dialogue. During the period of participation of the Russian Federation in the Council of Europe and the Convention for the Protection of Human Rights and Fundamental Freedoms, the Constitutional Court of the Russian Federation carried out significant work harmonising the Russian legal system with the European and international legal space. His approaches contributed to introduction of European and international standards into Russian law. The Constitutional Court of Russia has repeatedly demonstrated its readiness to find a compromise and uphold international legal standards even when considering complex issues encountering ambiguous or negative attitude of the society.

In the long term, the consistent implementation of such approaches by national and interstate bodies will ensure effectiveness of national human rights mechanisms. This, in turn, not only directly protects the rights of citizens, but also helps maintain confidence in domestic law and the formation of a legal culture. At present, it seems that the legal standards set with the participation of the Constitutional Court, despite the termination of the membership of the Russian Federation in the Council of Europe, will ensure preservation of the ensured level of legal protection for Russian citizens.

Finally, the positions developed by the Constitutional Court of the Russian Federation in relation to the general principles of interaction with supranational human rights mechanisms (primarily in relation to mutually respectful dialogue) can be extended to any supranational human rights mechanisms. Their consistent application would ensure enforceability of decisions of an interstate judicial body, thereby increasing its effectiveness as a whole and helping to strengthen its authority.

CONSTITUTIONAL AND LEGAL GUARANTEES FOR THE ENFORCEMENT OF DECISIONS OF THE CONSTITUTIONAL COURT OF THE REPUBLIC OF TAJIKISTAN

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Of course, the topic of the execution of decisions of the Constitutional Court, as a body of constitutional control, is very important and relevant, since the state of constitutional legality both in the Republic of Tajikistan and in developed democratic countries with constitutional control bodies largely depends on the execution of decisions of constitutional courts by all bodies of government, including the legislative and executive branches.

Accurate execution of the decisions of the body of constitutional control is the most important element of the mechanism for ensuring constitutional legality in the state and shows a high level of legal culture of authorities and officials, the consent of the subjects of appeal to the Constitutional Court with the provisions of the Basic Law of the country.

The facts of non-execution of the decisions of the constitutional courts of the countries of the "young democracy" became the reason for raising the question of creating legislative mechanisms aimed at ensuring the real execution of these decisions.

In this connection, non-execution or improper execution of decisions of constitutional control bodies calls into question the entire mechanism for the implementation of the Constitution, leads to fluctuation of the goals they were aimed at, that is, to ensure the supremacy and direct action of the Constitution of each state, protection of human and citizen rights and freedoms, as well as strengthening a single constitutional and legal space in the state.

Most researchers agree that constitutional courts do not have a mechanism capable of enforcing their decisions, and that it is very difficult to create such legal mechanisms.

The procedure for enforcement proceedings is based on the possibility of implementing a court decision against the will of the obligated subject through the actions of the competent public authority. It is difficult to imagine such a procedure, for example, in relation to the adoption of a legal act, which should replace the one recognized as unconstitutional. Intellectual activity cannot be carried out under duress. In the procedure for the execution of decisions of constitutional courts, it is important not only to carry out certain actions, it is important to carry them out by specific subjects in a procedure defined by law.

Regardless of the fact that constitutional justice is a fundamentally new constitutional and legal institution for Tajikistan, which is carried out by the Constitutional Court of the Republic of Tajikistan, its role in society has recently increased significantly through decision-making, the implementation of which, first of all, contributes to ensuring the rule and direct operation of the Constitution, as well as the protection of the rights and freedoms of man and citizen.

An important legal guarantee for the execution of decisions of the Constitutional Court of the Republic of Tajikistan is the Constitution of the Republic of Tajikistan, which according to Art. 89 of which the acts of the Constitutional Court are final.

That is, according to the constitutional prescriptions, the acts of the Constitutional Court are final and not subject to appeal, their binding acts without any exception. The decision of the Constitutional Court does not require confirmation by any other bodies - it is subject to strict execution.

Accurate execution of the decisions of the body of constitutional control is the most important element of the mechanism for ensuring constitutional legality in the state, and the effective operation of the institution of judicial constitutional control depends on this.

In this regard, in order to ensure the direct effect of the acts of the Constitutional Court, and to completely prevent the re-adoption of the norms declared by the Constitutional Court as contrary to the Constitution, as part of the implementation of the new Program of Judicial and Legal

Reform in the Republic of Tajikistan for 2019-2021, part 5. Art. 60 of the Constitutional Law of the Republic of Tajikistan, just recently, a new amendment was introduced, according to which: "Repeated adoption of acts that contradict the decision of the Constitutional Court of the Republic of Tajikistan is prohibited. When such acts are adopted, they will not have legal force."

However, it should be noted that in this area, there is still an unresolved problem associated with the lack of norms in the regulatory legal acts regulating the mechanism for the execution of decisions of the Constitutional Court, which also directly or indirectly affects the increase in the effectiveness of its acts.

Practice shows that only the actual execution of decisions taken by the bodies of constitutional control, based on the exercise of their legal powers, makes constitutional justice real and complete. Therefore, the mechanism of an independent judiciary system, which ensures the supremacy of the Constitution and the protection of human and civil rights and freedoms, includes as a mandatory element the enforcement of a judicial act. This, of course, is determined by the presence of a legislatively established mechanism for the implementation of these decisions.

In this connection, the presence of legislatively fixed procedures for the execution, measures of responsibility for non-execution of judicial acts within a reasonable time are considered expedient for the execution of the decisions of the Constitutional Court by public authorities. In this case, legally established measures of responsibility will be considered as necessary measures of state coercion to ensure the execution of acts of this independent judicial authority.

The Constitutional Court of the Republic of Tajikistan, as a body of constitutional control, adopts acts that complete constitutional proceedings in the form of decisions or rulings that contain a reasonable legal position, which is also important in law-making activities.

Statistics and practice show that the intensity and number of appeals to the Constitutional Court of the Republic of Tajikistan is increasing every year. It should also be noted that, of course, most of the appeals still contain issues that are not within the competence of the Constitutional Court, and therefore, on such appeals, answers explaining the authority of the Constitutional Court are sent to applicants.

But in general, during the period of its activity, the Constitutional Court of the Republic of Tajikistan considered a number of issues that played a significant role in ensuring the supremacy of the Constitution, strengthening constitutional legality and protecting the rights and freedoms of man and citizen.

Including the Decree of the Constitutional Court of the Republic of October 16, 2001 "On determining the compliance with the Constitution of the Republic of Tajikistan of part 1 of Article 303 and part 1 of Article 337 of the Civil Procedure Code of the Republic of Tajikistan", according to which the parties and other persons participating in the process were deprived of the right to appeal and protest decisions and rulings of the Supreme Court of the Republic of Tajikistan, issued during the consideration of cases at first instance, were found to be inconsistent with the norms of the Constitution. This decision gave the parties and other participants in the process the right to appeal and protest against decisions and rulings of the Supreme Court of the Republic of Tajikistan when considering cases in the first instance.

Also, the following Resolution of the Constitutional Court of the Republic of Tajikistan dated January 20, 2005 "On determining the compliance of Article 181 of the Economic Procedure Code of the Republic of Tajikistan with Articles 17, 19 and part 2 of Article 88 of the Constitution of the Republic of Tajikistan" Article 181 of the Economic Procedure Code of the Republic of Tajikistan in terms of failure to present to the parties and other participants the right to file a supervisory appeal against decisions and resolutions of economic courts that have entered into legal force in the court process was recognized as not complying with Articles 17, 19 and Part 2 of Article 88 of the Constitution of the Republic of Tajikistan. On the basis of which the parties and other participants in the process were granted the right to file a supervisory appeal against decisions and resolutions of economic courts that have entered into legal force.

In each of its adopted acts, the Constitutional Court of the Republic of Tajikistan indicates the need to clarify and develop legislative norms in order to eliminate uncertainty in legal regulation and ensure the constitutional meaning of the application of the norms of the law. The effectiveness of the decisions of the Constitutional Court is determined by their impact on legislative and law enforcement activities, on overcoming the shortcomings of normative regulation, which include inconsistency

between various legal acts. A frequent defect in the legal regulation that the Constitutional Court encounters in the course of its activities is a gap in the legislation. By virtue of the legal position formulated by the Constitutional Court, a gap in the law, if it leads to such an interpretation and application that violates or may violate specific constitutional rights, may be the basis for checking the constitutionality of this law.

The normative and methodological criterion for assessing gaps in legislation for the Constitutional Court is the Constitution of the Republic of Tajikistan with the principles of legal equality, the rule of law, the balance of constitutionally protected values, legal certainty, maintaining citizens' confidence in the law and the actions of the state, proportional restrictions of rights and freedoms, the presumption of innocence, full and effective judicial protection, the separation of powers and the resulting system of balances, etc.

Of course, in general, it would be advisable to achieve more effective interaction of constitutional control bodies with other highest bodies of state power by virtue of their authorities in terms of facilitating the timely execution of decisions of the Constitutional Court, since most of the means that can be designated as guarantees of execution of these decisions fall within the powers of those bodies.

The specification in the internal regulations of the relevant state bodies of the procedure for implementing the decisions of the Constitutional Court, as well as the establishment of possible measures of personal responsibility for failure to fulfill the obligation to enforce the decision of the Constitutional Court is, therefore, an extremely important aspect of the problem of execution of decisions of the Constitutional Court.

In accordance with Article 60 of the Constitutional Law of the Republic of Tajikistan "On the Constitutional Court of the Republic of Tajikistan", the acts of this body are final, not subject to appeal and are binding on all bodies, enterprises, institutions, organizations, political parties, other public associations, officials and the citizens to whom they are addressed.

Also, in part five of this article, a rule is provided according to which laws and other normative legal acts or their separate provisions, recognized by the Constitutional Court as unconstitutional, lose their force, simultaneously canceling the effect of other normative legal and other acts

based on an act recognized as unconstitutional.

Article 61 of the Constitutional Law of the Republic of Tajikistan "On the Constitutional Court of the Republic of Tajikistan" establishes the norms regarding the execution of the decision of the Constitutional Court. Thus, in accordance with part 1 of Article 61 of this regulatory legal act, the decisions and conclusions of the Constitutional Court come into force from the moment of adoption or from the moment established in them. Other acts come into force from the moment of their announcement. The key role in the execution of the decisions of the Constitutional Court is also played by the two existing most important properties of the acts of the Constitutional Court of the Republic of Tajikistan - their finality and binding nature.

Part 2 of Article 61 of this Constitutional Law states that the decisions and conclusions of the Constitutional Court of the Republic of Tajikistan are published in the media. At the discretion of the Constitutional Court, its other acts may also be published. The established norm of the Constitutional Law, firstly, is one of the forms for implementing the principle of publicity in constitutional proceedings, and, secondly, it contributes to the proper and prompt execution of the final decisions of the Constitutional Court, since the adoption of such a decision is brought to the public through the media.

The same article also mentions a list of state bodies and parties to constitutional proceedings, to which resolutions and conclusions of the Constitutional Court of the Republic of Tajikistan are sent in a mandatory way.

Sending them its final decisions, the Constitutional Court of the Republic of Tajikistan thereby obliges the relevant state authorities and officials to take appropriate measures to enforce the decisions of the Constitutional Court.

The special significance of decisions taken by the Constitutional Court of the Republic of Tajikistan within the framework of the exclusive powers granted to it by the Constitution of the Republic of Tajikistan to verify the constitutionality of normative legal acts predetermines the need for their strict execution by state authorities and officials, which ensures the requirements of the unity of the constitutional and legal field of the republic and the inadmissibility of opposing the rule of law and expediency.

Of course, in order to suspend the operation of the norms of the law and other normative legal acts recognized as unconstitutional, and to prevent their application in the future in other legal relations, it is necessary to timely ensure the execution of the decision of the Constitutional Court by the relevant authorized entities. In this connection, Article 62 of the said Constitutional Law provides for a norm according to which non-execution, improper execution or obstruction of the execution of the acts of the Constitutional Court of the Republic of Tajikistan entails liability established by the legislation of the Republic of Tajikistan.

In general, the legally proclaimed mandatory execution of these acts does not entail the automatic implementation of their instructions. Only the actual execution of the decisions of the Constitutional Court makes constitutional justice real and complete, which requires legislative consolidation of the procedures for the execution of these acts, as well as measures of state coercion to the execution of acts of the Constitutional Court.

It should be noted that Article 363 of the Criminal Code of the Republic of Tajikistan provides for a general rule, according to which, for malicious non-compliance by a representative of the authorities, civil servants of a local government body and self-government bodies of towns and villages, as well as employees of a state institution, commercial or other organization of a court verdict, court decision or other judicial act that have entered into force, as well as obstruction of their execution, criminal punishment is provided.

If you pay attention to the role of the body of constitutional control in ensuring its acts, then it does not have its own coercive mechanism for this, which, of course, is not inherent in such bodies, but it can basically influence this process mainly by the clarity of legal arguments and conclusions justified in their decisions.

Timely and full implementation of the decisions of the Constitutional Court serves to ensure a unified constitutional and legal field in the conditions of a rule of law, which ultimately determines the supremacy and direct effect of the Constitution of the country, the inviolability of state sovereignty as the most important component of the foundations of the constitutional system of Tajikistan.

The effectiveness of the execution of decisions of the Constitutional

Court is mainly in internal interconnection and correlation with the concepts of the effectiveness of constitutional control and the effectiveness of constitutional proceedings. The disclosure of this relationship is a comprehensive and systematic approach to understanding the effectiveness of the execution of decisions of the Constitutional Court. Of course, the main criterion for the effectiveness of the execution of decisions of the Constitutional Court should be understood as the timeliness of their execution, based on the presence of social and value content in the decisions of the Constitutional Court, and subsequent consideration in the current legislation.

The world experience of the activities of constitutional control bodies shows that the effectiveness of the execution of judicial acts depends on the completeness and quality of legislative regulation of issues on the procedure, deadlines for execution, responsibility for non-execution of acts of the Constitutional Court, and, accordingly, incomplete legislative regulation of these issues does not allow timely enforcement of adopted Constitutional Court acts.

An analysis of domestic legislation indicates the insufficiency of legislative regulation of issues on the procedures for the execution of decisions of the Constitutional Court by state authorities, on the responsibility of bodies and their officials for non-execution of acts. It should also be noted that all this entails the possibility of a long-term non-execution of the decisions of the body of constitutional control on the recognition of normative legal acts that violate the rights and freedoms of man and citizen as inconsistent with the norms of the Constitution.

Timely non-execution of decisions of the Constitutional Court also indicates the presence of gaps in the legal field, including legislative regulation, expressed in the absence of clearly defined procedures and deadlines for execution, as well as measures of responsibility for non-execution or delay in the execution of judicial acts, which undermines the authority of the body of constitutional control in the country.

Unfortunately, the effectiveness of the activities of the bodies of constitutional control, including the judiciary in general, is still assessed only by those indicators that characterize the quality of the process of consideration and resolution of the claims declared by the subjects of circulation, but which do not include the process of execution of acts

that ensures real the supremacy of the Constitution and the restoration of violated rights, freedoms and legitimate interests of man and citizen.

In this connection, we express our solidarity with the position of some legal scholars that it is expedient, within the framework of the legislation that determines the legal basis for the activities of public authorities, to include a provision establishing the obligatory execution of decisions of constitutional control bodies and improving the mechanism for the execution of decisions of constitutional courts.

КОНСТИТУЦИОННО-ПРАВОВЫЕ ГАРАНТИИ ИСПОЛНЕНИЯ РЕШЕНИЙ КОНСТИТУЦИОННОГО СУДА РЕСПУБЛИКИ ТАДЖИКИСТАН

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Безусловно, тема исполнения решений конституционного суда, как органа конституционного контроля, является весьма важной и актуальной, поскольку состояние конституционной законности как в Республике Таджикистан, так и в развитых демократических странах, имеющих органы конституционного контроля, во многом зависит от исполнения решений конституционных судов всеми органами государственной власти, в том числе законодательной и исполнительной властями[1].

Четкое исполнение решений органа конституционного контроля является важнейшим элементом механизма обеспечения конституционной законности в государстве и показывает высокий уровень правовой культуры органов власти и должностных лиц, согласие субъектов обращения в Конституционный Суд с предписаниями Основного закона страны.

Факты неисполнения решений конституционных судов стран «молодой демократии» стали причиной постановки вопроса о создании законодательных механизмов, направленных на обеспечение

[1] См.: Махкам Махмудзода. Обеспечение исполнения решений Конституционного суда - гарантия развития эффективности конституционного правосудия //Правовая политика и демократическое государство (сборник научных статей и докладов). Душанбе: «ЭР-граф», 2017.

реального исполнения этих решений [2].

В связи с чем неисполнение или ненадлежащее исполнение решений органов конституционного контроля ставит под сомнение весь механизм реализации Конституции, приводит к колебанию целей, на достижение которых они были направлены, то есть на обеспечение верховенства и прямого действия Конституции каждого государства, защиту прав и свобод человека и гражданина, а также укрепление единого конституционно-правового пространства в государстве.

Большинство исследователей сходятся в том, что конституционные суды не имеют механизма, способного принудить к исполнению своих решений, и что очень трудно создать подобные правовые механизмы[3].

В основе процедуры исполнительного производства лежит возможность реализации судебного решения помимо воли обязанного субъекта с помощью действий компетентного органа государственной власти. Сложно представить такую процедуру, например, в отношении принятия правового акта, который должен заменить признанный неконституционным. Интеллектуальная деятельность не может производиться по принуждению, в процедуре исполнения решений конституционных судов важно не только осуществить определенные действия, важно осуществить их конкретными субъектами в определенной законодательством процедуре[4].

Независимо от того, что конституционное правосудие является принципиально новым для Таджикистана конституционно-правовым институтом, которое осуществляется Конституционным Судом Республики Таджикистан, в последнее время значительно возросла

[2] См.: Тохян Ф.П. Проблемы исполнения актов Конституционного Суда Республики Армения II Конституционное правосудие. Ереван,2001. №3(13). Н.Селивон: «Мы не позволяли выходить за рамки Конституции» //Голос Украины. 2005. 21 октября. Мезеи А. Роль Конституционного суда Венгрии в совершенствовании избирательного законодательства //Политические права и свободные выборы: Сб. докладов. М., 2005. С. 117. Баишев Ж.Н. Конституционный Суд в системе государственной власти: Автореф. дис. ... канд. юрид. наук. М., 1994. С. 7.

[3] Митюков М.А. Конституционные суды постсоветских государств: проблемы исполнения решений //Конституционное право: Восточноевропейское обозрение. Москва; Нью-Йорк, 2002. № 3(40). С. 73.

[4] А.М.Кальяк. Проблемы обеспечения исполнения решений Конституционного суда России. М.: 2006.

его роль в обществе посредством принятия решений, исполнение которых, прежде всего, способствуют обеспечению верховенства и непосредственного действия Конституции, а также защиты прав и свобод человека и гражданина.

Важной правовой гарантией исполнения решений Конституционного суда Республики Таджикистан является Конституция Республики Таджикистан, согласно ст. 89 которой акты Конституционного суда являются окончательными.

То есть, согласно конституционным предписаниям акты Конституционного суда являются окончательными и обжалованию не подлежат, их обязательность действует без какого-либо исключения. Принятое решение Конституционного суда не требует подтверждения каких-либо других органов – оно подлежит неукоснительному исполнению.

Четкое исполнение решений органа конституционного контроля является важнейшим элементом механизма обеспечения конституционной законности в государстве, и от этого зависит эффективная деятельность института судебного конституционного контроля.

В связи с этим, для обеспечения непосредственного действия актов Конституционного суда, и полного предотвращения повторного принятия норм, объявленного Конституционным судом, противоречащим Конституции, в рамках реализации новой Программы судебно-правовой реформы в Республике Таджикистан на 2019-2021 годы, в ч.5. ст. 60 Конституционного Закона Республики Таджикистан буквально на днях была внесена новая поправка, согласно которой: «Повторное принятие актов, противоречащие постановлению Конституционного суда Республики Таджикистан запрещается. При принятии таких актов, они не будут обладать юридической силой».

Однако следует отметить, что в указанной сфере, все еще остается нерешенной проблема, связанная с отсутствием в нормативных правовых актах норм, регулирующих механизм исполнения решений Конституционного суда, что также напрямую или косвенно влияет на повышение эффективности его актов.

Практика показывает, что только фактическое исполнение

решений, принятых органами конституционного контроля, исходя из реализации своих законных полномочий, делает конституционное правосудие реальным и завершенным. Поэтому механизм независимого органа судебной власти, обеспечивающий верховенство Конституции и защиту прав и свобод человека, и гражданина, включает в себя в качестве обязательного элемента обеспечение исполнение судебного акта. Это, конечно же, определяется наличием законодательно установленного механизма исполнения названных решений.

В связи с чем считается целесообразным для исполнения органами публичной власти решений Конституционного Суда наличие законодательно закрепленных процедур исполнения, мер ответственности за неисполнение судебных актов в разумные сроки. В данном случае законодательно установленные меры ответственности будут рассматриваться в качестве необходимых мер государственного принуждения, обеспечивающих исполнение актов данного независимого органа судебной власти.

Конституционный Суд Республики Таджикистан, как орган конституционного контроля, принимает акты, завершающие конституционное судопроизводство, в виде постановлений или определений, в которых содержится обоснованная правовая позиция, имеющая также важное значение в правотворческой деятельности.

Статистика и практика показывает, что с каждым годом повышается интенсивность и число обращений в Конституционный суд Республики Таджикистан. Также следует отметить, что, конечно же, до сих пор в большей части обращений содержатся вопросы, рассмотрение которых не входит в полномочие Конституционного суда, в связи с чем по таким обращениям заявителям отправляются ответы, в которых разъясняется полномочие Конституционного суда.

Но в целом Конституционным Судом Республики Таджикистан в период его деятельности был рассмотрен ряд вопросов, которые сыграли заметную роль в обеспечении верховенства Конституции, укреплении конституционной законности и защиты прав и свобод человека и гражданина.

В том числе Постановлением Конституционного суда республики от 16 октября 2001 года «Об определении соответствия Конституции Республики Таджикистана части 1 статьи 303 и части

1 статьи 337 Гражданского процессуального кодекса Республики Таджикистан»[5], согласно которым стороны и другие лица-участники процесса лишались права обжалования и опротестования решений и определений Верховного Суда Республики Таджикистан, вынесенных при рассмотрении дел по первой инстанции, были признаны несоответствующими нормам Конституции. Указанное постановление дало сторонам и другим участникам процесса право обжалования и принесения протеста на решения и определения Верховного Суда Республики Таджикистан при рассмотрении дел в первой инстанции.

Также следующим Постановлением Конституционного суда Республики Таджикистан от 20 января 2005 года «Об определении соответствия статьи 181 Хозяйственного процессуального кодекса Республики Таджикистан статьям 17,19 и части 2 статьи 88 Конституции Республики Таджикистана» статья 181 Хозяйственного процессуального кодекса Республики Таджикистан в части непредставления сторонам и другим участникам процесса права принесения надзорной жалобы на вступившие в законную силу решения и постановления экономических судов была признана не соответствующей статьям 17, 19 и части 2 статьи 88 Конституции Республики Таджикистан. На основе чего сторонам и другим участникам процесса было предоставлено право принесения надзорной жалобы на вступившие в законную силу решения и постановления экономических судов.

В каждых из принятых своих актов Конституционный Суд Республики Таджикистан указывает на необходимость уточнения и развития законодательных норм для устранения неопределенности в правовом регулировании и обеспечения конституционного смысла применения норм закона. Эффективность решений Конституционного суда определяется их воздействием на законотворческую и правоприменительную деятельность, на преодоление недостатков нормативного регулирования, к числу которых следует отнести несогласованность между различными правовыми актами. Нередкий дефект правового регулирования, с которым Конституционный суд сталкивается в процессе осуществления своей деятельности, это пробел в законодательстве. Конституционным судом к рассмотрению

[5] Митюков М.А. Конституционные суды постсоветских государств: проблемы исполнения решений //Конституционное право: Восточноевропейское обозрение. Москва; Нью-Йорк, 2002. № 3(40). С. 73.

в силу сформулированной им правовой позиции пробел закона, если он приводит к такому его истолкованию и применению, которое нарушает или может нарушить конкретные конституционные права, может являться основанием проверки конституционности данного закона.

Нормативным и методологическим критерием оценки пробелов в законодательстве для Конституционного суда является Конституция Республики Таджикистан с заложенными в ней принципами юридического равенства, верховенства права, правового государства, баланса конституционно защищаемых ценностей, правовой определенности, поддержания доверия граждан к закону и действиям государства, соразмерности ограничения прав и свобод, презумпции невиновности, полной и эффективной судебной защиты, разделения ветвей властей и обусловленной им системы противовесов и т.д.

Конечно, в целом было бы целесообразным достичь более эффективного взаимодействия органов конституционного контроля с иными высшими органами государственной власти в силу их полномочий в части содействия своевременному исполнению решений Конституционного суда, поскольку большинство средств, которые могут быть обозначены как гарантии исполнения этих решений, относятся к полномочиям этих органов.

Конкретизация во внутренних нормативных актах соответствующих государственных органов процедуры реализации решений Конституционного суда, а также установление возможных мер персональной ответственности за неисполнение обязанности по обеспечению исполнения решения Конституционного суда является, таким образом, чрезвычайно важным аспектом проблемы исполнения решений Конституционного суда.

В соответствии со статьёй 60 конституционного Закона Республики Таджикистан «О Конституционном суде Республики Таджикистан» акты данного органа являются окончательными, обжалованию не подлежат и обязательны к исполнению всеми органами, предприятиями, учреждениями, организациями, политическими партиями, иными общественными объединениями, должностными лицами и гражданами, к которым они обращены.

Также в части пятой данной статьи предусмотрена норма, согласно которой законы и иные нормативные правовые акты или их отдельные положения, признанные Конституционным судом неконституционными, утрачивают силу, одновременно отменяя действие других нормативных правовых и иных актов, основанных на акте, признанном неконституционным.

В статье 61 конституционного Закона Республики Таджикистан «О Конституционном суде Республики Таджикистан», установлены нормы, касающиеся исполнения решения Конституционного суда. Так, в соответствии с частью 1 статьи 61 данного нормативного правового акта постановления и заключения Конституционного суда вступают в силу с момента принятия или с момента, установленного в них. Иные акты вступают в силу с момента их оглашения. Ключевую роль в исполнении решений Конституционного суда играют также два существующих важнейших свойств актов конституционного суда Республики Таджикистан – их окончательность и обязательность.

Часть 2 статьи 61 данного конституционного закона гласит, что постановления и заключения Конституционного суда Республики Таджикистан публикуются в средствах массовой информации. По усмотрению Конституционного суда иные его акты также могут быть опубликованы. Установленная норма конституционного закона, во-первых, является одной из форм реализации принципа гласности в конституционном судопроизводстве, и, во-вторых, содействует должному и оперативному исполнению итоговых решений Конституционного Суда, так как о принятии такого решения доводится до всеобщего сведения через средства массовой информации.

Также в этой же статье упоминается перечень государственных органов и сторон конституционного судопроизводства, которым в обязательном порядке направляются постановления и заключения Конституционного Суда Республики Таджикистан. Направляя им свои итоговые решения, Конституционный суд Республики Таджикистан тем самым обязывает соответствующие государственные органы власти и должностных лиц принять надлежащие меры для исполнения решений Конституционного суда.

Особой значимостью решений, принимаемых Конституционным судом Республики Таджикистан в рамках предоставленных ему

Конституцией Республики Таджикистан исключительных полномочий по проверке конституционности нормативных правовых актов, предопределяется необходимость их неукоснительного исполнения органами государственной власти и должностными лицами, чем обеспечиваются требования единства конституционно-правового поля республики и недопустимости противопоставления законности и целесообразности.

Конечно, для приостановления действий норм закона и иных нормативных правовых актов, признанных неконституционными, и предотвращения применения их в будущим в других правоотношениях необходимо своевременное обеспечение исполнения постановления Конституционного Суда, соответствующими уполномоченными субъектами. В связи с чем в статье 62 указанного конституционного Закона предусмотрена норма, в соответствии с которой неисполнение, ненадлежащее исполнение либо воспрепятствование исполнению актов Конституционного суда Республики Таджикистан влечет привлечение к ответственности, установленной законодательством Республики Таджикистан.

В целом законодательно провозглашенная обязательность исполнения указанных актов не влечет за собой автоматической реализации их предписаний. Только фактическое исполнение решений Конституционного суда делает конституционное правосудие реальным и завершенным, для чего требуется законодательное закрепление процедур исполнения данных актов, а также мер государственного принуждения к исполнению актов Конституционного суда.

Следует отметить, что статьёй 363 Уголовного кодекса Республики Таджикистан предусмотрена общая норма, в соответствии с которой за злостное неисполнение представителем власти, государственным служащим местного органа государственной власти и органов самоуправления посёлков и сёл, а также служащим государственного учреждения, коммерческой или иной организации вступивших в законную силу приговора суда, решения суда или иного судебного акта, а равно воспрепятствование их исполнению предусматривается уголовное наказание.

Если обратить внимание, на роль самого органа конституционного контроля в обеспечении своих актов, то он не имеет

для этого собственного принудительного механизма, что, конечно, не присуще такого рода органам, он в основном может влиять на этот процесс главным образом ясностью правовых аргументов и выводов, обосновываемых в своих решениях.

Своевременное и в полном объеме исполнение решений Конституционного Суда служит обеспечению единого конституционно-правового поля в условиях правового государства, чем, в конечном счете, определяется верховенство и прямое действие Конституции страны, незыблемость государственного суверенитета как важнейшей составляющей основ конституционного строя Таджикистана.

Эффективность исполнения решений Конституционного суда в основном находится во внутренней взаимосвязи и соотношением с понятиями эффективности конституционного контроля и эффективности конституционного судопроизводства. Раскрытие этой взаимосвязи представляет собой комплексный и системный подход к пониманию эффективности исполнения решений Конституционного суда. Конечно, под основным критерием эффективности исполнения решений Конституционного суда следует понимать своевременность их исполнений, основанной на наличии социально-ценностного содержания в решениях Конституционного Суда, и последующий учет в действующем законодательстве.

Мировой опыт деятельности органов конституционного контроля показывает, что эффективность исполнения судебных актов зависит от полноты и качества законодательного регулирования вопросов о порядке, сроках исполнения, ответственности за неисполнение актов Конституционного суда, и, соответственно, неполное законодательное урегулирование данных вопросов не позволяет своевременно обеспечить исполнение принятых актов Конституционным судом.

Анализ отечественного законодательства свидетельствует о недостаточности законодательного регулирования вопросов о процедурах исполнения органами государственной власти решений Конституционного суда, об ответственности органов и их должностных лиц за неисполнение актов. Следует также отметить, что все это влечёт за собой возможность длительного неисполнения

решений органа конституционного контроля о признании несоответствующими нормативные правовые акты, нарушающие права и свободы человека и гражданина Конституции.

Своевременное неисполнение решений Конституционного суда свидетельствует и о наличии пробелов в правовом акте, в том числе законодательном регулировании, выражающихся в отсутствии четко прописанных процедур и сроков исполнения, а также мер ответственности за неисполнение либо просрочку исполнения судебных актов, что подрывает авторитет органа конституционного контроля в стране.

К сожалению, эффективность деятельности органов конституционного контроля, в том числе в целом органов судебной власти, до сих пор оценивается только по тем показателям, которые характеризуют качество процесса рассмотрения и разрешения, заявленных субъектами обращения требований, но в которые не включается процесс исполнения актов, обеспечивающий реальное верховенства Конституции и восстановление нарушенных прав, свобод и законных интересов человека и гражданина.

В связи с чем, мы выражаем свою солидарность с позицией некоторых ученых – правоведов о том, что целесообразно в рамках законодательства, определяющего правовую основу деятельности органов государственной власти, включить положение, устанавливающее обязательность исполнения решений органов конституционного контроля и усовершенствование механизма исполнения решений конституционных судов.

КОНСТИТУЦИОННЫЙ СУД УЗБЕКИСТАНА НА НОВОМ ЭТАПЕ СВОЕГО РАЗВИТИЯ

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В современном демократическом государстве наиболее эффективным институтом обеспечение верховенства закона и конституционной законности является институт конституционного контроля. Институт конституционного контроля в Узбекистане призван обеспечить верховенства Конституции и законов, соблюдения режима конституционной законности в стране. В своем развитии институт конституционного контроля прошел несколько этапов.

Начало современного этапа развития конституционного контроля обусловлено теми кардинальными изменениями в судебно-правовой системе, инициированными Президентом Узбекистана. В соответствии со Стратегией действий по пяти приоритетным направлениям развития Республики Узбекистан осуществляются коренные реформы в судебно-правовой сфере. В частности, на основе Стратегии действий 31 мая 2017 года были приняты Закон «О внесении изменений в отдельные статьи Конституции Республики Узбекистан» и Конституционный закон «О Конституционном суде Республики Узбекистан». В них были закреплены ряд новых положений, реализация которых характеризует современное состояние конституционного контроля в стране.

Порядок формирования Конституционного суда стал более демократичным. Отныне Конституционный суд избирается Сенатом по представлению Президента Республики Узбекистан из числа

лиц, рекомендованных Высшим судебным советом. Таким образом, в формировании Конституционного суда участвуют не только парламент и глава государства, но и специализированный орган судейского сообщества в лице Высшего судебного совета.

Председатель Конституционного суда и его заместитель избираются из числа судей Конституционного суда на его заседании. Такая практика безусловно укрепляет независимость и самостоятельность судей. Раньше Президент представлял в Сенат кандидатуру председателя, заместителя председателя и судей Конституционного суда.

Одно и то же лицо не может быть избрано судьей Конституционного суда более двух раз. Установлен также предельный возраст пребывания в должности судьи, как правило – 70 лет. Ограничения возраста пребывания в должности судьи и запрета на переизбрания более двух раз вполне соответствует практике конституционных судов зарубежных стран.

Расширен круг субъектов, обладающих правом внесения вопросов на рассмотрение Конституционного суда, в их число были включены Кабинет Министров и Уполномоченный Олий Мажлиса Республики Узбекистан по правам человека (Омбудсман). Расширение круга субъектов, обладающих правом внесения вопроса в Конституционный суд, служит расширению доступа к конституционному правосудию.

Конституционный суд Узбекистана является органом конституционного контроля ориентированной на осуществление последующего контроля (ex-post). Вместе с тем, с принятием нового закона частично внедрено и превентивный контроль (ex-ante). Закон возлагает на Конституционный суд задачу определять соответствие Конституции Республики Узбекистан конституционных законов, законов о ратификации международных договоров — до их подписания Президентом Республики Узбекистан. Таким образом, введена новая форма осуществления конституционного контроля – превентивный контроль за конституционностью конституционных законов и законов о ратификации международных договоров.

Вместе с тем, следует отметить, что осуществлению действенного конституционного контроля препятствовали

определенные проблемы. В частности, можно отметить пассивность субъектов конституционного контроля, отсутствие института конституционной жалобы, несовершенства правовых механизмов осуществления конституционного контроля.

Несмотря на то, что Конституционный закон «О Конституционном суде Республики Узбекистан» был принят относительно недавно, необходимость в принятии нового закона стала очевидной. В целях дальнейшего совершенствования механизма защиты прав и свобод человека, упрощения порядка обращения в Конституционный суд 27 апреля 2021 года парламент принял новый Конституционный закон «О Конституционном суде Республики Узбекистан».

Новый закон, в первую очередь, направлен на усиление правозащитной функции Конституционного суда. В частности, расширен круг субъектов, обращающихся в Конституционный суд: среди них – физические и юридические лица, Национальный центр по правам человека Республики Узбекистан, Уполномоченный при Президенте Республики Узбекистан по защите прав и законных интересов субъектов предпринимательства (Бизнес омбудсман), Уполномоченный по правам ребёнка (Ювениальный омбудсман). Расширение круга субъектов конституционного контроля безусловно является положительной нормой и служит расширению доступа к конституционному правосудию, усилению системы защиты прав и свобод граждан, особенно детей, а также законных интересов субъектов предпринимательства.

Практика органов конституционного правосудия зарубежных стран свидетельствует, что все большее внимание уделяется правозащитной функции конституционных судов. Эффективным средством защиты основных прав человека является институт конституционной жалобы. Анализ практики конституционных судов зарубежных стран показывает, что конституционного контроля без конституционной жалобы не может быть эффективным.

Пожалуй, самой важной нормой рассматриваемого нового закона является внедрение института конституционной жалобы граждан. В статье 27 Конституционного закона установлено, что обращение допустимо при условии, если закон нарушает

конституционные права граждан и юридических лиц и применен в конкретном деле, рассмотрение которого в суде завершено. Конституционная жалоба должна быть подана не позднее одного года со дня окончания рассмотрения дела в суде. Так, окончание рассмотрения дела в суде, по сути, означает, что лицом использованы все возможности прежде, чем обратиться в Конституционный суд.

В законе предусмотрены требования допустимости конституционной жалобы граждан. В частности, согласно со статьей 86 Конституционного закона обращение гражданина является допустимым, если закон нарушает конституционные права граждан и законные интересы юридических лиц при применении в конкретном деле, рассмотрение которого в суде завершено. Такая жалоба должна быть подана не позднее одного года со дня окончания рассмотрения дела в суде. В обращение должен быть указан факт рассмотрения дела в суде и использования всех форм судебной защиты.

Прямой доступ к конституционному правосудию предусматривает непосредственное обращение граждан в Конституционный суд с жалобой на нарушение его основных прав и свобод правовыми актами, примененными судами общей юрисдикции. Значение прямого доступа заключается в том, что обеспечивается реальная доступность конституционного правосудия для каждого лица в защите своих прав и свободы.

Опыт органов конституционного надзора зарубежных стран показывает, что наделение граждан правом внесения вопроса на рассмотрение Конституционного суда приводит к резкому увеличению нагрузки в суде. Естественно, увеличатся и сроки рассмотрения дел.

Практика рассмотрения конституционной жалобы граждан неизбежно приведет к увеличению нагрузки Конституционного суда. Данный процесс также требует установления четких правил подачи конституционной жалобы гражданами и юридическими лицами, определения критериев допустимости обращений, укрепления структурных подразделений аппарата Конституционного суда.

Внедрение конституционной жалобы приведет к увеличению нагрузки и занятости судей. В большинстве странах численность судей Конституционного суда составляет 9 человек, а в некоторых

странах количество судей варьируется от 11 до 18 человек. С учетом зарубежной практики в новом законе увеличен число судей Конституционного суда - теперь он состоит из 9 судей, включая председателя и его заместителя.

Конституционный суд Узбекистана является органом конституционного контроля ориентированной на осуществление последующего контроля (ex-post). Вместе с тем, с принятием нового закона частично внедрено и превентивный контроль (ex-ante). Закон возлагает на Конституционный суд задачу определять соответствие Конституции Республики Узбекистан конституционных законов, законов о ратификации международных договоров - до их подписания Президентом Республики Узбекистан. Таким образом, введена новая форма осуществления конституционного контроля - превентивный контроль за конституционностью конституционных законов и законов о ратификации международных договоров.

Анализ теоретических и практических аспектов внедрения института конституционной жалобы, позволяет утверждать, что принятие нового Конституционного закона «О Конституционном суде Республике Узбекистан» служит усилению конституционного контроля, укреплению законности, совершенствованию конституционного судопроизводства и, в конечном итоге, эффективной защите прав и свободы граждан, гарантированной Конституцией страны.

Институт конституционной жалобы в Узбекистане строится по модели частичной жалобы, так как предметом обжалования является закон, а не любой нормативно-правовой акт. Характеризуя модель конституционной жалобы, отметим, что институт конституционной жалобы в Узбекистане находится на стадии становления. Следующим шагом по расширению прав граждан на доступ к конституционному правосудию могло бы стать включение в Конституционный закон «О Конституционном суде Республики Узбекистан» положений, предусматривающих возможность оспаривания конституционности не только законов, но и других нормативно-правовых актов.

Закон ограничивает на переизбрание судей Конституционного суда, одно и то же лицо не может быть избрано судьей более двух раз. Вместе с тем, увеличен срок полномочий судьи Конституционного

суда, который составляет при первоначальном избрании пять лет, при очередном избрании – десять лет.

Установлен также ограничение на переизбрания председателя Конституционного суда и его заместителя. Председатель и его заместитель избираются Конституционным судом сроком на пять лет. Если до окончания срока их полномочий в качестве судьи Конституционного суда осталось менее пяти лет, то они избираются на оставшийся срок. Одно и то же лицо не может быть избрано председателем или заместителем более двух сроков.

Новый закон унифицировал нормы, касающиеся отдельных полномочий Конституционного суда, предусмотренного в других законах. В частности, в учетом статьи 13 Закона «О прокуратуре» в новом Конституционном законе включена норма, предусматривающая, что акты Генерального прокурора (за исключением акта индивидуального характера), признанные несоответствующими Конституции и законам по решению Конституционного суда, прекращают свое действие. Генеральный прокурор должен привести свой акт в соответствие с Конституцией и законами не позднее одного месяца на основании решения Конституционного суда.

Таким образом, принятие Конституционного закона «О Конституционном суде Республике Узбекистан» 27 апреля 2021 года ознаменовало новый этап в развитие конституционного контроля, который обусловлен укреплением законности, совершенствованием конституционного судопроизводства и в конечном итоге эффективной защите прав и свободы граждан, гарантированной Конституцией страны.

Внедрение института конституционной жалобы способствует активизации деятельности Конституционного суда и послужит реализации статьи 44 Конституции Республики Узбекистан, где каждому гарантируется судебная защита его прав и свобод. Значение конституционной жалобы не ограничивается обеспечением гражданам доступа к конституционному правосудию. Она также служит правовым механизмом повышения качества и эффективности законов, обеспечения их конституционности, дальнейшей демократизации жизни государства и общества.

Следует отметить, что институт конституционной жалобы в Узбекистане находится на стадии становления. Дальнейшие шаги по расширению прав граждан на доступ к конституционному правосудию могло бы стать включение в Конституционный закон «О Конституционном суде Республики Узбекистан» положений, предусматривающих возможность оспаривания конституционности не только законов, но и других нормативно-правовых актов, в том числе указов и постановлений Президента Республики Узбекистан, постановлений правительства, решений местных органов государственной власти имеющих нормативно-правовой характер. Переход к модели полной конституционной жалобы должно быть поэтапным с учетом развития практики рассмотрения конституционных жалоб. При этом, следует улучшать организацию работы в Конституционном суде, совершенствовать организационно-правовую структуру Аппарата Конституционного суда, создавать структурные подразделения, укреплять его кадровый потенциал, а также материально-техническую базу.

Подводя итоги анализа развития института конституционного контроля в Узбекистане можно утверждать, что конституционный контроль прошел сравнительно небольшой исторический период развития. Развитие конституционного судебного контроля в Узбекистане является закономерным логическим шагом по пути демократизации общества, укрепления конституционной законности в стране. За прошедший период создана прочная правовая база осуществления конституционного контроля, совершенствования конституционного судопроизводства, повышения эффективности конституционного правосудия.

Конституционный суд Республики Узбекистан состоялся как орган конституционного судебного контроля, самостоятельно и независимо осуществляющим судебную власть в форме конституционного судопроизводства в целях защиты основ конституционного строя, основных прав и свобод человека и гражданина, обеспечения верховенства и прямого действия Конституции, то есть соблюдения и обеспечения основных ценностей, провозглашенных и гарантированных Конституцией.